

The Human Rights Act 1998



Introduction

The Human Rights Act was given Royal Assent in UK in 1998 and came into effect in October 2000. The Act ensures that all public authorities act without breaching human rights. Before the Human Rights Act 1998, the only way that UK citizens could bring a legal challenge relating to their rights was through the ECtHR.

The Human Rights Act:

- allows the rights afforded by the ECHR to be upheld in UK courts.
- brings the rights outlined in the ECHR into British Law and also outlines how they are to be enforced and applied.
- says that any judgement from the ECtHR must be taken into account
- sets out that any new laws passed by the government must not be in breach of the Act

The Articles

There are 14 Articles within the Act. These are based on the ones listed in the European Convention on Human Rights (ECHR). You'll notice that there isn't an Article 1 or 13, this is because by creating the Human Rights Act, the UK automatically fulfills these rights (for example Article 1 is about making governments accountable for ensuring the rights are protected and Article 13 requires states to make sure that people have a way to effective remedy if they believe their rights have been breached. The Human Rights Act is the UK's way of making sure these things happen.

- Article 2: the right to life
- Article 3: freedom from torture or inhumane and degrading treatment
- Article 4: freedom from slavery and forced labour
- Article 5: the right to liberty and security
- Article 6: the right to a fair trial
- Article 7: no punishment without law
- Article 8: right to a private and family life
- Article 9: freedom of thought, belief and religion
- Article 10: freedom of expression
- Article 11: the right to protest and freedom of association
- Article 12: the right to marry
- Article 14: protection from discrimination

Public Bodies

Under the Human Rights Act, it is unlawful for a public authority to breach people's rights. This duty ensures all decisions and actions they make, properly take into account people's rights and freedoms. This obligation does not apply if, under the law, the public authority could not have acted differently.

What is a Public Authority?

A public authority includes a court or tribunal and any person whose functions are of a public nature. This includes:

- Police Officers
- Local authorities
- Government departments
- Statutory bodies (for example the Information Commissioner's Office, the National Crime Agency and the Office of Fair Trading)
- Prison managers and staff
- Some private bodies in certain circumstances, if contracted to carry out work on behalf of a public authority – for example, if publicly funded to perform work generally carried out by the Government (for example, privately run prisons, independent schools, private hospitals).
- Nursing and personal care accommodation providers.

What is not a Public Authority?

Parliament and anyone exercising a function in connection with proceedings in Parliament (such as MPs and peers in Parliament) are not classed as a public authority nor is anyone acting in a private capacity (such as a police officer in his or her private life).

A private company not exercising functions of a public nature is also not classed as a public authority – this would include a private company that receives no public funding and is under no statutory obligation to perform its functions.

Addressing potential breaches

Through your work you may come across a public authority who may have breached a person's human rights. If the matter goes to court, the court can:

- Grant traditional 'judicial review' relief – which reviews the lawfulness of a decision by a public authority. If the court concludes that a decision is unlawful it can, among other things:
 - declare that the public authority acted unlawfully
 - cancel the decision, or
 - prevent a public authority from acting in a certain way. In most situations, if a decision is found to be unlawful, the court will send the issue back to the public authority to make the decision again.
- Award compensation to the extent the court considers it necessary, just and appropriate. The courts often take into account the conduct of the person seeking compensation when deciding whether to grant it.

This is in addition to the courts' power to make a declaration that the law (rather than the decision made under the law) is in breach of human rights.

Source:

<https://www.libertyhumanrights.org.uk/your-rights/the-human-rights-act/how-the-human-rights-act-works/>

Using the Act in your advocacy

As health and social care involves accessing services run by public or private bodies acting on behalf of public authorities, the Human Rights Act should be upheld by all the people who provide services and make decisions about services.

Any of the articles in the Human Rights Act may be referred to by advocates but the following Articles are the most commonly referred to by advocates in their work.

Read on to learn how the Articles have been used in the past and how they may be relevant to use when supporting and representing people.

Article 2 Right to life

As well as prohibiting the ending of a life, public authorities must also take action to protect a life if it is in danger. The obvious example of this is the police responding if someone is threatening your life.

There is also a requirement for an investigation into any death that occurs because a public authority has not protected someone.

Article 2 in action

A common issue for advocates is if life-saving treatment is withheld or a DNACPR (Do Not Attempt Cardiopulmonary Resuscitation) is placed on a person without their consent or without discussion with their family or representative.

