

# “Human Rights Act and Commercial Law”

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## 1. STANDING: WHO CAN SUE

1. Under the HRA, only a person who is, or would be, a “victim” of an action by a public authority which is incompatible with the Convention can bring proceedings or rely on the Convention right or rights concerned<sup>1</sup>.
2. “Victim” bears the same meaning as under Article 34 of the Convention which states that only a victim may bring an application before the Court<sup>2</sup>.
  1. An applicant may not challenge a law in the abstract; the victim must generally be directly affected; see *Klass v Germany*<sup>3</sup>.
  2. Strasbourg does, however, sometimes admit applications by those sufficiently “indirectly affected” to be considered a victim. Eg: family member or even the father of an unborn child who asserts the right to life of an unborn child<sup>4</sup>.
  3. Companies and other non-natural persons may be victims. In very limited circumstances the Strasbourg Court may be willing to “pierce the corporate veil” to allow actions by shareholders in “exceptional circumstances”: *Agrotexim v Greece*<sup>5</sup>

## 2. WHO CAN BE SUED?

3. The Act’s fundamental principle is that:

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.<sup>6</sup>”

4. A “public authority” is “any person certain of whose functions are functions of a public nature”<sup>7</sup>. A person is not to be treated as a public authority if the act challenged is by

<sup>1</sup> HRA s 7(1).

<sup>2</sup> S 7(7).

<sup>3</sup> *Klass v Germany* (1979-80) 2 EHRR 214.

<sup>4</sup> *Paton v United Kingdom* (1980) 19 DR 244 at 248.

<sup>5</sup> (1996) 21 EHRR 250 para’s 65, 66.

<sup>6</sup> S 6(1).

<sup>7</sup> S 6(3).

its nature private<sup>8</sup>.

5. The “public functions” test is - on the face of it at least - the test for susceptibility to judicial review set out in *R v Take-Over Panel ex p Datafin Plc*:<sup>9</sup> a non-statutory body which formed part of the self-regulatory framework of the City of London was held to be susceptible to judicial review.
6. It is quite clear, however, that Parliament intended the scope of the HRA to be wider than that of “ordinary” judicial review. *Hansard* reveals that the express intention is to create three categories of bodies. First, “obvious” public authorities, “all of whose functions are public.”<sup>10</sup> Such bodies are caught by the 1998 Act “in respect of everything they do.”<sup>11</sup> Examples given in Parliament include Government Departments, local authorities and the police.<sup>12</sup>
7. Secondly, there are “organisations with a mix of public and private functions.” This category includes private bodies which carry out public functions; examples given at the time included Railtrack, private security firms that run prisons.<sup>13</sup> Such bodies are susceptible to challenge only in respect of their public functions.<sup>14</sup>
8. The Court of Appeal has held a housing association to be exercising a public function<sup>15</sup>, but the an attempt to establish that the operator of a nursing home exercised a public function failed: *Heather v Cheshire*<sup>16</sup>.
9. The third category of bodies contains those with no public functions. Whilst such bodies may not be defendants to an action brought under the Act, they may still be affected by it.

#### **Horizontal effect: public law principles in private law disputes**

10. In some circumstances, the Convention impacts upon disputes between two private bodies, or individuals. The English Courts have already applied the Act in a range of private disputes, eg: *Payne v Payne*<sup>17</sup> the Court of Appeal considered the effect of Article 8 in a case concerning a dispute over the residence of a child; *B & C v A*<sup>18</sup> the discharge of an injunction against the publication of details of a footballer’s adulterous relationships, having weighed the footballer’s right to privacy against the newspaper’s freedom of expression.
11. Most commercial litigation qualifies as a dispute as to civil rights or obligations, and accordingly falls within the scope of Article 6, the right to a fair trial. Thus, a breach of Article 6(1) by a first instance court or tribunal may give grounds for appeal, eg *Dombo Beheer BV v The Netherlands*<sup>19</sup>. The Act places the courts, as with all other public authorities, under a duty to act compatibly with Convention rights.
12. In addition, the HRA requires that so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights<sup>20</sup>. In *R v A*<sup>21</sup>, Lord Steyn stated that this obligation is a “strong one” and goes far

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<sup>8</sup> S 6(5).

<sup>9</sup> [1987] 2 WLR 699, CA.

