

Commissioner's Advice to Inspectors

The Human Rights Act 1998

The Human Rights Act 1998 ("the Act") incorporates most of the rights expressed in the European Convention On Human Rights ("the Convention") into domestic law. It came into force on 2 October 2000. This Advice explains the implications of the Act for Inspectors.

1. Which Rights and Freedoms are Incorporated into Domestic Law?

These are "the Convention rights" set out in Section 1(1) of the Act and include:

- (a) Articles 2 to 12 and 14 of the Convention,
 - (b) Articles 1 to 3 of the First Protocol, and
 - (c) Articles 1 and 2 of the Sixth Protocol,
- As read with Articles 16 to 18 of the Convention.

Article 8 is likely to raise the most serious human rights issues in the social fund context. It provides that everyone has the right to respect for his private and family life, his home and his correspondence. Other Convention rights which may be raised include: the right to life (Article 2), the right not to be subjected to inhuman or degrading treatment (Article 3), the right to a fair hearing (Article 6), and the right to freedom from discrimination in the enjoyment of Convention rights (Article 14).

2. How should the Convention rights be interpreted?

Under Section 2 of the Act, a "court or tribunal", in determining a question which has arisen in connection with a Convention right, must take into account the jurisprudence of the European Court of Human Rights ("the Court"). This includes the substantive decisions on particular Convention rights, as well as the general methods of interpretation adopted.

Even if an Inspector does not constitute a "court or tribunal" he should nevertheless take account of the jurisprudence of the Court, as domestic courts would do so should his decision come before them.

At present there is a lack of case law from the Court or domestic courts, which relates closely to issues faced in the social fund context. In addition, the Convention is treated as a living instrument. The interpretation of it changes in response to changes in society. Past decisions do not form a binding precedent. Accordingly, this Advice will be kept under continuous review.

3. Inspectors must act in a way Compatible with the Convention Rights

Section 6(1) to (3) of the Act provides that:

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if -
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes -
 - (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature,but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

Section 6 of the Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so to give effect to primary legislation. An “act” includes a failure to act (section 6(6) of the Act).

The term, “public authority”, includes “any person certain of whose functions are functions of a public nature” – and so this includes Inspectors.

It follows that the Convention rights should form a background to all decision making. Inspectors have a duty to consider human rights issues even if an applicant has not raised them.

Where there is a real human rights issue in a case and/or where an applicant has raised a human rights issue, an Inspector will need to address the human rights issue explicitly in his decision, outlining his findings clearly. As in other areas, if there is no reason to think a Convention right is in issue, there will be no need for an Inspector to say anything about the right in his decision.

4. What Steps should an Inspector take in order to Identify and Deal Correctly with Human Rights Issues?

There are a series of steps that an Inspector must take if he is to identify and to deal correctly with human rights issues. The order in which these steps are considered is important. The series of steps are explained in detail in this section of the Advice, and are illustrated by a flow diagram in section 5, below.

A. Decide the Case Under Domestic Law Without Regard to the Convention Rights

The first step for an Inspector is to decide the case under domestic law, without regard to the Convention rights. A departure from this approach is only appropriate in a limited number of cases, described below.

B. Does Deciding the Case Under Domestic Law, Without Regard to the Convention Rights, lead to a Breach of one of the Convention Rights?

Next the Inspector must consider whether deciding the case under domestic law, without regard to the Convention rights, would breach any of the Convention rights.

The Convention restrains States from interfering with the Convention rights of its citizens. It also imposes positive obligations on States to take action to protect the Convention rights of its citizens, and it is these positive obligations that are most likely to be the issue in social fund decision making. In this context an Inspector must reach a decision on whether deciding the case under domestic law, without regard to Convention rights, would lead to a breach of a positive obligation.

It is important to note here that positive obligations under the Convention are imposed on the State, and not on individual agencies within the State. For example, a State may, in a particular case, have an obligation to provide support for family life, but it may be difficult to decide, as a matter of domestic law, which agency is responsible for providing a remedy (*R v. Camden and Islington Health Authority Ex parte K* [2001] EWCA Civ 240).

Before an Inspector concludes that he is responsible for providing a remedy he should consider whether any other public authority may be responsible. For example, a local authority, may be responsible for providing a remedy. The determination of responsibility will depend on an examination of the statutory context of the particular need in question.

If it is clear that another agency is responsible for providing a remedy the Inspector must decide the case under domestic legislation, without regard to the Convention rights. However, he should advise the applicant to pursue the responsible agency for assistance.