For more information (optional reading):

<https://www.cqc.org.uk/publications/themed-work/protect-respect-connect-%E2%80%93-decisions-about-living-dying-well-during-covid-19>

Article 3 Freedom from torture or inhumane or degrading treatment

This prohibits ill-treatment that causes severe suffering, either mental or physical, as well as anything that is grossly humiliating or undignified. This includes failure of a local authority to protect a child from abuse, neglect by a care home or hospital or deporting someone to a country where they will face a real likelihood of torture or degrading treatment.

Article 3 in action

Whorlton Hall, 2019 was investigated following a BBC Panorama Programme that exposed carers had habitually subjected people with a learning disability to degrading and inhumane treatment. In the Independent Review Report, there was discussion of breach of human rights (including Article 3, 5 and 8). For more details and general information (optional reading):

1. *CQC Second Report of Independent Review into its regulation of Whorlton Hall*
2. *Out of Sight? Who Cares? A Review of Restraint, Seclusion, and Segregation for Autistic People, and People with a Learning Disability and/or Mental Health*

Article 5 Right to liberty and security

This Article is all about protecting people's freedom from unreasonable detention.

A person cannot be deprived of their liberty unless it is in accordance with the law. If the correct procedure in respect of any detention is not followed, a legal challenge can be raised.

If a person is deprived of their liberty, they must have the following:

- the opportunity to have their side of the story represented at a tribunal hearing (either by the person or their representative)
- have a right to legal representation
- have an opportunity to see and challenge the report and other evidence which led to the decision to detain a person

Article 5 - When can you be detained?

The circumstances in which public authorities can detain you (within the law) include the following scenarios:

- A person has been found guilty of a crime and sent to prison
- A court has ordered a person to do something and they haven't
- There is reasonable suspicion that a person has committed a crime, or someone is trying to stop another person from committing a crime
- A person has been found to meet the criteria to be detained under the Mental Health Act
- A person is capable of spreading an infectious disease
- A person is attempting to enter the country illegally, and they are going to be deported or extradited.

The Children Act 1989 also permits that a Local Authority can keep a young person in 'secure accommodation' if they have a 'history of absconding and is likely to abscond from any other description of accommodation and... suffer significant harm'. (see s25 of the Children Act for more information).

Article 5 in action

Article 5 is very important for the delivery of Mental Health Act 1983 and Mental Capacity Act 2005 (including DoLS/LPS) and all aspects of legislation for the delivery of care and social support for adults and children.

The Mental Health Act 1983 and the Mental Capacity Act 2005 refer to restrictions that are for the safety of the person or others. These restrictions are very carefully monitored and there are safeguards in place to ensure that a person does not have their human rights breached.

An advocate is one of those safeguards and can support a person who is detained to understand and uphold their rights under the legislation including the HRA.

Case law re Article 5 - Bournemouth

HL v United Kingdom 2004 European Court of Human Rights (ECtHR) (known as The Bournemouth Case)

This case gave rise to amendments to the Mental Capacity Act through the revised Mental Health Act 2007. It also led to the Deprivation of Liberty Safeguards (DoLS) supplement to the Mental Capacity Act Code of Practice. These changes formed what became known as the Bournemouth gap and were set to remedy gaps in UK Law (England and Wales) and ECHR.

The case concerned HL, a severely autistic man, who lacked capacity to consent to or refuse hospital treatment. HL was admitted to Bournemouth hospital in 1999 and was kept there against the wishes of his carers.

HL was not detained under the Mental Health Act because he did not object or resist to the admission but was informally admitted to hospital as his doctor considered that HL required treatment.

Case law re Article 5 - Bournemouth

HL remained in hospital for weeks and was prevented from leaving or seeing his carers.

The carers engaged a solicitor and the case was escalated to the European Court of Human Rights who found that HL had been deprived of his liberty in hospital.

The deprivation was unjustified and that there was not provision in law or formalised admission procedure to protect a patient from having Article 5 of their human rights breached in this context. There was a breach of Article 5 because HL had no recourse to apply to the court to challenge his deprivation of liberty.

As a direct result, the Deprivation of Liberty Safeguards were introduced and came into effect in 2009.

Case Summary

<https://equalityhumanrights.com/en/what-are-human-rights/human-rights-stories/bournemouth-case>

Further information:

https://www.mentalhealthlaw.co.uk/Bournemouth_gap_bridged_by_Deprivation_of_Liberty_Safeguards_inserted_into_MCA_2005

Actual case (optional reading) : <http://www.bailii.org/eu/cases/ECHR/2004/720.html>

Case law re Article 5 - Cheshire West

1) P v Cheshire West & Chester Councils and Another; 2) P & Q v Surrey County Council 2014 Supreme Court

The case involved three people, each living with learning disabilities and different kinds of needs. It was established that each of the three people lacked capacity to make decisions about their care and treatment, and all three were living in different care settings. Whilst the adequacy of the care was not at issue, what was a concern was the fact that each person was under continuous supervision and could not (or would not be allowed) to leave of their own accord.

