

A PRACTICAL LOOK AT SOME HUMAN RIGHTS

Notes for a talk given to the Young Solicitors Association by Mary Higgins, QC

6 March 2007

"Whatever career you may choose for yourself - doctor, lawyer, teacher - let me propose an avocation to be pursued along with it. Become a dedicated fighter for civil rights. Make it a central part of your life. It will make you a better doctor, a better lawyer, a better teacher. It will enrich your spirit as nothing else possibly can. It will give you that rare sense of nobility that can only spring from love and selflessly helping your fellow man. Make a career of humanity. Commit yourself to the noble struggle for human rights. You will make a greater person of yourself, a greater nation of your country and a finer world to live in¹.

1. Introduction:

- 1.1 This talk aims to give a quick overview of the Human Rights Act 1998 with a view to alerting you to some issues under Articles 2, 3, 6 and 9 of the Convention that you might come across in your practices and explaining how you might be able to rely upon them - if not nobly then at least reasonably effectively!

2. Structuring your case under the Human Rights Act 1998

- 2.1 The Human Rights Act 1998 ("HRA") did not incorporate the European Convention on Human Rights into domestic law. Instead, in "bringing rights home" the Government gave effect to the Convention rights specified in Schedule 1 of the Act² by introducing a strong rule of construction under section 3 and imposing an obligation on public authorities not to act in a way which is incompatible with the European Convention on Human Rights under section 6³.
- 2.2 The decisions of the European Court of Human Rights ("ECtHR") are technically not binding upon our courts: section 2 HRA only requires the court to take account of these decisions. In practice, however, ECtHR decisions are generally followed unless in a particular case the decision maker is found to be entitled to large degree of deference⁴. The level of deference will depend not only on the subject matter under review but also on the nature of the review itself. Matters of public interest are not invariably beyond the review of the courts: **Department of Social Development v MacGeagh** [2005] NICA 28

¹ The name of the author of this quote has been hidden somewhere in the most turgid section of these notes

² which exclude Article 13 – the right to an effective remedy

³ **Section 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..... **Section 6(1)** - It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (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 the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

⁴ "There are isolated occasions..when a domestic court may challenge the application..of the principles [the ECtHR] has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities.... But it is ordinarily the clear duty of our.. courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the [ECtHR]. .. the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles [the ECtHR] lays down": **Kay v London Borough of Lambeth** [2006] UKHL 10, [28] per Lord Bingham

- 2.3 In order to be able to rely upon the HRA, your client has to be able to qualify as a victim under the Act (s.7⁵ HRA⁶) and you have to be able to enforce your client's rights against a public authority, which includes a court of law.
- 2.4 You can seek to enforce or protect your client's human rights in the following ways:
- 2.4.1. Directly in correspondence or negotiations with public authorities before the decision adversely affecting your client is taken.
- 2.4.2 By way of an application for judicial review challenging the legality of the actions that a public authority⁷ has taken.⁸ (It was expected that most Convention points would be raised in this way⁹).
- 2.4.3 By asking a court or tribunal to secure to your client his or her Convention rights in the proceedings before it in two ways:
- (a) interpreting a piece of legislation in a Convention compliant way which will favour your client; or
 - (b) by taking account of the Article 6 requirements of fairness, equality of arms, and effective participation in determining procedural applications in private law disputes or in the context of a public law dispute where that dispute is directly decisive of civil (private law) rights and obligations¹⁰

⁵ 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) Proceedings under subsection (1)(a) must be brought before the end of (a) **the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances** but that is subject to any rule imposing a stricter time limit in relation to the procedure in question. (6) In subsection (1)(b) "legal proceedings" includes- (a) proceedings brought by or at the instigation of a public authority; and (b) an appeal against the decision of a court or tribunal. (7) For the purposes of this section a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

⁶ Article 34 ("Individual applications") provides "the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by [the United Kingdom] of [Convention rights]". Section 7 HRA casts a much narrower net. It appears on its face to empower only individuals to rely upon the HRA in domestic courts. Under Section 1, "the Convention rights" do not include the Article 13 right to a remedy. Would s.6 HRA require that a court when asked to determine whether a pressure group, such as Friends of the Earth, was a victim would have to find that it was in order to guarantee it an effective remedy which is "a Convention right"?

