HUMAN RIGHTS ACT 1998

Introduction

1. Schedule 1 of the Human Rights Act 1998 sets out the particular rights which have been incorporated into UK law from the European Convention on Human Rights.

2. This Advice Note sets out the human rights arguments most likely to be made in rights of way cases, the Planning Inspectorate’s views on them, and guidance to Inspectors on how they should deal with them.

3. This Advice Note is publicly available, but has no legal force.

Key sections of the Human Rights Act 1998

4. The key sections of the Act most likely to affect Inspectors are as follows:

   3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

   6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

   6(2) Subsection (1) does not apply to an act if –

   (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

   (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions.

   7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –
(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

5. The Inspector is a public authority, as is the Secretary of State/National Assembly for Wales (s.6(3)). They are under a positive obligation not to act in a way that is incompatible with a Convention right (s.6(1)). This means they must be mindful of circumstances giving rise to a potential violation of a person’s Convention rights.

6. S.7(1)(b) makes it clear that if a party to an order feels that their Convention rights have been, or would be, violated, they can pursue their claim at an inquiry, hearing or following the written representations procedure.

7. It will not always be possible for primary and/or subordinate legislation to be read and given effect in a way which is compatible with Convention rights (s6(2)). This may be especially relevant to the consideration of orders made under the Wildlife and Countryside Act 1981 (see paragraphs 34 to 37).

8. Another important provision is that all courts and tribunals (including Inspectors) are required to take into account the case law of the European Court of Human Rights (s2(1)).

Key Convention Rights likely to affect Rights of Way Work

The Right to a Fair Trial – Article 6

9. Article 6 is concerned with the fairness of the procedure for access to, and handling of, inquiries and other procedures for considering objections to orders. The relevant part of Article 6 is as follows:

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ARTICLE 6: The Right to a Fair Trial

6(1) In the determination of his civil rights and obligations.... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law......
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The procedural framework established by statute was considered in *R v SSETR ex parte Alconbury Developments Ltd and others* [2001] UKHL
23. The House of Lords held that, when taken as a whole, the appeal process, which includes the safeguard of being able to challenge the legality of an appeal decision in the High Court, is compatible with Article 6. Claims attacking the procedural framework cannot be considered by the Inspector or Planning Inspectorate staff. However, some claims will fall within their remit. These may include:

i) the right of effective access to appeal proceedings e.g. the venue must not be so distant from the parties’ homes that they are unable to attend proceedings;

ii) ‘equality of arms’ between the parties i.e. each party must have a reasonable chance to put their case and must not be put at a substantial disadvantage in relation to another party;

iii) the right to a hearing within a reasonable time, including the right to a decision within a reasonable time; and

iv) the right to an independent and impartial tribunal.

10. On (iv), an Inspector is independent and impartial for the purposes of Article 6(1). It was held in Bryan v UK [1995] 21 EHRR 342 that “...there is...nothing to suggest that, in finding the primary facts and drawing conclusions and inferences from those facts, an Inspector acts anything other than independently”. The judgment by the European Court of Human Rights recorded that:

- the Inspector is in no sense connected with the parties to the dispute or subject to their influence or control;
- the Inspector’s findings are based exclusively on the evidence and submissions before him;
- the Inspector has a duty to exercise independent judgment;
- the Inspector is required not to be subject to any improper influence; and
- it is the stated mission of the Planning Inspectorate to uphold the principles of openness, fairness and impartiality.

11. The approach of the European Court was fully endorsed by the House of Lords in Alconbury (paragraph 24 of the judgment). The Alconbury case has been applied in subsequent cases in the Court of Appeal including R (oao Whitmey)v Commons Commissioners[2004] All ER 376) and R (oao Trailer and Marina ( Leven) Ltd) V SSEFRA and English Nature [2004] EWCA Civ.1580
The Right to respect for Private and Family Life and for the Home - Article 8

12. Rights under Article 8 are qualified, which means they may be interfered with in certain circumstances. Interference must, however, be proportionate and can only take place where it is necessary in the interests of the wider community. Of the four private interests mentioned in the Article, three (respect for private life, family life and for the home) may be relevant to rights of way work. They tend to inter-relate and are often grouped together.

ARTICLE 8: The Right to Respect for Private and Family Life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) 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 or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13. In a rights of way case, there may be an interference in the rights of anyone whose home, private life and/or family life is adversely affected by the making of the order. For example, in an extreme case, a stopping-up or diversion order might deprive the occupants of a house of access to their home. However, it is unlikely that an order making authority would promote an order which violated a person’s Article 8 rights.

14. The word ‘home’ is interpreted widely: in Eames v Chichester County Council [2004] EWCA, the Court of Appeal considered that Article 8 rights were engaged with respect to gypsy caravans which were the applicants’ homes.

