

The AIRE Centre



# Women's Organisations and the Human Rights Act 1998

**A HANDBOOK FOR VOLUNTARY ORGANISATIONS**

# Introduction

## WHAT IS THE HUMAN RIGHTS ACT 1998?

The *Human Rights Act 1998 (HRA 98)* entered into force in October 2000. It incorporated most of the rights contained in the *European Convention on Human Rights* into English law. It allows individuals to directly rely on Convention rights when litigating in the English courts.

## WHAT IS THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

The *European Convention on Human Rights* is an international treaty concluded by the member states of the *Council of Europe*. The Council of Europe was formed at the end of the Second World War by the European powers to encourage respect for the rule of law, to protect fundamental freedoms and to promote economic and social development. The drafting of a human rights charter was a high priority, and shortly after the Council of Europe was formed, the then ten member states signed the Convention for the Protection of Human Rights and Fundamental Freedoms (the *European Convention on Human Rights*). It entered into force on 3 September 1953.

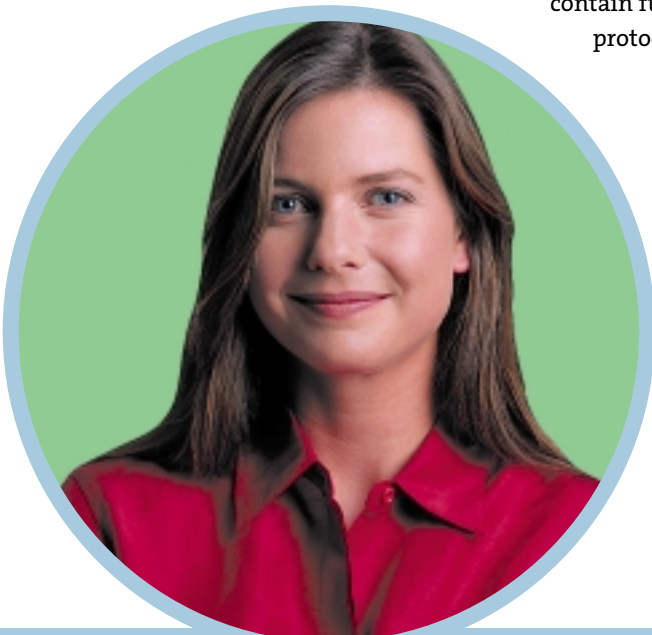
## THE EUROPEAN CONVENTION ON HUMAN RIGHTS IS DIVIDED UP INTO THREE SECTIONS:

Section I defines the rights guaranteed by the Convention (Articles 1-18)

Section II established the European Court of Human Rights and provides for its operation (Articles 19-51)

Section III deals with miscellaneous provisions such as territorial application, reservations, signature and ratifications (Articles 52-59)

In addition to the text of the Convention, there are a number of protocols that contain further rights. States can choose whether or not to ratify these protocols.



## WHAT IS THE EUROPEAN COURT OF HUMAN RIGHTS?

The *European Court of Human Rights* is based in Strasbourg, France, and oversees the implementation of the Convention. Each member state of the Council of Europe nominates one judge to the Court. The Court has jurisdiction over all matters concerning interpretation and application of the Convention and the Protocols, in





both cases between two states and in cases that originates in an application by an individual. Previously there was also the *European Commission on Human Rights*, which is now abolished and the Court deals with all cases. However, the case law of the Commission is still relevant if the Court has not subsequently changed it. The *Committee of Ministers* supervises the execution of the Court's judgements.

## WHAT IS THE PROCEDURE FOR TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS?

When dealing with a case before it, the Court first has to decide whether it considers that the case is *admissible* or not. This means it has to rule on whether it should deliver a judgement on the merits. The Court can declare a case inadmissible if for example the case has not been submitted in time, the applicant has not exhausted all effective domestic remedies or if the application is manifestly ill-founded.

If the Court declares an application admissible, it will then deliver a judgement on the merits of the case. If it finds a violation of the Convention, it may award "just satisfaction" to the applicant.

It is of course still possible to apply to the European Court of Human Rights even though the HRA 98 has come into force in the United Kingdom. An application to the Court has to be made within six months after the applicant has exhausted his/her domestic remedies.

## WHAT ARE THE MOST IMPORTANT PRINCIPLES OF THE CONVENTION?

When interpreting and applying the Convention, the European Court of Human Rights uses a number of principles. These are concepts that sometimes can not be found directly in the text of the Convention or the Protocols, but which over the years have become an integral part of Convention law. The member states of the Council of Europe have a certain leeway in how to apply the Convention rights in their countries. However, the Convention is a living instrument, and new case-law on how to interpret the provisions therein will continue to develop, both in Strasbourg and now also in the United Kingdom's domestic courts. For more details on the principles applied by the European Court, see *Glossary of Principles (at the back of this handbook)*.