⁷ The HRA applies to both core public authorities and hybrid public authorities. The former is a governmental organisation. The latter exercise both private and public functions. In **Aston Cantlow and Wilmcote Parochial Church Council v Wallbank** [2003] 3 All ER 1213 at [6] - [12] Lord Nicholls considered that the "Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service." In **R (A) v. Partnerships in Care Ltd** [2002] 1 W.L.R. 2610 a private provider of mental health care was held to be a hybrid authority exercising public functions as its function was similar to that of running a prison; In **Hampshire County Council -v- Graham Beer t/a Hammer Trout Farm** [2003] EWCA Civ 1056 a private company set up by the council, which ran markets for the council in the way that the council had previously done on property owned by the council and which was assisted by the council in his functions was held to be a "hybrid" public authority.

⁸ For example, where a Convention right is engaged and the decision-maker has failed to take account of the Convention obligations explicitly or to make the specific enquiries that arise in relation to the Convention right in question (which would include questions about legitimate aim and the fact-sensitive questions of necessity and proportionality), it will be extremely difficult to argue justification: **AR v Homefirst Community Trust** [2005] NICA 8; **Re Jennifer Connor's Application** [2004] NICA and **Re Misbehavin' Limited** [2005] NICA 35. As the Court made clear in **Misbehavin'** at [58], "The failure to take those rights into consideration would vitiate the decision unless one could conclude that, had they been taken into account, it would not have changed the outcome of the application."

⁹ It is important to note that a court will be slow to grant leave where an applicant has failed (i) to clearly set out their case in open correspondence to the proposed respondent; (ii) to clarify the reasons for the decision; and (iii) to give the respondent a reasonable opportunity to respond to the case made: **Re Cunningham's application** [2004] NIQB 58

¹⁰ In **R (Kehoe) v Secretary of State for Work and Pensions** [2005] 2 FCR 683 Mrs K argued that the Child Support Act 1991 gave her a right to recover financial support for the children from her husband, and that the provisions of the Act purporting to deny her a power of direct enforcement against him were inconsistent with the right of access to a court guaranteed by art 6. The House of Lords rejected this argument and held that as Mrs K did not have a right to claim

2.4.4 By pursuing a claim under s 7 of the 1998 Act against the government or any public authority for breach of its obligations under the HRA. Such a claimant can seek a declaration in the absence of damage.

SOME CONVENTION RIGHTS

3. Respect for human dignity is the touchstone of human rights. If as a solicitor you are hearing from your client that s/he was not treated with respect or dignity or fairness by a public authority, it may well be that one or more of his/her Convention rights have been breached.

4.1 Article 2: Right to life - qualified

- 1 *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
- 2 *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
 - a *in defence of any person from unlawful violence;*
 - b *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - c *in action lawfully taken for the purpose of quelling a riot or insurrection.*

4.2 Article 2 protects the right to life. "The Court's case-law accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention ... It safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory."¹¹

4.3 The right to life imposes a positive obligation upon the State to protect life. In order to establish a breach of this obligation "it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of the circumstances of any particular case." **Osman v United Kingdom** [1998] 29 EHRR 245 at [18]. "[14]..... despite the fundamental and unqualified nature of the right to life it is still appropriate to show some deference to and/or to recognise the special competence of the Prison Service in making a decision going to the safety of the inmates life. The intensity of the court's review is greater – perhaps greatest in an Article 2 case – than for those human rights where the Convention requires a balance to be struck: **Re Samuel Anderson's application** [2005] NIQB 61 Weatherup J.

