



The British Institute of Human Rights (BIHR) is an independent charity that raises awareness and understanding about the importance of human rights.

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### The British Institute of Human Rights

School of Law,  
King's College London,  
26–29 Drury Lane,  
London WC2B 5RL

Tel: 020 7848 1818  
Fax: 020 7848 1814  
Email: [info@bihr.org.uk](mailto:info@bihr.org.uk)  
Web: [www.bihhr.org.uk](http://www.bihhr.org.uk)

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Registered office as above.

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# Editorial

The 'grave train' for lawyers that some said would follow as soon as the Human Rights Act came into force was quickly revealed to be a false prediction – or hope, depending on your point of view. A recent government review found that only around 2% of all appellate cases since the Act came into force had been classified as involving substantial discussion of the issues under the Act.

In fact many lawyers have been curiously cautious when it comes to using the Act. Perhaps due to a combination of the negative public and political climate that has built up around the Act, narrowness or hostility among some judges, the absence of any public debate in the run-up to the Act's introduction (which has limited individuals' understanding and therefore their ability to articulate and claim their entitlements inside or outside the courtroom) and of course the limitations of the current legal framework which fails to encompass the full range of economic, social and cultural rights.

Fortunately there have been trail-blazers who have embraced the new law and its underpinning principles; we feature three in this newsletter. Yogi Amin, a solicitor with Irwin Mitchell, worked on the high profile case involving the fundamental right to life of Ann Marie Rogers, a breast cancer patient who eventually secured the cancer drug Herceptin. Saimo Chahal, of Bindman and Partners, highlights the potential for human rights to open up public bodies to far greater scrutiny. In a recent case she represented a woman who challenged the breach of her right to a family and private life. A judge failed to consider the right for her medical records to be kept confidential when he ordered disclosure to the defendant, without giving her the right to be heard. This led to significant new rights being given to victims and third parties in criminal cases. And David Wolfe, a barrister at Matrix, has pushed the boundaries of our current legal framework. His cases have highlighted the right for children with special educational needs to be educated in mainstream schools, and in relation to a risky industrial development with serious environmental concerns he relied on positive obligations to protect the right to life, in the absence of a right to a clean and healthy environment.

These cases paint a richer picture than the usual depiction of rights being heavily relied on by criminals, terror suspects or asylum-seekers. They show how human rights can empower people by giving them a clear sense of their entitlements in relation to public services, and challenge public bodies to be more open about the decisions they make. Above all they reveal how one person's case can clarify and strengthen the standards that we can all expect from a public body in future. An individual's willingness to challenge authority can ripple positively throughout and beyond their immediate community.

**Katie Ghose**  
Director

# BIHR news

## **New Education Officer for BIHR**

Helen Trivers joined the BIHR team in October, to take up the newly created post of Education Officer. As reported in the summer edition of *BIHR Brief*, the Department for Constitutional Affairs (DCA) is funding the development of an exciting 'Human rights in schools project' which will see Helen work with a range of education stakeholders including secondary school teachers and young people in England and Wales. Helen has experience in education, both as a classroom teacher and at policy level.

## **BIHR conference: Human rights visions of equality**

Planning is currently underway for a BIHR annual conference, with the first taking place in spring 2007 – ahead of the launch of the Commission for Equality and Human Rights (CEHR) in the autumn. The 2007 conference, 'Human rights visions of equality', will draw on BIHR's unique experience of putting human rights principles into practice. We hope that it will help people to understand what difference a human rights approach to equality can make.

Aimed at all those working on equalities and human rights issues (including the voluntary and community and public sectors, politicians, civil servants and other policymakers), the conference will be designed so that delegates interact, share information and expertise, and come away with practical skills and knowledge that can be put into action immediately in their everyday work.

Further information about the conference will be distributed and added to our website as it becomes available.

## **New BIHR patron to speak at Annual Reception**

We are thrilled to announce that Cherie Booth QC is to be a patron of BIHR, and will speak at our Annual Reception on 23 November. The reception, generously sponsored by Clifford Chance and Matrix, will see BIHR share our fresh vision for human rights in the UK. Please note that the event is invitation only.

## **Raising the profile of BIHR**

Over the past few months we have been working hard to increase our profile and presence at external events, including co-hosting and speaking at the following:

### **Labour party conference**

We jointly hosted a reception at the Labour party conference with Carers UK, the Disability Rights Commission and the Equal Opportunities Commission. Entitled 'Caring about equalities and human rights', it included a keynote address by Meg Munn MP, Minister for Equalities.

### **Human rights summit**

In early November we jointly hosted a human rights summit for the voluntary and community sectors, with NCVO (National Council for Voluntary Organisations), the largest general membership body for charities and voluntary organisations in England. The summit brought together the Chief Executives of leading NGOs to help increase their human rights awareness and engagement in the run up to the CEHR.

### **Older people: public law and human rights**

On 9 November BIHR, Matrix and Help the Aged hosted a round table discussion bringing together lawyers and voluntary sector organisations. The meeting discussed the practical problems that older people face in our society and whether public and human rights law can address these, and looked at the barriers to accessing effective legal remedies that older people face. It is hoped that it will begin a dialogue that will encourage greater use of public and human rights law by older people, aided by further meetings and an on-line 'community'.

### **DCA conferences: Human rights and human lives**

BIHR was involved in shaping two October conferences for public sector workers, hosted by the Department for Constitutional Affairs in Manchester and London. Our director Katie Ghose spoke at both events. See Human

rights news on page 4 for more details of the conferences and new DCA human rights publications.

### **LAPG conference**

In October, Katie Ghose spoke at the Legal Aid Practitioners Group (LAPG) annual conference in Cardiff – 'Mapping the post-Carter world'. Drawing on her book *Beyond the Courtroom*, Katie spoke both to the main conference and at a session organised by Young Legal Aid Lawyers & Trainee Solicitors Group about 'challenging authority' – how the legal profession can effectively campaign to influence controversial proposals relating to legal aid practice.

### **Age Concern Cymru**

Katie Ghose spoke at Age Concern Cymru's Age Equality and Human Rights conference and Annual General Meeting in October in Cardiff. The conference focused on the Human Rights and Age Equality Agenda and its implications for older people.

