Empowering Civil Society
Using the Public Sector Equality Duty to Tackle Race Disparity in the Criminal Justice System

Find this guide and the rest of the toolkit at criminaljusticealliance.org/PSED-toolkit

GUIDE 2A

How to legally challenge public bodies who do not comply with the PSED

THIS GUIDE EXPLAINS:

How Judicial Review (JR) works when you are already working with a lawyer or when you are already seeking legal advice on a potential claim.

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1. What is a Judicial Review and what can be challenged?
2. Thinking about bringing a Judicial Review: what to be aware of early on
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Criminal Justice Alliance

PART ONE

1. What is a Judicial Review and what can be challenged?

The Public Sector Equality Duty (PSED) may be relevant when challenging decisions made in relation to an individual, as well as to legal challenges to policies and procedures affecting large numbers of people. Sometimes a legal challenge may be to both a policy and an individual decision.

Most challenges relying on the PSED will be by way of Judicial Review. It is important to be clear about exactly which decision or policy you are challenging. This will affect the time limits for bringing the challenge, the outcome you are seeking and how the decision might be challenged.

The way Judicial Review operates is set out below.

What can be challenged?

Judicial Review is a particular type of civil claim which is brought in the Administrative Court, a part of the High Court. The Administrative Court is based in the Royal Courts of Justice in London but has regional branches in Birmingham, Cardiff, Leeds and Manchester.

Judicial Review is defined in the Civil Procedure Rules as:

> *a claim to review the lawfulness of an enactment, or a decision, action or failure to act in relation to the exercise of a public function.*

Judicial Review can apply to decisions, actions and failures to act in relation to public functions. It is also possible to challenge an 'enactment', which means statutory law. However, it is a general principle of constitutional law that 'primary legislation' (Acts of Parliament) cannot be challenged by Judicial Review, so this means that only 'secondary legislation' (e.g. regulations and orders) can be challenged. However, under the Human Rights Act 1998 the court can make a declaration that primary legislation is 'incompatible' with the European Convention on Human Rights (see Section 7).

Special court rules apply to claims for Judicial Review, including:

- The requirement to get permission to bring the claim.
- Rules on 'standing' – who can bring a claim?
- Time limits – which are much shorter than for most claims.
- Remedies – the court always has a discretion about what remedies, if any, to award.

2. Thinking about bringing a Judicial Review: what to be aware of early on

Pre-Action Protocols

There are 'Pre-Action Protocols' (PAPs) for most types of civil claims. Parties are expected to follow the Protocol before issuing a claim. Under the Protocols, a potential **Claimant** must send a letter to the potential **Defendant** summarising the claim and sharing relevant evidence. The Defendant should respond, setting out whether they accept the claim, or any part of it, and also sharing relevant evidence (for example, see case below).

The Judicial Review Pre-Action Protocol is quite prescriptive and includes a template letter of claim and template response. These are included in the template letters. The PAP letter of claim must include:

- the identity of the possible Claimant/s and possible Defendant/s.
- a description of the decision or policy that is being challenged.
- the relevant facts.
- the legal grounds of the challenge.
- what action the Claimant wants the Defendant to take.
- a deadline for any action.

Claimant – a person applying for relief against another person in an action, suit, petition, or any other form of court proceeding.

Defendant – a person or company in a law case that is accused of having done something illegal, or of harming someone else

Case study

PAPs – Failure to release people from prison during the COVID-19 pandemic

The Howard League for Penal Reform and the Prison Reform Trust sent a formal, joint-letter before claim to the Secretary of State for Justice in April 2020, over the government's failure to release vulnerable people from prison quickly during the COVID-19 pandemic.

See the full summary of the *Howard League and Prison Reform Trust v the Ministry of Justice* case on the CJA website.

Time limits

The Judicial Review PAP suggests that the Claimant should usually give the Defendant 14 days to reply. However, sometimes it will not be possible to give the full 14 days, so a shorter deadline can be given. This is often necessary because of the short time limit for starting a Judicial Review claim.

