THE HUMAN RIGHTS ACT 1998

By Ann-Marie Christopher

Introduction

The UK ratified the European Convention on Human Rights 1950, in 1951 but the Human Rights Act 1998 which incorporates it into UK domestic law, only came into force on 2nd October 2000. Several months into the new era of Human Rights law, the legal system has not collapsed under the impact, but many organisations are still apparently unconscious of the effects of the European Convention on Human Rights (ECHR) on their businesses.

Public authorities' decisions and actions, including legislation could be open to challenge. The term 'public authorities' is widely defined in the Act to include *'any person certain of whose functions are of a public nature'*. However a point of debate is whether the Act does apply in private law actions. Those that believe that it applies in private law actions argue that the courts have a duty to apply Convention principles when they are adjudicating any dispute because:

- The courts are themselves 'public authorities' and are under a duty to act in a way, which is compatible with Convention rights.
- The European Court of Human Rights has held that states do not merely have an obligation to comply with the Convention but in some instances must intervene when a persons convention rights are being ignored by another private person (see *X and Y v Netherlands* (1985) 8EHRR 235).

The Act creates an uncertain legal environment for businesses. Arguably not only does it apply to courts, tribunals and most government and statutory bodies but also, as is not widely appreciated, many private and professional bodies too. Even if the Convention is not directly applicable to private parties, it seems likely that the courts may gradually apply convention principles in all forms of litigation as they have already been doing in developing certain areas of the common law. Companies and other private bodies, may therefore not only acquire new rights but their existing legal obligations could be affected.

How does the Act Apply?

The government's immediate aim in introducing the Act was to allow cases concerning Convention rights to be brought in the UK courts and tribunals. Previously claimants (companies and individuals) had to incur the cost and delay of taking their case to the European Court of Human Rights in Strasbourg. This court is

now only a court of last resort, if the UK courts fail to provide a remedy or if they declare legislation to be incompatible with the Convention and the government fails to remedy the situation. Therefore individuals and companies will now be able to rely on the articles of the convention incorporated by the Act in any legal proceedings against public authorities, not just in judicial review cases.

Under the Act:

- UK Courts will be required as far as possible to interpret all legislation, whenever enacted, in a way which is compatible with Convention rights.
- It will be unlawful for public authorities to act in a way which is incompatible with convention rights
- It will be unlawful for public authorities to act in a way, which is incompatible with Convention rights (section 6).
- When introducing legislation, government ministers will have to make a statement about the compatibility of the bill with Convention rights.

What areas of activity does the Act apply?

The areas and activities affected will be wide-ranging and not confined to minority and welfare rights. Amongst the other areas which over time could be affected are behaviour of courts, tribunals and arbitrators; regulatory and investigative activities; insurance matters; personal injury, medical treatment and disability; employment and discrimination; immigration; property; taxation; data protection; planning and the environment; and freedom of expression, liberty and security.

Impact on Financial Services

The likely effect on the financial services industry has been the subject of much controversy and debate. Companies need to be aware of the consequences of the Act as it will affect many areas of business from financial regulation, environmental issues, employee rights and internet policies to health and safety practices. In a nutshell, "convention rights" are of a particular interest to the financial services industry as a result of the following Articles : -

Article 6

A right in both civil and criminal proceedings to "*a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.* Under Article 6 the presumption is of a defendant's innocence and he has the right to be informed promptly of the nature and cause of the accusations against him. It also

gives him protection against self-incrimination, a higher standard of proof than the civil "balance of probabilities" and rights aimed at achieving "equality of arms" (ie adequate time to prepare for and present his case, to have witnesses attend and be examined, to have the help of an interpreter in court and a right to legal assistance which should be given free "when the interests of justice so requires").

"Criminality" does not necessarily involve an offence under the criminal law and a punishment imposed on a defendant by a court or other public authority (like the Financial Services Authority) could also be held to be a criminal penalty if it is severe enough, and thus within the remit of Article 6. All eight FSA Ombudsmen schemes have complained that the ECHR will force them to set up a formal hearing system and have all sides represented by lawyers. It will be a requirement under the convention to make provision for oral and public hearings, cross-examination and so on. In other words the very apparatus of a formal court procedure which the current ombudsmen schemes have been set up to avoid.

Article 7

Freedom from retrospective criminal offences and penalties. Article 7 incorporates the fundamental right, namely an individual's freedom from the arbitrary use of powers to convict. This is pertinent to financial services because of the status of the Financial Services Authority's principles. The FSA has indicated that it will attempt to punish those who break its rules rather than its principles, but that it also reserves the right to punish them for infringing those principles as well. These principles are not clearly defined. Many firms, as in the past, will continue to commit breaches without knowing that they are doing so. At some stage in the future this could result in retrospective legislation, the consequences of which were not reasonably foreseeable.

UK Regulators

Enactment of the Human Rights Act 1998 means that domestic legislation in the UK must be construed with the ECHR "so far as it is possible to do so". Arguably human rights will more than anything else, limit the powers of the FSA and other regulatory bodies (such as within Lloyd's), as public authorities. The UK financial services industry will perhaps see an increase in judicial review applications against regulators that act outside the spirit of the ECHR.