### **ILPA conference**

In February 2007 the Immigration Law Practitioners Association (ILPA), with support from BIHR, will host a conference focusing on the interpretation and application of Article 8, and the fundamental right to respect for family and private life that it grants from the perspective of migrants and asylum-seekers.

BIHR will speak at the conference on the practical impact of Article 8 from a grassroots perspective, drawing on our experience of working with the public sector and the voluntary and community sectors. For further information about the conference please contact ILPA, [www.ilpa.org.uk](http://www.ilpa.org.uk).

# Beyond the courtroom

**Katie Ghose** looks at how lawyers can work with organisations to raise awareness and use of human rights

Lawyers should always look beyond the courtroom when new laws come on-stream.

Pooling expertise among lawyers, advisers and those working in the voluntary sector is the best way to tease out their full implications for citizens' lives. Lawyers can help predict how the courts may interpret a law whilst organisations have a critical role to play in empowering citizens to become informed and claim their rights.

## A different kind of law

It was even more crucial for this kind of joint working to happen when the Human Rights Act (HRA) came into force. The HRA is a different kind of law, and not just because of its ability to 'trump dominant legislation'. It puts a range of social and economic situations squarely in the courtroom – and via the mass media with the public. In balancing individuals' rights with wider group and societal considerations, judges have to take a broader view, examining evidence of trends in society as a whole. Lawyers rely on the depth of information and expertise that specialist voluntary organisations can bring as well as their knowledge about the political context in which laws are made and interpreted. The bar on interest groups taking HRA cases in their own name makes it even more important that lawyers encourage organisations to intervene or give expert evidence as appropriate. By giving expert evidence in a recent challenge to the narrow interpretation of public authority for the purposes of the Human Rights Act, BIHR was able to show, for example, that the case's significance extended to the vast majority of older people living in residential care, as well as to inform the court about the broad political and legal consensus in favour of a wider interpretation. (*R(Johnson) v Haverling LBC.*)

Outside the courtroom, only joint working can ultimately achieve the cultural change it was hoped the Human Rights Act would

herald. After all, this is a law which was supposed to shift the balance of power between citizen and state. Instead of the state being able to do anything it liked unless expressly prohibited, people would be empowered to hold public servants to a clear set of positive, minimum standards without having to resort to legal action. Ironically, the public focus on a few legal cases has helped to promote the opposite message. This in turn has limited lawyers' ability to use the Act creatively. At one end of the process, individuals fail to see human rights as something that can help them with a knotty problem. At the other, judges are often keen to narrow the opportunities for arguing human rights points rather than encourage the law to develop. In the middle, there is not enough translation of legal decisions into practical guidance that could help public bodies do the right thing first time round.

## Principles versus practice

Confining human rights largely to the level of individuals taking legal cases has had another damaging effect. It has distracted us from the 'practice' of human rights by which organisations take the principles and standards enshrined in law as their starting point and then develop their own 'human rights-based approaches'. It therefore relies heavily on our domestic law staying intact and on the courts robustly developing fundamental principles like dignity and fairness. Streaming human rights thinking into the lifeblood of organisations is all about putting these principles into practice. Perhaps the next challenge is to put 'practice into principles'. Being armed with the practical knowledge of what dignity 'looks or feels like', or the fulfilment of a person having their family or private life truly respected, can only aid lawyers as they test the boundaries of our law and help it achieve its full potential.

## Further information

There are numerous ways in which lawyers can work with others to make legal standards more of a practical reality, not least by promoting their 'ordinary' human rights cases relating to people's health, care, education and housing needs. In this spirit, BIHR recently launched a new lawyers' network ('Legal Friends') which aims to bring together lawyers and organisations with wide-ranging interests in human rights.

To become a Legal Friend of BIHR please complete the form on page 15. For further information or to discuss potential partnership working (including sponsorship opportunities) with your law firm or chambers please contact Jo Morgans on 020 7484 1924 or at [jmorgans@bihr.org.uk](mailto:jmorgans@bihr.org.uk).

This article is based on *Beyond the Courtroom: a lawyers' guide to campaigning*, by Katie Ghose, published by Legal Action Group in 2005. Details from [www.lag.org.uk](http://www.lag.org.uk)

## CEHR Consultation seminar for London's Voluntary and Community Sector

Race On The Agenda (ROTA), with support from BIHR and others, is hosting a free consultation and information event about the new Commission for Equality and Human Rights (CEHR), on 11 December.

The consultation will engage and inform the London voluntary and community sector about the work of the CEHR.

Keynote speakers are Sheila Rogers, Department for Communities and Local Government and Head of Transition Team, CEHR, Elizabeth Balgobin, London Voluntary Service Council and Jane Goldsmith, Independent Voluntary Sector Expert.

For more details visit [www.lvsc.org.uk](http://www.lvsc.org.uk)

# Human rights news

## UN Convention on Disability Rights to be finalised

The UN Convention on the Rights of Persons with Disabilities is expected to be ratified in December, after five years of negotiations. The first human rights treaty of the 21st century, it aims to secure the rights of disabled people around the world in areas including access to justice, education, health services and transport. It also guarantees disabled people the same right to life as everyone else.

Countries signing up to the Convention will have to enact laws and other measures to improve disability rights and get rid of legislation, customs and practices that discriminate against disabled people. A UN monitoring body will judge whether governments are fulfilling their obligations under the Convention, and it is hoped that groups working within these countries will use this convention as a key campaigning tool.

Disability campaigners, including the UK's Disability Rights Commission, have welcomed the Convention, which hopes to change attitudes so that the focus is on equality, rights and freedoms rather than welfare and charity. Chairman of the ad-hoc committee, ambassador Don MacKay of New Zealand, says: '[The Convention] will force states to develop a different way of thinking about disability issues.'

## New Scottish legislation and human rights commission

The Scottish Parliament debated the final Stage of the Scottish Commission for Human Rights (SCHR) Bill in early November. The Commission, when appointed, will liaise with the Commission for Equality and Human Rights (CEHR) but remain independent and accountable to the Scottish parliament. The Commission will be responsible for promoting awareness and understanding of, and respect for, human rights.

The Bill is expected to be given Royal Assent in December.