The Civil Procedure Rules provide that a claim for Judicial Review must be brought:

> *promptly, and in any event not later than three months after the grounds to make the claim first arose.*

So, a Claimant must not delay before bringing the claim. A court can find that a Claimant has not acted promptly even if the claim is brought within three months. This may result in the court refusing to grant permission, or refusing to grant a particular remedy. So, **it is really important to refer a potential case to solicitors, or to discuss it with solicitors, as soon as possible**. The parties cannot agree to extend these time limits.

Sometimes it can be difficult to decide when 'the grounds to make the claim first arose'. In the case of a specific decision the date should be clear, but sometimes policies are developed in stages, with basic principles decided upon first, followed by a specific policy being developed, and then the policy being implemented. Also, for some types of case, it can be argued that unlawful conduct is continuing. It is best to discuss this with solicitors as soon as possible.

The role of the court in Judicial Review

The Court is not hearing an appeal but is 'reviewing the lawfulness' of enactments and decisions relating to 'the exercise of a public function'.

The fact that the Court is **reviewing** the lawfulness of a decision means that the focus is usually on **the way the decision was made, rather than** the merits of the decision – so, **whether the decision was right or wrong**. The PSED is relevant when a public body is exercising public functions: it must have 'due regard' to the equality objectives set out in the PSED.

If a criminal justice or policing body is subject to the PSED (see Guide 1), Judicial Review will be a possible way to challenge the decision **provided it can be argued that the body has failed to have the necessary 'due regard' to the equality objectives**.

Exercising public functions

Private bodies can exercise public functions such that they are subject to the PSED, and to Judicial Review and bound by the Human Rights Act 1998. The tests for each of these is not exactly the same and sometimes it can be difficult to decide if a private body is exercising public functions. However, if the body is subject to the PSED it will almost certainly be exercising public functions so as to be subject to Judicial Review.

Alternative remedies

Judicial Review is a 'remedy of last resort', which means that if there is an effective alternative remedy this must be pursued. If it is not, the court may refuse to grant permission to bring a Judicial Review claim. Examples of possible alternative remedies would be statutory appeals, internal appeals or complaints, or Ombudsman investigations. These are only likely to be available when challenging individual decisions, rather than challenging policies or regulations.

Who can bring a claim

The first step in the claim is to ask the court to grant permission for the claim to go ahead.

To apply for permission the Claimant files a Claim Form at court setting out in full the legal grounds of the challenge and the evidence in support of the claim. For permission to be granted, the case must be 'arguable' which means that it must have a reasonable prospect of success.

'Standing' refers to the right to bring a claim for Judicial Review. The court rules provide that a Claimant must have 'sufficient interest' in the matter to which the application relates. For individuals directly affected by decisions this is usually clear: such a person has sufficient interest in the decision. However, in matters of public interest, the courts usually apply the test in a liberal way and allow Civil Society Organisation (CSO) to be the Claimants in claims for Judicial Review (see Part Two for more info on permission and standing).

Funding a claim and financial implications

For Judicial Review claims, the unsuccessful party must pay the legal costs of the successful party. So, if a CSO is considering bringing a claim (or even applying to intervene in a claim) it must consider how it will pay its own legal team (usually solicitors and a barrister) and how it will pay the Defendant's legal costs if the claim does not succeed.

Legal aid

Solicitors will likely want to know whether any individuals are affected at an early stage and whether they are eligible for legal aid. CSOs can check this here: www.gov.uk/check-legal-aid. Individuals who are granted legal aid to bring claims for Judicial Review have 'costs protection' (see Section 5).

Law centres and clinics

Law centres and law clinics at universities may be able to provide specialist law support for free or support CSOs to access funding elsewhere.

