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Human Rights in the UK

An Introduction to the Human Rights Act 1998

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ALWAYS LEARNING

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Human Rights in the UK

In the case of *Austin*,[20] the courts had to consider the legality of the detention of the protesters held by police within a cordon in Oxford Circus in central London during the demonstrations on May Day 2001. The House of Lords' analysis is that Article 5(1), which prevents arbitrary detention, was not engaged, because the restrictions on movement of the protesters was not sufficiently serious to amount to a deprivation of liberty. Their Lordships also considered the purpose of the measure, and held that the measures were reasonably necessary and proportionate, and that there was no infringement. These are alternatives: if the right was not *engaged*, then there is no interference with it, and no need to justify that interference – this was the Lord's primary conclusion and the European Court agreed. Alternatively, once there is an interference with personal freedom the right is *engaged*, once there is an interference with personal freedom of movement (which there was here), but there was no infringement of Article 5 because the interference was justified by the need for crowd control for the safety of others, and it was proportionate to that need.

We will consider the specific circumstances where one applies a particular qualification in the discussion of the individual articles. The purpose of this discussion is to consider this general approach.

'IN ACCORDANCE WITH THE LAW'

This is an important requirement to ensure that the rule of law is upheld: if there are to be circumstances where what would appear to be an infringement of a right is permitted, it must be one which is clearly defined and set out by the law of the country in question. This applies equally to the phrase 'in accordance with the law' in Articles 8 to 11 or the references to 'the law' or being 'prescribed by law', for example, in Articles 2, 5 and 6.

There are two aspects to this idea. First, there must be some basis in the national law for the provision being relied on, and second, the national law must be accessible and precise. As to the first, in most cases this is present; it is uncommon for there to be a complete absence of legal basis for official action in any of the states who are parties to the Convention. It is also not common in the European Court cases that there was a breach of national law, because if there is such a breach, there is usually a remedy under the national law; and it is necessary to exhaust the local court process before seeking a remedy from the European Court. Thus if a police officer acts in breach of the law on how to arrest someone, there will be a liability for wrongful arrest without the need to rely on any breach of Article 5 which may also have been committed.

One example where it was held that there was *no* relevant law is the *Halford*[21] case. Alison Halford was the Assistant Chief Constable of Merseyside. She complained that calls which she had made from her office and home telephones were intercepted by the police in order to gather information for use against her in sex discrimination proceedings, in breach of Article 8. At the time there was an Act of Parliament in force (the Interception of

[20] *Austin* v *Metropolitan Police Commissioner* [2009] UKHL 5, [2009] 2 WLR 372, *Austin* v *UK* (2012) 55 EHRR 14 discussed below in the context of Article 5, p. 189.

[21] *Halford* v *UK* (1997) 24 EHRR 523.

Communications Act 1985) which aimed at providing a statutory framework to ensure that the interception of communications on public systems would be authorised and controlled in a manner commanding public confidence. But it did not apply to internal communications systems operated by public authorities, such as that at Merseyside Police Headquarters, and there was no other provision in domestic law to regulate interceptions of telephone calls made on such systems. Thus it could not be said that the interference in her case was 'in accordance with the law', since there was no relevant legal framework to regulate interferences with the right to respect for privacy.

The more usual contention is the second one, that the national law is uncertain or gives too wide a discretion to officials. This is described by the European Court as meaning that there must be a 'quality of law', the law must be precise and accessible. Again, these criteria will usually be fulfilled in our law: Acts of Parliament are usually reasonably clear in their meaning, and the judgments of the courts are couched in careful and precise language. Still, this is an important test. So that everyone is treated fairly, everyone is presumed to know what the law is – this is what is meant by 'ignorance of the law is no excuse'. So everyone must be able to know what the law is which applies to any given situation.

