

## Answers to end of chapter Q&A

### **Question 1: To what extent does the ECHR affect relations between private landowners?**

The ECHR is a treaty which binds signatory states including the UK and a private landowner can bring action in the Strasbourg Courts against a defaulting state. The HRA 1998 with effect from 2nd October 2000 incorporates the ECHR into the law of this country. The means by which the HRA 1998 does so is considered in section 2. By section 6 of the HRA 1998 public authorities must act in a manner which is compatible with the ECHR and a private landowner may bring action against a public authority that breaches its obligations to do so – see section 7. This is known as the vertical effect of the HRA 1998 0 see section 2.1.

The ECHR may also have an effect upon the relations between private landowners, although the precise ambit of this effect is at yet uncertain. This is known as the horizontal effect of the HRA 1998 and is considered in section 2.2. By section 3 of the HRA 1998 legislation must be interpreted as far as possible in a manner which is compatible with the ECHR. Where it is not possible to so interpret legislation, the courts are able to issue a declaration of incompatibility whereupon the Government may amend the offending provision. Thus where legislation governs relations between private landowners the ECHR will have an impact – see *Ghaidan v Godin-Medoza*. It is argued that the courts, as public authorities, must act in a manner which is compatible with the ECHR under section 6 and thus when applying common law and equitable principles should also act in a compliant manner. These arguments are considered in more detail in section 2.2.

### **Question 2: How does Article 1 Protocol 1 operate to protect rights of property?**

Article 1 Protocol 1 is considered in section 3. This Article focuses upon the protection of existing property rights and comprises three elements. First, it articulates an overall principle of the peaceful enjoyment of possessions, including property rights, secondly it provides that a person should not be deprived of their possessions except in the public interest and thirdly it permits a state to control the enjoyment of possessions in the general interest or to enable the payment of taxes etc . These elements were explained in *Sporrong and Lonroth v Sweden* although it is sometimes not easy to distinguish between a deprivation and a control of possessions – see *JA Pye (Oxford) Ltd v UK*.

The protection of property rights afforded by the Article is qualified. A deprivation may be justified if it is in the public interest and a control may be imposed in the general interest. There is not thought to be any distinction between public or general interest. In establishing whether or not these qualifications are satisfied it is necessary to apply the justification formula explained in section 2.4. Thus the government, in determine whether a measure is in the public or general interest, enjoys a wide margin of appreciation. A state's decision in this regard will be respected unless no reasonable government could have come to a similar decision in the circumstances. Nevertheless, there must be

proportionality, both in terms of substance and process, between the interference and an individual's right of property.

The application of this justification formula is illustrated in both *James v UK* and *JA Pye (Oxford) Ltd v UK* which are extracted in the text.

**Question 3: What is the role of compensation in determining whether or not an act which affects property rights is compliant with the ECHR?**

In considering the proportionality of a deprivation of possessions the question of the payment of adequate compensation is an important factor whereas compensation is not so necessary where the interference is a control of possessions. This important distinction is explained by the Grand Chamber of the Strasbourg Court in *JA Pye (Oxford) Ltd v UK*.

**Question 4: Article 8 provides that respect is to be afforded to an individual's home. What does respect mean in this context?**

Article 8 is explored in section 4. It provides not a right to a home but a right to respect for an individual's existing home. Respect invokes both negative and positive connotations. Negative protection entitles an individual to expect that he or she will be able to occupy their home without unjustified interference, for instance from arbitrary police powers of entry and search or from unwarranted compulsory purchase or planning controls. Positive protection operates to place upon government an obligation to frame the law in such a way that an individual is at liberty to enjoy their home, for instance free from unjustified pollution or nuisance. It is the government's responsibility to put in place a framework that will adequately control its own and other's activities so that an individual's home is respected.

The right to respect is not absolute and may be justified by the wide ranging factors found in Article 8(2). Particularly significant in relation to the operation of property rules are measures designed to promote the economic well being of the country, to protect public safety or the rights and freedom of others. The operation of the justification formula where Article 8 is called into question can thus involve a challenging balancing exercise.

**Question 5: Is there such a concept as a human property right?**

This is a difficult question to which there is no clear answer. Some commentators have argued that rights may arise based upon the protections enshrined in the ECHR even though the claimant may have no recognized proprietary right. This protection has been dubbed a human property right. One example of this possibility is found in a series of cases where a local authority has brought possession proceedings against a trespasser. We consider these cases in section 4.2.2. and touch on the wider question in our concluding comments in section 7.

It is clear that the meaning of home for the purpose of Article 8 does not depend upon the occupier holding a proprietary interest in the property. A home is a place of residence with which the claimant has sufficient and continuing links – see *Harrow LBC v Qazi*. A trespasser may thus look to the protection of Article 8 where a local authority seeks possession. This has happened in a number of cases where a local authority has sought possession following their revocation of an occupational licence – see *Connors v UK*, *Kay v Lambeth LBC*, *Leeds CC v Price* and *Birmingham CC v Doherty* and following the termination of a joint tenancy by a notice given by one joint tenant – see *Harrow v Qazi* and *McCann v UK*. In these cases the occupier of their home has become a trespasser upon the entirely legal revocation of their licence in the first instance and the termination of their tenancy in the second. Nevertheless, they have argued that the respect for their home has been unjustifiably infringed where the local authority has taken possession proceedings to remove them from their home.