Pro bono support

Solicitors and barristers may agree to act for an organisation on a *pro bono* basis (so for no fee) or at reduced rates. But it will still be necessary to consider how the Defendant's costs will be paid if the claim is unsuccessful.

Philanthropic funding

Various grant-making bodies, such as the Baring Foundation, Law for Change Fund, Therium Access and Strategic Legal Fund provide funding for legal action.[1]

You can also crowdfund legal costs.

3. Tips for civil society organisations considering legal action

Always be aware of the time limits – make a diary note of the date of the decision so you can instruct solicitors in good time.

If possible, build up relationships with solicitors at an early stage so they can offer informal advice about the steps you are taking.

Remember the solicitors must send a Judicial Review Pre-Action Protocol letter to the Defendant and give time for a response before the claim can be issued – 14 days is reasonable.

Think about the costs and whether your organisation can be the Claimant. Do the trustees agree and are they aware of the possible costs and financial implications?

It is usually best to identify more than one individual willing to be a Claimant – sometimes individuals decide they don't want to proceed or their situation changes so they no longer have 'sufficient interest' in the claim or are no longer entitled to legal aid.

Keep good records: always make notes of any conversations you have with the public body you may be challenging. Sending an email note to the person you speak to immediately after the conversation is a good idea – it confirms that your understanding of what was said is correct and provides a written record of the conversation.

Solicitors have to send lots of letters to clients, confirming instructions and setting out how the firm operates. Sometimes these can be hard to understand – don't be afraid to ask for explanations of anything that is unclear.

Solicitors should keep you informed of developments if you are their client – don't be afraid to ask for updates if this is not happening. If an individual is their client, you may want to ask them to authorise the solicitors to keep you informed.

Make sure you can quickly collate all the relevant documents to send to your legal advisers.

If you think it best that you support individuals to bring the claim, try to identify individuals that are affected at an early stage and check that they are eligible for legal aid – you can check this online here: www.gov.uk/check-legal-aid

PART TWO

4. Important procedural issues

Permission

The first step in the claim is to ask the court to grant permission for the claim to go ahead.

The steps under the Judicial Review Pre-Action Protocol should have been completed first (see Pre-Action Protocols on page 3) and template letter (see page 4 of Guide 3). To apply for permission the Claimant files at court a Claim Form setting out in full the legal grounds of the challenge and the evidence in support of the claim. This will be supported by a bundle of all relevant documents, including witness statements, documentary evidence and the legal cases and statutes relied on. In response, the Defendant need only file 'Summary Grounds' of Defence, which may be brief: at this stage the Defendant will be trying to persuade the court that there is no merit in the challenge and that permission should be refused.

In most cases a judge will consider whether to grant or refuse permission 'on the papers', so based on the written arguments of the parties. However, in some cases the court will consider whether to grant permission at an oral hearing. Sometimes, when it is clear that a permission application will take significant time and will involve argument about the substantive grounds, the court will order a 'rolled up' hearing when permission and the substantive claim will be considered at the same time.

For permission to be granted, the case must be 'arguable' which means that it must have a reasonable prospect of success. Also, there must be no other reason why permission should be refused. If the case is arguable, reasons permission might be refused could include: delay, the Claimant not having 'standing' to bring the claim (see below), there being an alternative remedy, or the issues between the parties having become 'academic' (so where an individual's case has been resolved).

If permission is granted, the Defendant will then file detailed grounds of defence together with any evidence it relies on. There will usually be further exchanges of documents and legal argument before the case is listed for a substantive hearing.

If permission is refused, the Claimant can 'renew' the application for permission at a hearing. If permission is again refused at an oral hearing, the Claimant can appeal against the decision, but must have legal grounds to appeal. This is different to an 'oral renewal' which is available as of right (unless a judge has certified the claim to be 'totally without merit').

Standing

'Standing' refers to the right to bring a claim for Judicial Review.