The Commission will be able to choose which issues are investigated and reported upon within the tight limits prescribed by the Bill. The Equality Bill that created the CEHR states that the CEHR will not be able to act on human rights in relation to matters that are devolved to the Scottish parliament, unless it has the consent of the Commission. However, it is expected that the two bodies will work closely together and will agree a Memorandum of Understanding, when the SCHR is set up.

A separate new bill to prevent unsuitable people from working with children and adults was published in September. The Protection of Vulnerable Groups (Scotland) Bill takes forward key recommendations from Sir Michael Bichard's report following the Soham tragedy.

The Bill builds on existing legislation, particularly the Protection of Children (Scotland) Act 2003 and Part V of the Police Act 1997. It extends the protection of children and introduces new safeguards for vulnerable adults.

It closes loopholes in current vetting arrangements and provides duties in relation to sharing child protection information, ensuring awareness of best practice. The introduction of a Single Executive Agency will support the new vetting and barring scheme and bring together Disclosure Scotland (the vetting function) and the Central Barring Unit (the barring function).

## Ban on age discrimination at work

On 1 October new regulations came into effect banning age discrimination in the workplace. The Employment Equality (Age) Regulations 2006 follow six years of debate on how age discrimination should be tackled, and fulfil the UK's obligation to implement the European Employment Directive 2000 in relation to age.

The legislation applies to employers and training bodies and covers both overt (e.g. making someone redundant for being too old) and indirect (e.g. making an ageist comment) discrimination. It will be unlawful to discriminate against an employee under the age of 65 on the grounds of age, and employers will not be able to specify that a new recruit should be above or below a particular age. However, discrimination may be allowed if it is a 'proportionate means of achieving a legitimate aim'.

Controversially, the regulations include a default retirement age of 65 or above at which it is legal to retire people. The minimum wage bands will also remain, to encourage young people to remain in education.

The new regulations leave age behind the other five main streams of equality legislation, as the only one not already or soon to be covered by protection from discrimination in relation to goods and services. There are also existing or soon to be introduced duties on public authorities to promote equality in race, disability and gender, but not age. Organisations including Age Concern and Help the Aged are campaigning for such a duty on age to be included in the Single Equality Bill that the Government has committed to introduce in this parliament.

### Iraqis forcibly removed despite persecution fears

In September 32 Iraqis were forcibly removed from the UK on military aircraft, despite fears that they may face persecution in Northern Iraq for their opposition to the major political parties.

Home Secretary John Reid had earlier stated that he would ignore any applications for judicial review and only those whose applications had been accepted by the courts would be removed from the flight. Despite this, a High Court judge granted five out of six applications for an injunction, blocking their forcible removal. However, the Government had prepared for legal challenges and filled the five places with other Iraqis who had been served deportation notices and detained the week before.

The flight has been condemned by refugee charities and Iraqi organisations. Maeve Sherlock, former Chief Executive of the Refugee Council, said: 'Not only has the Home Office made it clear that they are willing to take the risk of returning someone who has legal proceedings outstanding, we cannot be sure that all those returned have had access to legal advice at all.'

The asylum seekers were returned to the 'safe area' of the Kurdish Regional Government, but a spokesperson for Amnesty International said: 'Serious human rights violations have been committed in Kurdish areas in Northern Iraq. To assume that people can be returned to Iraq in safety and with dignity, just because they are returned to Kurdish areas, could have grave implications for people's safety.'

### Trevor Phillips appointed as Chair of CEHR

Trevor Phillips has been announced as the Chair of the new Commission for Equality and Human Rights (CEHR), to become operational in late 2007.

The CEHR will inherit the responsibilities of the existing equality commissions: the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission. It will combine these with responsibilities for rights in relation to age, sexual orientation, religion and belief as well as a robust suite of powers and responsibilities in relation to human rights. The intention is to provide a single point of contact for individuals and organisations and to become a powerful overall champion for equality and human rights issues.

Currently Chair of the Commission for Racial Equality, Trevor Phillips is also Chair of the Equalities Review which is examining the root causes of inequality in our society and is expected to issue its final report early next year.

Mr Phillips notoriously once described the CEHR as a 'train wreck waiting to happen', and his appointment has been greeted with dismay by some, including disability and race campaigners. However, speaking as his chairmanship was announced he said: 'I am thrilled to be asked to lead this completely new organisation which I hope will inherit the best of its predecessors and be enriched by the contributions of the new equality strands.' Speaking at a Labour party conference fringe meeting, he said that he wanted to promote the 'version of human rights' that happens in the 'real world', adding: 'We must make sure that the language and practice of human rights are central to the new organisation.'

### New DCA human rights handbooks for public authorities

The Department for Constitutional Affairs (DCA) launched two handbooks for public authorities at two conferences in October.

*Making sense of human rights – a short introduction* is designed for staff in public authorities to assist them in working with the Human Rights Act 1998. It gives a brief introduction to human rights for use in straightforward situations. More detailed guidance can be found in the human rights handbook for public officials, *Human rights: human lives*.

*Human rights: human lives – a handbook for public authorities* is a more in-depth guide designed to assist staff in public authorities to implement the Human Rights Act 1998.

The DCA's October conferences, aimed at public sector workers, discussed how to adopt a human rights approach that could help them in their service delivery role. They followed the recent review of the Human Rights Act by the Government, which concluded that there is a need for further training and awareness raising in relation to human rights – especially among decision makers in public authorities.

Handbooks can be downloaded from [www.dca.gov.uk/peoples-rights/human-rights/publications](http://www.dca.gov.uk/peoples-rights/human-rights/publications)

# Interview: Human rights legal champions

The average person might struggle to describe a legal case where the Human Rights Act (HRA) has been used to help 'ordinary' people – the Act is after all widely perceived as a charter for 'criminals, chancers and celebrities', irrelevant to everyday life. But away from the glare of the media there are many battles being fought by lawyers on behalf of clients who won't hit the headlines – clients who include disabled people, older people, and those with mental illness.

We have spoken to three human rights legal experts who have worked on – and won – cases drawing on the Human Rights Act: Saimo Chahal of Bindman and Partners, Yogi Amin of Irwin Mitchell and David Wolfe of Matrix chambers. Continually striving for better standards, their groundbreaking work has secured fair treatment and a better quality of life for their clients, and set standards for the future. Successes include securing access to leisure facilities for disabled people, and ensuring the right to family life (Article 8) was taken into account when considering whether to provide care for a patient at home or in a residential facility.

