

FIFTH EDITION

# SOCIAL WORK LAW

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It is apparent from the wording of Art. 12 that it is limited to heterosexual relationships and there have been cases where transsexuals have been denied the right to marry (*Rees v United Kingdom* (1987 9 EHRR 56; *Cossey v United Kingdom* (1991) 13 EHRR 622). In *Goodwin v United Kingdom* [2002] 2 FLR 487, the ECHR found that the United Kingdom's refusal to allow people who had undergone gender reassignment the ability to alter their gender on their birth certificate was in breach of Convention rights. Legislation to remedy this position has been introduced in the form of the Gender Recognition Act 2004. The Civil Partnership Act 2004, which provides for legal recognition of homosexual relationships in a similar form to marriage, and subsequently the Marriage (Same Sex Couples) Act 2013, should also be noted. It is possible that decisions to sterilise young women with learning disabilities may be subject to closer scrutiny in future, given the application of the right to found a family under Art. 12 (*Re F* [1990] 2 AC 1). Article 12 is also relevant to adoption as a means of founding a family. However, it is unlikely to support an argument that an individual has a right to fertility treatment.

## Article 14

### ECHR

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(HRA 1998)

Article 14 prohibits discrimination (based on a wide range of grounds) in individuals' enjoyment of the rights contained in Articles of the European Convention on Human Rights. It is not a freestanding Article but is directly linked to the other Articles.

Sexuality is not specifically listed in Art. 14 as a ground of discrimination but case law has shown that discrimination on the grounds of a person's sexuality does fall within the Article. This position was confirmed in the case of *Ghaidan v Mendoza* [2004] UKHL 30. The issue in this case was whether Mr Mendoza was entitled to succeed to a tenancy under the Rent Act 1977, i.e. was he entitled to carry on the tenancy of the property in which he lived with his same-sex partner, when his partner died, the tenancy having been in his partner's name. The relevant paragraph in the regulations refers to a surviving spouse or 'a person who was living with the tenant as his or her wife or husband'. Applying the duty to read legislation compatibly with the Convention, the court interpreted 'as his or her wife or husband' to mean, 'as if they were his or her wife or husband', thus including same-sex couples. The court commented that issues of discrimination have 'high constitutional importance'.

In *R (Carmichael and ors) v Secretary of State for Work and Pensions* [2016] UKSC 58, the Supreme Court held that the housing benefit cap known as the 'bedroom tax' unlawfully discriminated against claimants who needed an additional bedroom due to a disability. The appellants' housing benefit had been capped because the number of bedrooms in their homes exceeded their entitlement under the Housing Benefit Regulations 2006. They challenged reg. B13 on the basis that it violated their rights under ECHR Article 14 (anti-discrimination),

and Article 8 (right to privacy and family life). The Court held that the Minister's decision to structure the scheme as he did was reasonable; however, some people had an obvious medical need for an additional bedroom. There was no valid reason to distinguish between adults and children, where they could not share a bedroom because of disability, nor to distinguish between adults and children in need of an overnight carer. There had therefore been a violation of Article 14, discrimination in the enjoyment of Article 8 rights.

## First Protocol

The First Protocol contains Articles that were added to the Convention following ratification:

*Article 1: Protection of property may be relevant to cases of financial and material abuse suffered by vulnerable adults and to the operation of systems whereby management of property and finances are delegated to another person or body.*

*Article 2: Right to education could be relevant in general terms to people with a learning disability and to provision for special educational needs, and specifically to the provision of sex education.*

Challenges under the Human Rights Act will frequently include more than one of the Articles as illustrated in the case of *ZH v Commissioner of Police for the Metropolis* [2012] EWHC 604 (QB). A 16-year-old boy with severe autism and epilepsy was taken swimming and refused to move from the poolside. His carers were unable to move him with distraction techniques. Police attended and were informed of his autism. When one of them touched the boy he jumped into the pool. He was lifted, struggling, out of the pool and the police restrained him with handcuffs and leg restraints. He was then placed in a cage in the police van. Human rights claims under Articles 3, 5 and 8 were successful. It was found that the police had inflicted inhuman or degrading treatment on the boy considering the duration of force and restraint, injuries to the boy and his age, health and vulnerability. He was deprived of his liberty as the nature and duration of the restraint amounted to more than a restriction on movement. The police actions also interfered with the boy's right to respect for his private life and could not be justified as proportionate as less intrusive action could have been taken. Damages were awarded. The court noted that, 'The case highlights the need for there to be an awareness of the disability of autism within the public services.'

### Reflect

Does the Human Rights Act 1998 really address fundamental rights in modern society? Would you add to or alter the existing rights?

## Using the HRA 1998

To bring a claim under the HRA 1998, the individual must be a 'victim'. This means that they are directly affected by the measure or at least at risk of being affected, or a person closely or personally related to one affected. It is not possible to complain in abstract about



behaviour. This formulation is more restrictive than the existing criterion for judicial review applications of having a 'sufficient interest' in an issue. It will be possible for interest groups, e.g. MIND and BAAF, to bring an action only if their members are themselves victims. It is possible for a company or group of individuals to make a claim as a victim. In fact, case law suggests that the term 'victim' is not unduly restrictive. For example, in *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, a case which challenged the use of corporal punishment in schools, the applicants were classed as victims because their children went to state schools where corporal punishment was permitted; the applicants' children had not actually been punished.