The court rules provide that a Claimant must have 'sufficient interest' in the matter to which the application relates. For individuals directly affected by decisions this is usually clear: such a person has sufficient interest in the decision. However, in matters of public interest, the courts usually apply the test in a liberal way and will allow CSOs to be the Claimants in claims for Judicial Review.

Although the question of whether a Claimant has standing will be considered at the permission stage, it is sometimes closely connected to the subject matter of the claim and the court can grant permission but nevertheless decide, at a substantive hearing, that a party does not have standing to make the claim, or to seek a particular remedy.

There are three types of case in which a CSO may have standing to bring a claim:

Associational standing
When an organisation is suing on behalf of its members, e.g. a trade union or trade body.

Surrogate standing
When an organisation is representing the interests of others who may find it difficult to bring a claim. Examples of this include challenges brought by Child Poverty Action Group (CPAG) on behalf of benefit claimants and by Medical Justice, a CSO campaigning for the rights of detained migrants.

Public interest standing
When an organisation (or individual) seeks to challenge a decision on public interest grounds even though they do not represent individuals affected by the decision.

While the courts have embraced a more liberal approach to issues of standing in recent years, this does not mean that every CSO can claim to have standing to challenge government decisions simply because their stated aim is to hold the government to account. The court may decide that a person or CSO does not have standing because there are other people who are better placed to bring a claim. The reason for the liberal approach to standing is to ensure that potentially unlawful decisions or policies do not go unchallenged for want of an affected claimant able to bring a claim, i.e. it is in the public interest to allow such challenges to go ahead.

Deciding who should be the Claimant

Although it is possible for an organisation to bring a claim for Judicial Review (see Standing on page 7) it may be better for an individual or several individuals jointly to bring the claim. The reasons are that:

- Individuals may be granted legal aid to bring the claim and this means (1) that their own legal costs will be paid by legal aid and (2) they will have some protection from being ordered to pay the other party's costs if the claim does not succeed (see Section 5).
- If they are directly affected by the policy or decision they will clearly have standing to bring the claim.
- If the claim relies on an allegation of a breach of human rights, only individuals who are victims of the breach can be the claimant for that part of the claim.

Other ways of being involved in the claim

In Judicial Review it is common that, in addition to the Claimant and the Defendant, other parties may be involved in the claim. 'Interested parties' are those directly affected by the claim but who are neither the Claimant or the Defendant. An example would be the Parole Board in a case in which a prisoner was challenging the government for introducing new rules affecting the way the Parole Board operates.

In addition, it is possible for a third party to apply to the court to be an 'Intervenor' in the case.

Intervenors

Sometimes CSOs apply for permission to make representations or file evidence in Judicial Review claims brought by others. This is known as 'intervening' and the CSO is an 'Intervenor'. An application must be made to the court as early as possible indicating the proposed form of the intervention, for example by making written submissions only or by also filing evidence. The application must include a summary of the representations and a copy of the evidence they propose to submit. See Section 5 for the possible cost implications of applying to intervene in a case.

Remedies in Judicial Review

The 'remedy' is the order the Claimant is asking the court to make. It is also referred to as 'relief'.

The orders the court can make include:

- a **quashing order** – this has the effect of cancelling a decision
- a **declaration** – this sets out the legal rights of the parties, and may state that the decision was made in an unlawful way
- a **mandatory order** – this requires a body to carry out a particular act
- a **prohibiting order** – this prohibits a body from carrying out a particular act

The court can also award damages to a claimant, but only if the claimant has a recognised right to damages, for example for a breach of human rights or for a period of unlawful detention.

All the remedies in Judicial Review are discretionary. This means that the court can refuse to make an order, even if the claimant succeeds in establishing unlawfulness. Sometimes the court may refuse a quashing order but nevertheless make a declaration that the public body behaved unlawfully. This might be because there has been delay in bringing the claim and/or because quashing the decision would cause hardship and/or administrative inconvenience to others.