4.4 The Article prohibits the deliberate taking of life save in very narrowly defined circumstances. While many of the Convention rights involve a negative aspect, Article 2 cannot be interpreted as conferring a right to die, whether at the hands of a third person or with the assistance of a public authority: **Pretty -v- UK** [2002] EHRR 97 (Apn no. 2346/02) at [40]

4.3 Examples:

maintenance directly from her husband, she no longer had any civil rights which would have engaged Article 6. Baroness Hale dissented on the basis of an argument which she framed and which was not considered by the rest of the House. She concluded that Article 6 was engaged because the children's civil right to maintenance from their father was not removed by the 1991 Act and that Mrs K was entitled to rely upon these; and further that "the public authority which is charged by Parliament with securing the determination and enforcement of their rights is under a duty to act compatibly with their art 6 right to the speedy determination and effective enforcement of those rights" and had failed to do so [56].

¹¹ **Pretty v UK** at [37]

4.3.1 Deaths in which potential responsibility lies with the agents of a state: **R(Khan) v Sec of State for Health** [2003] 4 All ER 1239 i.e. deaths in police custody, prison or hospital (which could be due to professional negligence or hospital based infection); or where a person was killed due to the actions of policemen dealing with a riot situation: **McShane v UK** [2002] ECHR 43290/98; or where the police failed to properly protect a witness who had been threatened and was subsequently killed: **Van Colle v Chief Constable of the Hertfordshire Police** [2006] All ER (D) 147 (Mar) Cox J¹².

Such deaths give rise to an obligation on the state to hold a proper public investigation into the cause of death which involve the next of kin to the extent necessary to safeguard their legitimate interests: **Jordan v UK** [2001] ECHR 327; **Keenan v UK** (2001) 33 EHRR 913 at [110] ; **R(Amin) v Sec of State for Home Department** [2003] 4 All ER 1264 (HL).

4.3.2 Witnesses applying for screening or videolink on grounds of threat to life: **R (on the application of A and others) v Lord Saville of Newdigate** (No 2) [2001] All ER (D) 232 (Nov); **Officer L & Ors, Re Application for Judicial Review** [2007] NICA 8

4.3.3 Where public authorities negligently fail to take action to address a known risk, such as an environmental risk, which was liable to give rise to a serious risk for life or various aspects of the right to life: **Oneryildiz v Turkey** [2002] ECHR 496¹³

4.3.4 Other potential violations:

- where the prison authorities fail to take adequate steps to try to prevent a suicide risk in prison from committing suicide
- where a health authority fails to take adequate steps to reduce the waiting times for cardiac surgery which would be likely to have prevented the death of someone on that list who died while waiting for surgery.
- where a maternal death during labour is contributed to by a lack of midwifery or obstetric staff

5. Article 3 – Prohibition of torture - Absolute right

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

5.1 “Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention ... taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in

¹² In this case, s.7 proceedings were taken by the administrator of his estate. Cox J held that the proper question in that case was whether the protective measures that were reasonably open to the police in the circumstances could have had a real prospect of altering the outcome and avoiding G's death. She found that on the evidence, it would have been more likely than not that G's death would have been avoided had those steps been taken. £15,000 was awarded in respect of the witness' distress in the weeks before his death and £35,000 for the claimant's own grief and suffering.

¹³ The ECtHR found Article 2 was violated where public authorities had negligently failed to take action to address a known risk of a methane explosion at a waste dump. The government disputed the applicability of Article 2 but the Court said that a violation of the right to life can be envisaged in relation to environmental issues relating not only to the sphere of alleged negligence but also to areas liable to give rise to a serious risk for life or aspects of the right to life.

particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.”¹⁴

5.2 The article is intended to protect an individual’s dignity and physical integrity: **Tyrer v UK** (1978) 2 EHRR 1. The degrading conduct that results in a breach must be such that it “grossly humiliates”. In determining whether conduct is “degrading” relevant but not conclusive factors are whether the purpose of the treatment was to humiliate or debase the victim and whether or not the treatment was intended. Regard will also be had to the way that the applicant was adversely affected by the treatment: **Raninen v Finland** (1997) 26 EHRR 563. The burden of proof is the civil burden of proof (in Scotland anyway): **Robert Napier v The Scottish Ministers** [2005CSIH16]

