

# Our Human Rights Act

The right to respect for private and family life, home and correspondence : What could change and what does this mean?



**HUMAN RIGHTS**



# The right to respect for private and family life, home and correspondence: What could change and what does

## What is Article 8?

Article 8 of our Human Rights Act (HRA) protects our right to respect for private and family life, home and correspondence. This human right has four parts:

- 1 Private life protects things like, private information, privacy, wellbeing, physical and mental health, identity, autonomy, and participating in the community.
- 2 Family life is about developing relationships and maintaining contact with your family (whoever you see as your family).
- 3 Home is the right to respect for the home that you have, whatever that may be
- 4 Correspondence is about private and unrestricted communication with others, in whatever form (e.g. from letters to social media).

This is a non-absolute right, so in certain circumstances (when it is lawful, legitimate and proportionate) it can be restricted. You can find out more about Article 8 on our [website](#).

## How could the new "Bill of Rights" change this?

The UK Government (which we've referred to as 'Government') often criticises how our Article 8 human right has been protected. This is in different contexts; however, it is often directly aimed at the human rights of prisoners and of immigrants whom the Government wants to 'deport' or 'remove' (when they want to seek asylum (e.g. the Rwanda removal policy), are failed asylum seekers or are overstayers).

The new Bill of Rights (which we are calling a Rights Removal Bill since it just reduces our human rights protections) aims to reduce the human rights of certain categories of people. This includes preventing non-British citizens who have committed a criminal offence (however serious) from being able to rely on their and their family's Article 8 right to private and family life to not be deported to another country.

If they want to rely on Article 8, an individual will have to prove that if they were deported, their child or dependent (who must be a British citizen, have 'settled status' in the UK or, if they are the individual's 'child', have lived in the UK continuously for seven years) would come to 'exceptional and overwhelming' harm that is incapable of being avoided or is 'irreversible'. Further, when the harm will be to a dependent (rather than a child (under 18) whom the individual has always had a 'genuine and subsisting' parental relationship with) there is additional hurdle that it is only in the 'most compelling circumstances' that the courts can find that the Article 8 right to family life should prevent deportation.

This is an extraordinary limitation on the right to private and family life. It completely removes the Article 8 right of the individual being deported and virtually removes the Article 8 right to family life of that individual's children and dependents. **It is the Government trying to directly cut off some groups of people from accessing their Article 8 right to private and family life.** (The Rights Removal Bill also aims to remove the right to a fair trial of individuals facing deportation – this is also very concerning but is not addressed in this briefing).

## But human rights are for everyone...

Our human rights are universal. They protect everyone equally from the abuse of state power, whatever that abuse and whoever the individual is. **Limiting human rights for any group of people, is not only discriminatory, but undermines the very point of human rights.**

The same applies to our Article 8 right – it is a human right that everyone has and is equally entitled to defend and seek accountability when it is not respected, including when they risk deportation. Unfortunately, it often seems that when Article 8 protects certain categories of individuals, whether it be non-British citizens, social tenants or prisoners, then it becomes something to be vilified. This misses the point: human rights protect everyone. However, often it will be those that are marginalised, minoritised, and for whom the state holds significant power, that will find themselves needing to rely on them the most. **The Government, who have responsibilities under human rights laws, should not get to pick and choose whose rights they uphold and whose they do not.**



## **In the courts: legal recognition of trans people, Goodwin v UK**

Despite living and working as a woman, Christine Goodwin, who was a trans woman, was still considered a man in the eyes of UK law. This meant that she could not marry a man, her birth certificate said that she was a man and she could not draw a pension at 60. Christine took a case to the European Court of Human Rights in Strasbourg, who ruled that her right to respect for private and family (combined with her right to live free from discrimination), and her right to marry, were being breached. The UK then introduced the Gender Recognition Act in 2004 which gave trans people the right to be legally recognised in the UK.



## **In practice: participating in the community as a gay disabled man**

Alfie, a gay disabled man, was being supported by the local authority to participate in social activities. Alfie's request to be accompanied by a social worker to a gay pub was denied, even though heterosexual service users were regularly supported to attend pubs and clubs of their choice. Alfie's advocate was able to use Alfie's right to respect for private life, which includes being able to participate in the community, along with Alfie's right not to be discriminated against, to successfully challenge the local authority's decision.