15. On the other hand, it could be argued that the failure to divert a footpath may perpetuate problems of privacy or security where the existing footpath passes close to someone’s home, even through their garden. However, it is doubtful if this would represent an interference in the owner’s Article 8 rights as it could be argued that anyone buying a house with a footpath running through the property should normally have been aware of it (but see paragraphs 34 to 37 below).
**ARTICLE 1 OF THE FIRST PROTOCOL: Protection of Property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

16. This Article contains 3 elements - the peaceful enjoyment of possessions, non-deprivation of possessions, and the control of the use of property in the general interest. The element most likely to be raised in a rights of way case is the interference with the peaceful enjoyment of possessions. The term "possessions" is widely defined. It includes all property (not just dwellings as in Article 8) and other property rights such as the benefit of a restrictive covenant\(^1\).

17. Interference with this right could occur if a property is adversely affected by the making of an order. For a dwelling, this tends to duplicate the protection provided by Article 8; as the latter is held to be the stronger, it will often eclipse Article 1 of Protocol 1.

**DEALING WITH HUMAN RIGHTS QUESTIONS**

*How to approach a claim of a violation of human rights at an inquiry or hearing (excluding Wildlife and Countryside Act cases)*

18. On the basis that claims alleging interference with an individual’s human rights may be frequent but actual interference amounting to violation will be rare, the Inspectorate’s recommended approach is to turn away human rights representations which are wholly without merit and concentrate attention on those where there is a potential violation of a Convention right.

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\(^1\) A restrictive covenant is a clause in a contract that requires one party to do, or refrain from doing, certain things.
19. The burden is on the claimant to prove the type and degree of harm likely to be suffered. However, Inspectors may need to be proactive in identifying the relevant considerations to ensure that enough information is obtained in order to undertake a proportionality assessment if harm is demonstrated, especially in cases dealt with by means of a hearing where the Inspector takes a more inquisitorial role.2

20. The Inspector must balance any likely private harm against the wider public good. Inspectors are advised to take a four-step approach to verify the basis and substance of a claim:

i) establish whether the claimant is a victim (only a victim can bring a claim. A victim must be someone actually and direct affected by the action complained about. A victim must be able to produce reasonable and convincing evidence that he or she will personally be affected);

ii) establish the Article under which the claim is brought;

iii) establish the degree of harm (interference);

iv) consider whether the interference is proportionate (the degree of harm to the individual balanced against the public interest).

21. Further guidance to help establish whether a proportionality assessment is required was set out in a case concerning the grant of planning permission, AZ v SSCLG and South Gloucestershire DC [2012]:

- Will the proposed decision be interference by a public authority with the exercise of the (appellant) and their family’s right to respect for their private / family life or home?

- If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

- If so, is such interference in accordance with the law?

- If so, is such interference 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 the rights and freedoms of others?

2 See AZ v SSCLG and South Gloucestershire DC [2012] EWHC 3660 (Admin)
• If so, is such interference proportionate to the legitimate public end sought to be achieved?

22. The judgment indicated that if these tests are met so that a proportionality assessment is required, the following four stages should be followed:

- Identification of all relevant considerations relating to the (appellant) and their family’s respective rights of enjoyment of family life and a home;
- The identification of the best interests of the children;
- The identification of public or community interests to be balanced against the (appellant) and their family’s interests;
- A structured weighing up and balancing of all these interests. The balancing exercise should involve a consideration of children’s best interests first\(^3\) and then strike a fair balance between the rights of the individuals concerned and the interests of the community.

23. If the interference is not proportionate, there is a violation. Note that if compensation is payable, there may be no violation.

24. Cases directly relevant to rights of way work are lacking but it is clear from planning and environmental cases that the interference must be extreme if a violation is to occur (assuming there is an offsetting public interest). Examples are *Lopez Ostra v Spain* [1993] 20 EHRR 277, in which the applicant and her family suffered health problems from a waste treatment established next to their home which they had to leave; and *Baggs v UK* [1981] 52 DR 29 and *Arrondelle v UK* [1977] 19 DR 186 and DR 26, in which their homes were so close to the end of a runway that aircraft noise caused the applicants intolerable stress for which they had not been compensated.

25. The Court of Appeal in the case of *David Lough and Others v First Secretary of State and Bankside Developments Limited* [2004] EWCA Civ 905 considered in detail the tests to be applied in deciding to what extent Article 8 of the Convention was engaged. This case (in the context of s.288 of the Town and Country Planning Act 1990) decided that not every adverse effect on residential amenity would amount to an infringement of the right to respect for a person’s home under Article 8(1). In addition, the loss of value of land to landowners caused by neighbouring developments did not constitute a separate

\(^3\) *ZH (Tanzania) v SSHD* [2011] UKSC 4 established that the best interests of the children are a primary consideration and must be considered first.
or independent basis for alleging a breach of the ECHR Article 8 and Article 1 of the First Protocol.