5.3 Examples:

5.3.1 Asylum cases: Article 3 precludes the return of applicants for asylum to their home countries where they would be liable to suffer treatment which breached if returned: **K and Fornah v. Secretary of State for the Home Department** [2006] UKHL 46. It also precludes the use of evidence obtained by torture: **A v Secretary of State for the Home Department (No 2)** [2006] 1 All ER 575 (HL);

5.3.2 Where the State failed to prevent serious long term neglect and/or abuse of children: **Z v UK** [2001] ECHR 29392/95

5.3.3 Where the State has failed to treat disabled people with respect and dignity to such an extent it amounts to inhuman and degrading treatment: **Price v UK** (2001) 34 EHRR 1285¹⁵

5.3.4 Where the state is responsible for or has failed to take adequate steps to prevent an assault upon a child - at the least one which leaves a mark: **A v UK** (1998) 27 EHRR 611¹⁶; **Tyrer v UK** (1978) 2 EHRR 1¹⁷

5.3.5 A disturbed prisoner, known to be a suicide risk but now approaching the end of his short sentence, was administratively sentenced for a violent breach of discipline to a further substantial spell of imprisonment, the first part in punitive isolation, without the possibility of appeal or review: **Keenan v United Kingdom** (2001) 33 EHRR 913¹⁸

5.3.6 A refusal to manually lift a disabled person where they refused to be mechanically lifted as it caused them pain may engage Article 3 where it meant that they remained sitting in bodily waste or on the lavatory for hours, unable to be moved: **A v East Sussex County Council** [2003] EWHC 167 (Admin) Munby J: “ The concept of human dignity may be the same as

¹⁴ **Z v United Kingdom** (2001) 34 EHRR 97 at 131, [73]

¹⁵ The applicant, a four-limb-deficient thalidomide victim with various health problems, was committed to prison for contempt of court in the course of civil proceedings. Leaving her unable to move in her wheelchair for hours was found to be both inhuman and degrading; one judge described it as “possibly torture”. There was no evidence of any positive intention to humiliate or debase the applicant.

¹⁶ in respect of corporal punishment carried out by the applicant’s stepfather, the State was obliged to ensure “a legal system which provides adequate protection for children’s physical and emotional integrity”.

¹⁷ Punishment of a 15 year old boy convicted of assault and sentenced to 3 strokes of the birch to be administered at the local police station was not inhuman but nonetheless in breach of Article 3 as it was degrading

¹⁸ The assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.”

ever, but the practical standards which require to be met are not. Changes in social standards demand better provision for the disabled if their human dignity is not to be impaired.”

5.3.7 Other potential violations:

- a prisoner denied his medication in prison
- a long- term failure to provide any or adequate speech and language therapy for children with severe learning difficulties which prevents them from being able to communicate as well as they could, and from being able to engage with their teachers and to learn to the best of their ability, if at all.
- where a disturbed adolescent is left on the waiting list for adolescent psychiatry
- where the home care team employed by the Trust are short staffed during a holiday period and are unable to visit and address the needs of one of their vulnerable clients
- where elderly residents in nursing homes are unnecessarily and regularly given drugs which make them groggy, or when they are regularly put in nappies when they are not incontinent but staff shortages mean they may not be able to find the time to bring them to the toilet
- where the lock up sanitation facilities in a prison cell can involve a bucket and you happen to be imprisoned in Scotland: **Napier, Petition for Judicial Review** [2004] Scot.CS (where notably this had an adverse impact on the petitioner’s health); in NI, we are made of sterner stuff: **Re Karen Carson’s Application** [2005] NIQB 80; and **Martin v NI Prison Service** [2006] NIQB 1 (Article 8 breach found however¹⁹). If the prison conditions as a whole, including the lack of proper sanitation, had an adverse impact on a prisoner’s health, for instance, by aggravating eczema, there could be a successful claim that this amounts to an Article 3 violation