*“For those for whom the state looms large in their lives, the HRA is absolutely vital. That is why such significant numbers of HRA cases have been brought by children in care, people in NHS hospitals, people in detention, people subject to immigration control – and service personnel, whose lives are tightly controlled by the State in a way that civilians find hard to imagine. They need and deserve its protection too.”*

*– Susan Smith, the mother of Private Phillip Hewett who died when his Snatch Land Rover was destroyed following the detonation of an IED*



## No evidence: Article 8 and Immigration

The case has not been made to change our human rights framework and protections with respect to immigration. Any changes must be made on published evidence-based analysis. This has not happened. Data is also not publicly available on the specific human rights relied upon in cases regarding preventing deportation, nor whose human rights are relied upon, e.g. the rights of the person subject to the deportation attempt or the rights of dependent children who may be British citizens.

Instead the Government has presented a selection of cases as demonstrating the need for reform, but consistently fails to provide the full context and reasons (including the striking facts) for each of these cases (see [details of these cases provided by the JCHR](#)).



*"These cases cited by the Government show that the domestic courts and the [European Court of Human Rights] take account of both the rights of the individual and the public interest in deportation, applying the stringent tests laid out in the statutory framework. Inevitably there will be cases where the rights of the individual outweigh the public interest in deportation and the Government does not agree with the outcome, but this is not a sufficient justification for reforming the system by further eroding the protection of rights."*

- [Joint Committee on Human Rights \(JCHR\), HRA Reform, para. 232](#)



The Government's evidence does not reflect the law as it is now. It includes data and selected cases from before the Immigration Act 2014 which made it much harder for people to appeal against deportation using their Article 8 right. This means that the Government's data "obscures actual trends" ([Bail for Immigration Detainees](#)) and, in reality, there has been a reduction in human rights preventing deportations.



## Part 5A (117C), Nationality, Immigration and Asylum Act 2002 (introduced by the Immigration Act 2014)

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.



*"The scales are heavily weighted in favour of deportation and something very compelling is required to swing the outcome in favour of a foreign criminal whom Parliament has said should be deported."*

- Court of Appeal, *SSHD v CT (Vietnam)*



### What could the changes mean in practice for immigration?

In short, the Government's proposals on deportation would create categories of individuals who have less access (and often no access) to their human rights than others. This is completely unjust. By preventing courts from engaging in a case-by-case balancing exercise considering the individual's rights and the wider public interest for or against deportation (e.g. considering the impact on an individual's family who may be British citizens and the impact this may have on the wider public interest), the Government's proposals will create an arbitrary and incredibly unfair framework. This will cause confusion; undermine the public interest; and, crucially, will have serious impacts on people's human rights with corresponding serious negative consequences for their and their family's lives.

Whereas the current test allows courts to consider the "reality of the affected child's particular situation", the Rights Removal Bill states courts can only consider harm that is "exceptional and overwhelming [and] incapable of being mitigated to any significant

extent or is otherwise irreversible" – setting an incredibly high threshold. It also only considers children with whom parents have "always had" a genuine and subsisting parental relationship, excluding those who may have, for a variety of reasons, been separated from their children in the past but who play an important role in the child's life at the time the Government wants to deport them.



*"These proposals would: (i) deny FNOs their full Convention rights, thereby undermining the principle of universality of rights; (ii) remove the safeguard of meaningful judicial oversight; and (iii) place important human rights considerations in the hands of the Home Secretary, who is not an independent decision-maker. They are therefore likely to lead to increased litigation and potentially adverse judgments before Strasbourg."*

- Joint Committee on Human Rights (JCHR), HRA Reform, para. 240 (commenting on the similar proposals in the Government's Human Rights Act reform consultation)



### **Life story – the importance of Article 8 for families**

[Example from JCWI – [JCWI's response to Ministry of Justice's Consultation – Human Rights Act Reform: A modern Bill of Rights](#)]

"S was brought to the UK from Jamaica at the age of four. S completed his schooling in the UK, but did not register as a British citizen as he would have been entitled to after ten years because the fees were too high and his family could not afford it. He lived with his mother and assisted her as a carer for his younger siblings. In 2018, S was convicted of possession with intent to supply cannabis. He was sentenced to 15 months in prison and subsequently [was] to be deported to Jamaica. ... [the court] noted that while S was in prison, his younger brother, with whom he had a relationship more akin to that of a father and son, had suffered. The younger sibling had exhibited behavioural problems, which were resolved when S returned to the family home. It was established that S's mother's mental health had also suffered as a result of being separated from S and that she would be unable to care on her own for his younger siblings without his support. Evidence was further presented about the efforts at rehabilitation that S had made, including ending the misuse of cannabis and the conclusion that he was at low risk of reoffending. On this basis ... S's deportation order was successfully overturned."