Not having arbitrary restrictions placed on movement is a key part of everyone's right to liberty, protected by HRA (Article 5). Restrictions can only be put in place for one of a limited number of lawful reasons, and safeguards to review the deprivation of liberty must be in place. In the Cheshire West case, the courts were asked to decide whether the care being provided to the three people was depriving them of their liberty and if that was the case whether adequate safeguards were in place.

Case law re Article 5

Initially, the court ruled that as continuous supervision would have been usual for anyone in their situation, that they were comfortable in the care, and that the measures were in place for their best interests, then it could not be a deprivation of liberty. This raised some important questions about universality – the application of human rights equally to everyone.

Five years later in 2014, the Supreme Court saw the case differently. In this judgement, the focus was on the fact that even though a person who lacks capacity about care and treatment may not express a desire to leave their care setting, if they would be prevented from leaving this is a deprivation of their liberty. The Supreme Court confirmed that having a learning disability does not mean that the right to liberty, and the safeguards that it entails, can be applied differently.

The judgement set out the ‘acid test’ that health and care professionals must follow when faced with similar circumstances. Whether a care setting and its restrictions is relatively “normal” or in a person’s best interests is not relevant to whether their liberty has been restricted.

Case law re Article 5

Lady Hale in the Supreme Court said:

The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.

The Cheshire West judgment significantly changed a lot of practice – many people had not had DoLS in place because it was thought that their positive and “relatively normal” care arrangements could not be a breach of their right to liberty. The Supreme Court ruling meant that many thousands more people should have been assessed for DoLS. However, DoLS processes were not set up to consider human rights in the way confirmed by the Supreme Court, and The Law Commission was asked to review Deprivation of Liberty Safeguards.

This review resulted in the recommendation of the new Liberty Protection Safeguards which is included in the Mental Capacity (Amendment) Act 2019.

Source: <https://www.bihr.org.uk/blog/cheshirewest2017>

Local Government Ombudsman Reports on decisions from complaints can be helpful references for advocates when trying to find previous examples of outcomes to assist in similar situations for their own partners.

Local Government Ombudsman Case

Cheshire East Council (Decision: November 2020) were at fault for failing to put a DoLS authorisation in place 11 months after application for Mr Y. The LGO investigation found that there were a number of people across the local authority who had been living without DoLS authorisation for a substantial amount of time due to lack of local authority response to application for assessment.

It was concluded that the people in question were living with an unlawful deprivation of liberty that could be potentially harmful. The local authority agreed to produce an action plan of how to address the backlog of DoLS authorisation assessments and to produce an action plan for addressing cases where the deprivation of liberty was not lawful and harmful or potentially harmful.

Actual report:

<https://www.lgo.org.uk/decisions/adult-care-services/assessment-and-care-plan/19-010-786>

Case study - advocacy and Article 5

Louisa is 68 years old and has bipolar disorder. She has the tendency to hoard. She lives in her own accommodation, but it is increasingly becoming a fire and environmental hazard and she is thought to be unable to look after herself adequately at home.

Following an extreme low, Louisa is admitted to hospital and detained under Section 2 of the Mental Health Act that is later changed to Section 3. She stays in hospital for a few months and it is decided that Louisa should not go home when ready for discharge but instead should live in supported accommodation with a locked door policy that would require a DoLS authorisation.

Louisa wants to go home - she has seen the proposed new accommodation and does not wish to live there.

While in hospital under section, Louisa makes good progress with her health, works with an IMHA and discusses accommodation and moving very clearly stating her wishes and her opinion that she would be better able to live at home.

Case study - advocacy and Article 5

The IMHA has seen no sign of a capacity test around accommodation having been made and challenges the psychiatrist and social worker who are proposing the change of accommodation. The IMHA points out that without a capacity test, Louisa would not be eligible for a DoLS and could not stay in locked accommodation without her consent.

When a mental capacity assessment is completed, it concludes that Louisa has capacity to make her own decisions about where she lives. The IMHA asks the social worker to consider making a referral for a Care Act Advocate to support Louisa (who has no friends or family to support her) to secure an adequate care package for her to be able live at home and make her accommodation habitable. A Care Act Advocate is appointed to help with discharge planning and a suitable care and support package is put in place to help Louisa tidy up her flat and live at home.