## THE HUMAN RIGHTS ACT 1998

The following part of the handbook explains how the most important sections of the Act work, together with explanations of some of the key concepts in each section.



# The Human Rights Act 1998

## SECTION 1 (THE CONVENTION RIGHTS FOUND IN THE ACT)

Section 1 explains which of the 'Convention rights' have been incorporated into domestic law by the Act.

### ***Haven't all the Convention rights been included?***

No. The ones that have been included are:

Articles 2 to 12 and 14,  
Articles 1 to 3 of the First Protocol,  
Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

The 'Convention rights' incorporated into domestic law by the Human Rights Act 1998 are therefore 'right to life' (Article 2); 'prohibition of torture' (Article 3); 'prohibition of slavery and forced labour' (Article 4); 'right to liberty and security' (Article 5); 'right to a fair trial' (Article 6); 'no punishment without law' (Article 7); 'right to respect for private and family life' (Article 8); 'freedom of thought, conscience and religion' (Article 9); 'freedom of expression' (Article 10); 'freedom of assembly and association' (Article 11); 'right to marry' (Article 12); 'prohibition of discrimination' (Article 14); 'right to protection of property' (Article 1 of Protocol No.1); 'right to education' (Article 2 of Protocol No.1); 'right to free elections' (Article 3 of Protocol No.1); Articles 1 and 2 of Protocol No.3 (regarding the death penalty).

## SECTION 2 (INTERPRETATION OF CONVENTION RIGHTS)

Section 2 places an obligation on any 'court or tribunal' determining a question which has arisen under the Act in connection with a Convention right to take account of the 'Strasbourg jurisprudence'. Whilst the Strasbourg jurisprudence is not binding on domestic courts and tribunals, it must be taken into account.

### ***What is meant by 'court or tribunal' in section 2?***

This concept must be interpreted broadly. It clearly covers Magistrates' Courts, County Courts, the High Court, Crown Courts and upwards as far as the House of Lords. The real question is how far the concept extends downwards below the level of the Magistrates' Courts and County Courts. All of the following are definitely covered by section 2: Employment Tribunal, Social Security Appeal Tribunal, Immigration Appellate Authority, Immigration Appeal Tribunal, Tax Tribunal. In short, if you think the body you are dealing with is a court or tribunal it probably is as far as section 2 is concerned.

### ***What exactly is the 'Strasbourg jurisprudence' referred to above?***

The European Court of Human Rights (and the old European Commission on Human Rights) is based in Strasbourg, France. Over the years these bodies have ruled on a huge number of cases. These rulings include decisions and judgments. They are referred to by their official names in section 2(1)(a)-(d) of the Act, and they tend to be known as the 'Strasbourg jurisprudence' (or the 'Strasbourg case-law').





**Will the obligation imposed on courts and tribunals by section 2 change settled domestic case-law?**

All settled domestic case-law is subject to re-interpretation in light of the Strasbourg case-law; that said, most of the settled domestic case-law is likely to be Convention compatible.

**SECTION 3 (INTERPRETATION OF LEGISLATION)**

Section 3 of the Human Rights Act requires 'primary legislation' and 'subordinate legislation' to be read and given effect in a way that is compatible with Convention rights whether it was enacted before or after the Act. The obligation on the domestic courts is to interpret domestic legislation so that it is compatible with the Convention rights 'so far as it is possible to do so.' This is a wide obligation, and it means that the domestic courts must go far to satisfy this requirement. It may even go as far as to require judges to omit certain words from statutes in order that they may be read in a manner which is compatible with the Convention.

**What is the difference between 'primary legislation' and 'subordinate legislation'?**

The term 'primary legislation' refers to Acts of Parliament, whenever enacted. 'Subordinate legislation' refers to many other types of laws. Statutory instruments are the best example. Subordinate legislation therefore includes all Regulations or Orders. These are also covered by section 3 whenever they were enacted.

**What if a provision of domestic legislation is not Convention compatible?**

Where primary legislation cannot be read and given effect in a way that is compatible with Convention rights the 'validity, continuing operation or enforcement' of that legislation is not affected. Subordinate legislation can however be struck down unless primary legislation prevents this.

**SECTION 4 (DECLARATION OF INCOMPATIBILITY)**

Section 4 of the new Act allows certain courts to make an official declaration, called a 'declaration of incompatibility', that a provision of primary legislation or inevitably incompatible subordinate legislation is incompatible with a Convention right. This is a new concept in the domestic legal system. In England and Wales, only the High Court, the Court of Appeal and the House of Lords can make a declaration of incompatibility.

**What is the effect of a 'declaration of incompatibility'?**

Importantly, a declaration of incompatibility is not binding on the parties to the proceedings in which it is made; nor does it affect the validity of any provision in respect of which it is given. Section 10 of the Act provides a 'fast-track' procedure that can be used to make any necessary amendments to legislation in order to remove incompatibility with the Convention where a declaration of incompatibility has been made. Parliamentary sovereignty is thus preserved by the new Act.