To continue with the example of tapping a telephone, consider a situation where the police wish to tap a telephone line to prevent or detect criminal activity. Clearly it would defeat that purpose if the police were obliged to inform the citizen that their telephone conversations were being monitored. As soon as the person being monitored found out about the surveillance, they would stop using the telephone for any criminal purposes. However, in general terms, everyone is entitled to know under what circumstances it is possible or likely that an order can be made permitting the police to tap their telephone; and further, they should be able to know what safeguards exist to prevent unwarranted invasions of this privacy.

So in the case of *Malone*,[22] the applicant was prosecuted for offences related to the dishonest handling of stolen goods; during the trial it emerged that his telephone had been tapped by the police acting on the authority of a warrant issued by the Home Secretary. He was acquitted and sought to establish that the tapping had been unlawful, complaining of a breach of Article 8. The European Court decided that the English law did not indicate with sufficient clarity the scope and manner of exercise of the relevant discretion conferred on public authorities in the field of interception of communications. To that extent the minimum degree of legal protection to which citizens were entitled under the rule of law in a democratic society was lacking. The law should be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to their secret and potentially dangerous interference with the right to respect for privacy.[23]

A more recent example from domestic law of a failure for restrictions to be 'according to law' relates to the long-running saga of the anti-war protester, Brian Haw, who mounted a protest

[22] *Malone* v *UK* (1985) 7 EHRR 14.

[23] We discuss some more cases about what is 'in accordance with law' in the context of Article 5, below p. 186; surveillance is considered further in the context of Article 8, below, pp. 281–4.

against government policy in Iraq outside Parliament from June 2001 until shortly before he died in June 2011. Section 133 of the Serious Organised Crime and Police Act 2005 required anyone intending to organise a demonstration near Parliament to apply to the police for authorisation: this was directed at Haw. One aspect of being governed by the law is for the law not to be retrospective and Haw challenged whether this statute could properly apply to his protest retrospectively, but Court of Appeal held that the Act does apply to him, from the date when it came in.[24] Authorisation was given to him in May 2006, allowing him to protest, but limiting this to an area 3m wide by 3m high and 1m deep. Haw was prosecuted for breaching these conditions, because of the size of his banners. However, at his trial, before District Judge Purdy, the Court dismissed the case on the grounds that the conditions imposed on him were not sufficiently certain and were therefore invalid. This was upheld by the Divisional Court:[25] the conditions imposed did not satisfy the test of being 'according to law'.[26]

'NECESSARY IN A DEMOCRATIC SOCIETY'

In Articles 8 to 11, this is the second element which must be proved by the state in order to justify the interference with the right or freedom; but the idea of necessity is also found in cases on other Articles. The key idea is that the particular legal provision or official activity on the part of the state, which has caused the interference with the right or freedom, must go no further than is **necessary**. This is not the same as 'reasonable', 'ordinary' or 'desirable'. The European Court has developed this principle in accordance with the doctrine of the margin of appreciation, where it will usually be for the national authority to make the initial assessment of whether there is a pressing social need which the measure is addressing.[27] But the European Court will still review this assessment, and has established that there are three distinct matters which must be addressed. As well as answering a **pressing social need**, the measure must pursue one of the **legitimate aims** set out in the relevant Article, if it contains grounds which justify interference; and there must be a reasonable relationship of **proportionality** between the means employed and the aim which is being pursued.

One example where the European Court considered whether a restriction was 'necessary in a democratic society' was the case of *Chassagnou* v *France*.[28] This case concerned a French law which compelled certain landowners to join a hunting association and allow hunting across their land. In deciding that this was in breach of the Article 11 right to freedom of association, the European Court stated that:

[24] *R (Haw)* v *Home Secretary* [2006] EWCA Civ 532, [2006] 3 WLR 40.
[25] *R* v *Haw* [2007] EWHC 1931 (Admin), [2008] 1 WLR 379.
[26] For further proceedings involving Mr Haw, see below p. 331. SOCPA has since been replaced in this respect by the Police Reform and Social Responsibility Act 2011, which has been held to be compatible with the Act: *R (Gallastegui)* v *Westminster City Council* [2012] EWHC 1123 (Admin), [2012] 4 All ER 40, especially as the Convention rights do not provide a right to have a tent or sleeping equipment in a particular space.
[27] *Handyside* v *UK* (1979–80) 1 EHRR 737 the margin of appreciation is discussed above, p. 54.
[28] (2000) 29 EHRR 615; the property aspect of the case is considered below, p. 371.

