

A0174

## ILPA HUMAN RIGHTS ACT - Part IV

### - Prohibition of Discrimination

#### Article 14 ECHR Et. Al. -

by Tim Eicke<sup>1</sup>

12 April 2000

#### 1. Article 14

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

#### 2. Article 14 does not provide a free standing right of non-discrimination or equal treatment.

The right to non-discrimination under Article 14 is “parasitic” and only arises where one of the other (substantive) provisions are engaged. There is no need to establish even an arguable violation; it is sufficient if the conduct (or omission) in question falls within the “ambit” of one of the other provisions<sup>2</sup>.

#### 3. Abdullaziz, Cabales and Balkandali v. United Kingdom (1985) 7 EHRR 471:

“For the purposes of Article 14, a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality

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<sup>2</sup> The Council of Europe is currently drafting Protocol No 12 to the ECHR which would provide for a free standing right of non-discrimination in relation to “the enjoyment of any right set forth by law”.

between the means employed and the aim sought to be realised'.” (Para. 72)<sup>3</sup>

“... Article 14 is concerned with the avoidance of discrimination in the enjoyment of Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways. The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.” (Para. 82)

4. Differential treatment: Moustaquim v Belgium (1991) 13 EHRR 802:

“... Article 14 safeguards individuals placed in similar situations from any discriminatory differences of treatment in the enjoyment of rights and freedoms recognised in the Convention and its Protocols.” (Para. 49)

5. “Aliens” and own nationals are NOT in a similar situation because “The latter have the right of abode in their own country and cannot be expelled from it; this is confirmed by Article 3 of Protocol No 4.” (Para. 49). See, however, Appl. No. 38088/97 S.N. v Netherlands (admissibility decision of 4 May 1999):

“Moreover, in as much as a further appeal against a decision given on appeal by the Regional Court is not available under Netherlands law in any immigration case, the applicant’s situation does not differ from that of other categories of persons (including Netherlands nationals) in an analogous situation - for example, Netherlands nationals seeking to contest a decision refusing a right of residence to a foreign relative.” (Para. 3)<sup>4</sup>

6. However, Moustaquim implies that “aliens” generally and EC nationals are in a “similar situation” (the difference in treatment is, however, justified (see below)). See, however, in the context of Article 16 ECHR, Piermont v. France (1995) 20 EHRR 301 (expulsion order in breach of Article 10): the Court expressly recognised the special status of

<sup>3</sup> See also Gaygusuz v Austria (1997) 23 EHRR 364

<sup>4</sup> But see Joined Cases C-65/95 and C-111/95 R v Secretary of State for the Home Department ex parte Shingara and Radiom [1997] ECR I-3343

citizens of other Member States of the European Community as compared to "aliens".

In the context of a justification argument raised by the Respondent Government on the basis of Article 16 of the Convention, the Court stated

"The Court cannot accept the argument based on European citizenship, since the Community treaties did not at the time recognise any such citizenship. Nevertheless, it considers that Mrs Piermont's possession of the nationality of a member State of the European Union and, in addition to that, her status as member of the European Parliament do not allow Article 16 of the Convention to be raised against her..." (Para. 64)

7. Grounds on which discrimination is prohibited is open-ended
  - a. Not confined by the grounds listed in Article 14
  - b. Protection, where it applies, therefore (potentially) wider than domestic legislation and (possibly) EC law - note, however, the Race Relations (Amendment) Bill (currently before Parliament);
  
8. European Court of Human Rights, generally, takes a particularly strict view of differential treatment on grounds of:
  - a. Gender<sup>5</sup>;
  - b. Nationality<sup>6</sup>;
  - c. Race<sup>7</sup>;
  - d. Illegitimacy<sup>8</sup>; and (possibly

<sup>5</sup> Schmidt v Germany (1994) 18 EHRR 513; Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471

<sup>6</sup> Gaygusuz v Austria (1997) 23 EHRR 364

<sup>7</sup> East African Asians (1981) 3 EHRR 76

<sup>8</sup> Marckx v Belgium 2 EHRR 330; Inze v Austria (1988) 10 EHRR 394

e. Sexual orientation<sup>9)</sup>

These, therefore, require "very weighty reasons" in order to be justified.

9. Indirect discrimination: The Court has not so far found a violation of a claim for indirect discrimination - but has also not ruled out the possibility that such a claim could be successful. The hurdle to be overcome is, however, very high: Abdulaziz, Cabales and Balkandali, para. 85:

"That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others."