Article 6(1) – Right to a fair trial

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 require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- 6.1 Foremost among the elements which have been held to be inherent to the concept of a fair hearing is “equality of arms” i.e. a fair balance between the parties. This means that “each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis a vis his opponent”:
Dombo Beheer v Netherlands (1993) 18 EHRR 213, [33]

¹⁹ “The lack of in-cell sanitation does not of itself establish a lack of respect for the prisoners’ privacy rights under article 8 as I sought to establish in *Re Karen Carson*. However the absence of such a facility means that prisoners may have to excrete in circumstances which are in modern conditions somewhat humiliating and distasteful. If not properly managed and handled with care the practice has the potential to be significantly demeaning to a prisoner in an intimate aspect of his private life. Having regard to the general principles emerging from the prison rules and the EPR the Prison Service is bound to put in place and operate a system that minimises so far as possible interference with the prisoner’s rights to respect in relation to his private life affected by his bodily functions”. per Girvan J at [35]

- 6.2 Other elements of the right include: (i) effective access to a court, which can mean a requirement to provide legal aid; (ii) the right to have a case determined within a reasonable time; and the requirement of legal certainty²⁰.
- 6.2 Article 6(1) extends only to contestations (disputes) over (civil) "rights and obligations" which are or are arguably recognised under domestic law. It is a procedural right and of itself does not guarantee any particular content for (civil) "rights and obligations" in the substantive law²¹

Examples:

- Legal aid refusal: The denial of legal aid in a defamation case involving complex factual and legal issues violated Article 6 and imposed an unfair restriction on the applicants' ability to present an effective defence and depriving them of the opportunity to prevent their case effectively before the court and contributed to an unacceptable inequality of arms with their opponent: **Steel and Morris v UK** ECHR [2005] (Application no. 68416/01) 15.2.2005.
- Awards of damages in a defamation case of £36,000 and £40,000 made against individuals of modest incomes and limited resources in favour of a large and powerful corporate entity which had not had to establish that it had suffered any financial loss as a result of the offending publications was disproportionate²² to the legitimate aim served: **Steel and Morris v UK** [2005] EHRR (Appn no. 68416/01) 15.2.2005. It was irrelevant in that case that MacDonalds had not sought to enforce the order and recover damages: the fact was that they could.
- Reasoned judgment: in judicial or quasi-judicial proceedings, Article 6(1) places the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. There will be a violation if a judgment leaves it unclear whether the court in question has addressed a contention advanced by a party that is fundamental to the resolution of the litigation: **Van de Hurk v The Netherlands** (1994) 18 EHRR 481 [59]. In **Re SOS' application** [2006] NIQB Girvan J (as he then was) gave guidance to Criminal Injury Appeal Panels as to what this duty entails²³. Conclusions do not amount to reasons. Brief reasons for the conclusions reached are required. It must be clear that the the factual and legal issues had been conscientiously addressed and an explanation given as to how the result had been reached: **Re Anne Marie McCallion's Application** [2005] NICA 21 Coghlin J [37]

²⁰ **Re an application by the Landlords Association for NI for leave to apply for judicial review** [2005] NIQB 22; **Leeds City Council v Price(FC)**; **Kay and others (FC) v London Borough of Lambeth** [2006] 2 WLR 570

²¹ **James v UK** (1986) 8 EHRR 123[81]; **Lithgow v UK** (1986) 8 EHRR 329,[192]; **Holy Monasteries v Greece** (1995) 20 EHRR 1 [80]

²² Under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered: **Tolstoy Miloslavsky v UK** 13.7.1995, Series A, No. 316-B, [49]