Much of BIHR's work in recent months has focused on defending the Human Rights Act from widespread attack (see *BIHR Brief*, summer 2006). In our experience however, these attacks are often based on a misunderstanding of the Act, particularly in relation to balancing the rights of the individual with the wider community. Worryingly, it is not just the general public who are ill-informed – key decision-makers all too often lack a basic understanding of the principles of the Act, resulting in bad practice and policies that disregard the basic rights of vulnerable people such as those in care homes.

But a lack of understanding is not the only barrier to successful implementation of human rights principles. Often the people who rely on the Human Rights Act the most are the ones who find it hardest to access appropriate support and assistance. They are also likely to depend on legal aid if they are to take their cases to court.

The proposed government shake-up of legal aid however – including cutting fees, exchanging

hourly rates for fixed fees and an overhaul of the funding of criminal defence firms by introducing competitive tendering – could make accessing legal aid harder than ever before. Many law firms argue that they will have to close down if the proposals go ahead, with Citizens Advice predicting that one in five of the 250 bureaux funded by the Legal Services Commission could be in danger if the fees are introduced.

Family lawyers group Resolution says that 'the few remaining legal aid firms in south London typically turn away up to 20 people a day because their books are full and there is no one else to whom they can refer cases'. The quality of legal advice on offer is also expected to suffer as it will no longer be economically viable for respectable law firms to take on certain cases.

Yogi Amin says that 'the future for legal aid is depressing', while Saimo Chahal argues: 'These proposals, if introduced, will reduce access to justice and create disincentives to take on the more complex and time consuming cases so that human rights issues may not get an airing.'

As the interviews on the next three pages show, there is still a long way to go before the Human Rights Act fulfils its potential. But as it continues to withstand attempts to scrap or weaken it, and slowly becomes better understood and applied, we can be hopeful that human rights ideals – based around respect, fairness and other simple, uncontroversial principles – will one day be part of everyday life.

As Saimo Chahal notes: 'There is a strong developing "culture of human rights" which is here to stay and which is fundamentally about respecting human rights, treating people with dignity and empowering ordinary people.'

*key decision-makers all too often lack a basic understanding of the principles of the Act*

*the future for legal aid is depressing*

*The Act has made the actions of public authorities more open to scrutiny*



**Saimo Chahal** is a partner and head of the Civil Liberties and Social Welfare team in the Public Law and Human Rights department of Bindman and Partners. Saimo won

the 2006 Legal Aid Lawyer of the year award in mental health for repeatedly pushing the boundaries of the law on behalf of vulnerable individuals, including those with mental illness and learning difficulties.

#### **Describe a case/cases where you have used the Human Rights Act for your clients.**

The Human Rights Act (HRA) has made the actions of public authorities more open to scrutiny and more accountable. In a recent case – *R (TB) acting by her litigation friend the Official Solicitor v Stafford Crown Court* – TB was able to challenge the breach of her Article 8 rights (to family life) by a Crown Court judge who failed to have regard to her right to confidentiality of her medical records, when he ordered disclosure to the Defendant, without giving TB the right to be heard and to object to the disclosure. The case has widespread implications and gives new rights to victims and third parties in criminal cases.

In another case – *R (LD) v Secretary of State for the Home Department (CA)* – a prisoner, who was inadequately cared for at HMP Pentonville, attempted suicide resulting in catastrophic brain damage. LD again relied on the Human Rights Act to challenge the Secretary of State's failure to carry out a full and independent investigation into his suicide attempts in breach of Articles 2 (right to life) and 3 (right to be free from inhuman and degrading treatment) of the ECHR. The High Court ordered a public inquiry which was upheld on appeal. The case is significant because it has wide reaching implications for attempted suicides in prison and police custody as well as for detained mental patients. The case was widely reported in the press because of the use of the Human Rights Act to assist vulnerable people.

#### **What difference do human rights make?**

Using the HRA can make a significant difference particularly in cases involving relatively inarticulate, powerless people. Asserting their rights through the use of the HRA has added an extra dimension

to the cases which has proved very successful, for example when challenging actions of public authorities such as decisions to close a day centre for people with mental health problems and clients with other disabilities.

#### **What kinds of problems do people have accessing human rights/human rights legal assistance?**

There is a pressing need for more lawyers to be trained effectively to use human rights legislation. There are also concerns about the future of areas of law such as mental health, public law and social welfare law. Fewer young people are interested in a career in these areas given the uncertainties surrounding legal aid. The Legal Services Commission (LSC) and DCA proposal of fixed fees for civil, including public law controlled, work is adding to the problems.

#### **If you could make one policy or legislative change to help build a culture of human rights, what would it be?**

An extension of the HRA to provide that legislation that has been declared incompatible with the convention should cease to have effect 12 months after such a declaration – so that governments would be forced to give legislative effect to such declarations.

#### **What was your proudest or most memorable experience as a lawyer?**

A few months after I qualified as a solicitor, I represented a young black man at his employment tribunal. I felt passionately about how badly he had been treated by his employer, British Transport. He had been robbed by a gang of youths as a bus conductor and had resisted, trying to prevent the robbery of his employer's money. The assault resulted in psychological trauma, sickness and finally, dismissal by his employer. He looked so vulnerable as we faced a row of men in pinstriped suits representing the employer with their very experienced solicitor. But we won and when the Chairperson announced that we should adjourn to agree damages neither of us could believe it! Victory was made even sweeter when the BT solicitor came over to congratulate me and tell me that it was a very long time since British Transport had lost an ET case.

*Decision-makers should put themselves in the client's place*



**Yogi Amin** is an Associate in the Public Law Unit at Irwin Mitchell solicitors. Yogi specialises in judicial review work across a wide range of subjects.

### **Describe a case where you have used human rights for your clients.**

In the case of *Rachel Gunter v. South Western Staffordshire Health Authority*, the Primary Care Trust was empowered by the National Health Service Act 1977 to use a voluntary organisation such as an independent user trust to provide services to a severely disabled patient. The trust was obliged to consider the impact of Article 8 (right to family life) of the European Convention on Human Rights (ECHR) when deciding whether to make arrangements for the provision of nursing care to the patient at home or to remove her to a residential setting.

