

# PART 2: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

## Chapter 2: The Human Rights Act 1998 and the Criminal Justice System

Outline	2.1	Introduction	2.5	Using the Human Rights Act 1998 in support of a defendant's legal rights under the European Convention on Human Rights
	2.2	The European Convention on Human Rights – the essential background		
	2.3	The European Convention on Human Rights	2.6	Article 6
	2.4	The legal effect of the Human Rights Act 1998	2.7	Summary



### Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the CILEx syllabus:

- 1 Understand the overall structure of the courts with criminal jurisdiction

### 2.1 Introduction

The **Human Rights Act 1998 (HRA 1998)** has resulted in a number of significant changes to criminal procedure and evidence. This chapter introduces the essential background to the **European Convention on Human Rights (ECHR)** and explains its general legal effect in domestic law. The application of **ECHR** through **HRA 1998** to the substantive principles of criminal evidence and litigation are considered at appropriate points throughout the manual. It should be emphasised that there is no direct connection between the United Kingdom's membership of the European Union and the matters covered in **HRA 1998**. It means that any decision as to the future of **HRA 1998** will be a separate matter from Brexit.

### 2.2 The European Convention on Human Rights – the essential background

**ECHR** is an international agreement between 47 European states, which guarantees a number of fundamental social, political and civil rights in the legal systems of the Member States. The Member States (including the United Kingdom) guarantee that their citizens will enjoy a number of legal rights in relation to the criminal justice system, including:

- **Art 3** – the prohibition of torture and inhuman or degrading treatment;
- **Art 5** – the right to liberty and security of the person;

- **Art 6** – the right to a fair trial in both civil and criminal proceedings;
- **Art 7** – freedom from the operation of retrospective criminal laws;
- **Art 8** – the right to respect for four distinct interests: private life, family life, home and correspondence.

**Art 5** provides that everyone has the right to liberty and security of the person. No one is to be deprived of liberty unless it is after conviction by a competent court or after lawful arrest or detention. Anyone arrested must be informed promptly of the reasons and of any charge against him, and must be brought promptly before the courts. He is entitled to trial within a reasonable time, or release on bail.

**Art 6** is the most important of the provisions in **ECHR** in the context of criminal litigation, and is therefore reproduced in full. It provides:

*1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so requires or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

*2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

*3 Everyone charged with a criminal offence has the following minimum rights:*

*(a) to be informed promptly, in a language which he understands and in detail, of the nature of the case and cause of the accusation against him;*

*(b) to have adequate time and facilities for the preparation of his defence;*

*(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

*(d) to examine or to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

*(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in the court.*

**Art 7** says that no one can be guilty of a criminal offence unless it was an offence at the time that it was committed. Further, a heavier penalty may not be imposed than that which was applicable at the time the offence was committed. In other words, it prohibits retrospective legislation.

**Art 8** seeks to protect the individual from arbitrary interference by the state, by guaranteeing the individual's right to his private and family life, his home and correspondence. It is, however, a qualified right and permits interference *in accordance with the law* if it 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 or crime, for the protection of health or morals, or for the protection of others*. Any interference must be authorised in accordance with the law and must be **proportionate**. **Art 8** may be cited by defendants to challenge the admissibility of evidence obtained in breach of the defendant's right to a fair trial under **Art 6**. For example it might be used to argue that intrusive surveillance of a defendant's home should be ruled inadmissible.

## 2.3 The European Convention on Human Rights

Although the United Kingdom played an influential part in drafting **ECHR** Articles and was one of the original state signatories (and is a signatory to some of the Protocols made under **ECHR**), for many years no government passed an Act formally incorporating the provisions of **ECHR** into English law. Until the implementation of **HRA 1998** it was not possible for British lawyers directly to invoke the provisions of **ECHR** before domestic courts and tribunals. At best, in a long line of decisions, **ECHR** was used by the judiciary as an aid to statutory interpretation, where Parliament's purpose in passing the legislation was unclear. In order to enforce the rights guaranteed under **ECHR**, it was necessary to pursue an action against the United Kingdom in the Strasbourg-based European Court of Human Rights (ECtHR). For many litigants this remedy was unsatisfactory owing to the high costs of litigation, and the period of up to five years for the case to be decided. The implementation of **HRA 1998** brought an end to the uncertain status in domestic law of **ECHR**.

## 2.4 The legal effect of the Human Rights Act 1998

**HRA 1998** has the following legal effect. **s1** formally incorporates into English law the rights protected under **ECHR**. Under **ss2** and **3** all courts and tribunals **must** interpret domestic primary and secondary legislation to comply with the rights and jurisprudence of **ECHR**. Where it is found that domestic legislation conflicts with **ECHR**, **s4** provides that the *superior courts*, including the High Court, the Court of Appeal and the Supreme Court (formerly the House of Lords) may make a *declaration of incompatibility*, which triggers a fast-track legislative procedure for Parliament to amend the offending legislation to ensure compliance with **ECHR**. **s6** places a duty on a public authority to discharge its statutory and common law duties in compliance with the jurisprudence of **ECHR**. **s7** creates a cause of action against a *public authority* – which includes the police, the CPS, the Magistrates' Service, Crown Court and the Ministry of Justice, where the organisation has acted in breach of the applicant's human rights. **s8** provides that where a court finds that a public authority has acted unlawfully it must grant a remedy that is *just* and *appropriate* and any remedy which is ordinarily available to a court may be applied to cases involving **ECHR** rights.

The most important practical provision is **s3 HRA 1998** and the Supreme Court has given several examples of how the courts should approach the interpretive obligations imposed on them under **s3**. Decisions in cases such as:

- **A (No. 2) [2001]** about the evidence that can be adduced in the cross-examination of a complainant in a sexual offence case;
- **Sheldrake v DPP; A-G's Reference (No. 4 of 2002) [2004]** on reverse burdens of proof;
- **Looseley; A-G's Reference (No. 3 of 2000) [2001]** about the admissibility of evidence obtained by entrapment; and
- **Al-Khawaja and Tahery v United Kingdom [2009]** about the admissibility of hearsay evidence where it forms the sole or decisive prosecution case against the accused.

These cases are discussed at appropriate points in this manual.

## 2.5 Using the Human Rights Act 1998 in support of a defendant's legal rights under the European Convention on Human Rights

There are a number of ways in which a defendant may invoke his legal rights under **HRA 1998**.

First, as noted above, a cause of action may lie against a *public authority* that has acted in breach of the victim's **ECHR** rights. The provision does not apply where the public authority could not have acted otherwise because of primary legislation, as this would undermine the traditional principles of parliamentary supremacy. Actions will be possible only from individuals who are "victims" (i.e. from those persons who are directly affected by the act or omission of the public authority). Unlike in some judicial review proceedings, pressure groups will not be granted the right to be heard in court.

Second, **ECHR** may also be used to object to a decision by a public body, such as the CPS or a local authority, to prosecute. In addition, it may be open to a defence advocate to argue that the admissibility of a particular piece of evidence in a case will violate the defendant's right to a fair trial in accordance with **Art 6**.

Third, **HRA 1998** requires the judiciary to apply **ECHR** as an aid to statutory interpretation of primary and secondary legislation.

When applying the provisions of **ECHR** all courts and tribunals must give effect to its key principles. First, the "*margin of appreciation*" allows the legal systems of Member States to depart from strictly imposed obligations under **ECHR** to give effect to "relevant" social/political needs in their society. Avoiding such obligations may also be permitted in the "public interest" (**Handyside v United Kingdom [1979]**).

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