**SECTION 6 (ACTS OF PUBLIC AUTHORITIES)**



Section 6(1) of the Human Rights Act makes it generally unlawful for a 'public authority' to act in a way that is incompatible with a Convention right. The term 'act' in this context includes a failure to act, except that it does not include the failure to legislate.

It is important to note that the definition of 'public authority' under section 6(1) includes courts or tribunals. Therefore, when a court or tribunal is determining a dispute, whether it is between a public authority and a private individual or between two private individuals, it is under a specified duty to act in a way that is compatible with Convention rights.

### ***Apart from courts or tribunals, what other bodies are covered by the term 'public authority'?***

This term is not exhaustively defined in the Act, but it can be said to cover two other types of body:

- a) 'Classic' public authorities. This includes government departments, local authorities, the Armed Forces, the police, NHS Trusts, Customs & Excise. It does not include either House of Parliament;
- b) 'Hybrid' public authorities. These are bodies with some public functions and some private functions. It probably includes Railtrack, British Telecom, housing associations, Football Association and charities. These bodies are only 'public authorities' for the purpose of section 6 in respect of their public functions.

## **SECTION 7 (BRINGING PROCEEDINGS AGAINST A PUBLIC AUTHORITY)**

Section 7(1)(a) provides that any 'victim' who claims that a public authority has acted (or proposes to act) in a way which is incompatible with Convention rights (that is, if a public authority has acted 'unlawfully' for the purposes of section 6) can bring proceedings to enforce those rights in 'the appropriate court or tribunal'.

### ***What is meant by 'victim'?***

This concept is taken from Article 34 of the Convention. A person is a 'victim' for the purposes of the Act only if he or she is, or would be, a victim of the act or omission that is the subject of the complaint. Victims need not be individuals; the term also covers victim companies, for example. Sometimes the actual victim is dead; this does not prevent the deceased's family members from being victims under the Act. Potential victims are covered i.e. someone at risk of a human rights violation doesn't have to wait for it to happen in order to be a victim. Taken together, the term victim is usually said to cover:

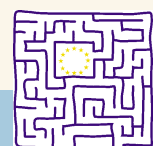
- direct victims;
- indirect victims;
- potential victims.

A 'public authority' cannot be a victim under the Act, since the Act is primarily designed to protect people from human rights violations perpetrated by the State.

### ***What is 'the appropriate court or tribunal' referred to in section 7?***

No new human rights courts have been created by the Act. The appropriate court or tribunal in which to bring proceedings against a public authority under section 7(1)(a) is the High Court in respect of a judicial act or any court if it is any other kind of claim under section 7(1)(a) – see Civil Procedure (Amendment No. 4) Rules 2000, section 6.

Section 7(1)(b) permits a person to rely on the Convention right or rights concerned in any legal proceedings.







**Can proceedings under section 7 be brought by way of an application for judicial review?**

Yes. This possibility is referred to in section 7(3). Only 'victims' can bring such applications (for interpretation of the term 'victim', see above).

**What is the time limit for instituting legal proceedings under the Human Rights Act?**

Section 7(5) stipulates a limitation period of one year beginning from the date on which the act complained of took place. However, section 7(5)(b) provides that a longer period of time for commencing proceedings may be granted where the court or tribunal considers this 'equitable having regard to all the circumstances'.

Where a party has not commenced proceedings against a public authority and is only seeking to rely on their Convention rights in proceedings brought by another party there is no limitation period as regards the Human Rights Act.

**SECTION 8 (REMEDIES)**

Under section 8 courts are given wide powers to grant such relief, remedy or orders as it considers just and appropriate, provided they are within its existing powers.

**Do these remedies include damages?**

Damages may be awarded if necessary to afford 'just satisfaction'. Only courts with the power to award damages or compensation can make such awards under the Human Rights Act. When the courts are awarding damages they must take into account the principles applied by the European Court of Human Rights when it awards compensation under the Convention. It should be noted that the damages awarded by the Strasbourg Court have generally been low.

**SECTION 9 (JUDICIAL ACTS)**

As noted above the definition of a 'public authority' under section 6 includes a court or a tribunal. Therefore, it is possible for 'judicial acts' to violate Convention rights incorporated by the Human Rights Act.

**Can you therefore sue a court or tribunal using section 7(1)(a) if they violate a Convention right?**

No. Section 9 says that proceedings under section 7(1)(a) in respect of a judicial act may only be brought by exercising a right of appeal, applying for judicial review or by bringing proceedings 'in such other forum as may be prescribed by rules'.

