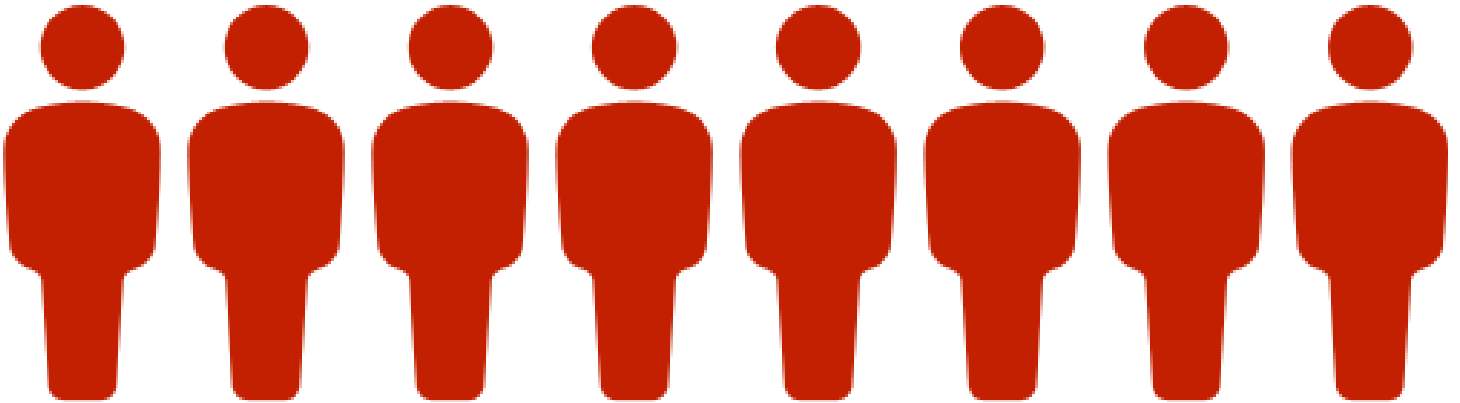


# Defending human rights

16 May 2006



## Summary

Faced with the horrors of extreme crime and terror the Human Rights Act has been an easy target for some politicians to attack. But it is simply not true to say that those who have benefited most from the protection of the Act have been criminals and terrorists.

The British Institute of Human Rights (BIHR) is a charity with a unique focus on human rights as they affect people in the UK in their everyday lives. In this briefing we tackle some of the myths circulating about human rights and, from our experience of working with the voluntary and public sectors, highlight how the Act has helped transform ordinary people's daily lives. These individuals' stories often go unreported by the mainstream media. But they are important because they show the Human Rights Act in a different light, not as an aide to criminals or terrorists, but as a British creation that has breathed new life into long-held values like dignity, fairness and respect. Because of our experience, BIHR strongly opposes calls to scrap or weaken the Act as this would mean that ordinary people would lose the important protection human rights offers.

If you are a journalist or politician and would like further briefing, comment or spokespersons (BIHR's Director, Katie Ghose or Chair, Geoffrey Bindman), please contact Anna Edmundson or Jo Morgans on 020 7848 1818.

For more details about the British Institute of Human Rights and the work we do please visit: [www.bihar.org](http://www.bihar.org).

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# Defending Human Rights

## Why is the Human Rights Act in the news?

There have been two different cases – a group of Afghani refugees who hijacked a plane and who were subsequently protected from return to Afghanistan (under Article 3 which prohibits return to a country where they face a real risk of torture) and the murder of a woman by a convicted rapist who had been released on life licence by the Parole Board. In the latter case various allegations have been made that human rights considerations were given too much weight but it is not clear exactly who was thinking about human rights and how they were factored into any decisions. These stories hit the headlines shortly after an administrative cock-up by the Home Office which led to prisoners going free who apparently should have been deported (nothing to do with the Human Rights Act) and some commentators wrongly conflated these stories to talk about the Act being a charter for criminals.

## Aren't human rights an alien import?

No. The Human Rights Act did not alter rights which all of us had previously and which are part of our heritage, going back to the Magna Carta. The Government's consultation paper, which foreshadowed the Act, was called *Bringing Rights Home*. This refers to one of aims of the Act: to place the rights which we had already signed up to in 1950 in the European Human Rights Convention under the jurisdiction of our own British courts. It was a means of strengthening domestic control over human rights as well as a time and money saver for those who previously could only claim their rights by a laborious journey ending up in Strasbourg.

Those rights which have now been brought home are not a set of alien rules imposed from the outside: British lawyers, led by the Conservative Lord Chancellor Kilmuir, were responsible for the original draft of the European Convention in 1950. The European Convention was a response to the horrors of the Second World War and enshrined the values that the people of Britain and elsewhere fought to preserve, faced with the threat of a very different world order.

## How do the human rights in the Act work?

Not all the Convention rights contained in the Human Rights Act operate in the same way. Some are 'absolute' and should never be interfered with or opted out of (such as the Article 3 prohibition on torture or the prohibition on slavery contained in Article 4).