²³ [9] ...There is a duty imposed on the Panel to give reasons for its determination, normally at the end of the hearing but otherwise by written notification as soon as is practicable. Having determined that the applicant was eligible.. the Panel should have explained how it came to that conclusion. Clear legal and factual issues fell for determination, firstly, whether the applicant sustained a criminal injury in the sense of suffering (in this case) mental injury that was directly attributable to a crime of violence, and secondly, if that were so, whether the applicant had shown that he had been put in reasonable fear of immediate physical harm to his own person. The Panel should have addressed the legal questions and shown how it arrived at its conclusion in favour of the applicant on the evidence before it. The Panel short-circuited this reasoning process by simply stating that the applicant had established eligibility. It rationalises the situation by saying that it so found having regard to the evidence. It should have indicated the findings of fact it reached that led it to the legal conclusion that eligibility was established.

- Burden of proof in ASBO applications: "it was likely to be appropriate to apply the criminal standard of proof in the majority of [ASBO] applications": **R (McCann) v Crown Court at Manchester** [2002] 4 All ER 593 HL. This principle would equally apply to other civil proceedings with a criminal character²⁴.
- Ability to cross-examine: Where in criminal proceedings, the complainants did not turn up to court and their statements were read out by the police instead, and the defendant was thereby deprived of the opportunity to cross examine them, the Court held that he was thereby denied his Article 6 right to a fair trial: **Majadallah v Italy** (No. 62094/00)²⁵.
- A failure to let the parties see all of the documents that the judge sees and to give them the opportunity to comment upon anything filed with the court with a view to influencing the court's decision is a breach of Article 6: **JJ v The Netherlands** [1998] EHRR 27.3.1998. Similarly, a failure of a judge to reconvene a case so as to give the parties an opportunity to comment upon a judgment he has turned up since the hearing and intends to rely upon would breach Article 6.
- Bias: Proceedings in which a judge involved in determining an aspect of the case had 9 years earlier represented an opponent in the case in a very minor way violated Article 6. The judge's involvement - reinforced by the fact that his daughter subsequently represented the opponent for a time - was "a situation which was capable of raising legitimate doubts as to [the judge's impartiality: **Meznaric v Croatia** (Application no 71615/01) 15.7.2005²⁶
- Bias: Proceedings in which for eight months the judge in a set of proceedings brought by the application had acted as a legal representative for the applicant's opponent in parallel proceedings. As a result...the applicant could have had reason for concern that [the] judge ... would continue to see in him the opposing party. In the Court's opinion this situation could have raised legitimate fears in the applicant that [the] judge ...was not approaching his case with the requisite impartiality: **Wittstein v Switzerland** [2000] EHRR (Appn No 33958/96) [47]. The fact that W., an office colleague of this judge and another judge hearing the case, had in other proceedings represented the applicant's opponent, while only of minor relevance, could be seen as further confirming the applicant's fear that [the] judge was opposed to his case.

6.2 Other potential violations:

²⁴ A series of cases have tested the boundaries of the concept of a criminal charge within civil proceedings for the purposes of the application of the criminal limb of Article 6 (and the additional procedural safeguards that entails). Generally, where the measure appears to be designed to be preventative in some way instead of penal it has been held not to be a criminal penalty even when imposed in the context of or as a result of criminal proceedings. The courts have emphasized that the standard of fairness and the procedural safeguards required under the civil limb of Article 6 will increase depending on what is at stake for the individual: "... it is not an invariable rule that the - Author of the quote on page 1: Martin Luther King, Jr - lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made." per Lord Hope in **R (McCoy)** at [82]

²⁵ The question is, in relation to an application for an ASBO in which a criminal standard of proof is appropriate, are these Article 6(1) and Article 6(3) guarantees to cross-examine the complainants also required to be imported? (This judgment is only available on the HUDOC website in French but is summarised in an English press release at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=809713&portal=hbkm&source=externalbydocnumb&table=F69A27FD8FB86142BF01C1166DEA398649>)

²⁶ The common law test for bias has been settled by the House of Lords in **Porter v Magill** [2002] 1 All ER 465, [103] and **Lawal v Northern Spirit Ltd** [2001] 1 All ER 187, [14]: "The question is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased"