<sup>10</sup> Ibid col 409.

<sup>11</sup> Jack Straw MP, *Hansard* HC, 16 February 1998, col 775.

<sup>12</sup> Jack Straw MP, *Hansard* HC, 17 June 1998 col 409-410.

<sup>13</sup> Jack Straw MP, *Hansard* HC, 17 June 1998 col 409-410.

<sup>14</sup> The Lord Chancellor, *Hansard* HL, 24 November 1997, col 785.

<sup>15</sup> *Poplar Housing v Donoghue* The Times, 21 June 2001.

<sup>16</sup> [2002] EWCA Civ 336.

<sup>17</sup> [2001] HRLR 28.

<sup>18</sup> [2002] EWCA Civ 337.

<sup>19</sup> (1993) 18 EHRR 213.

<sup>20</sup> S 3(1).

<sup>21</sup> [2001] HRLR 49.

beyond the use of the Convention to resolve ambiguity. It could lead to the “implication of provisions.” Compare, however, the more conservative approach in *Re S & W*<sup>22</sup>. Thus, courts may be required to consider the Convention in the construction of statutory material which falls for consideration during private law litigation.

### 3. WHICH COURT?

13. Section 7(1) of the HRA provides that a person who claims that a public authority has or may act incompatibly with a Convention right may:
  1. bring proceedings against the authority in the *appropriate court or tribunal*; or
  2. rely on the Convention right in any legal proceedings.  
(Emphasis added)
14. The CPR does not specify which court or tribunal is generally “appropriate” for the commencement of a claim, although a rule to this effect was considered by the rules committee.
15. One important question is whether such a claim ought to be brought by judicial review, where a 3 month time period applies. The HRA allows one year.
16. The answer lies in the nature of the remedies sought. Section 8(1) of the HRA provides:
 

“In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”

### 4. TYPES OF CHALLENGE UNDER THE ACT

#### **Challenge to primary legislation**

17. Legislation must be read so far as is possible to “give effect to” it in a way which is compatible with Convention rights<sup>23</sup>. If it cannot be so read, a higher court may make a “declaration of incompatibility”<sup>24</sup>. Such a declaration is not binding, and does not affect the continuing validity of the legislation<sup>25</sup>. Declarations of incompatibility have now been made in a few cases: *R (on the application of H) v Mental Health Review Tribunal, North and East London Region*<sup>26</sup>, *Wilson v First County Trust Ltd*<sup>27</sup>, *Matthews v MOD*<sup>28</sup>.

#### **Subordinate legislation**

18. Courts may give relief against subordinate legislation on the grounds that it infringes Convention rights to the extent that they have the power to grant an appropriate remedy<sup>29</sup>. The HRA does not embody any form of general power which would authorise the quashing, or (in the manner of European Community law) the setting aside of legislation.

#### **Action by public authorities**

19. It is unlawful for a public authority to act so as to infringe Convention rights.<sup>30</sup> The HRA provides a defence, where:
  1. the authority was bound to act as it did by primary legislation;
  2. the authority was acting to give effect to or to enforce provisions of, or made under primary legislation which cannot be read or given effect to in a way which is compatible with Convention rights<sup>31</sup>.
20. In those circumstances, the impugned action is “lawful”<sup>32</sup>. There is therefore a powerful

<sup>22</sup> [2002] UKHL 10.

<sup>23</sup> S 3(1).

<sup>24</sup> S 4(2).

<sup>25</sup> S 4(6).

<sup>26</sup> [2001] HRLR 752.

<sup>27</sup> [2001] HRLR 102.

<sup>28</sup> [2002] EWHC 13.

<sup>29</sup> S 3(2).

<sup>30</sup> S 6(1).

<sup>31</sup> S 6(2).

<sup>32</sup> S 6(2).

incentive for a public authority to assert that source of any breach lies in primary legislation.