26. In the more recent case of *AZ v SSCLG and South Gloucestershire DC* [2012] it was made clear that a proportionality assessment required by Article 8 is separate to any balancing exercise undertaken when addressing the criteria required by the legislation (the 1990 Act in that case) and may involve a wider range of circumstances.


27. Problems such as those instanced above in relation to Article 8 of the Convention and Article 1 of the First Protocol are, to an extent, already recognised in the decision-making process in Highways Act cases where expediency is a consideration. The term ‘expediency’ suggests that a wide range of considerations may be material so there should be no difficulty dealing with human rights questions involving the interests of owners and tenants of the land directly affected although the decision will need to make clear that a proportionality assessment has been carried out.

28. There is, however, some uncertainty over the status of owners and occupiers of land adjoining the path or way in question. Before the Highways Act 1980, the case of *Allen v Bagshot Rural District Council* [1970] held that adjoining landowners and occupiers were not within the class of persons whose interests were to be considered by a local authority, or the Secretary of State, in relation to s.119 orders.

29. The wording of what is now s.119(1) makes it less clear that adjoining landowners have no right to have their objections considered. This is because s.119(1) now refers to expediency in ‘the interests of the owner, lessee or occupier or of the public’. The previous test for expediency (as contained in the Highways Act 1959) was expressed merely in terms of whether the diversion would lead to the more efficient use of the land or provide a shorter or more commodious path. The general meaning of the term “public” is not limited by subsection (1), nor has it been considered by the courts. These doubts may, to some extent, be reinforced by consideration of the Convention Rights of adjoining landowners under Article 8 and Article 1 of the First Protocol.

30. On this basis, and until there is a clear ruling from the courts, Inspectors, when considering ‘expediency’, should take due regard of any argument put forward by an adjoining landowner that their rights under Article 8 and Article 1 of the First Protocol would be infringed.
Town and Country Planning Act 1990: orders made under s.257

31. The criteria for considering stopping up and diversion orders under s.257 appear to be tightly defined:

257 (1) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that it is necessary to do so in order to enable development to be carried out -

(a) in accordance with planning permission granted under Part III or section 293A, or

(b) by a government department

32. However, the effect of the judgments in K C Holdings Ltd v Secretary of State for Wales (DC) [1990] JPL 353 and Vasiliou v Secretary of State for Transport [1991] 2 All ER 77 is to widen the criteria very considerably. Both cases referred to s.247 (which provides for the Secretary of State, rather than a competent authority, to make a stopping up or diversion order) but the key word “may” is common to both s.247 and s.257. In K C Holdings Ltd the Deputy Judge held that “may” implies a discretion to consider the demerits and merits of the particular closure in relation to the particular facts which obtain. In Vasiliou, the Court of Appeal held that when exercising his discretion, the Secretary of State was not only entitled, but required to take into account any directly adverse effect the order would have on all those entitled to the rights which would be extinguished by it, especially as the section contains no provision for compensating those so affected.

33. So Town and Country Planning Act s.257 cases can be dealt with in a way similar to Highways Act cases (paragraph 16-18 above). If there is dispute as to the relevance of K C Holdings Ltd and/or Vasiliou, the requirement in s.3(1) of the HRA – as far as possible to read legislation compatibly with the Convention rights (paragraph 4 above) – is likely to resolve the matter.

Wildlife and Countryside Act 1981: orders made under ss. 53 & 54

34. In cases which involve proposed modifications to the definitive map and statement, the criteria are strictly limited to matters of fact and evidence. Section 53 of the 1981 Act imposes a duty on the surveying authority to make changes to the definitive record ‘as soon as reasonably practicable’ upon discovery of evidence which shows that a path or way is omitted or is incorrectly shown. In all cases the evidence will show that the event has already taken place, for example a footpath or bridleway has already come into existence.
after twenty years uninterrupted use by the public, or a track should have been recorded as a vehicular right of way based on evidence from the nineteenth century. The legislation confers no discretion on a surveying authority (or the Secretary of State) to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it.

35. It is not unknown for the owners of a house to discover a public right of way passes through their home when they had hitherto been unaware of the fact. The existence of definitive rights of way have not always been revealed during land searches unless specifically requested and unrecorded rights may not be discovered until, perhaps unwittingly, obstructed by a new land owner.

36. In such situations, where the primary legislation offers no scope for personal circumstances to affect the decision on the order, the Inspectorate’s recommended approach is to turn away any human rights representations.

37. A decision confirming an order made under the Wildlife and Countryside Act 1981 would be lawful (under domestic law) as provided by s.6(2) of the HRA even in cases where the Convention was apparently infringed, where it was impossible to interpret the 1981 Act in such a way that it is compatible with the Convention rights (HRA s.3). (However, it might still be the case that the Convention was infringed under public international law, and an appeal still lie (after exhausting all domestic levels of appeal) to the ECtHR in Strasbourg.)