> The Court reiterates that in assessing the necessity of a given measure a number of principles must be observed. The term 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'. In addition, pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Lastly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued.
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> In the present case the only aim invoked by the Government to justify the interference complained of was 'protection of the rights and freedoms of others'. Where these 'rights and freedoms' are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society'.

In this case, the aim invoked by the French government was the protection of the rights of others; but the right relied on was a right to hunt, which is not one of the Convention rights. The Court considered that in such a case only 'indisputable imperatives can justify interference with a Convention right'. The ethical objections of the applicants to hunting were sufficiently cogent and important to be worthy of respect in a democratic society. It could therefore not be said that it was *necessary*, in a democratic society, to interfere with them, and so the compulsory obligation to join a hunting society was in breach of Article 11.

PROPORTIONALITY

The idea of proportionality is an important one in all cases where there is a proviso to a right or where the European Court has had to consider any argument that an interference with a right is justified. The idea is that such interference should be proportionate: the extent of the interference covers only the purpose which justifies it, and does not go beyond it. So, for example, an interference with the right to privacy which consists of asking people questions about where they are going may be a proportionate response to a terrorist threat whereas arresting them without reasonable suspicion might not be. This is important because there is a point beyond which an interference with a right cannot be justified.

In considering a question of proportionality, the court must ensure that:

- the objective of the legislation is sufficiently important to justify some interference with a basic right;
- the measure is rationally connected with the objective in question;
- it is not arbitrary, unfair or based on irrational considerations;
- the limitation impairs the right as little as possible; and
- even if these criteria are met, the interference is not so severe in effect that it outweighs the objective for which it would otherwise be permitted.[29]

[29] These criteria are based on *De Freitas* v *Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69.

Further, it is important that in considering these issues, the court does not lose sight of the overall need to balance the interests of society with those of individuals and groups.[30] One example of a case where the European Court considered that the interference with the Convention right met the criteria of being a legitimate aim, but was not necessary in a democratic society because it was disproportionate, was *Vogt* v *Germany*.[31]

Here Mrs Vogt had been dismissed from her job as a teacher for being a member of the German Communist Party, which the German tribunal considered stood for anti-constitutional aims, meaning that Mrs Vogt was infringing her duty of political loyalty as a civil servant.

The European Court considered that there was an interference with the Article 10 right to freedom of expression, which was for a legitimate aim, namely, the obligation on civil servants to actively uphold Germany's free and democratic constitution, especially given Germany's history and desire to prevent a repeat of 'the nightmare of Nazism'.

However, the Court considered that the justification put forward by the German government was not sufficient to establish that it was necessary to dismiss Mrs Vogt from her job, which was a disproportionate consequence. In particular, there were no complaints about Mrs Vogt's performance at her job, there was no evidence that Mrs Vogt had actually made any anti-constitutional statements or personally adopted an anti-constitutional stance. Nor had the Communist Party been banned.