If it is unclear which agency of the State is responsible for averting a breach of Convention rights it may be necessary to resolve this problem by obtaining a declaration from the High Court. However, if time is very limited section 6 of the Act may require the Inspector to assume responsibility, as the "authority of the moment". (Recompense may be sought from another agency at a later date, if appropriate.)

If deciding the case under domestic law, without regard to the Convention rights, would lead to a breach of one of the Convention rights (in this context the Inspector will be clearly responsible for averting the breach of a Convention right, or he will be “the authority of the moment”) the Inspector should proceed to the next step; otherwise the case should be decided under domestic law, without regard to the Convention rights.

C. Does the Approach to Interpreting and Applying Legislation under Section 3 of the Act result in a Compatible Outcome?

For cases reaching this stage, Section 3 of the Act requires that a radical new approach to the interpretation and application of legislation be adopted:

Section 3 of the Act provides that:

- (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- (2) This section –
 - (a) applies to primary legislation and subordinate legislation whenever enacted;
 - (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
 - (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Section 3 applies to primary legislation (Acts of Parliament) and subordinate legislation (legislation made under Acts of Parliament). In the social fund context the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, and the Social Security Act 1998 are primary legislation; and the various social fund regulations and directions are all subordinate legislation.

Inspectors are required by Section 3 to **read** and **give effect to** legislation in a way that is compatible with the Convention rights **so far as it is possible to do so**.

This involves a radical departure from the normal approach to the interpretation and application of legislation. Inspectors, in striving to read and give effect to legislation in a compatible way, must consider all possible interpretations and applications of legislation. This may involve reading words into legislation; or construing the words of legislation more widely or narrowly than usual. It may mean that a certain set of facts would be taken to fall within or outside the terms of legislation, when it would not under the normal approach to the interpretation and application of legislation.

There is, however, a limit to what is possible under section 3 of the Act. For example, section 3 allows Inspectors to interpret legislation, but not to legislate. If, in order to achieve Convention compatibility, it is necessary to radically alter the effect of legislation or to alter a fundamental feature of legislation, this is likely to involve more than the interpretation or application of legislation. In addition, it is not possible to remedy a legislative omission. If legislation does not cater for a particular occurrence section 3 of the Act cannot be used to fill the gap.

A compatible interpretation will not be possible where legislation, by express provision or necessary implication, contradicts the meaning of the compatible interpretation. Statute cannot be given a meaning that Parliament could not have intended.

It is important to note that where the Section 3 approach has been adopted in a particular case to remedy an incompatibility, this does not change the normal approach to the interpretation and application of legislation for future cases.

If an Inspector is able to read and give effect to the law in a way that is compatible with the Convention rights he should decide the case accordingly. If this is not possible he should proceed to the next step:

D. Is the Incompatible Legislation Primary Legislation?

Under Section 3(2)(b) of the Act, if primary legislation cannot be interpreted or applied in a way that is compatible with the Convention rights, its validity is not affected, and the Inspector must apply it. In such cases the Inspector would decide the case under domestic legislation without regard to the Convention rights.

If the incompatible legislation is not primary legislation the Inspector proceeds to the next step:

E. Does Primary Legislation Prevent Removal of the Incompatibility?

Where subordinate legislation cannot be interpreted or applied in a way that is compatible with the Convention rights its validity, continuing operation or enforcement is not affected if primary legislation prevents removal of the incompatibility (Section 3(2)(c) of the Act).