### **What difference do human rights make?**

They can make public authorities and decision-makers pay attention to this aspect of decision-making. This should lead to a fair consideration of the individual's point of view, and a more detailed examination of his/her circumstances. For example, protesters have been in the news lately, and the question arises of how fairly they are being treated. Such cases are often judged arbitrarily, when decision-makers looking through the lens of the Human Rights Act (HRA) should put themselves in the client's place.

From another angle, public authorities are service providers, who should see service users as fellow members of society. There is a need for public education so that the concept of human rights becomes incorporated into official thought and actions. At the same time, the HRA is often shown to conflict with English law, which can lead to a declaration that human rights law must prevail. This will give confidence to people 'out there' that they do have rights and can assert them.

### **What kinds of problems do people have accessing human rights/human rights legal assistance?**

Legal aid is being reduced, with the result that human rights are and will increasingly be the preserve of specialists. Some firms will opt out of the legal aid system altogether, while Irwin

Mitchell is staying with it, and contracting with the Legal Services Commission for human rights work.

Correspondingly, there will be fewer specialists, because the new generation of lawyers will not opt for the study of human rights. While it is a 'sexy' topic, it may be badly paid, and the reliance on willing law student volunteers to give time at Law Centres or pro bono initiatives will further downgrade the status of human rights as a career option. The future for legal aid in general is depressing and even the most idealistic of young lawyers will lose interest in it.

### **If you could make one policy or legislative change to help build a culture of human rights, what would it be?**

The *Leonard Cheshire* case of 2002 established that private care homes were not subject to the checks and balances of the HRA, which apply to public authorities. I would like to see Section 6.3.b of the HRA clarified. A wider interpretation of hybrid public authorities should include care homes that undertake public functions when caring for and accommodating vulnerable individuals. There have been many comments on the case, to the effect that the judgement was too restrictive, and will be prejudicial to public understanding of the working of the HRA.

Vulnerable patients should not be penalised because they are in private rather than local authority care homes, particularly as such care is increasingly being farmed out to private companies. It should be made clear that everyone is included in the protection of the HRA.

### **What was your proudest or most memorable experience as a lawyer?**

Most memorable is the media attention given to the Herceptin judicial review cases (*Rogers v Swindon PCT*) I worked on, both at High Court and Court of Appeal hearings. There was general satisfaction with the outcome, with the patient receiving the drugs that her doctor prescribed. Of course, this is not the end of the matter, as there will undoubtedly be other such cases and other drugs, which will need to be fought all over again. But the case itself was valuable, given the division in law and public opinion on the subject.

*Our current legal framework does not yet properly recognise the full range of what I consider to be 'human rights'*



**David Wolfe** is a barrister at Matrix. He is also a part-time Chair of the Special Educational Needs and Disability Tribunal, and a part-time Commissioner at the Legal Services Commission.

### **Describe a case where you have used human rights for your clients.**

I see 'human rights' as including economic and social rights, which go beyond the rights protected by the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA).

I have been involved in cases where disabled people have sought access to leisure facilities and to the support they need for 'independent living', which built on the Article 8 ECHR (right to respect for family life) of the Human Rights Act. But what is really needed is an express right to 'independent living' for disabled people.

Similarly, a case in support of a challenge to a risky industrial development, involving Liquefied Natural Gas (LNG) close to homes in Wales, relied on the positive obligations to protect life in Article 2 ECHR. But what we really need is a direct and express right to a clean and healthy environment, such as exists in other countries.

### **What difference do human rights make?**

A rights-based approach can provide a framework within which to balance individual and collective entitlements against the wider public interest in a coherent way. It starts from the position that individual rights will be secured where possible.

But for that to become meaningful and effective, the civil, political and other rights set out in the ECHR in the aftermath of World War II (and subsequently developed through a 'civil liberties' tradition) need to be complemented by wider economic and social rights of relevance today.

### **What kinds of problems do people have accessing human rights/human rights legal assistance?**

Firstly, our current legal framework does not yet properly recognise the full range of what I consider to be 'human rights'. Secondly, decision-makers are not yet sufficiently trained and aware of how to give effect to human rights in their decisions. Thirdly, our current system of courts and tribunals is not sufficiently accessible

or geared to applying a rights based approach across the board – we lack, for example, proper local environmental tribunals where people could easily argue in support of their right to a clean and healthy environment. Finally, within our existing court system the cost of litigating and the limits on 'legal aid' mean few people can pursue their complaints in court when decision-makers have gone wrong.

### **If you could make one policy or legislative change to help build a culture of human rights, what would it be?**

A statutory statement of rights and values (or a 'bill of rights'), building on the Human Rights Act, would help to finish the job that the Act started and allow wider economic and social rights to be set out in clear terms.

### **What was your proudest or most memorable experience as a lawyer?**

Three examples of using the existing law to vindicate rights going beyond those set out in the ECHR/HRA:

Firstly, acting in *MH v Special Educational Needs and Disability Tribunal* which went a long way to securing a right for 'inclusion' – namely a right for children with special educational needs to be educated alongside their peers in mainstream school.

Secondly, acting in *Gregan v Hartlepool Borough Council* where the court quashed decisions which would have allowed scrap US naval ships to be dismantled in Hartlepool (potentially prejudicing local people's rights to a clean and healthy environment) without that activity having been subject to full and proper scrutiny and assessment.

Thirdly, acting in challenges to decisions about proposals to set up Academies (which would have led to significant reductions in the educational rights and protections given to parents and pupils), which have prompted the Department for Education to move to close the gap between the rights enjoyed at new Academies and those at maintained schools.

# Do wicked people have human rights? Four cases of the South African Constitutional Court

Taken from the BIHR Paul Sieghart Memorial Lecture held in July 2006, delivered by **Justice Albie Sachs**

There was a provision at the end of the Constitution, which became known as the epilogue. It said that we cannot forget the many untold injustices of the past, the divisions, the hatreds, the persecutions, but we respond to them in the spirit not of vengeance and retaliation, but of what is called 'ubuntu': the spirit of reconciliation. To this end, parliament may take measures in that spirit to deal with crimes of the past. The new parliament chose to establish the Truth and Reconciliation Commission and grant amnesty to those who came forward. If they acknowledged what they had done, told the truth as they believed it and showed that what they did was in the course of political activity, then they would be entitled to amnesty.