Other rights are 'limited' or 'qualified' in nature and contain an in-built mechanism to balance the rights of the individual with those of others or the public interest. Examples are Article 8 (the right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), and Article 11 (freedom of assembly and association).

These rights are two-tiered: the right is set out in the first paragraph, while the second paragraph comprises a limitation clause which enables the general public interest to be taken into account. The types of reasons the state can give for interfering with an individual's rights include: *in the interests of national security, public safety or the economic*

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*well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Even if a particular action that interferes with an individual's right pursues one of these aims (such as the prevention of crime), this will not justify the restriction if the means used to achieve the aim are disproportionate or excessive in the circumstances. In short, public authorities *must not use a sledgehammer to crack a nut*. But equally the more serious the threat to, for example, public safety or national security, the more forcible the measures that can be justified.

## What about the rights of victims?

Contrary to some recent reports, victims have special protection under human rights law. Human rights are based on a set of values that seek to secure the respect and dignity of every individual. As a result there are many cases that have set out the importance of protecting the human rights of victims, which stress the importance of protecting them from physical or psychological harm, securing their privacy, and protecting them from intimidation in court. Most importantly, under human rights laws, the Government has an obligation to deter crimes, prosecute suspects and to carry out an effective investigation of crimes after the event. In certain circumstances there is even a special duty on the Government to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v UK* (1998) for more on this principle).

## What does this mean for the Rice case?

It is clear that those dealing with a prisoner who had served time for such serious offences had an explicit duty to consider public safety against any rights he might have argued he had to a family or private life. But more than that, if there was evidence of such a serious threat to public safety as was then borne out there can have been nothing in the Human Rights Act that would have prevented dealing with him in a restrictive fashion. On the contrary, it is hard to see how it would have been unreasonable or disproportionate to do anything other than have restrictive measures on his liberty – assuming those making decisions had evidence that he was dangerous. It appears that the officials made the wrong assessment about his release and how likely he was to reoffend and then used the 'human rights culture' as a scapegoat for their decision. The latest comments seem to reflect this, with police and probation services pointing both to an 'unusual and tragic' case and a 'string of failures' rather than singling out the Act.

## What does this mean for the Afghanis' case?

Contrary to many reports the Judge in this case (Justice Sullivan) did not say that the hijackers could not be removed from the country. He simply said the Government had failed to follow correct legal procedures and 'deliberately delayed' implementing the previous immigration court's ruling in 2004 in which adjudicators had said that they couldn't be removed because of the risk to their lives. He went on to say 'it is difficult to conceive of a clearer case of conspicuous unfairness amounting to an abuse of power.'

There is a good reason why there is an absolute prohibition on torture/inhuman and degrading treatment. Britain along with other countries decided in the wake of the

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Second World War that the horrors meted out to millions of people should never be repeated. We made the decision then that torture was offensive to ordinary standards of humanity and decency and never acceptable, whatever the circumstances, and that any wavering from this would be a 'slippery slope' to go down. The case against torture is still as compelling today, especially if we are to hold ourselves out as an example for other countries to follow.

## What options are the Government considering?

The Secretary of State for Constitutional Affairs has publicly stated that the Government wants to ensure 'public safety first' is the guiding principle when courts deal with cases that raise individual human rights issues. Lord Falconer has stated that this would involve ensuring officials were properly trained, but could in time require legislation to change the Act. And the Prime Minister has asked the Home Secretary to 'look again at whether primary legislation is needed to address the issue of court rulings which overrule the government in a way that is inconsistent with other EU countries' interpretation of the European Convention on Human Rights'.

Amending the Act to put public safety first is unnecessary because the interests of the public are already at the heart of human rights laws (see above). The Act contains an in-built mechanism to make sure that when officials make decisions based on human rights they routinely consider the rights of others. What is needed is greater understanding and application of this existing aspect of human rights law – not a new law.

Some people have called for the UK to pull out of the European Convention altogether. This isn't an option as in practice it would mean pulling out of the EU as all members of the EU need to have signed up to the European Convention. It is not one of the opt-in/opt-out parts of being in the EU – it is something that members expect each other to sign up to. It would be extraordinary for member states to call on Turkey, a prospective EU member, to 'clean up' its human rights record whilst allowing existing members to renege on a fundamental human rights agreement.

Politicians from across the political spectrum have called for the Human Rights Act to be scrapped or reformed. This would be a grave mistake. It would make no difference to cases such as that of Anthony Rice because poor decision-making and administrative failings led to his release – not the Human Rights Act. But scrapping or reforming the Act would undermine the protection that it offers to ordinary people in difficult situations.

## How has the Human Rights Act been used to benefit ordinary people?

Contrary to media reports about the Act becoming a charter for 'criminals, chancers and celebrities' it has more often been used by ordinary people in their everyday lives – although these individual stories rarely hit the headlines.