## 5. INTERLOCUTORY RELIEF

21. The grant of interlocutory relief may, evidently engage Articles 8 (the right to privacy) and/or 10 (freedom of expression); eg: *B & C v A*<sup>33</sup>
22. It may also be relevant to the execution of a search order: *Chappell v United Kingdom*<sup>34</sup>.. Section 12 of the HRA embodies measures designed to ensure that the Act is not used so as to erode freedom of expression. A court must pay "particular regard" to its importance.<sup>35</sup>
23. Where a court is considering whether to grant relief which might affect the exercise of Article 10 rights, it must not do so in the absence of the respondent unless satisfied that the applicant has taken all reasonable steps to notify the respondent, or there are compelling reasons why he should not be notified.<sup>36</sup>
24. No such relief is to be granted so as to restrain publication unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.<sup>37</sup> The Court of Appeal has stated that this requires the courts to look at the merits of the case, not merely to apply the *American Cyanamid* "real prospect of success" test.<sup>38</sup>
25. Where proceedings relate to literary or artistic material, the court must have "particular regard" to the extent to the extent to which the material has, or is about to become public, the public interest in publication and any relevant privacy code.<sup>39</sup>

## 6. DAMAGES

26. Damages may be awarded for the unlawful act of a public authority in breach of Convention rights under the HRA, <sup>40</sup> but only if the court or tribunal has power to award damages or compensation in civil proceedings, and if necessary to afford "just satisfaction"<sup>41</sup>.
27. "Just satisfaction" is the test applied by the Strasbourg Court pursuant to Article 41 of the Convention, and the Act requires the English courts to have regard to the principles the Strasbourg Court applies<sup>42</sup>:
  1. The Strasbourg Court has interpreted the word "necessary" in Article 41 as importing a discretion as to whether it should award damages.<sup>43</sup>
  2. The "tortious" measure of damages has been occasionally adopted: the applicant should, as far as possible, be put into the position he would have been in had the Convention not been disregarded, eg: loss of the value of property.<sup>44</sup>
  3. Usually, if the Court makes an award of damages at all, it does so on an "equitable basis". In practice, such awards of damages are low, and may be awarded even where an economic loss is capable of quantification.
  4. Damages are awarded for non-pecuniary loss. The Court has made awards under this head for a wide range of harms including injury to feelings, or distress.<sup>45</sup>
  5. The Court frequently refuses to make any award on the grounds that the judgment itself offers sufficient reparation. Such awards are sometimes made even where the

<sup>33</sup> [2002] EWCA Civ 337.

<sup>34</sup> *Chappell v United Kingdom* (1990) 12 EHRR 1.

<sup>35</sup> S 12(4). It must also pay particular regard to the importance of Article 9, the right to freedom of thought, conscience and religion where its determination might affect the exercise by a religious organisation of that right: s 13. See also *Ashdown v Telegraph Group Ltd*, CA 18 July 2001.

<sup>36</sup> S 12(2).

<sup>37</sup> S 12(3).

<sup>38</sup> *Douglas and Zeta Jones v Hello!* [2001] HRLR 512.

<sup>39</sup> S 12(4).

<sup>40</sup> S 8(1).

<sup>41</sup> S 8(3)(4).

<sup>42</sup> S 8(4).

<sup>43</sup> *Guzzardi v Italy* (1981) 3 EHRR 333.

<sup>44</sup> *Pine Valley v Ireland* (1992) 14 EHRR 319.

<sup>45</sup> Eg: *Halford v UK* (1997) 24 EHRR 523, *Engel & others v Netherlands* (1979-80) 1 EHRR 706.

- Court finds that the applicant has suffered harm.<sup>46</sup>
28. In deciding whether an award is necessary to afford just satisfaction, the Act requires the courts to take into account two factors in particular. Section 8(3) of the HRA provides:  
“No award of damages is to be made, unless, taking account of all the circumstances of the case, including:  
(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court); and  
(b) the consequences of any decision (of that or any other court) in respect of that act,  
the court is satisfied that the award is necessary to afford just satisfaction.”
29. The first award of damages by an English court (apparently) was made by the TCC in *Marcic v Thames Water Utilities*:<sup>47</sup> breach of Convention arising out of failure of utility company to maintain sewers. The judge held that a claim in nuisance failed, but that a claim under the HRA succeeded. The award was quashed on appeal, the Court of Appeal holding that the defendant was liable in nuisance and that, having regard to s 8(3), the claimant’s right to damages at common law displaced any right to damages under the HRA.

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<sup>46</sup> Eg: *Dudgeon v United Kingdom* (1983) 5 EHRR 573.

<sup>47</sup> 14 May 2001.