## AZAPO

AZAPO was an organisation that objected to this amnesty. It argued that these were people who had committed horrendous crimes, who had violated every principle of human rights, systematically over a long period of time. AZAPO argued that such amnesty devalues the rights to respect for life and limb. They also argued that the provision in the epilogue could justify an amnesty against criminal prosecution, but not take away the rights of the victims to sue the perpetrators for damages in a civil action. These were the issues that our court had to respond to.

We decided unanimously that the spirit of the epilogue, the context in which it was drafted and the whole context of easing our country into democracy, meant that for the Truth Commission to be effective some form of indemnity in criminal and civil proceedings could be granted.

The judgement was written by the deputy president of our court, Ismail Mahomed. He found truly poetic legal language to do this and in a way it was a poetic moment for our country. You had to deal with extreme pain and anguish

if you were to be honest and not just sweep under the carpet the terrible humiliations, degradations and hardships that people had suffered. On the other hand there was a great need for truth, and if the persons responsible for these terrible crimes were not given the promise of being free from prosecution we would never get the truth or move forward. The judgement described how there would be 'an acknowledgement of criminality by each individual, being punished by shame, if not being punished by prison'. It needed language poetic, historic and legal jurisprudential in character, all integrated explaining why our country had opted for this very unusual path of balancing out the getting of truth with amnesty.

## Mohamed

The next case involved a man called Mohamed who worked as a pastry chef in Cape Town. It turned out that there was very strong evidence that he'd been part of a group, now known as Al-Qaeda, that were involved in the bombing of the US Embassy in Dar es Salaam in 1998. The embassy was blown up and 67 people were killed, most of them Tanzanian. It was one of the most horrible episodes of that period.

Mohamed had come to Cape Town under an assumed name, been given political asylum and was now working quietly as a pastry chef. The South African authorities, working with the FBI, arrested him as an illegal immigrant and handed him over to the United States. His boss at the bakery didn't know what was going on. He tried to get a lawyer, but the lawyer was turned away. He went to the Cape High Court but was told that Mohamed was an illegal alien being deported and that was the end of the matter.

We were extremely troubled by how this process had been handled. There was no question that Mohamed should be put on trial, that he should stand trial in America and that he had no right to stay in South Africa, but the manner of his deportation worried us. Why

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*however abominable the behaviour, there is a human being behind it*

*one of the fundamental rights is the right to life*

was he not allowed access to counsel? The more serious the charge, the more important it becomes to assert the principles of law. Why was the term used to describe the proceedings 'rendition', which has no precise legal meaning? It's not 'deportation', and it's not 'extradition' and so the considerations of neither process need be followed.

Our court had decided in the very first case that we heard that capital punishment violated core principles of our bill of rights. However abominable the behaviour, there is a human being behind it. Capital punishment violates our human rights. Just as the officials of our country have no right to hand over someone to face torture in another country, they have no right to hand over someone to face capital punishment. An assurance should have been obtained from the American government before Mohamed was handed over that if found guilty, he would not be executed. An Al-Qaeda co-conspirator discovered in Germany was in fact given that assurance. Why? Because that was Germany, a powerful, important European country. With us it's just 'rendition'.

We sent a copy of our judgement to the trial court judge in America, but this happened after Mohamed had been found guilty and there was a big debate in New York as to whether the jury should have access to the judgement and whether it was relevant to the decision they now had to make about capital punishment. In the end I believe they did have access to the judgement and they split 7/5. Mr Mohamed received a sentence of life imprisonment.

I might mention that we gave this decision at a time when bombs were going off in Cape Town and when our own security was a serious concern. It wasn't as though we were living in a beautiful never-never land where such things don't happen. For us though it was a matter of principle, and not just in abstract. In the past there was always an emergency to justify the 90 Day Law, the Public Security Act, the

Terrorism Act... and they were never enough. The state got its extra powers and they were never enough. I had the pleasure of being locked up first under the 90 Day Law and then under the 180 Day Law and afterwards they didn't even pretend it was 180 days, it was indefinite detention. It's never enough, once you make that breach.

### **Basson**

The third case involves Dr Wouter Basson – the newspapers called him 'Dr Death' – who was the head of South Africa's bacteriological and chemical warfare programme during the last ten years of apartheid. There were two batches of charges against him, the first dealing with fraud and the second with the development of toxic chemical and bacterial agents for purposes of eliminating opponents of the South African government in neighbouring countries. It was argued that he was given money to acquire chemicals and defensive agents internationally, but that he had creamed off a lot of that money, all secret funds, and acquired a hotel, a liquor store and five or six different companies for himself. He claimed that he had registered these companies in his name in order to protect people he had bribed who couldn't receive the money in their own countries. The judge who heard the matter believed him. The prosecution appealed on the basis that the judge was biased in favour of the accused.

The more serious charges related to the development of poisons through experimenting on prisoners. There had been up to 200 captors who had been injected by him or with poison that he had supplied. It paralysed them and they were then taken in planes and dropped over the ocean. The Judge said, 'I am looking at the charge sheets and you are alleged to have conspired with others in South Africa to murder Namibians in Namibia. That is not a criminal offence; conspiracy on your soil to commit an offence in another country is not a criminal offence'. And he quashed the charges. The prosecution appealed

*these men had gone into the lion's den and were surprised to find there was a lion there*

*to demand of a foreign government that they apply our bill of rights is a very extraordinary proposition*

to the Supreme Court of Appeal which dismissed the appeal, largely on procedural grounds. They refused to hear the challenge largely on the basis that the documents weren't properly in order and were delivered late and incorrectly set out. The state then appealed to our court.

The first question was whether the matter was a constitutional issue and our court was divided. There were several who said that it was not in itself a constitutional matter, but that the powers of a court on appeal are. The majority of the court said that our constitution requires the state to promote and assist in the observance of fundamental rights. One of the fundamental rights is the right to life, so the state is under a duty to prosecute and if a Judge gives a ruling that frustrates that prosecution then the Judge is raising a constitutional question.