The following examples all followed British Institute of Human Rights human rights training sessions, for voluntary and community groups and local authorities:

- The parents of a learning disabled patient in a hospital noticed unexplained bruising on their son. When they raised the issue with staff, their concerns

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were dismissed and they were no longer allowed to visit. After receiving human rights training they used their son's right not to suffer inhuman or degrading treatment (Article 3) and their right to respect for family life (Article 8) to challenge the hospital. The result was that the ban on them visiting has been overturned.

- A social worker from the domestic violence team at a local authority received training on the 'positive obligations' placed on the local authority to protect the right to life (under Article 2) and right to be free from inhuman and degrading treatment (protected by Article 3). She went on to use human rights arguments to secure new accommodation for a woman and her family at risk of serious harm from a violent ex-partner.
- A local authority was failing to provide school transport for physically disabled children in its area with special educational needs. A local action group used human rights arguments to persuade them to change their policy – recognizing that they needed to get out and about and take part in social activities just like other children (Article 8)
- A mentally-ill patient in hospital was placed in seclusion and kept soiling himself. Staff refused to clean up the mess or move him to another room, arguing that the same thing would happen again. Local volunteers argued that this was a breach of Article 3, which bans 'degrading treatment'. As a result, the patient was moved to a new room.
- A care home for elderly people had a blanket policy of not providing residents with bed-pans between lunch-time and tea-time. This was challenged by a local support group as a breach of the residents' right to respect for their private life under Article 8 of the convention. The policy was changed.

In the last two examples, the institutions changed their policy once the law was explained to them: there was no need to go to court. This is the case with a lot of our practical examples – some of the most sensible uses of the Act are 'on the ground' and not in the courts.

However, there have also been some important legal cases in the courts that have protected the human rights of ordinary people. For example:

- *Mr and Mrs Gunter and their daughter Rachel*  
Rachel is severely disabled and requires constant nursing. After caring for Rachel 24 hours a day for 6 years, her parents were no longer able to give her the physical support and mental stimulation she required. Mr and Mrs Gunter approached the Primary Care Trust for help. The Trust, reluctant to provide care in the Gunters home, hoped to put Rachel into a residential facility. However, Rachel's parents felt this would deprive her of mental stimulation that they could provide, and that had already increased Rachel's confidence and communication skills. On the grounds that taking Rachel from her home would infringe on her right to family life under Article 8, the court ordered that the primary care trust reconsider its decision. See *Rachel Gunter (by her litigation friend and father Edwin Gunter) and South Western Staffordshire Primary Care Trust* [2005]
- *Mr and Mrs Bernard and their family*

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Mr Bernard was looking after his six children and his disabled wife in a home that wasn't suitable for their needs. Mrs Bernard was only able to access the lounge room, could not use the stairs and therefore had no access to the first floor where the bathroom and bedrooms were situated. This was a particular problem as she was incontinent. Although their local social services department recommended that the family be provided with specially adapted accommodation, the family heard nothing for well over a year. When their case came before a Court, the judge held that the local authority had a positive obligation to enable the family to lead as normal a family life as possible and that they had not done this – in breach of their Article 8 right to respect for family life. See *R (on the application of Bernard) v Enfield LBC* [2002].

- *Ms A and B*

Ms A and B are two disabled sisters, who need assistance in order to move, living with their parents in a specially adapted house. The local authority policy imposed a complete ban on all manual lifting of people which meant that the sisters were unable to be move or go outside their home. They challenged the ban in Court. The judge concluded that a complete ban on manual lifting is unlikely to be lawful, because it does not consider a person's individual circumstances. Inhuman or degrading treatment contrary to Article 3 might occur if the women were left in their own bodily waste or stuck on the lavatory for hours. The Court ordered the local authority to revisit its policy to make sure it struck a better balance between the human rights of the sisters and the rights of the carers to a safe working environment. See *A and others v East Sussex County Council and other* [2003].

## Why do we need a 'human rights culture'?

Because the Human Rights Act is not just about lawyers and legal cases. The broader and deeper aim behind the Act was a democratic one: to build in every citizen a consciousness of shared ownership of the fundamental values of society, enforceable as a last resort through the legal process. Moreover, the Human Rights Act was specifically linked with the Government's mission to provide public services that are responsive, flexible and aimed at individuals. This bid to create a 'human rights culture' has met with some criticism from those who see it as heralding a society based on rights rather than responsibilities. But that is a misunderstanding. It should rather be seen as a path to greater decency, respect and fairness for everyone.

All the evidence suggests that far from a 'human rights culture' which respects the rights of individuals taking hold, most people, citizens, front line workers and managers alike, remain largely unaware of their rights and responsibilities under the Act. So, for example, elderly people have faced separation from each other when one goes into care after years of marriage, precisely because social workers and others have failed to think about their right to private and family life (Article 8). The Government must be careful about claiming that a human rights culture has taken hold in Britain when the evidence suggests that many ordinary people have yet to wake up to the fact that they have rights at all. Where people do know about their rights and how to claim there is evidence that this leads to common sense results (as set out in the examples given above).

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