## Remedies

If a court finds that there has been a violation of one of the Articles, there are a range of possible remedies available to the person whose rights have been breached. These remedies are: injunctions, declarations, declaration of incompatibility, and an award of 'just satisfaction' in financial compensation. Damages awarded under the HRA 1998 will be assessed in a slightly different manner from the normal calculation of damages in civil cases but may nevertheless be substantial. In *Re H (A Child – Breach of Convention Rights: Damages)* [2014] EWFC 38 parents were each awarded £6,000 in just satisfaction after the local authority admitted 14 breaches of Articles 6 and 8 which caused significant delay in reuniting the parents with their child. In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, the discharge of the applicants from the armed forces following an investigation into their sexual orientation was found to be a violation of their right to respect for private life (Art. 8). In the circumstances they were awarded £19,000 each. The total cost to the Government, including costs and expenses, far exceeded the amount paid in damages. This serves as a further useful reminder of the value of local authorities' reviewing procedures in search of any areas of non-compliance. Litigation is expensive and if a local authority is found to be in breach it may be faced with a substantial bill.

## Equality and Human Rights Commission

At the time the Human Rights Act 1998 was introduced there was no body equivalent to the Equal Opportunities Commission or the Commission for Racial Equality to assist people who wished to bring a case under the provisions of the HRA 1998. Subsequently, the Equality Act 2006 created the Equality and Human Rights Commission which drew together the functions of equality commissions, e.g. the Commission for Racial Equality, with an extended remit to include human rights issues. One of the duties of the Commission is to promote human rights and to raise public bodies' awareness of their obligations under the HRA 1998. (The role of the Commission is considered in more detail in Chapter 6.)

The Commission has powers under s.16 of the Equality Act 2006 to make formal enquiries into particular areas of practice. Examples of published enquiries include:

- 'Hidden in plain sight: Inquiry into disability-related harassment' (2011). This report includes an examination of ten serious cases in which disabled people died or were seriously injured, including Fiona Pilkington and Steven Hoskin.
- 'Close to home: An inquiry into older people and human rights in home care' (2011). This inquiry highlights the fact that unlike residential homes, independent homecare

providers and unregulated providers such as personal assistants do not have any direct duties under the Human Rights Act, yet provide the large majority of care in individuals' own homes.

- 'Preventing deaths in detention of adults with mental health conditions report' (2015). This inquiry notes the increase in number of deaths in detention and produced a human rights checklist for those holding adults in detention in a range of settings.
- 'Housing and disabled people: Britain's hidden crisis' (2018). This inquiry considers whether the accessible and adaptable housing available in Great Britain is fulfilling disabled people's rights to live independently.

## Influence of European and international law and Conventions

The discussion above explains how the European Convention on Human Rights has been fully incorporated into our domestic law. There are other European and international Conventions which it is useful to be aware of, even though they do not carry the same force of law and are best described as morally persuasive statements of intent.

### Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights 1948 contains a number of Articles which are similarly worded to the ECHR, e.g. Art. 33: 'Everyone has the right to life, liberty and the security of person' It is, however, a broader statement of rights, starting with Art. 1, which states that 'All human beings are born free and equal in dignity and rights.'

Other significant Articles include:

**Article 6:** Everyone has the right to recognition everywhere as a person before the law.

**Article 14:** Everyone has the right to seek and to enjoy in other countries asylum from persecution.

**Article 16:** Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

**Article 21:** Everyone has the right to take part in the government of his country, directly or through the freely chosen representatives. Everyone has the right of equal access to public service in his country.

### United Nations Convention on the Rights of the Child 1989

The United Nations Convention on the Rights of the Child 1989 provides a useful guide for good practice for promoting children's rights. While the rights are not enforceable in a court of law in the same way as the right within the HRA 1998, the rights are nevertheless persuasive and have been referred to in domestic judgments. The United Kingdom has experienced a

high level of criticism by the UNCRC Committee on the Rights of the Child, which conducts reviews of states' compliance with the Convention. Recently, this criticism may arguably have been partly responsible for the introduction of the Children's Commissioner in England.

The Articles include a range of rights which position the child's best interest as priority, provide for children to participate in decisions affecting them, and ensure the protection from harm and provision of basic needs. The following Articles are particularly significant, starting with a commitment to anti-discrimination

### **Article 1**

States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.
2. States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and shall take all appropriate legislative and administrative measures.
3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

### **Article 9**

States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case, such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

### **Article 12**

States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

It is clear that the rights outlined in the above Conventions extend further than the rights that have been incorporated into domestic law via the Human Rights Act 1998. For example, the HRA 1998 does not include reference to the right of access to public services, nor does it specifically recognise the special status of a child.

## United Nations Convention on the Rights of Persons with Disabilities 2006

### Article 12

States parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law, recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity, and ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review.

### Article 19

States parties recognise the equal right of all persons with disabilities to live in the community, with choices equal to others and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.

## Chapter summary

- The Human Rights Act 1998 will have a significant influence on the future development of vast areas of English law, but particularly on the role and responsibilities of public authorities, which includes Social Services Departments.
- The Human Rights Act 1998 incorporates the European Convention on Human Rights into domestic law, making its rights, freedoms and prohibitions more directly enforceable in the domestic courts.
- The Articles of the ECHR are incorporated in three main ways. First, courts are bound to take into account judgments of the European Court when determining any question in connection with a Convention right; second, legislation must be read and given effect in a way that is compatible with the Convention rights; third, it is unlawful for a public authority to act in a way that is incompatible with the Convention rights.
- Public authorities including central and local government, police, courts, social services, CAFCASS, regulatory bodies and others exercising functions of a public nature may be faced with compensation claims if they violate or propose to violate individual rights. This establishes a further level of accountability for social services.
- The ECHR Articles contain rights, prohibitions and freedoms which may be absolute, limited or qualified. Some interference with the rights may be permissible but must be proportionate.
- Rights which are particularly relevant to social work practice are: the prohibition against torture or inhuman or degrading treatment or punishment (Art. 3); the right to liberty and security of the person (Art. 5); the right to a fair and public hearing (Art. 6); the right to respect for private and family life (Art. 8).