Case study - advocacy and Article 5

The proposal to move Louisa into a secure locked accommodation without having tested for her capacity to understand the change of accommodation is an infringement of her liberty. Under the Mental Capacity Act, the decision of depriving Louisa of her liberty and deciding accommodation can only be made if she does not have the capacity to make her own decisions about her accommodation and how she lives (or by using other provisions of the Mental Health Act that affect where a person lives)

By proposing this the psychiatrist and social worker have potentially denied Louisa her right to liberty and security under Article 5 of HRA.

Article 8 - Right to family & private life

This Article protects a person's right to respect for their private life, their family life, their home and their correspondence (letters, telephone calls and emails, for example). A person has the right to live their life privately without government interference.

The courts have interpreted the concept of 'private life' very broadly. It covers things like the right to determine sexual orientation and lifestyle. It also includes the right to control who sees and touches a person's body. For example, this means that public authorities cannot do things like leave a person undressed in a busy ward, or take a blood sample without a person's permission. Private life also covers the right to develop personal identity and to make friendships and relationships.

This includes a right to participate in economic, social, cultural and leisure activities. In some circumstances, public authorities may need to help a person enjoy their right to a private life, including the ability to participate in society.

Article 8 - Right to family & private life

This right means that personal information about a person (including official records, photographs, letters, diaries and medical records) should be kept securely and not shared without a person's permission, except in certain circumstances.

A person has the right to enjoy family relationships without interference from government. This includes the right to live with their family and, where this is not possible, the right to regular contact.

The right to respect for a person's home does not give them a right to housing but it is a right to enjoy their existing home peacefully.

Article 8 - Restrictions

There are situations when public authorities can interfere with your right to respect for private and family life, home and correspondence. This is only allowed where the authority can show that its action is lawful, necessary and proportionate (appropriate and no more than necessary) in order to:

- protect national security
- protect public safety
- protect the economy
- protect health or morals
- prevent disorder or crime, or
- protect the rights and freedoms of other people

Case study - advocacy and Article 8

Tom lived in his own supported living accommodation until he fell and broke his hip. The injury has left him unable to walk easily and he now uses walking aids and a wheelchair. He has learning disabilities and has capacity over his accommodation and living arrangements. Recently he moved to a residential rehabilitation centre with an open-door policy and likes to live independently.

Prior to his injury Tom was very active in making floats for carnivals and his social life was centred around this. Tom visited the pub on occasion where he was sometimes open to exploitation and abuse. The rehabilitation centre manager has not allowed Tom to visit the carnival group and the pub saying that he is too vulnerable to go and needs supervision for his mobility.

Tom's advocate has discussed this with the centre manager and supported Tom to challenge the decision but the manager still says it is not possible for Tom to attend. Tom talks about the situation with the advocate and agrees that they should challenge the centre manager again.

Case study - advocacy and Article 8

The advocate raises concerns that this decision is not in line with the Care Act 2014 and could be in breach of Article 5 (because Tom is not free to do what he wishes) and Article 8 of the HRA because Tom's ability to engage with the people that he has done for years is being compromised.

The care home manager maintains that Tom cannot go out alone because he is vulnerable and needs supervision – the care home does not have enough staff to support Tom to go out.

Tom wants to maintain his involvement with the group but does agree he sometimes feels unsafe and his advocate ask for a review of his care and support plan and asks for a 1:1 support worker to support him at regular intervals (including once a week in the evening) so that he can maintain his social life.

Local Government Ombudsman Case

The Local Government Ombudsman found that Windsor and Maidenhead council failed to consider the human rights of a couple it separated after 59 years together and put them at undue risk of harm by the separation. (Decision Date: August 2020).

Mr and Mrs Y had lived together for nearly 60 years and following a hospital admission Mrs Y was admitted to a care home. Mr Y was also admitted to hospital and then discharged home with a care package and died three months later after a quick deterioration.

The Ombudsman found the separation caused Mr Y significant and undue distress and contributed to his worsening condition.

During this time he became very low and did not eat and drink properly. Mrs Y was also distressed at the separation and the ombudsman found that she had been caused undue harm by the council's decision.

Local Government Ombudsman Case

The ombudsman said that the separation constituted a limitation on the couple's right to a private, home and family life under Article 8 of the Human Rights Act, but that there was no evidence that the council had considered whether this was appropriate, or to consider Mr and Mrs Y's rights at all.

It was found that the council had not properly considered a live-in care arrangement or placing Mr and Mrs Y together in spite of saying that it would.

Case summary in Community Care:

<https://www.communitycare.co.uk/2020/09/15/council-failed-consider-human-rights-couple-separated-59-years-together-says-watchdog/>

Actual report (optional reading):

<https://www.lgo.org.uk/information-centre/news/2020/sep/elderly-man-suffers-after-council-splits-him-from-his-wife>

Article 8 and children & families

Removal of children from the family home or protection of children is a serious interference with family life whether temporary or permanent and can affect both parents and children. This interference can only be made if it is necessary and proportionate.