5. Cost orders, protection and capping

As for other civil claims, the usual rule is that the unsuccessful party must pay the legal costs of the successful party. However, the court always has a discretion about whether to make a costs order and, if so, what order to make. An order made against a party, to pay the costs of the other party, is known as an 'adverse costs order'.

Costs protection and costs capping

Legal Aid

Individuals who are granted legal aid to bring claims for Judicial Review have 'costs protection'. This means that if the claim is unsuccessful the court will only order the legally aided party to pay what is reasonable, based on their means. In fact, the usual type of costs order made against a legally aided party means that they will not have to pay any of the costs of the other party even if they lose the case.

Costs capping

For Judicial Review claims that raise issues of general public importance, the court can make an order that limits the Claimant's liability for the Defendant's costs in the event that the claim does not succeed. These orders are called 'Costs Capping Orders' (previously they were called Protective Costs Orders). The effect of such an order is to cap the potential liability of both parties at a certain sum. This means that if the Claim succeeds, the amount of costs the Defendant will be ordered to pay to the Claimant will also be capped.

When will the court make Costs Capping Orders?

An application must be made before the court considers whether to grant permission for the claim. The following criteria must be met:

- The proceedings must be 'public interest proceedings'.
- Without a Costs Capping Order the applicant would be forced to withdraw the proceedings (because of the risk of an adverse costs order).

'Public interest proceedings' refers to proceedings that concern issues of general public importance, which it is in the public interest to resolve, and in circumstances where the proceedings are likely to provide an appropriate means of resolution. Relevant factors are: the numbers of people likely to be directly affected by the outcome of the claim, how significant the effect is likely to be, and whether a point of law of general public importance is being considered.

When making an application the claimant will have to provide evidence of (amongst other things): its own financial resources and those of any person providing financial support to the parties; and whether its own representatives are acting free of charge (which makes such an order more likely to be granted).

It is important to get advice at an early stage as to whether a Costs Capping Order is likely to be granted, as an intention to make an application should be indicated in the Pre-Action Protocol letter.

Costs and intervenors

Intervenors can be ordered to pay any legal costs incurred by the other parties as a result of the intervention. Such orders will be made if:

The intervenor has effectively acted as the sole or main applicant or defendant.

The intervenor's evidence and representations have not been of significant assistance to the court.

The intervenor has acted unreasonably.

Costs of the permission stage

If the court does not grant permission on the papers, the Defendant can claim the costs of having drafted the Acknowledgment of Service, with summary grounds of defence. These costs will usually be relatively modest. The Defendant cannot usually recover the costs of attending an 'oral renewal' hearing, but the court always has a discretion to award costs, depending on the Claimant's conduct (for example, if they are unreasonably pursuing a hopeless case). If permission is refused at a 'rolled up' hearing, it is likely that the Claimant will be ordered to pay the Defendant's costs as they will have had to prepare for a substantive hearing.

NOTES

6. Possible grounds for Judicial Review

Often a decision will be challenged on a number of different grounds. The courts have classified the possible grounds for Judicial Review under the following headings:

Your lawyer will be able to advise you on possible grounds. The rest of this guide provides background information which may support your understanding as your claim progresses.

Illegality

Traditionally, this referred to decisions that were 'ultra vires', which means beyond the powers of the body making the decision. But, in recent years it has been applied to encompass the following types of error:

- decisions based on incorrect interpretations of the law or mistakes of fact;
- decisions made when relevant matters have been ignored, or irrelevant matters taken into account;
- decisions unlawfully delegated to another person or body;
- fettering discretion, ie a decision taken in accordance with a rigid policy rather than being a true exercise of a discretion.

Irrationality

This is sometimes described as '*Wednesbury* Unreasonableness', after a legal case setting out the basis of this ground. It has been described as meaning a 'decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'. It is also referred to as **perversity** and it reflects a very conservative view of the role of the court: the idea that the court should only consider the merits of an administrative decision if it is 'perverse' or 'outrageous in its defiance of logic'. More recently the courts have moved towards a less stringent test, possibly because of the increasing relevance of proportionality when considering discrimination and human rights (see Section 7).