**Does the Human Rights Act have any retrospective effect?**

The general rule is that proceedings under the Human Rights Act can only be brought against a public authority for its acts or omissions that occur after 2 October 2000. However, under section 22(4) where proceedings are brought by or at the instigation of a public authority the 'defendant' may rely on a Convention right or rights as part of his defence (under section 7(1)(b)) whenever the act complained of took place. In this respect the Act has some retrospective effect.



# Women's Organisations and the Human Rights Act 1998

**THIS HANDBOOK WILL NOW LOOK AT ISSUES THAT SPECIFICALLY AFFECT WOMEN. IT WILL BE EXAMINING (1) THE SUBJECT OF DISCRIMINATION, THEREAFTER (2) PROTECTION AGAINST DOMESTIC VIOLENCE AND (3) TO SOME EXTENT FAMILY LAW, ESPECIALLY CUSTODY AND CARE PROCEEDINGS.**

## ***Does the Convention protect individuals from discrimination?***

ARTICLE 14 OF THE CONVENTION CONTAINS A PROHIBITION OF DISCRIMINATION. IT READS

*“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.”*

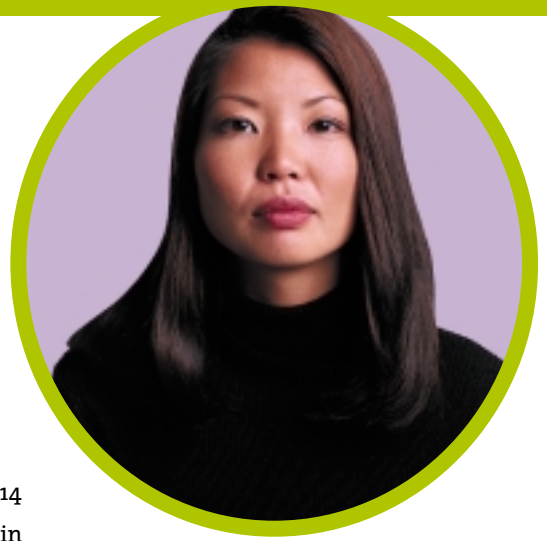
As can be seen from this Article, one of the bases upon which discrimination is prohibited is sex.

## ***What are the issues that this prohibition cover?***

Article 14 does not prohibit discrimination in general. The Convention protects a person against discrimination when this person is exercising one of the other rights in the Convention. For example, if someone is denied a fair hearing on the basis of his/her race, this is covered by Article 14 of the Convention. However, if a person feels that he/she has been discriminated against in the context of employment procedures, this is not covered by Article 14 since there is no right to employment in the Convention. In the respect of employment, domestic English legislation is far more wide-ranging in the way it protects individuals against discrimination on the basis of sex than the Convention. For a list of the Convention rights that have been incorporated by the HRA 98, see the Introduction.







When the European Court of Human Rights deals with issues of discrimination it does not consider it necessary to actually find a breach of another Article before it can move on to examine complaints under Article 14, as long as the complaint falls within the ambit of another right. This means that the circumstances under which a person claims he/she has been discriminated against, must be covered by the Convention. In other words, whilst there can never be a breach of Article 14 considered in isolation, there may be a breach of Article 14 considered in conjunction with another Article of the Convention in cases where there would be no violation of that other taken alone.

### ***How is the discrimination prohibition applied?***

The principle of equality of treatment is violated if there is a difference in treatment on for example the basis of sex, and this difference has no objective and reasonable justification. The relationship between the means employed for the discrimination and the aim sought to be obtained by the State must also be proportionate.

The following is a checklist of principles that is applicable to most Article 14 situations.

### ***Is there a difference in treatment?***

To establish differential treatment, a person must show that he/she has been treated less favourably than others who are in a similar or analogous situation. It is important to show that any difference in treatment is based on one of the grounds in Article 14, and in the context of this handbook, difference on the basis of sex.

### ***Does the different treatment affect the enjoyment of a Convention right?***

As explained above, there can only be a violation of Article 14 taken in conjunction with another Article of the Convention.

### ***Does the difference in treatment pursue a legitimate aim?***

Not all differences in treatment will constitute a violation of Article 14. The European Court has accepted that a literal application would lead to absurd results and that the inherent differences existing in legal situations and problems call for differing legal solutions.



Whether there is a legitimate aim will depend on the circumstances of each situation. The Court has held that administrative difficulties are generally not enough in a case where this was the sole basis for barring non-residents who worked in Sweden for an exemption of church tax available to residents in Sweden.

The Court has taken a very strong stance with regard to discrimination based on sex, as the advancement of the equality of the sexes is a major goal of the Council of Europe. Weighty reasons must be put forward before a difference in treatment on the sole ground of sex could be regarded as compatible under the Convention.