Amongst other things, persons brought before the FSA not only have a right to legal representation but also a right to silence. Similarly, the regulator may not enter and search premises without a warrant and cannot retain its fine income. The ECHR has

particular implications in respect of market abuse. For example, market users are protected against self-incrimination and it is also now accepted that compliance with the Code of Market Conduct is a complete defence under Article 7 of the convention.

The FSA is working to ensure that its current procedures will be compatible with the Convention rights. The Government has confirmed that the Financial Services and Markets Act is compatible with the Convention, however the FSA must also ensure that the exercise of its new duties and powers after N2 will also comply with the Convention.

Article 8

Respect for private and family life, home and correspondence. The whole Convention is important but real issues arise from the right to privacy, particularly when combined with the impact of the Data Protection Act 1998.

The impact for business, is set to be significant for the e-commerce sector. The internet is a relatively easy means of collecting information about those who purchase products and services (directly from internet users when register on a mailing list or taking part in an on-line competition; indirectly through 'cookies' and by users inputting data about themselves via newsgroups, bulletin boards and other public discussion forums). What will be the full implications of transferring data to and from different countries via the internet?

The right to privacy is conferred not only to the consumer but also in the workplace. In *Halford v UK [1997]* IRLR 471, the European Court of Human Rights found that the secret interception of calls made by Ms Halford from her office amounted to an unjustifiable interference with her right to respect for her privacy and correspondence.

Privacy violations could therefore extend to the surveillance of employees at work (reading their e-mails, checking the internet sites they visit, recording their telephone calls or installing video cameras to watch for 'dodgy' activities at work). Such actions are affected by Article 8 as all of these arguably involve a breach by the employer of privacy in the eyes of the European Court. This is of concern to the financial services industry and liability insurers in particular, where such practices are widespread and frequently necessary for the well-being and security of the organisation. The scope of Article 8 is also likely to extend to rules in relation to medical testing, dress regulations, anti-smoking rules and perhaps private conduct outside the workplace (such as homosexuality and mental illness).

Under Article 8, the employer has to show that any breach of the employee's right to privacy is justified on the grounds that it is reasonable, has a legitimate business purpose and could be justified for the smooth running of the business or for the protection of the rights and freedoms of others. For example, the routine surveillance of employees may go against Article 8, but such surveillance can be justified in the case of a misconduct investigation.

The legal waters have been muddied, by the passing of the Telecommunications Lawful Business Practice Regulations (SI 2000/2699). The regulations were designed to allow business to monitor some employee activity, without fear of breaching the right to privacy. The Regulations make it lawful for businesses to monitor or record certain communications where the telecommunications system is provided for use in connection with that business. However the interception is legitimate only if the system controller has made all reasonable efforts to inform every person who may use the telecommunications system in question, that communications transmitted can be intercepted. The government's decision not to force employers to obtain consent for most monitoring may reveal incompatibilities with the Human Rights Act, but only time will tell.

In future companies and organisations who routinely record calls and allow systems to be used for private communications, should ensure that staff consent to such monitoring, in the terms of service and the possibility of it occurring should be made clear to them. Personal use of communications should be addressed. The best way to achieve this is to formally introduce a workplace policy, which is read and signed by all, setting out exactly how surveillance will take place. Such a policy will go a long way towards complying with the law.

Article 10

A right to freedom of expression. Although the European Court has interpreted Article 10 in a restricted way, if an employer inhibits his employee's freedom of expression (by restricting his choice of clothing or anything else the employee says is essential to his self-expression) he may be contravening Article 10.

Compliance with the Act

Companies have a direct responsibility for the impact of their activities on their employees, on consumers of their products and on the communities within which they operate. This means ensuring the protection afforded by the Human Rights Act, in their own operations.

Compliance with the Act therefore also needs to be built into a holistic risk management culture. Companies need to continuously review their policies in all areas if they have not already done so, to ensure ongoing compliance with the Act.

Too many companies have made little or no effort to train their managers and staff in the practical application of these principles and have no system for assessing whether those principles are being implemented. Look around your organisation. How many employees are even aware of such policies? A survey by Cameron McKenna amongst the board members of FTSE 350 companies found that 24% of respondents have little or no idea how the Human Rights Act will affect their business.

Amnesty International recognised that the performance of a company's contractors, suppliers and partners (whether they are governments, government agencies or businesses) is perceived to reflect the performance of the company. The general public does not draw a distinction between them and the transitional corporations to whom they are contracted. Companies need to therefore promote similar standards through all third parties who act with them or on their behalf.

(b) Companies adopting human rights principles therefore need to:

- set forth procedures to ensure all operations are examined for their potential impact on human rights;
- provide safeguards to ensure that company staff are never complicit in human rights abuses;
- enable issues about human rights and the rule of law are raised with the FSA and other government authorities;
- provide for human rights training of all employees within the company;
- ensure it is pragmatic and specific rather than academic and vague.

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