When working with children or parents of children under protection plans, it is important to remember their human rights particularly under article 8. Parents and children should be consulted even in an emergency before a child is removed from the home or they are put under protection. Contact should also be considered and supported.

Summarised from: How important is the Human Rights Act for Vulnerable Children or Families, Family Rights Group Briefing, 2014. Case studies can be found here that may help when advocating for parents or children.

https://www.frg.org.uk/images/Policy_Papers/repeal-the-human-rights-act-working-doc-22-oct-2014.pdf

Case law re Article 5 & 8

London Borough of Hillingdon v Steven Neary (2011)

This involved a 21-year-old man who has autism and a severe learning disability who lives with, and is cared for by, his father, Mr Neary. Steven required constant support and supervision, and Mr Neary was helped by a care package provided by Hillingdon Council.

In 2009, when Mr Neary fell ill, the local authority accepted Steven into respite care for a few days, but subsequently kept him there for a year, despite Mr Neary's insistence that Steven come home. The case judgement focused on the unlawfulness of Steven's detention under Article 5 (the right to liberty), but also found Hillingdon council to be in breach of the right to respect for family life under Article 8, by failing to consider the human rights implications of keeping Steven away from his family for a long period of time.

Case law re Article 5 & 8

One aspect of the Article 8 breach was based on the council's failure to listen to Mr Neary's complaints. The court said that: 'Hillingdon's approach was calculated to prevent proper scrutiny of the situation it had created. In the weeks after Steven's admission, it successfully overbore Mr Neary's opposition. It did not seriously listen to his objections and the suggestion that it might withdraw its support for Steven at home was always likely to have a chilling effect. Once Mr Neary's resistance was tamed, the question of whether Steven was in the right place did not come under any balanced assessment.'

Source: Chapter on Court of Protection by Steven Neary's father from 2017, Legal Action Group

<https://www.lag.org.uk/article/202467/the-court-of-protection--steven-neary-rsquo-s-story>

Actual case (optional reading):

<https://www.bailii.org/ew/cases/EWHC/COP/2011/1377.html>

Article 14 Protection from Discrimination

The Human Rights Act makes it illegal to discriminate on a wide range of grounds including 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

The case law relating to this right has shown that the term 'other status' includes sexual orientation, illegitimacy, marital status, trade union membership, transsexual status and imprisonment. It can also be used to challenge discrimination on the basis of age or disability.

The Equality Act 2010 is a development of Article 14 and other parts of the Human Rights Act to ensure equality opportunity and prevent discrimination for all people living in UK.

Case law re Article 14

R v Norfolk County Council & Secretary of State for Health and Social Care

It was found that Norfolk's adult social care charging policy discriminated against R and generally against severely disabled people contrary to Article 14 of HRA.

R was charged for services relating to care package provided by the council with regard to what they described as additional income provided by enhanced rates of benefits. R argued successfully that enhanced rates of benefits were funds provided for R's special needs caused by severe disability and that they were not additional funds to be taken into account when calculating an individual's contribution to charges.

The court found that this was discrimination against severely disabled people that applied to the council's policy as well as to R's situation.

Summary of case with details (optional reading):

<https://www.cascaidr.org.uk/2021/01/02/r-on-the-app-of-sh-through-her-litigation-friend-mh-v-norfolk-county-council-sec-state-for-health-and-social-care-2020/>

Further Reading

Amnesty

<https://www.amnesty.org.uk/issues/human-rights-act>

British Institute of Human Rights (BIHR)

<https://www.bihhr.org.uk/>

The BIHR have produced some very accessible and useful leaflets relevant to human rights and advocacy: Pdf on Mental Health Advocacy and Human Rights

<https://www.bihhr.org.uk/mental-health-advocacy-and-human-rights-your-guide>

Pdf on Mental Health, Mental Capacity and Human Rights

https://www.basw.co.uk/system/files/resources/basw_94150-7_0.pdf

Pdf on Learning Disability, Autism and Human Rights

<https://www.bihhr.org.uk/Handlers/Download.ashx?IDMF=5867be08-7d9e-42d1-8fb5-f94770df85cf>

Further Reading

Citizens Advice

<https://www.citizensadvice.org.uk/law-and-courts/civil-rights/human-rights/>

Equality and Human Rights Commission

<https://www.equalityhumanrights.com/en/what-are-human-rights/history-human-rights-britain>

Liberty

<https://www.libertyhumanrights.org.uk/your-rights/the-human-rights-act/>

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