### ***Are the means employed to achieve the aim proportionate?***

In this respect one has to examine if the disadvantage suffered by the individual is excessive in relation to the legitimate aim pursued. The following questions have to be answered:

- Has relevant and sufficient reasons been put forward in support of the measure in question?
- Was there a less restrictive alternative?
- What was the actual effects on the individual in question?

A balance has to be reached between the individual's right not to be discriminated against on the one hand, and the State's interest in achieving a legitimate aim on the other.

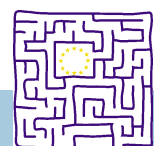
### ***Is indirect discrimination covered by the discrimination prohibition?***

Indirect discrimination is discrimination resulting from a rule or practice applied equally to all individuals without differentiation, but which has a disproportionate and unjustified adverse impact on members of a particular group or minority. The Court has not yet ruled definitely that indirect discrimination is covered by Article 14, but it would be surprising if such discrimination is found to be excluded from Article 14 considering it is well established in EC law and English law.

### ***What about positive discrimination?***

As explained above, if the difference in treatment pursues a legitimate aim, it will not constitute a violation of the Convention.

The aim of redressing a pre-existing situation of inequality has been accepted by the European Court as a legitimate objective of differential treatment. The Court has held that not all instances of differential treatment breaches Article 14 and that certain legal inequalities tend only to correct factual inequalities.



**What other issues does discrimination raise?**

Discriminatory treatment is capable of amounting to degrading treatment which is prohibited by Article 3 of the Convention. However, in order for a form of treatment to be considered “degrading treatment” there is a very high threshold of severity which must be met. It is unlikely to be reached in the absence of special or aggravating circumstances.

**Does the Convention protect against domestic violence?**

There is no specific provision protecting against domestic violence in the Convention. The Articles that are the most relevant in domestic violence cases, are Article 3 and Article 8. Article 3 reads

*“No one shall be subjected torture or to inhuman or degrading treatment or punishment.”*

This Article of the Convention is an *absolute right*. This means that there are no exceptions to this rule. However, for treatment to be considered as being torture or inhuman or degrading, it has to reach a certain *“threshold of severity”*. The Court has set this threshold relatively high. For example, in relation to corporal punishment, the Court held that the slipping three times with a gym shoe of a child at school was not sufficiently severe to constitute degrading treatment contrary to Article 3. Many Article 3 cases concern the treatment in individuals in detention and prisons, and there is a growing number of cases about expulsion. The Court has found it a violation of Article 3 to deport an individual who was suffering from AIDS and only had a short time to live, to his state of origin where he would not have access to appropriate medical treatment and would die in complete destitution.

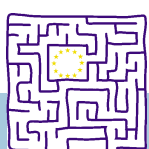
Article 3 also covers mental suffering, and the Court has held that a mother in Turkey whose son had disappeared was subjected to inhuman and degrading treatment. This was because of the uncertainty as to whether he was still alive that she had suffered over a long period of time and which had caused her severe mental distress and anguish.

**ARTICLE 8 READS**

*“Everyone has the right to respect for his private and family life, his home and his correspondence.”*

*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

This right, unlike Article 3, is not an absolute right. States are *allowed to interfere* with the rights of individuals, but only *on certain grounds* that are listed in the second paragraph of the Article. As can be



seen in the text of the Article above, these include national security, the prevention of disorder and crime, the protection of health and morals and the protection of the rights and freedoms of others. The interferences also have to be in accordance with English law and necessary in a democratic society. (For more details on how the Court apply these principles, see the Glossary of Principles at the end of this handbook.)

The Court has made clear that the expression “private life” includes a person’s *moral and physical integrity*. If a person is treated in a way that does not amount to a violation of Article 3 of the Convention (freedom from torture, inhuman and degrading treatment, see above), there might still be a violation of Article 8. The level of what constitutes an interference with someone’s moral and physical integrity is lower for Article 8, then the test under Article 3.

### ***Is the State responsible for protecting a person from someone in their own home?***

As explained in the Glossary of Principles at the end of this handbook, the European Convention not only puts an obligation on States not to interfere with individuals’ rights. It also demands that States should secure the rights in the Convention for individuals. This is called “positive obligations”.

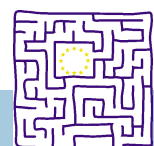
The State is under an obligation arising from Article 3 and Article 8 to provide effective protection against domestic violence. The European Court of Human Rights held that there had been a violation of Article 8 in a case where a woman had tried to obtain a decree of judicial separation, but there was no legal aid for such separation proceedings. The main factor underpinning this decision was the recognition that the applicant needed protection from her alcoholic and violent husband.