Objective and reasonable justification

10. Moustaquim:

"As for preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order." (Para. 49)

11. Commission in Application No. 9285/81 X, Y, Z v. United Kingdom<sup>10</sup> held that, in the operation of the immigration rules, one group of "aliens" received preferential treatment over another group of aliens, could be objectively justified:

<sup>9</sup> Smith and Grady v United Kingdom, judgment of 27 September 1999

<sup>10</sup> 29 D&R 205

"... the difference in immigration rights between a Commonwealth citizen and an alien in the United Kingdom has an obvious objective and reasonable basis, i.e. in acknowledging the right of a country to limit the number of foreign persons who are entitled to reside in its territory, a State may reasonably give priority to the citizens of those countries with whom it has the closest links." (P. 210)<sup>11</sup>

12. Positive discrimination: Van Dijk and Van Hoof "Theory and Practice of the European Convention on Human Rights"<sup>12</sup>:

"... a difference in treatment which is aimed at eliminating an existing inequality creates substantive equality and is consequently in conformity with Article 14." (P. 719)

13. Et. al.: Discrimination is capable of amounting (or leading) to a violation of one (or more) of the substantive provisions of the ECHR: in particular reference should be made to Article 3 (and Article 8), the right not to be subjected *inter alia* to degrading treatment: see East African Asians, where the Commission held that discrimination based on grounds of race may "constitute a special form of affront to human dignity" and "therefore be capable of constituting degrading treatment [under Article 3] when differential treatment on some other ground would raise no such question". (The Commission found a violation of Article 3)

14. More recently, the Court confirmed in Smith and Grady v United Kingdom that:

"... treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (...). Moreover, it is sufficient if the victim is humiliated in his or her own eyes (...).

...

The Court ... would not exclude that treatment which is grounded upon a

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<sup>11</sup> See also Abdulaziz, Cabales and Balkandali, para. 84

<sup>12</sup> 1998, Kluwer Law International

predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3.”

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## **The European Convention on Human Rights and Immigration and Asylum Law**

### **1. The applicable Convention provisions**

|                      |   |  |
|----------------------|---|--|
| Article 1            | - | obligation to secure Convention rights                   |
| Article 2            | - | right to life  |
| (Protocol No.6)      | - | death penalty  |
| Article 3            | - | prohibition on torture                                   |
| Article 5            | - | liberty and security of the person                       |
| Article 6            | - | right to fair trial                                      |
| Article 8            | - | right to respect for family or private life              |
| Article 13           | - | right to an effective remedy to enforce Convention right |
| Article 16           | - | restrictions on the political activities of aliens       |
| Article 18           | - | limitation on the use of restrictions on rights          |
| Prot.No.1, Article 1 | - | right to respect for peaceful enjoyment of possessions   |
| Prot.No.1, Article 2 | - | right to education                                       |

(NB. The UK is not a party to Protocol No. 4 and No.7)

### **2. Article 1: obligation to secure Convention rights**

*'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'*

#### *Points to note*

- Not incorporated by the HRA 1998
- Duty to secure to everyone within the jurisdiction: positive obligations

### **3. Article 2: right to life**

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

- a. *in defence of any person from unlawful violence;*
- b. *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- c. *in action lawfully taken for the purpose of quelling a riot or insurrection.*

**NB Protocol No. 6: Abolition of the death penalty**

1. *The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.*
2. *A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.*
3. *No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.*

**Cases**

|                                 |               |                  |
|---------------------------------|---------------|------------------|
| <i>Kaya v. Turkey</i>           | Judgement     | 19 February 1998 |
| <i>Bahaddar v. Netherlands</i>  | Judgement     | 19 February 1998 |
| <i>Mentes v. Turkey</i>         | Judgement     | 26 EHRR 595      |
| <i>Aylor Davis v. France</i>    | Admissibility | 76 DR 164        |
| <i>Leong Cheong v. Portugal</i> | Admissibility | 83A DR 88        |
| <i>Raidl v. Austria</i>         | Admissibility | 82A DR 134       |

**4. Article 3: Prohibition on Torture**

*'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*

*Points to note*

- absolute prohibition
- definition of torture

- relationship with Article 8
- inherent procedural safeguards
- expulsion where there 'are substantial grounds for believing' that an applicant faces a real risk of torture or inhuman or degrading treatment or punishment
- expulsion constituting inhuman or degrading treatment
- exclusion constituting inhuman or degrading treatment
- 'minimum threshold of severity' test
- contrast the protection afforded by the 1951 Convention on the Status of Refugees
- returns under the Dublin Convention
- Exceptional Leave to remain

