



## ***FAQs, Current Human Rights Act issues in the CJS & Human Rights Act Myths***

### **FAQs**

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### **Some current Human Rights Act issues in CJS**

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2. Road traffic offences – privilege against self-incrimination
3. Withholding information from the defence – Public Interest Immunity
4. Use of Hearsay/bad character evidence
5. Police duty to protect witnesses
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### **Human Rights Act Myths**

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**Last up-dated November 2007**

## 1. What is the Human Rights Act?

The United Kingdom signed and ratified the European Convention on Human Rights (ECHR) in 1951. This Convention is a binding international agreement that the UK helped to draft and has had to comply with for over half a century. The Convention contains fundamental civil and political rights.

The Human Rights Act creates no new human rights, but previously using the Convention usually meant taking a case to the European Court of Human Rights in Strasbourg. Since coming into force on 2 October 2000, the Human Rights Act has made rights from the ECHR enforceable in our own courts.

## 2. What does the Human Rights Act do?

The Act does three simple things about the rights in the European Convention on Human Rights:

- i. It makes it unlawful for a public authority to violate Convention rights, unless, because of an Act of Parliament, it had no choice.
- ii. It says that all UK legislation should be given a meaning that fits with the rights, if that's possible. If a court says it's not possible, it can make a "declaration of incompatibility" which means that it will then be up to Parliament to decide what to do.
- iii. Cases concerning Convention rights can be dealt with in a UK court or tribunal.

## 3. Is this a European imposition?

No. The Human Rights Act is British legislation. The European Convention on Human Rights, which is the source of the Act, was, in fact, largely drafted by British lawyers.

## 4. What is a public authority?

There is no express definition of "public authority" in the Act but the term includes:

- Government departments
- Local authorities
- Police, prison, probation, immigration officers
- Public prosecutors
- Courts and tribunals

- “Public authority” would be likely to include anyone working in the criminal justice system.

## 6. Are all of the rights applied by the courts in the same way?

No. Not all the Convention rights are formulated in the same way.

The different types of rights are sometimes explained as:

### ***Absolute rights***

Such as the right to protection from torture, inhuman and degrading treatment or punishment (Article 3). If a right is absolute it means that there are **no circumstances** when the state (or anyone else) can breach that right, **regardless** of the reasons for the breach. There can be no balance struck in these cases as the individual’s right is absolute.

### ***Limited rights***

Such as the right to liberty (Article 5). These rights are limited under explicit and finite circumstances, set out in the ECHR itself, which provide the *only* permitted exceptions to the general right

### ***Qualified rights***

Which include the right to respect for private and family life (Article 8), religion and belief (Article 9), freedom of expression (Article 10), assembly and association (Article 11), the right to peaceful enjoyment of property (Protocol 1, Article 1) and to some extent the right to education (Protocol 1, Article 2). Interference with them is permissible on the grounds that:

**A.** it has its basis in law, and

**B.** is done to secure a permissible aim set out in the relevant Article, for example for the prevention of crime, or for the protection of public order or health, and

**C.** is necessary in a democratic society, which means it must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued

It is the application of the qualified rights of the individual (such as the right to respect for private and family life) that criminal justice agencies have to balance against the right of the public to be protected.

It is also important to note that some rights (for example, Article 9 – right to freedom of thought, conscience and religion) contain a mixture of absolute and qualified rights.



*For more detailed information on the particular convention rights and their application see the “Guide to the Human Rights Act 1998: Third edition” available at [www.dca.gov.uk/peoples-rights/human-rights/index.htm](http://www.dca.gov.uk/peoples-rights/human-rights/index.htm)*

## **7. Which rights apply most often to the Criminal Justice system?**

Potentially any of the rights could apply. It will depend on the circumstances of the case and the impact of the decision being made.

There are some rights that obviously apply to the CJS. Article 5 – right to liberty and security, Article 6 - right to a fair trial, Article 7 – no punishment without law.

There are other rights which may also be relevant. For example Article 8 – right to respect for private and family life is often relevant in respect of Prison Service policies.

Other rights that have been raised in respect of the CJS include Article 3 - prohibition of torture, inhuman and degrading treatment and punishment, Article 9 – freedom of thought, conscience or religion, Article 10 – freedom of expression.