Procedural impropriety

This would include a failure to act in accordance with express procedural rules, as well as a failure to observe basic rules of fairness. An example of breach of express procedural rules would be a decision taken by prison governors which is not in accordance with the Prison Rules.

The 'basic rules of fairness' have been described as the 'rules of natural justice' and two principles are seen as essential in proceedings that are similar to court proceedings:

- the right to an unbiased decision-maker; and
- the right to be informed of and to be able to respond to adverse information.

Many of the cases in which these principles have been established have concerned the rights of prisoners.

Legitimate expectation

More recently, the courts have held that public bodies may be acting unlawfully if they fail to honour people's [legitimate] expectations of being treated in a certain way. This is usually seen as a type of procedural impropriety: failing to observe basic rules of fairness.

Usually, the legitimate expectation is about 'procedural rights' rather than 'substantive rights', e.g. an expectation of being consulted about a change of policy rather than an expectation of receiving a substantive benefit under a policy. Public bodies are entitled to change their policies but if a group of people are likely to be adversely affected by a new policy, they may have a 'legitimate expectation' that they will be consulted before the policy is introduced. This often overlaps with arguments about the PSED, with a formal consultation being a way of gathering evidence about the potential impact of a policy on those with protected characteristics.

Reasons

There is no general duty on a public body to give reasons for its decisions. However, sometimes there are procedural rules that must be followed that require reasons to be given. Also, some situations are such that an explanation may be called for, such as when a public body has decided not to follow a recommendation or to reject evidence provided to it. If there is a duty to give reasons they must be 'proper, adequate and intelligible and enable the person to know why they have won or lost'.

A decision can be challenged on the sole ground that the decision-maker has failed to give adequate reasons for the decision. However, the appropriate remedy in such a case may be limited to an order that the decision-maker explains the decision. This would be something the courts would expect to happen under the Pre-Action Protocol, so as to avoid a claim being issued.

Proportionality

Public bodies are often required to consider the 'proportionality' of policies and measures they are implementing. The precise requirements of a 'proportionality review' differ according to the issues at stake but essentially it is about balancing the aims of the measure with any adverse impact.

The courts will review decisions on the basis of proportionality when breach of human rights or discrimination is alleged. But the UK courts did review decisions involving 'fundamental rights' on the basis of proportionality before the Human Rights Act 1998 came into force. The *R v Secretary of State for the Home Department, ex parte Daly* (page 14) judgment reflects the basic principle of proportionality: the question is whether the breach of fundamental rights is disproportionate to the aim of the measure. This may involve considering whether a less intrusive measure was possible.

If a person establishes, on the face of it, that a decision or policy has a discriminatory effect, the body making the decision or policy must 'justify' the discrimination. This includes establishing that (1) the aim is sufficiently important to justify limiting a fundamental right (the right not to be discriminated against), (2) the measure adopted is rationally connected to that aim, (3) the measure does not go further than is necessary to accomplish the aim, and (4) overall, the infringement was not disproportionate to the likely benefit. This may involve consideration of alternative measures that were available.

In human rights cases, some of the rights under the European Convention on Human Rights are 'qualified', which means that a breach may be justified, applying a similar proportionality test.

Judicial Review and discrimination

Breach of the PSED may be alleged in a claim for Judicial Review, the argument being that the public body has failed to have due regard to the statutory equality objectives when making the decision and therefore acted unlawfully. Often it is also alleged in the same claim that an individual has actually been discriminated against, either directly or indirectly. While such a claim can be made within a Judicial Review, if discrimination is the sole issue (not alongside breach of the PSED), the claim should be brought as a claim for damages for discrimination in the county court.

