

## 6. The Human Rights Convention

### 6.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 3C-045

1. The countries which together formed the Council of Europe agreed the ECHR in 1950. The Council of Europe is a separate body from the European Union. The intention was “to link positive law with ethical values, and to protect individuals and minorities against the misuse of power by elected governments and unelected public officials in periods of emergency and in normal times.” (*Lester and Pannick, Human Rights Law and Practice, Butterworths 1999, p.4*).
2. Since 1966 it has been possible for an individual to petition the European Commission on Human Rights and the European Court of Human Rights (ECtHR) in Strasbourg if they consider that the UK has breached their rights under the Convention.

### 6.2 The Human Rights Act 1998 3C-046

1. The causes of action created by the Human Rights Act, in particular applications to seek declarations of incompatibility or to quash secondary legislation, usually arise in judicial review proceedings. Such cases will be considered under section 7 of the code – see guidance at paragraph 16.1.7.

### 6.3 Implications for the Community Legal Service and the Funding Code 3C-047

1. The ECHR and the HRA 1998 impact upon the CLS at a number of levels:
  - (a) Article 6 is directly relevant to decision making under the Funding Code. Indeed it is an aim of the Access to Justice Act 1999, and the rules of the Funding Code in particular, to ensure that individuals have the opportunity of a fair hearing in the determination of their civil rights. The Funding Code Criteria seek to achieve this for cases which have sufficient merit to justify public funding. To this extent the Funding Code already takes Article 6 fully into account. The Funding Code Criteria must be applied in every case, but where the Commission has a discretion, for example whether funding should be requested for a case under section 6(8)(b) of the 1999 Act, the Commission will take into account the Article 6 implications for the individual client. It is therefore material to consider when exercising any discretion whether, without public funding, the individual would be deprived of a fair hearing. This is particularly relevant to decisions to discharge a certificate at a late stage in proceedings – see *Alliss v. LSC, CO/3348/02, 25 September 2002* and Section 13.5 of this guidance.
  - (b) Cases against public authorities which raise significant human rights issues are a priority area under the Code. The Lord Chancellor’s directions (at paragraph 3.3.4 of this guidance) ensure that such cases are within the scope of the Act. Significant human rights issues are expressly recognised in the Criteria for claims against public authorities, whether in the form of judicial review (section 7 of the Code) or claims for damages (section 8). In such categories, cases against public authorities may be funded even if prospects of success are only borderline. The same approach applies to immigration cases under section 13 of the Code.

- (c) In applying cost benefit Criteria in the Code, whether in the form of the private client test or a general cost benefit test, weight will be given to significant human rights issues raised in the case.
- (d) Human rights issues are highly material to decisions as to whether funding is justified under the affordability criterion for high cost cases funded out of the central budget. (See section 15.4 of this Guidance).

3C-048

#### 6.4 Meaning and effect of “Significant Human Rights Issues”

1. For the purpose of the Lord Chancellor’s directions on scope and the Criteria in the Funding Code, human rights issues must be “significant”. This test in the Code does not mean that some breaches of human rights should be regarded as insignificant, in fact all breaches of human rights are significant. Instead, the approach in the Code is to consider whether the allegations of breach of human rights are significant to the particular case under consideration. The following approach should be adopted in deciding whether a case raises significant human rights issues:
  - (a) to be significant, the ECHR issues must be **material** to the case. This means the human rights issues must be an important part of the case, which are likely to make a difference to its outcome. It is not necessary to show that, without the human rights arguments, the case would fail. Indeed for many cases incorporation of ECHR will simply reinforce existing rights rather than create entirely new ones. For example, unlawful detention cases often raise significant human rights issues even though the right to claim damages for false imprisonment was well established in law prior to the Human Rights Act. However, a case will not be regarded as raising significant human rights issues if those issues appear to have been included in the case as an afterthought to bolster the claim or are unlikely to carry weight with the court;
  - (b) a case does not raise significant human rights issues if the argument that there has been a breach of human rights has **poor prospects of success**. This is a separate question from determining the prospects of success of the proceedings as a whole. There must be a reasonable case that human rights have been breached, which in the terms of the Code equates to the human rights allegation having prospects of success at least in the borderline category;
  - (c) significant human rights issues must flow from the case itself, not from the funding decision. A case cannot be said to raise significant human rights issues for the purposes of the Funding Code merely on the grounds that if public funding were not provided for the case there might be some arguable breach of Article 6. Such arguments would be relevant only in the context of a judicial review of the funding decision.
2. A case which raises significant human rights issues may still be refused under cost benefit Criteria. The Criteria in sections 7 and 8 of the Code require the benefits of the proceedings to justify the likely costs. Although human rights issues are always important, the mere fact that a case raises human rights issues does not mean that there is no limit on the amount of public funding which can be provided. A common sense test must be applied. The issue is whether the benefits flowing from the proceedings are sufficiently worthwhile that they justify the expenditure of public funds.
3. The nature and consequences of the right allegedly infringed must be taken into account. Although the private client test, as such, is not directly relevant to cases under sections 7 and 8 of the Code, it is appropriate to consider whether the significance of the issues at stake to the particular client, viewed objectively, justify the likely costs of the case. For example, it is far more likely that a challenge under Article 8 concerning prolonged unlawful telephone tapping would satisfy the cost

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benefit Criterion than, say, a challenge under Article 5 alleging unlawful detention by a police officer if the detention was only for a very short period.