## **8. What about the right of the public to be protected?**

Article 2 – right to life and Article 8 – right to respect for private and family life both impose positive obligations on the state. This means that criminal justice agencies have a duty under the Human Rights Act to take positive steps to protect the public.

Where it appears that a qualified right may be engaged (for example, Article 8 – right to respect for private and family life) by the actions, policies or decisions of someone working in the criminal justice system, the individual’s rights need to be balanced against the positive obligation to protect the public. Question 6 above provides a general outline of the principles that must be adopted in such cases.

## **11. Has the Human Rights Act under-mined the work of the police, courts, prisons and probation?**



The Human Rights Act creates no new human rights. There is a positive obligation on criminal justice agencies to take steps to protect the public and individual rights have to be balanced against this.

## **12. Have the Courts been swamped by dubious claims made under the Human Rights Act?**

No. Statistics show only very small increases in the total work of the courts. Senior judges have commented that the Act has not disrupted the system, rather it has complemented it.

### ***Current Human Rights Act issues in CJS***

#### **1. Releasing “wanted photographs” of offenders**

Despite some recent reports in the media, the police are able to release the photographs of offenders or suspects if it is necessary to protect the public or for the prevention or detection of crime and proportionate to do so.

While Article 8 (rights to respect for privacy and family life) of the ECHR is engaged by any decision to release the photograph of an offender or a suspect, 8(2) allows such an action provided that it is necessary for public safety or the prevention or detection of crime and disorder and proportionate in the circumstances.

#### **2. Road traffic offences – privilege against self-incrimination**

Two drivers recently challenged the requirement under section 172 of the Road Traffic Act 1988 to name the driver of the cars registered in their names, on the basis that it infringes their right to a fair trial under Article 6. They argued that the legislation forced them to incriminate themselves contrary to Article 6(1).

The court found that the drivers’ right to a fair trial had not been infringed. The legislation had not destroyed the very essence of their right to remain silent and their privilege not to incriminate themselves. By choosing to own and drive a car, the drivers had knowingly submitted to the regulatory regime that was imposed by the legislation to tackle the problem of road safety. The information the driver is forced to give is limited to who the driver was, which is not in itself incriminating. It still remained for the prosecution to prove the offence, with all relevant safeguards for a fair trial in place.

*See also the Case Summaries document on this site.*

### **3. Withholding information from the defence – Public Interest Immunity**

While the defence has a right to the full disclosure of any relevant evidence, this right is not absolute. There may be circumstances when it is necessary to withhold relevant material from the defence and make the material subject to Public Interest Immunity (PII).

This issue was recently considered by the European Court in the case of two defendants convicted of terrorist offences, *Botmeh and Alami*. The court found that there had been no breach of the defendant's right to a fair trial. The courts have held that provided the decision to withhold material is a judicial one, and subject to review throughout any trial (or appeal) then the right to a fair trial is not breached.

*See also the Case Summaries document on this site.*

### **4. Use of Hearsay/bad character evidence**

It has been suggested that Article 6 (right to a fair trial) has inhibited the use of bad character and hearsay evidence. This has been looked into by the Office of Criminal Justice Reform (OCJR) and there is no evidence that the Human Rights Act has been used to prevent bad character or hearsay evidence being submitted in evidence.

There is nothing in the European Convention on Human Rights that specifically precludes the use of hearsay evidence.

### **5. Police duty to protect witnesses**

The courts have recently considered the circumstances in which the police have a positive duty under Article 2 (right to life) to take steps to protect prosecution witnesses who face a "real and immediate" threat to their lives. In the case of *Van Colle*, the court held that witnesses fell into a special category of person. So where there was a real threat to a witness' life, that threat should be considered immediate if it was present and continuing in the period before the trial. In those circumstances, the police had an obligation to take measures reasonably open to them to protect the witness. [However, that decision is being appealed to the House of Lords].