In another case a woman had been harassed by her ex-husband by, among other things, him forcibly entering her home, following her and her children when she was driving and slashing her car tires. The European Commission recalled in its decision that the obligation to secure the rights in the Convention may involve the adoption of measures even in the sphere of relations between individuals. It found that the alleged harassment of the applicant was of a level which could arguably constitute an interference with the applicant’s right to respect for her private life the enjoyment of her home. It noted the persistent and distressing nature of the alleged conduct of the applicant’s ex-husband and the consequent effect which it had on the applicant and the way in which she led her life. In these circumstances, the Commission found that the responsibility of the State was engaged and that it was under a positive obligation to secure the applicant’s rights by providing adequate protection against this type of deliberate persecution.

### ***What does the Convention say about family law?***

Article 8 of the Convention provides for the right to respect for family life. This right may be subject to certain justified interferences. (For full text of Article 8 see above.)

The right to family life is not one right, but a bundle of rights. The most important part of the right to family life is the right to develop normal family relationships. Where all parties agree this will usually



mean living together, free from interference by the State, and enjoying each others' company. Where this is not possible, either because the parents in a family have separated, or because a child has been taken into care, the right to family life includes contact between the family members (although there may also be restrictions on these contacts if such restrictions are justified under the second paragraph of Article 8).



### ***Who is included in the concept "family life"?***

Two people who are married to each other are covered by the family life concept. Other similar relationships might also be included. Relevant factors are here:

- whether a couple live together
- the length of their relationship
- whether they have demonstrated the commitment to each other by having children together or by any other means.

Family life will also always embrace the tie between a parent and a child, and the general rule is that this will still be the case even where the parents are not married and do not live together. The particular circumstances of the case will here be decisive.

When deciding if a particular relationship is covered by the concept of family life, the European Court always looks at the factual reality, and not the legal position of that relationship.

### ***What about custody proceedings and access to children after divorce?***

Decisions about custody and access to children obviously affects a person's family life. This is especially so for the unsuccessful party to such proceedings and his/her chance to develop a relationship with the child in question. Article 8 does not guarantee any right to custody or access as such, but it does recognise that after divorce or separation each parent retains an interest in his/her child which must be protected. Decisions on custody and access must therefore be justified, necessary and proportionate.

Also, in all cases the main consideration must be the best interest of the child. This will usually be the determinative factor for issues under Article 8.

### ***What about the placing of children in care?***

The placing of children in care is another issue that clearly falls with Article 8. Such a decision must therefore be justified under Article 8(2), and be necessary and proportionate.



The Court has laid down the following principles, and these should be followed in all circumstances:

- 1 taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit
- 2 any measures taken to implement a decision to place a child in temporary care should be consistent with the ultimate aim of reuniting the natural parent and child
- 3 therefore a fair balance must be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child
- 4 when assessing whether a fair balance has been struck, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent
- 5 in particular, a parent cannot be entitled under Article 8 to have measures taken that would harm the child's health and development

As can be seen from point no. 1 and 2 above, the taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any measures of implementation should be consistent with the ultimate aim of reuniting natural parent and child. However, the fact that a child is placed in care with a view to permanent adoption and that contact between parent and child should be terminated does not in itself violate Article 8. One needs to keep in mind though that these are very far-reaching steps and can only be justified if they are based on an overriding requirement of to the child's best interests.

### ***Does the Convention afford any protection in proceedings concerning family life?***

Articles 8 and 6 contain a strict requirement of procedural fairness in proceedings concerning family life. Article 6 reads in relevant parts

*"In the determination of his civil rights and obligations..., everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

Proceedings concerning family life will almost always amount to the determination of civil rights and obligations and Article 6 will therefore be applicable. Parties to the proceedings will then have the right to, among other things, a trial within a "reasonable time". The European Court has many times stressed emphasised that childcare proceedings must be managed with particular expedition, having regard to the importance of what is at stake and the fact that the lapse of time might influence the outcome of the proceedings.

The guarantees under Article 6 also include a right to access to court. This means, that if a decision where an important aspect of a parent's relationship with a child has been made, the parent should have the right to challenge that decision in a court. For example, the Commission found a violation in a case where the mother of a child in care under a parental rights resolution and to whom access had been refused by the local authority, was unable to go to a court challenge that refusal.



The requirements of fairness deriving from Article 8 is a result of the fact that the European Court has recognised that “respect” for family life can only be achieved if the interests of family members are taken into account when family life issues are determined. The most important requirement stemming from Article 8 is that parents must be properly involved in proceedings concerning the custody, care or access to their children. If the parents are not properly involved, any interference with family life will not be capable of being regarded as necessary within the meaning of Article 8(2).



### ***Is there a right to have a family?***

ARTICLE 12 OF THE CONVENTION READS

*“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”*

The only exceptions to this rule are, as can be seen from above, that the persons are of marriageable age and that marriage is entered into in accordance with national laws. The role of national law is to govern the exercise of the right to marriage but the limitations imposed by the State must not have the effect of impairing the very essence of the right. Generally recognised limitations such as capacity, consent or prevention of bigamy are compatible with this requirement.