Both considerations of what is necessary in a democratic society and what is proportionate will apply equally in every case where a justification is put forward in our domestic courts and so both will recur as we discuss the different Convention rights. There may well be differences of opinion as to what measure of response is proportionate to a particular need. To this extent, our courts will have some regard for the solution that Parliament adopts for a particular problem, although the margin of appreciation does not apply as such to the decision of UK courts.[32] However, this measure of deference should not prevent the courts from deciding that a particular provision is a disproportionate response if the court considers that it goes beyond what is justified – and the courts have indeed reached that conclusion where they thought it was justified, as we discussed above when considering declarations of incompatibility.[33]

One good example of our courts considering proportionality is the legislative ban on hunting, the Hunting Act 2004, which was challenged in *R (Countryside Alliance)* v *Attorney General*.[34] The House of Lords had to consider very carefully the way in which they should approach the question of proportionality: this involves considering the reasons for and purpose of the statute, predominantly as it appears from the words of the statute, together with any evidence of the social problem which it is addressing, set against any evidence of the likely or actual practical impact of the statute.

[30] This additional point was emphasised by Lord Bingham when approving the approach of *De Freitas* in *Huang* v *Home Secretary* [2007] UKHL 11, [2007] 2 AC 167.
[31] (1996) 21 EHRR 205.
[32] The idea of deference was introduced above pp. 57–9.
[33] Above pp. 78–9.
[34] *R (Countryside Alliance)* v *Attorney General* [2007] UKHL 52, [2008] 1 AC 719 (see also p. 258 and p. 266); the equivalent challenge under Scottish law was *Friend* v *Lord Advocate* [2007] UKHL 53, 2007 SLT 1209.

In this case, the House of Lords considered in detail the purpose of the legislation, which was to prevent or reduce unnecessary suffering to wild mammals, and to enact the moral position that causing suffering for sport was unethical. They also considered the evidence which was before Parliament during the passage of the statute on hunting. The Lords concluded that, on the basis of all the evidence, this was a political judgment, and the position which a majority of the House of Commons adopted, to ban hunting, was within the range of reasonably necessary and proportionate responses to the issue in a democratic society, bearing in mind that this is the sort of question which is primarily for the legislature, not the courts, to determine.

An example of case where a measure was held to be disproportionate is the case of *Baiai*.[35] Here the House of Lords had to consider an interference with right to marriage (Article 12). The statute in question regulated the rights of foreign nationals in the United Kingdom to marry in order to prevent marriages of convenience – sham marriages aimed at giving one party residential status. The House of Lords held that the statute was not disproportionate – it did not impair the right to marry. But the regulatory scheme made under the statute *was* disproportionate because there was no reasonable relationship between the objective which justified the interference with the right – namely, preventing sham marriages – and the scheme. This was because it simply imposed a blanket ban on persons with certain immigration status from getting married and did not take into account in each case whether there was any evidence that this proposed marriage was genuine or not.

Another example is the case of *F*.[36] Here the Supreme Court held that a requirement that certain sex offenders were to be subject to requirements to notify the police about foreign travel plans was a disproportionate interference with Article 8. The Supreme Court accepted that the requirements served a legitimate purpose but they contained no possibility of review to allow the offender to establish that they should no longer be subject to the requirements. That was disproportionate: it was a greater interference with Article 8 than the government had shown could be justified by the legitimate purpose of the requirements.

WHICH RIGHTS ARE QUALIFIED?

Whether or not there are exceptions to a Convention right varies from article to article. The rights provided for by Articles 3 (freedom from torture), 4(1) (prohibition of slavery) and 7 (no punishment without law) contain no exceptions – these are rights where there is no legitimate justification for an infringement. The right to life in Article 2 has some very specific and narrowly drawn exceptions for self-defence and capital punishment (and the latter is removed by Protocol 13). Article 4(2) (prohibition of forced labour) and Article 5 (personal liberty) contain some specific exceptions. The right to a trial in public, which is part of Article 6(1), contains express exceptions; some of the other rights within the Article 6 rights to a fair trial, which have no express qualifications, are examples of where the European Court has held that some limited qualifications should be implied.

[35] *R (Baiai)* v *Home Secretary* [2008] UKHL 53, [2009] AC 287, see also below p. 344.
[36] *F* v *Home Secretary* [2010] UKSC 17, [2010] 2 WLR 992, also discussed below p. 273.