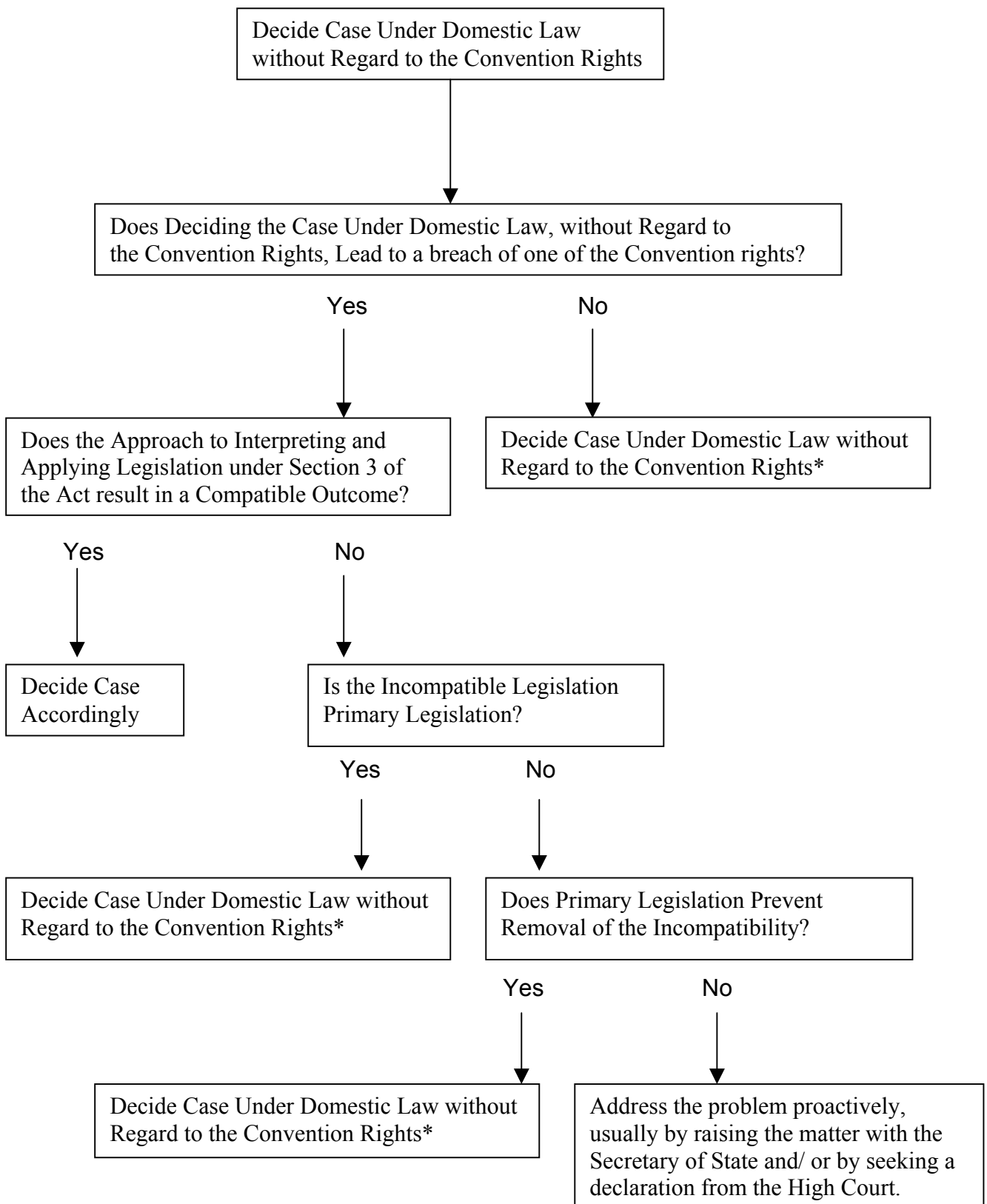
This means that an Inspector should apply the incompatible legislation as normal, if primary legislation prevents removal of the incompatibility.

If primary legislation does not prevent removal of the incompatibility then the subordinate legislation is not valid. In such circumstances the appropriate course will usually be to raise the matter with the Secretary of State, who may issue a revised direction, and/or to seek a declaration from the High Court, which could quash the relevant direction.

How does an Inspector decide whether the primary legislation would or would not allow removal of the incompatibility?

- Subordinate legislation is legislation made under primary legislation. The primary legislation confers a power to make subordinate legislation.
- An Inspector must examine the precise terms of the power conferred by the primary legislation to make the subordinate legislation.
- If the power would allow the existing incompatible subordinate legislation to be replaced with new subordinate legislation that is free of the incompatibility, then the primary legislation does not prevent removal of the incompatibility. It is not enough that the subordinate legislation could simply be revoked – it must be possible to replace it with legislation that is free of the incompatibility. This is because Section 3(2)(c) directs that the possibility of revoking the subordinate legislation must be disregarded.
- If the power would not allow the existing incompatible subordinate legislation to be replaced with new subordinate legislation that is free of the incompatibility, then the primary legislation does prevent removal of the incompatibility.

5. A Flow Diagram Showing the Steps an Inspector should take to Identify and Deal Correctly with Human Rights Issues



* The flowchart illustrates the steps in the mental process an Inspector must go through in order to identify and deal correctly with human rights issues. The drafting of decisions is a separate matter. In relation to the drafting of decisions, Inspectors are reminded that where there is a real human rights issue in a case and/or where an applicant has raised a human rights issue, an Inspector will need to address the human rights issue explicitly in his decision, outlining his findings clearly.