The right to found a family include the founding of a family by adoption. The Court has still to consider whether a couple that is infertile can derive a right of access to new medical technologies in order to found a family. Article 12 does not include the right to divorce.

### ***What does the Convention say about abortion?***

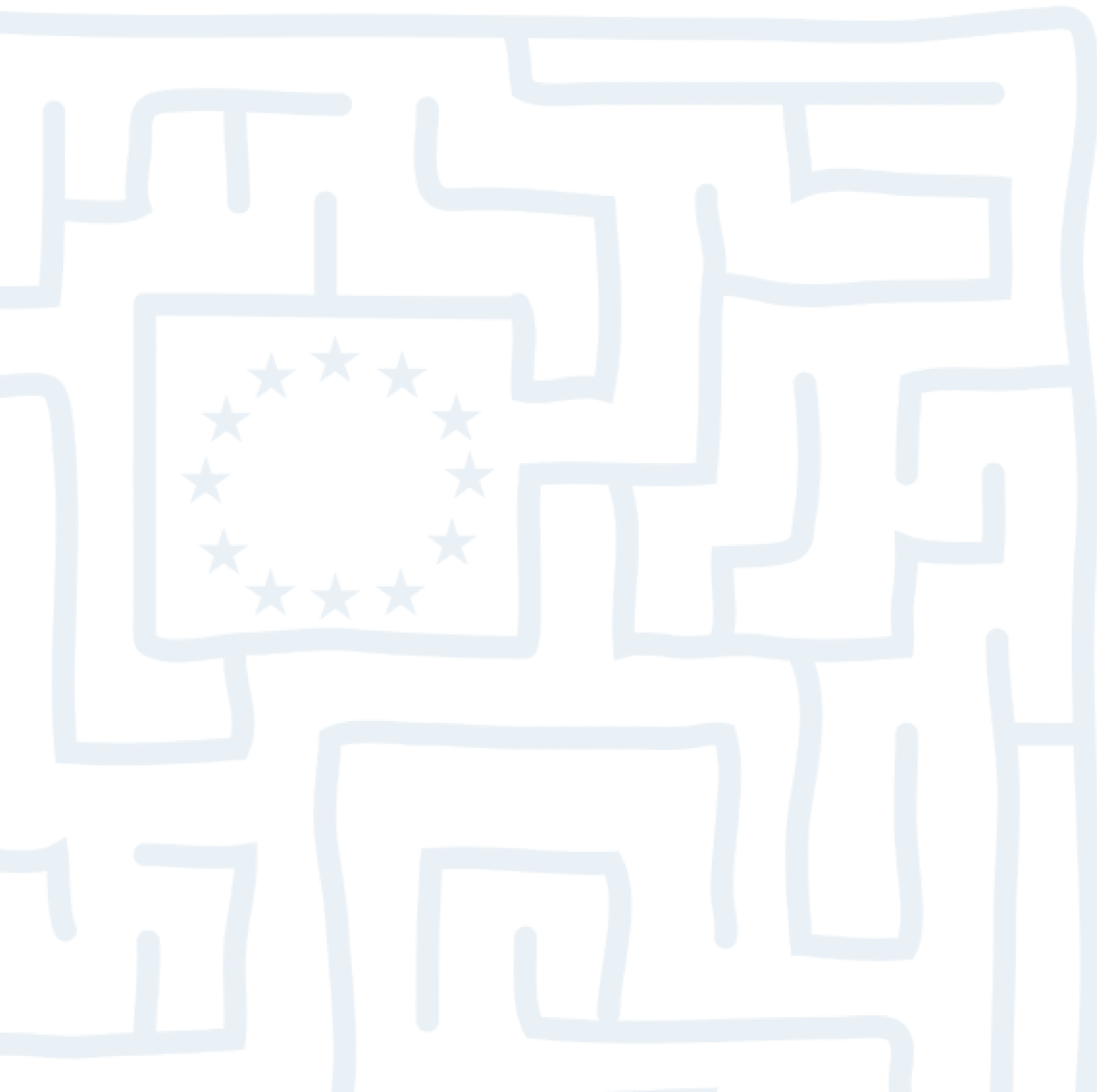
There is no specific provision in the Convention dealing with the issue of abortion. The Court and Commission have been very reluctant to draw any general conclusions in its case-law considering the different attitudes towards abortion in the 43 Convention States. The Commission has, without deciding, been leaning towards the view that a foetus or unborn child is not protected by Article 2, the right to life.