*See also the Case Summaries and detailed advice documents on this site.*

### **6. Licence conditions for those subject to Probation supervision**

The Human Rights Act does not prevent strict conditions being imposed where they are necessary and proportionate. In one case, a sex offender's licence conditions prevented him from going within two miles of the street where his ex-wife and one of the victims lived without prior approval and provided that any approved visits had to be specific and time limited. The court found that this restriction did not breach Article 8 (rights to respect for privacy and family life).

In another recent case, the court found no breach of Article 8 where an offender's licence conditions prevented from going abroad, and the Probation Service refused to waive this,

despite him arguing that it was necessary following an offer of employment.

## **Human Rights Act Myths**

Myths have sprung up about the Human Rights Act since it came into force, with “human rights” being blamed for a range of perceived ills. Such myths can be very damaging. Not only can they lead to the general public having a distorted and negative view, but it can also be a factor in its mistaken or over-cautious application by public authorities.

Some myths crop up regularly.

Some stem from reporting only the start of a case. The public don't always hear about the end of the case when the human rights claims actually failed.

Others concern arguments never heard by any court (for example, the false suggestion that the Human Rights Act prevents the filming of school nativity plays).

Then there are the myths by innuendo and vague reference to “human rights” which provide a back-drop for subsequent media discussion of the issue (for example, planning cases involving Gypsies and Travellers).

Below are some examples from the criminal justice system

### **Dennis Nilsen**

Myth: 'Serial killer Dennis Nilsen, 60, received hardcore gay porn in jail thanks to human rights laws' (The Sun)

Truth: Nilsen was denied access to the gay art book he had requested in the first instance by the Prison Governor. Nilsen's subsequent legal case fell at the first hurdle when he was refused permission to have his case heard because he did not establish that a breach of his human rights had occurred. He was therefore not given access to the gay art book he had requested, confirming the decision reached previously by the Prison Governor. (DCA Human Rights Review, 2006)

### **Anthony Rice**

Myth: Lawyers won Anthony Rice's freedom on human rights grounds - then got release terms relaxed with the same tactic. It left him able to stab and strangle 40-year-old Naomi Bryant nine months later. The Inspector of Probation concluded: "People managing this case started to allow its public protection considerations to be undermined by its human rights considerations." And after Rice's release, solicitors argued that the restrictions placed on him breached his human rights. (The Sun)

Truth: Article 5 of the Human Rights Act (right to liberty and security) does not impose a right to release a potentially dangerous criminal; Anthony Rice was released as a result of a series of errors undertaken by the Probation Service and the Parole Board. Where human rights

law ought to have come into play is that the Government is required by Article 2 (the right to life) to protect life. The public has a right to life, which was undermined by releasing Rice. (Liberty) <http://www.liberty-human-rights.org.uk/resources/policy-papers/2006/defending-the-hra-liberty-briefing-for-parliam.PDF>

### **KFC on the roof**

Myth: "Finger-nickin' good. Police gave the suspected car thief a meal because of his Human Rights" *The Sun* June 7, 2006

Truth: Barry Chambers had no "human right" to receive food in these circumstances, but instead, as part of a police operational decision aimed at resolving a stand-off quickly and peaceably, his demands for food and other refreshments were met as part of a negotiating strategy aimed (successfully in the event) at coaxing him down from the roof without injury to himself or others. (DCA Human Rights Review, 2006)

### **Life no longer means life.**

Myth: That criminals are being released early because of the Human Rights Act, and that life sentences no longer mean life.

Truth: Life sentences have never de facto meant the whole of a criminal's life spent in jail, and the Human Rights Act has not changed this. What has changed is that the power of the Home Secretary to add extra time onto trial judges' sentences for criminals has been removed. Instead judges now have exclusive responsibility for setting life sentences. Trial judges have all the facts in front of them and are best able to make the right decision.

### **Rapists can be freed more easily**

Myth: 'More criminals freed to protect human rights. Fury as more sex offenders are freed early under law on human rights. *The Daily Mail* May 16, 2006 p1

Truth: Allegations of this kind actually focus on particular Parole Board decisions and the allegation that they are being 'distracted' by human rights arguments in favour of inmates. Whilst the headline may say 'human rights', this is really an issue of balance. The safety and security of the public must always weigh heavily in any decision about the release of a dangerous prisoner. (DCA Human Rights Review, 2006)