I agreed with the majority, but I was dissatisfied. South Africa has a duty under the common clause number 3 in the Geneva Convention to prosecute war crimes. The question of 'a conspiracy on your soil to commit war crimes on another soil' does engage the constitution when you read it together with our customary responsibilities under the Geneva Convention.

Having said this I then went on to say that the fact that the crimes were so grave makes it not less important, but more important that the right to a fair trial is upheld. So we felt we could hear the matter as a constitutional matter – and almost regretted it when we received 10,000 pages of record, mostly in Afrikaans. In the end we couldn't continue with the case. To show bias you have to have a particularly compelling case and this one was not. We decided that the Supreme Court of Appeal, in weighing up whether or not to hear the application in relation to the quashing of the charges, gave far too much consideration to technical defects and didn't give enough consideration to, or even mention, the theme of war crimes. They saw this as just another criminal matter like the ones they had to hear day in and day out.

And at that stage, years had passed and the evidence was very stale. It was, unfortunately, not

worth proceeding, but the law was corrected and the theme of accountability for war crimes was firmly established.

### **Kaunda**

The last case is one that many of you will know something about for probably the most trivial of reasons – Mark Thatcher.

A plane from South Africa carrying 60 or 70 combatants, apparently on their way to Equatorial Guinea to overthrow the President there, landed in Zimbabwe. They were captured and put in prison in Zimbabwe. It was a very poignant situation: here were people who in an earlier phase were being called the dogs of war. They were great enemies of independence and self determination in Africa. They were people who were willing, simply for the money, to go to another country and kill. Willing to destroy and overthrow a government. Their families now were rushing to our court and they could see white and black, and they were worried. They claimed that their loved ones were being ill treated in Zimbabwe and, worse than that, they faced being deported to Equatorial Guinea where there would be a show trial and executions. And they wanted the Constitutional Court of South Africa to protect them.

I made a, possibly incautious, comment from the bench – sometimes you make these comments and you get criticised by your colleagues. You take it on the chin, but you are not sorry you actually said it. I said that it seemed to me that these men had gone into the lion's den and were surprised to find there was a lion there. It was very bizarre that people, who would apparently completely defy any rule of legality, were now running to the law for protection. But having got that off my chest, I could now look at the situation.

The first argument was that the South African Bill of Rights outlaws torture, it outlaws capital punishment and it guarantees a fair trial. We were asked to insist that the accused be extradited to stand trial in South Africa. We couldn't see how we could give extra territorial jurisdiction to our bill of rights. To demand of

*there isn't a formula, but  
there is an approach*

a foreign government that they apply our bill of rights is a very extraordinary proposition. And yet people who are South African citizens may be tortured and face execution after a show trial. Does the government have no responsibility to them? Does it mean that we as a court have nothing to say on the matter? We had to go into questions of international law. What makes international law difficult is that the language of international law is the same as the language of domestic law, but the meaning is different, the relationships are different, the institutions are different, the enforcing mechanisms are different.

We gave four separate judgements but what they all had in common was an understanding that South African citizens have some claim on their government. The Government should, at the very least, listen to their relatives if they have travelled abroad, and give a considered response in terms of what they can do. And I am not speaking just about consular access.

But what about the possibility of them being deported or ill treated in Zimbabwe and then sent to Equatorial Guinea? We felt we had to say something. We are all part of this world and we want these standards and norms. The theoretical foundation was a clause in our Constitution that says every citizen has a right to be protected by the government and that right has to be interpreted in keeping with the principles of customary international law which renounce torture and guarantee the right to a fair trial.

As far as capital punishment was concerned, although capital punishment was unconstitutional in South Africa we couldn't say it had become so in international law. So we couldn't rely on customary international law to say that steps had to be taken against capital punishment, but we did say we were sure that they would be taken in the ordinary diplomatic function. We also made a declaration to the effect that there was a duty to use their best efforts to prevent South African citizens from being tortured and from being punished without a fair trial.

We don't know what happened at the diplomatic court. We know that they weren't tortured, that

they weren't sent to Equatorial Guinea as there were others already there. That it wasn't a show trial as far as they were concerned, they weren't sentenced to death, but the newspaper headlines and publicity I am sure had more impact than any declaration that we might have made. But what was significant to me was the foreign ministers of three countries were now getting together discussing the norms of customary international law, the terms of no torture and the right to a fair trial.

These are four different ways in which we responded to the rights claimed by, and the rights that were given to, people who had done extremely wicked things. You can see that each one had a different outcome – there isn't a formula, but there is an approach. There's a set of values, a set of principles, and for us it was important that the language we used, the points of reference, the whole approach to these matters, had to be imbued with the letter and the spirit of our constitution. The issues had a technical dimension but they weren't just technical, they were historical, they were existential. They were about what it means to be a South African today, in a country that's known terrible disasters in the past. It's trying to create a form of public morality that will last and expresses through our thoughts, in a language that's convincing and persuasive, the character of the world in which our people want to live. So they feel in resolving this question we've not only been wise in the purely technical sense, we've been wise in the human sense. That we are finding a sense of common South African citizenship.

# Events calendar

## BIHR events

BIHR is committed to increasing public awareness and understanding of human rights. We hold a number of events, many of which are free and open to the public.

For further information about any of our events please see our website or contact Jo Morgans, Events and Publicity Officer, [jmorgans@bihr.org.uk](mailto:jmorgans@bihr.org.uk), 020 7848 1924.

If you are organising a human rights event and would like to be included in the Events Calendar, please contact Jo Morgans, Events and Publicity Officer, [jmorgans@bihr.org.uk](mailto:jmorgans@bihr.org.uk), 020 7848 1924.