The only case decided by the Court in regards to abortion concerned the complaint of two women's counselling organisations in Ireland that they were affected by an injunction which restricted them from providing information to pregnant women about abortion facilities in the United Kingdom. The Court held that the State did not have an absolute discretion in the field of morals. It concluded that the restriction was unnecessary, giving weight to the sweeping nature of the injunction regardless of the age, health and circumstances of the woman concerned, the fact that it was not against the law for a woman





to travel abroad and that it prevented the provision of information about abortion facilities which were available lawfully in other Convention States. The Court also noted that the counselling was non-directive which lessened any alleged link between the counselling and the destruction of unborn life and that in any case the information was available in other forms via magazines and telephone directories. It found that the ban appeared to penalise women who were less resourceful or educated and created a risk that women, in the absence of proper counselling, might seek abortion at later stages and fail to take advantage of medical supervision after an abortion.



# Glossary of Principles

As mentioned in the Introduction the European Court of Human Rights uses a number of principles when interpreting and applying the Convention. Below is a short description of the most important principles.

## **Proportionality**

The principle of *proportionality* is one of the most significant. It is of central importance when dealing with justifications for interferences with Convention rights. The questions that the Court asks when assessing a situation where a right has been interfered with are:

- 1) Are there “relevant and sufficient reasons” for the interference? Is it “necessary in a democratic society”? Does it correspond to a “pressing social need”?
- 2) Is there an alternative that would have interfered less?
- 3) Were safeguards in place and observed in order to avoid the possibility of abuse?
- 4) Does the interference “impair the very essence of the right”?

## **Margin of appreciation**

When implementing the rights of the Convention, the European Court allows the State a certain *margin of appreciation*. This is a creature of international law. By this principle, the Court has recognised that the Convention does not demand the same standards and rights to be applied uniformly throughout the 43 member States of the Council of Europe, as these have widely different social, cultural, economic and legal systems. As long as the States have secured the rights protected by the Convention, they have a margin of appreciation as to how they do so. If this margin is wide or narrow will depend on the right involved and the circumstances of the case.

## **Necessary**

Under certain Articles of the Convention interferences with the rights may be justified where they are in pursuit of so called legitimate aims, for example in the interest of national security. However, there is a requirement that such interferences must be *necessary*. What is necessary depends on the circumstances of the case, but it has been identified as being less than indispensable although not as flexible as useful, reasonable or desirable.

## **Living Instrument**

The Court has held many times that the European Convention on Human Rights is a *living instrument* that should be interpreted in the light of present-day conditions. When social and cultural attitudes in a society change, the Convention may be applied differently. Examples are cases the Court has dealt with concerning issues of homosexuality or corporal punishment in schools.



### ***Practical and Effective Rights***

Another important principle the Court has stressed many times is that the rights guaranteed by the Convention must be *practical and effective*, and not theoretical and illusory. For example, the Court has held that the mere nomination of a lawyer does not guarantee the right to effective legal assistance since he/she might die, fall seriously ill or otherwise be prevented from acting as the defendant's lawyer. If the authorities are notified of the situation, they should either replace him/her or cause the lawyer to fulfil his/her obligations.

### ***Positive Obligations***

The European Convention not only puts an obligation on States not to interfere with individuals' rights (a negative obligation), it also demands that the State should secure rights for individuals – a *positive obligation*. The Court has held in many cases that States are under a positive obligation to ensure that Convention rights are protected, and not just refrain from negative interferences. The Court has for example held that a judicial sanction must exist to protect certain rights, and in some cases it has gone so far as to state that this must be a criminal sanction. At the very least a State must have in place laws which ensure that Convention rights are adequately protected from infringements both by State officials and private individuals. The Court has extended this principle even more by saying that the State must also take active steps to ensure that individuals can exercise their Convention rights in practice.

The question the Court asks in such a situation is:

Did the State take all reasonable steps to protect an individual from harm of which it knew or ought to have known?

If the answer is 'no', there is a violation of the Convention. However, one should note that there is a very high threshold to overcome before an applicant can show that the answer is 'no'.



## ABOUT THE AIRE CENTRE

The AIRE Centre (Advice on Individual Rights in Europe) provides:

- Information and advice throughout Europe on International Human Rights law and European Union law;
- Direct legal advice and assistance on a case by case basis to individuals, or to the lawyers who represent them, and, where appropriate, direct representation before international tribunals;
- Expert resource persons and teaching materials to organisers of workshops and conferences;
- General advice on International Human Rights law to public authorities. We do not, however, provide assistance to such bodies in litigating against individuals.

## ABOUT THIS PROJECT

The "*Human Rights Training for the Voluntary Sector*" project is funded by the London Boroughs Grants



The "*Human Rights Training for the Voluntary Sector*" Project Co-ordinator is Nicola Rogers and the Outreach Worker for Women's organisations is Catharina Harby.

Contact Nicola Rogers or Catharina Harby for more information on the support and advice available under this project.





## The AIRE Centre



If you have an enquiry about any area of the AIRE Centre's work or need advice on the European Convention on Human Rights you can contact us by post, email, or fax or telephone our advice line. We are not able to see clients in person.

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