- Would a strict liability offence now offend the requirements of Article 6 given that the Convention is a living instrument and that the ECtHR has not revisited the issue since **Salabiaku v France** (1988) 13 EHRR 379? Not according to **Barnfather v Islington Education Authority** [2003] EWHC 418 (Admin) (07.3.2003).
- where Parliament or Belfast City Council open sessions or meetings with a Christian prayer or a reading from Scripture, can these bodies be seen as impartial and independent in reaching quasi-judicial decisions where religious sensitivities are involved and/or where members have been lobbied by believers to reach a particular decision? To date, it appears that they can: **Re Richard West's application** [2006] NIQB 39.

7 Article 7 – No punishment without law

- 1 *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
- 2 *This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*

7.1 Potential violation:

- A criminal charge for breach of an ASBO, where the act which breaches the ASBO is not, in itself, a criminal offence, may violate Article 7

8 Article 9 – Freedom of thought, conscience and religion

- 1 *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- 2 *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

8.1 Article 9 involves a spectrum. At one end is the unqualified right to freedom of thought, conscience and religion where those “views ... attain a certain level of cogency, seriousness, cohesion and importance”²⁷. “Plainly these expressions cover a wider field than even the most expansive notion of religion. Pacifism, vegetarianism and total abstinence from alcohol are uncontroversial examples of beliefs which would fall within Article 9 (of course pacifism or any comparable belief may be based on religious convictions, but equally it may be based on ethical convictions which are not religious but humanist)”²⁸

²⁷ **Campbell & Cosans v UK** (1982) 4 EHRR 293

²⁸ **R (Williamson) v Secretary of State for Education and Employment** [2005] 2 All ER 1 Lord Walker at [55]

- 8.2 At the other end of the spectrum is the qualified right to manifest one's religion or beliefs. "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism is dissociable from a democratic society, which has been dearly won over the centuries, depends on it".²⁹
- 8.3 Article 9 primarily protects the sphere of personal beliefs and religious creeds - that is, the area which is sometimes called the forum internum. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship and devotion which are aspects of the practice of a religion or a belief in a generally recognised form³⁰ - the manifestation of a religious belief under Article 9(2).
- 8.4 There is interference with Article 9(1) "only when a certain level of disadvantage is reached": **Re Parson's Application** [2004] NI 38. This is a "modest threshold" requirement³¹ for breach of Article 9(2)³², according to Lord Nicholls in **Williamson**:

[23] Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in art 9 of the convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision³³. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention.

[24] Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under art 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by art 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs. Article 9 is apt, therefore, to include a belief such as pacifism: **Arrowsmith v UK** (1978) 3 EHRR 218.

- 8.5 "If the Article means what it says, it [Article 9] has the potential to be far reaching in its legal, social, economic and political effects. Its subject matter (strongly held beliefs affecting what

²⁹ **Kokkinakis v. Greece** (1993) 17 EHRR 397 at [31]

³⁰ **X v United Kingdom** (1984) 6 EHRR 558.

³¹ Per Lord Nicholas (with whom Lord Walker and Baroness Hale agreed) in **Williamson**

³² Breach of Article 9(1) will have a similar if not arguably a lesser threshold

³³ "but for very exceptional cases, the right to freedom of religion as guaranteed under Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate." : **Hasan and Cherish v Bulgaria** [2000] 10 BHRC 646 ECtHR [78]

we live for and how we live) is a unique force in both uniting and dividing human beings in society”: **Copsey v WWB Devon Clays Ltd** [2005] EWCA Civ 932, [3] per Mummery LJ.