Case study

In the case of ***R v Secretary of State for the Home Department, ex parte Daly*** a prisoner challenged the practice of prison staff reading letters to and from his lawyers. The court held that this 'involved a disproportionate invasion of a prisoner's fundamental right to free communication with his lawyers' and that the 'degree of intrusion [was] greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners.'

See CJA's website for a full summary of *R v Secretary of State for the Home Department, ex parte Daly*.

NOTES

7. Human rights claims and procedural issues

Brief summary of the Human Rights Act 1998

The HRA 1998 came into force on 2 October 2000. It incorporated into UK law most of the rights contained in the European Convention on Human Rights (ECHR). The Convention is an international treaty, ratified by the UK in 1951. The human rights protected by the ECHR are referred to as 'Convention rights' and the HRA 1998 means that these rights can be enforced in UK courts. Previously, Convention rights could only be enforced by application to the European Court of Human Rights (ECtHR) in Strasbourg.

The HRA and ECHR did not depend on the UK's membership of the EU and post-Brexit, the UK remains a signatory to the ECHR and the HRA 1998 is still in force. However, the current government (at the time of writing in early 2023) has stated an intention to repeal the HRA 1998 and replace it with a British Bill of Rights, but it is now unclear when or whether their proposals will go ahead.

Enforcement of Convention rights in UK courts

The HRA 1998:

- lists the Convention rights which are made part of UK law;
- makes it unlawful for any 'public authority' to act in a way that is incompatible with Convention rights;
- enables a person alleging a breach of a Convention right to bring a claim in the UK courts against the relevant public authority; and
- allows such a person to claim compensation for a breach of Convention rights.

UK law must be compatible with the Convention

The HRA 1998 provides that:

- the courts are public authorities and must not act in a way that is incompatible with Convention rights;
- UK courts and tribunals must take account of decisions made by the ECtHR when making decisions about Convention rights;
- legislation must be interpreted in a way that is compatible with Convention rights 'so far as it is possible to do so'; and
- if this is not possible, the higher courts can make 'declarations of incompatibility', stating that legislation is not compatible with Convention rights.

Convention rights that are part of UK law

The following Convention rights are now part of UK law:

- **Article 2**: the right to life;
- **Article 3**: the prohibition on torture and inhuman or degrading treatment or punishment;
- **Article 4**: the prohibition on slavery and forced labour;
- **Article 5**: the right to liberty and security;
- **Article 6**: the right to a fair trial;
- **Article 7**: protection from punishment for acts that were not offences at the time they were committed;
- **Article 8**: the right to respect for private and family life, home and correspondence;
- **Article 9**: freedom of thought, conscience and religion;
- **Article 10**: freedom of expression;
- **Article 11**: freedom of assembly and association;
- **Article 12**: the right to marry and found a family;
- **Article 14**: the prohibition of discrimination in relation to the enforcement of Convention rights.

Under Protocol 1 to the Convention:

- **Article 1**: the right to property;
- **Article 2**: the right to education;
- **Article 3**: the right to free and fair elections.

Under Protocol 13 to the Convention:

- **Article 1**: abolition of the death penalty and prohibition on condemnation to death.

Absolute and qualified rights

Some Convention rights are 'absolute' and others are 'qualified'. When considering qualified rights, individual rights are balanced against collective rights: the state may be justified in restricting the exercise of qualified rights. In contrast, there can be no justification for breaching absolute rights. Article 3 is an absolute right: subjecting a person to torture, inhuman or degrading treatment cannot be 'justified'. Article 8 is a qualified right: interference with the right to liberty or the right to respect for private and family life, home and correspondence may be justified. But the interference must be 'proportionate'.