#### Cases

|  |                   |                   |
|--|-------------------|-------------------|
| <i>East African Asians v. UK</i>             | Commission Report | 78A DR 5          |
| <i>Yagiz v. Turkey</i>                       | Judgement         | 7 August 1996     |
| <i>Aksoy v Turkey</i>                        | Judgement         | 23 EHRR 553       |
| <i>Ayadin v. Turkey</i>                      | Judgement         | 25 September 1997 |
| <i>Ribitsch v. Austria</i>                   | Judgement         | 4 December 1995   |
| <i>Selmouni v. France</i>                    | Judgement         | July 1999         |
| <i>Assenov v. Bulgaria</i>                   | Judgement         | 28 October 1998   |
| <i>Osman v. UK</i>                           | Judgement         | 28 October 1998   |
| <i>Soering v. UK</i>                         | Judgement         | 11 EHRR 439       |
| <i>Cruz Varas v. Sweden</i>                  | Judgement         | 14 EHRR 1         |
| <i>Vilvarajah v. UK</i>                      | Judgement         | 14 EHRR 248       |
| <i>Vijaynathan and Pushparajah v. France</i> | Judgement         | 27 August 1992    |
| <i>Ahmed v. Austria</i>                      | Judgement         | 24 EHRR 278       |
| <i>H.L.R. v. France</i>                      | Judgement         | 29 April 1997     |

|                                   |               |                          |
|-----------------------------------|---------------|--------------------------|
| <i>D. v. UK</i>                   | Judgement     | 2 May 1997               |
| <i>Nasri v. France</i>            | Judgement     | 21 EHRR 458              |
| <i>M.A.R. v. UK</i>               | Admissibility | Application No. 28038/95 |
| <i>Popescu and Cucu v. France</i> | Admissibility | Application No. 28152/95 |
| <i>R.B. v. Sweden and Finland</i> | Admissibility | Application No.22508/93  |
| <i>Tahiri v. Sweden</i>           | Admissibility | Application No.25129/94  |
| <i>T.I. v. UK</i>                 | Pending       | Application No.43844/98  |

**5. Article 5: Liberty and security of the person**

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
  - a. *the lawful detention of a person after conviction by a competent court;*
  - b. *the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
  - c. *the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
  - d. *the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
  - e. *the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

- f. *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
  3. *Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
  4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
  5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.*

*Points to note*

- immigration detainees
- expulsion to face arbitrary detention

**Cases**

|                           |                   |                          |
|---------------------------|-------------------|--------------------------|
| <i>Amuur v. France</i>    | Judgement         | 22 EHRR 533              |
| <i>Chahal v. UK</i>       | Judgement         | 15 November 1996         |
| <i>Ali v. Switzerland</i> | Commission Report | Application No. 24881/94 |
| <i>Quinn v. France</i>    | Judgement         | 22 March 1995            |

**6. Article 6: right to fair trial**

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
  - a. *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
  - b. *to have adequate time and facilities for the preparation of his defence;*
  - c. *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
  - d. *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
  - e. *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

*Points to note*

- fair trial in immigration cases
- autonomous definition of a criminal charge
- expulsion to face unfair trial
- relationship between Article 6 and Article 13 (not incorporated)

## Cases

|                                     |               |                          |
|-------------------------------------|---------------|--------------------------|
| <i>Moustaquim v. Belgium</i>        | Judgement     | 13 EHRR 802              |
| <i>P. v. UK</i>                     | Admissibility | 54 DR 211                |
| <i>S. v. Switzerland</i>            | Admissibility | 59 DR 256                |
| <i>Drodz and Janousek v. France</i> | Judgement     | 14 EHRR 745              |
| <i>M.A.R. v. UK</i>                 | Admissibility | Application No. 28038/95 |

### 7. Article 8: respect for private life 'moral and physical integrity'

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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.*

#### Points to note

- right to *respect* for private life
- treatment that may not reach the minimum level of severity within Article 3

#### Questions to be addressed

- a. Is there a risk of a 'serious and significant' interference with the 'moral and physical integrity' of the individual through return?
- b. Is the interference '*in accordance with the law*' ?
- c. Does the interference '*pursue a legitimate aim*' ?

- d. Is there a reasonable relationship of proportionality between the legitimate aim pursued and the interference; is the interference '*necessary in a democratic society*' ?

**Cases**

|   |                                       |                          |
|---|---------------------------------------|--------------------------|
| <i>X and Y v. Netherlands</i>             | Judgement                             | 8 EHRR 235               |
| <i>Bulus v. Sweden</i>                    | Admissibility and Friendly Settlement | Application No 9330/81   |
| <i>Tanko v. Finland</i>                   | Admissibility                         | Application No. 23634/94 |
| <i>Bensaid v. United Kingdom</i>          | Admissibility                         | Application No. 44599/98 |
| <i>Whiteside v. United Kingdom</i>        | Admissibility                         | Application No. 20357/92 |
| <i>Costello-Roberts v. United Kingdom</i> | Judgement                             | 19 EHRR 112              |
| <i>Klass v. Germany</i>                   | Judgement                             | 18 EHRR 305              |