8.6 Examples

- A requirement that all elected members of an elected local authority swear and be faithful to and obey the Constitution of the Republic “on the Holy Gospels” was in breach of Article 9(2) and could not be regarded as “necessary in a democratic society”: **Buscarini and others v San Marino** [1999] EHRR
- A Jehovah witness who was sentenced to 4 years’ imprisonment for his refusal to enlist at a time of general mobilisation on the ground of conscientious objection. He was sentenced to four years’ imprisonment and who, after his release had passed his exams to become a chartered accountant did not have his qualification recognised by the board of accountants on the ground of his conviction. The Commission by a majority found that there was a prima facie breach of article 9(1): **Thlimmenos v Greece** [1998] EHRR (4 December 1998)

8.7 Not violations:

- An argument that the operation of the 50:50 rule in the PSNI appointment process tended to coerce or induce candidates to abjure their faiths and adhere to the Roman Catholic religion and was therefore in breach of Article 9 failed in **Re Parsons’ Application** [2004] NI 38. The NICA held that there was no interference because Mr Parsons had a choice of other employment available to him. (Alternatively, it could have held that he had not been subjected to a certain, if any level of disadvantage as he was ranked on merit 514/553th out of all applicants and there was no evidence that he had given any consideration to changing his religious belief as a result of this rule).
- A requirement to apologise or offer an expression of regret for any offence caused to some people by articles in your freesheet before public funding for your freesheet will be resumed, when that apology or expression would be insincere and contrary to your client’s passionate belief in freedom of speech and in the importance of speaking the truth is not at present³⁴ a breach of Article 9: **Re West’s application** [2006] NIQB 39
- A declaration of political allegiance or allegiance to the Queen could involve an interference with Article 9(1). By contrast, a requirement that the applicants - who had strongly held nationalist beliefs - make a declaration that they would serve the Queen was not in breach of their right to freedom of belief: **Re Treacy and Macdonald’s application** [2000] NIQB 6³⁵
- A school uniform policy which prohibits wearing of a jilbab which was a manifestation of the claimant’s religion did not interfere with her Article 9 right, as she could choose to go to another school where she could wear her jilbab: **R (on the application of Begum) v Headteacher and Governors of Denbigh High School** [2006] 2 All ER 487

³⁴ The decision of the NICA is currently awaited

³⁵ “Leaving aside the question whether a declaration of political allegiance involves an interference with freedom of thought or conscience, it is clear that no breach of Article 9 arises in the present case. By making a declaration that they will, if required to do so, render proper professional service to the donor of the office of Queen’s Counsel, the applicants make no declaration of allegiance which compromises their political beliefs. The undertaking to provide proper professional service to the Queen is not inconsistent with a strongly held nationalist belief. The declaration merely requires that the service rendered to the Crown should be of the same quality as that delivered to any other client.” per Kerr J

Lord Nicholls and Baroness Hale reached the same conclusion by a different analysis: the school's refusal to allow the claimant to wear a jilbab at school did interfere with her Article 9 right to manifest her religion, but the school's decision was objectively justified. It had the legitimate aim of protecting the rights and freedoms of others³⁶

- the banning at the University of Istanbul of the wearing of an Islamic headscarf was an interference with the right to manifest religion [71]. In looking at the question of justification, the margin of appreciation "is particularly appropriate...since rules on the subject vary from one country to another depending on national traditions" [10]. Ultimately, the Court concluded that there had been no breach of Article 9, since the assumed interference had been justified: **Sahin v Turkey** [2004] EHRR 29.6.2004
- Would a government policy which stops funding Catholic schools and instead promotes integrated education be interfering with the manifestation of a religious practice? It seems unlikely as that religious practice - such as school Masses or prayers - could be effectively engaged in outside school hours. (Although an argument under Article 2 of Protocol no. 1 - the right of the parents to ensure education and teaching in conformity with their own religious and philosophical convictions - could be made. Could an interference with this right be justified? - but see **Begum** and **Williamson**).

MARY HIGGINS, QC

³⁶ Baroness Hale: "Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shallower Kaman, and by allowing those who wished to do so to wear the hi-jab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed their concern that if the Gilbert were to be allowed they would face pressure to adopt it even though they do not wish to do so. Here is the evidence to support the justification"