Most relevant Convention Rights

The most significant Convention rights in the criminal justice system will be:

- **Article 3**: the prohibition on torture and inhuman or degrading treatment or punishment;
- **Article 5**: the right to liberty and security;
- **Article 6**: the right to a fair trial;
- **Article 7**: protection from punishment for acts that were not offences at the time they were committed;
- **Article 8**: the right to respect for private and family life, home and correspondence;
- **Article 14**: the prohibition of discrimination in relation to the enforcement of Convention rights.

These are set out below:

Article 3: torture and inhuman or degrading treatment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Torture is deliberate inhuman treatment which causes very serious suffering. Inhuman treatment or punishment is less severe than torture and need not be deliberately inflicted. The threat of torture and very poor conditions of detention may amount to inhuman treatment. Degrading treatment is that which 'grossly humiliates' or 'debases' the victim. To establish a breach of Article 3 the treatment must reach a minimum level of severity.

Article 5: Right to liberty

Everyone has the right to liberty and security of person. No one shall be deprived of their liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing them before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent them committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or their lawful detention for the purpose of bringing them before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent them effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which they understand, of the reasons for their arrest and of any charge against them.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his/her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and their release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6: Right to fair trial

In the determination of their civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....

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

Article 8: Respect for private and family life, home and correspondence

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

Article 14: Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The rights under Article 14 overlap with but are not the same as the anti-discrimination laws in the Equality Act 2010. The right not to be discriminated against under Article 14 is not a free-standing right. Article 14 is engaged only if other Convention rights and freedoms are involved.

Once discrimination (differential treatment) has been established, the burden is on the public body to 'justify' the discrimination. If it can satisfy this burden, the discrimination is not unlawful. The test for justification in relation to Article 14 is also a proportionality test, and has four stages:

1. Does the measure have a legitimate aim sufficient to justify limiting a fundamental right?
2. Is the measure rationally connected to that aim?
3. Could a less intrusive measure have been used? and
4. Has a fair balance been struck between the rights of the individual and the interests of the community?

Where a claim is made in a Judicial Review that an individual's human rights have been breached the court can make an award of damages.

Procedural issues in 'human rights' Judicial Reviews

There are two main issues to be aware of if a claim for Judicial Review includes a claim that a decision breaches a person's human rights:

(1) Standing and victim status

Only individuals who are 'victims' of human rights breaches have standing to bring claims. So, if a challenge includes an allegation that a decision would breach, or has breached human rights, there must be an individual claimant who has 'victim status'. This is why many claims are brought jointly by organisations and individual claimants.

(2) Declarations of incompatibility

Under the HRA 1998 the courts and tribunals:

- must interpret legislation in a way that is compatible with Conventions rights 'so far as it is possible to do so', and
- if this is not possible the higher courts can make 'declarations of incompatibility', stating that legislation is not compatible with Convention rights.

It is a constitutional principle in the UK that Parliament is 'sovereign' and this means that a court cannot quash or strike out Acts of Parliament (primary legislation). The HRA 1998 recognises this by making provision for declarations of incompatibility. Where such a declaration is made, the following applies:

- The Act of Parliament remains in force and binds the parties to the proceedings
- The government will usually take action to amend the primary legislation so as to make it compatible with the Convention.

(3) Damages

Where a claim is made in a Judicial Review that an individual's human rights have been breached the court can make an award of damages. A court will only award damages if satisfied that such an award is necessary 'to afford just satisfaction to the person in whose favour it is made'. The level of damages awarded for breaches of human rights tend to be quite low.

Alternatively, an individual can bring a free-standing claim for damages in the County Court for a breach of their human rights. Such a claim must be brought within 12 months from the date of the unlawful act but the court can extend the deadline and some breaches are considered to be continuing breaches.

Links to the cases in this guide can be found on CJA's website here: criminaljusticealliance.org/PSED-toolkit

1 Baring Foundation: www.baringfoundation.org.uk
Law for change: www.lawforchange.uk
The Therium: www.therium.com/therium-access
Strategic Legal Fund: www.strategiclegalfund.org.uk

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Company Registration No 06331413