The House of Lords has accepted that there may be exceptional circumstances where the law which entitles a landowner to regain possession of an occupier's home is incompatible with Article 8 – see *Kay*. This incompatibility might arise from the substance of the law, the process by which it is enforced or its discriminatory nature. There is nothing new here. However, where their Lordships diverged is whether a successful human rights challenge might be based upon the claimant's exceptional personal circumstances. A slim majority of their Lordships refused to accept this possibility but a minority was prepared to consider this possibility particularly where the claimant is a member of a vulnerable group eg gypsies to whom the government owe a positive duty to protect their home and way of life. This possibility is controversial as it raises the possibility that established property rules might require modification or alteration in order to give adequate respect to a particular individual's, or more likely group's, particular circumstances regarding their home. The Lords have flirted with this more radical agenda in the context of possession proceedings brought by a public authority ie where the HRA 1998 has vertical effect. The impact however would be even more revolutionary if the HRA 1998 had horizontal effect when possession proceedings brought by private landlords or lenders would also come under the spotlight. Commentators have warned against the uncertainty that would result if the law was to go down this road.

**Question 6: Article 14 has been described as “parasitic”. How may the Article 14 assist in a challenge based upon the HRA?**

Article 14 is considered in section 5. Its target is to prevent discrimination but it does not provide a free standing protection against discrimination but looks to prevent discrimination in the enjoyment of the rights protected by the ECHR. It is thus said to be parasitic for it is necessary for another article to be engaged before Article 14 can operate. The Article is of particular import where the engagement of the host article is found to be justified but is nevertheless a breach of Article 14 because it operates discriminately in a manner which cannot be justified. An example is found in the cases of *Ghaidan v Godin-Mendoza* where security of tenure legislation was found to act discriminately against homosexual partners.

**Question 7: To what extent is it appropriate for the courts to consider Government policy in determining the compliance of property rules with the ECHR?**

We have examined in question 1 the horizontal and vertical effect of the HRA 1998 and the manner in which public authorities are required to act in a human rights compliant manner and for legislation, and possibly also the common law and equitable rules, to be interpreted and applied in a similar manner. The underlying thrust is thus for property rules to be human rights compliant.

We have also seen in questions 2 and 4 that the major articles affecting property rules, namely Article 1 of Protocol 1 and Article 8 are qualified. Thus a prima facie breach of these articles may be justified, in the case of Article 1 Protocol 1, because they are in the public or general interest or, in the case of Article 8, because they meet one of the policy aims outlined in Article 8(2). In applying the justification formula the courts must thus assess whether or not these qualifications are satisfied and will thus inevitably need to consider policy. Lord Nicholls in *Wilson v First County Trust Ltd* described the court's task and outlined the type of evidence the court might need to consider – see extract in section 2.4.3. However this examination is made against the fact that the government enjoys a wide margin of appreciate in determining a given policy aim and the means adopted to achieve it. Thus the court's role is not to question Government policy. The court's attention is focused upon the general proportionality of a particular policy measure to evaluate whether there is a fair balance struck between the policy objective and the interference it causes to an individual's human rights. Examples of this process are found in relation to Article 1 Protocol 1 in the Strasbourg courts' discussion in *James v UK* (part of which is extracted in section 3.2.2) and in *JA Pye (Oxford) Ltd v UK* (considered in Chapter 10 section 5.4.). In relation to Article 8 the House of Lords deliberations in the possession proceedings cases considered in section 4.2 demonstrates the courts reluctance to question policy and the complexities of evaluating proportionality.

**Question 8: How useful is the human rights “prism” through which the law governing property rights must now pass?**

We consider the impact of human rights in section 7 in which we refer to the analogy of a prism used by Gray and Gray. Fox uses a similar analogy by describing the mechanism of evaluating the human rights' compliance as a “useful lens”. We describe this mechanism in section 2 and illustrate its import in the context of Article 1 Protocol 1 and Articles 8,6 and 14 in the subsequent sections of this chapter namely sections 3,4,5 and 6.

Allen has suggested two possible alternative routes that human rights might have on property rules. Either human rights will have little impact because the fundamental principles enshrined in the ECHR reflect the fundamental principles that have shaped our property law for centuries. Alternatively, human rights will have an influence by providing an overt and alternative balancing process against which competing property rights can be reconciled. For instance we have referred in question 7 to the extent to which the courts will need to consider whether a particular policy is a justified and proportionate interference with an individual's property rights or home. Whilst in the remaining parts of

this book we refer to occasions when we feel that human rights prism or lens may have an impact.

It is perhaps too early to tell which of these routes our property law will follow. The initial signs are that human rights prism will have a limited impact on property rights. The House of Lords have demonstrated a very cautious approach although it may be that the Strasbourg Courts will be more demanding – see for instance *McCann v UK*.