### November

**Organisers:** The Longford Trust

**Title:** The Longford Lecture

**Speaker:** Clive Stafford-Smith

**Date:** 27 November

**Time:** 6.30pm

**Location:** Westminster Central Hall

**Fee:** Free but request £10 per ticket to cover costs

**Further information:**

[www.longfordtrust.org](http://www.longfordtrust.org)

**Organisers:** Amnesty International

**Title:** Speaking out – the Sigrid Rausing Series: Women and globalisation

**Speaker:** TBC

**Date:** 28 November

**Time:** 7.00pm

**Location:** Amnesty International, Human Rights Action Centre, London EC2A

**Fee:** Free

**Further information:**

[www.amnesty.org.uk/events](http://www.amnesty.org.uk/events)

**Organisers:** Joint Council for the Welfare of Immigrants

**Title:** Criminal law and immigration offences

**Speaker:** Ranjiv Khubber

**Date:** 30 November

**Time:** 10.00am – 1.00pm

**Location:** London

**Further information:** [www.jcwi.org.uk](http://www.jcwi.org.uk)

### December

**Organisers:** Amnesty International

**Title:** Behind the Screen film: Wal-Mart: the high cost of low price

**Date:** 5 December

**Time:** 6.30pm

**Location:** Amnesty International, Human Rights Action Centre, London EC2A

**Fee:** Free

**Further information:**

[www.amnesty.org.uk/events](http://www.amnesty.org.uk/events)

**Organisers:** JUSTICE and Sweet & Maxwell

**Title:** Custody and Detention: obligations, rights and remedies

**Date:** 6 December

**Time:** 9.00am – 5.10pm

**Location:** Jolly Hotel St Ermin's, London SW1

**Fee:** Standard fee £325 plus VAT (10% discount to JUSTICE members)

**Further information:** [www.justice.org.uk](http://www.justice.org.uk), 020 7393 7859

**Organisers:** Constitutional and Administrative Law Bar Association (ALBA)

**Title:** Equality Legislation and Public Authorities

**Speakers:** Karon Monaghan and John Halford

**Date:** 12 December

**Time:** 5.45pm – 7.15pm

**Location:** Inner Temple Luncheon Room

**Fee:** Free, open to all, no advance registration

**Further information:**

[www.adminlaw.org.uk](http://www.adminlaw.org.uk)

**Organisers:** The Howard League for Penal Reform

**Title:** Gala dinner dance

**Date:** 13 December

**Time:** 7.00pm

**Location:** Gray's Inn

**Fee:** £200

**Further information:**

[www.howardleague.org.uk](http://www.howardleague.org.uk)

**Organisers:** The British Psychological Society

**Title:** Division of Clinical Psychology Annual Conference

**Speakers:** David Barlow, Barbara Sahakian, Matthew Sanders, Jane Wardle

**Date:** 14–15 December

**Location:** London, Congress Centre

**Further information:**

[www.dcpconference.co.uk](http://www.dcpconference.co.uk), 0116 252 9555

### January

**Organisers:** Liberty, Legal Action Group & Centre for Law, Gender & Sexuality at University of Kent

**Title:** Encountering Human Rights: Gender/ Sexuality, Activism and the Promise of Law

**Date:** 5–6 January

**Location:** University of Westminster, London

**Further information:** [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk)

**Organisers:** Joint Council for the Welfare of Immigrants

**Title:** Immigration Appeals and Court Procedure

**Speaker:** Patrick Lewis

**Date:** 23 January  
**Time:** 10.00am – 5.00pm  
**Location:** London  
**Further information:** [www.jcwi.org.uk](http://www.jcwi.org.uk)  
**Organisers:** Joint Council for the Welfare of Immigrants  
**Title:** Civil claims against the Home Office  
**Speakers:** Mark Scott & Hamish Arnott  
**Date:** 25 January

**Time:** 10.00am – 1.00pm  
**Location:** London  
**Further information:** [www.jcwi.org.uk](http://www.jcwi.org.uk)  
**Organisers:** Joint Council for the Welfare of Immigrants  
**Title:** Nationality law – new developments and practical guidance  
**Speaker:** Adrian Berry  
**Date:** 30 January

**Time:** 10.00am – 1.00pm  
**Location:** London  
**Further information:** [www.jcwi.org.uk](http://www.jcwi.org.uk)

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- a copy of our Annual Review.

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Continued overleaf...

# In the spotlight

BIHR is a leading provider of human rights training to the voluntary and public sectors. Our training is firmly rooted in BIHR's human rights expertise and in our belief that human rights awareness-raising has the potential to improve public service provision.

We provide in-house training as well as awareness-raising workshops, conference sessions, discussion groups and presentations.

Each issue we use this section of the newsletter to highlight the work of an organisation that has received training from BIHR.

**Name**

Disability Rights Commission (DRC),  
Legal Services

**Location**

Manchester

**Size**

Seven lawyers providing legal services to clients across England and Wales

**Who do you help:**

The DRC aims to create a society where all disabled people can participate fully as equal citizens. We are required by statute to work towards the elimination of discrimination against disabled persons, to encourage good practice and to promote equality of opportunity for disabled persons.

**What are your aims/challenges/plans for the coming year?**

The DRC is determined to leave a powerful legacy for the new Commission for Equality and Human Rights to take forward from October 2007.

Our Legal Services team will continue to:

- work to improve access to justice for disabled people;
- help build the capacity of external legal, advocacy and advice services;
- strategically enforce the Disability Discrimination Act 1995 (DDA) in individual cases;
- strategically intervene in other litigation, including in cases relating to the human rights of disabled people.

The DRC will work to:

- raise the profile of disability equality by promoting a new 'Disability Agenda' ([www.disabilitydebate.org](http://www.disabilitydebate.org));
- embed the new disability equality duty widely within the public sector;
- oversee implementation of the recommendations of our formal investigation into health inequalities;
- complete our investigation into professional fitness standards in teaching, nursing and social work;
- strengthen rights to independent living;
- inform people about new rights in transport.

**What human rights issues affect your organisation/service users?**

Our Legal Services team has used and will continue to use human rights arguments to address issues which the DDA, with its statutory limitations, cannot reach, but which nonetheless are matters of real importance to disabled people. Issues of particular relevance include independent living and access to health care, education and service provision generally.

**How has BIHR's training helped you?**

The training enabled us to further explore:

- specific rights of most relevance to disabled people;
- the relevance of the human rights framework to DRC's legal strategy;
- human rights and equality, beyond disability.

Ultimately this will benefit our enforcement function.

**Contact details**

DRC Helpline  
Freepost  
MID 02164  
Stratford upon Avon  
CV37 9BR  
Tel: 08457 622633  
Textphone: 08457 622644  
Fax: 08457 778878  
Web: [www.drc-gb.org](http://www.drc-gb.org)

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