Under the Rights Removal Bill, it is quite possible that S would have been deported. S's younger sibling would not count as a 'qualifying child' and may not even be considered a 'dependent' of S (especially if S's younger sibling was not a British citizen).

They also may not have met the very high threshold of exceptional, overwhelming, unavoidable and irreversible harm required to prevent S being deported.

S was at low risk of reoffending and had made considerable efforts at rehabilitation. Deporting S would have a serious negative impact on the lives and health of S's family and younger siblings (who were children and had not committed any criminal offence), and, by implication, the wider public and public bodies who may have had to then step in to support S's siblings. But under the Rights Removal Bill, S would very likely still have been deported.

## Article 8 works across all our lives – how could changes impact this?

Human rights are universal; history tells us that the moment this is no longer the case the effectiveness and extent of human rights protections for everyone will be undermined. Limiting Article 8 in one context, risks limiting it in all the other important contexts across people's lives in the UK.

Article 8 goes to what it means to live in society in the UK. It is about respect for us as individuals and our relationships with others. Having a human right that can protect these fundamental elements of our lives – in our everyday lives and when we unexpectedly find this threatened – should be celebrated. It is due to Article 8, for example, that:

- the police can no longer hold DNA of people found innocent (S and Marper v UK).
- we have a human right to decide the way in which and at which point our life should end (Pretty v UK) (Haas v. Switzerland).
- prisoners' correspondence with their doctors and lawyers is kept private (Szuluk v UK) (Gerrard v UK).
- the police cannot tap our phones without a warrant (Malone v UK).

“Majority support is needed through recognition that rights are for all. Consider, for example the position of care homes in the pandemic.”

*Sir Peter Gross (Chair of IHRAR): The Human Rights Act Reviewed*

“Thanks to Article 8, homosexuality is no longer criminalised, our employers can't secretly spy on our emails, and the police can't search us without reasonable suspicion.”

Participant on BIHR's Plan Language Workshop



## **Protecting the right to private life of a learning-disabled couple**

Tim and Sylvia, a learning-disabled couple, were living in a residential assessment centre so their parenting skills could be assessed by the local social services department. CCTV cameras were installed, including in their bedroom at night. Tim and Sylvia challenged this by talking to social services about their right to respect for private life. They did not want their intimacy to be monitored, and the baby slept in a separate nursery in any case. As a result, the social services team agreed to switch off the cameras during the night.



## **Helping a family fleeing domestic violence stay together**

Yolande and her children were fleeing domestic violence, and her husband's attempts to track them down. When they arrived in London, social workers told Yolande that the constant moving of her children meant she was an unfit parent, that she had made the family intentionally homeless, and that the children would be placed in foster care. With a support worker's help Yolande raised the need to respect her and her children's right to respect for family life. Social services reconsidered the issue. They all agreed that the family would remain together, and that social services would cover some of the costs of securing rented accommodation. This was an essential step for Yolande and her children to rebuild a new life in safety.



## **Supporting NHS staff to challenge poor practice**

A nursing home was using special 'tilt-back' chairs to stop residents in the home from trying to get up and falling. However, this meant many people who could walk had to wait for staff to come and get them out of the chairs so they could, for example, go to the toilet. Residents could no longer choose what they wanted to do with their days and were also starting to find walking very difficult.

Laura, a consultant, was concerned by this practice. After talking to residents, she realised that by not allowing the residents who could walk the freedom to do so, their dignity and autonomy, protected by the right to private life was being risked. Laura raised her concerns with staff and, using human rights language, they saw that treating all the residents the same in order to protect the few who needed the tilt-back chairs was not appropriate.



## **Keeping Irish Traveller families together**

A women's centre found that Irish Traveller families were being placed in temporary accommodation for long periods of time. This meant older children would grow up, and by the time the family was offered permanent accommodation, they were being told that children over 18 could no longer live with the family. Parents were being forced to either turn their children away and split the family up, or risk allowing them to stay at home secretly to try and keep the family together. The centre supported the families to talk to the local authority using the language of Article 8, which helped explain the impact of what was happening. The local authority looked again at the decision, and it was decided that the families could continue living together.

### **What could the changes mean in practice?**

In all the examples above, if our Article 8 human right had been watered down, the situation could have been very different. Even if the law is not directly changed for the situations above, weakening Article 8 in any context, still risks a chilling impact – discouraging individuals from raising it, and public officials considering and respecting it. Changing Article 8's protection for some groups, also creates inconsistency and confusion for public bodies, and ultimately undermines the human right more generally. The individuals involved in all these examples were in very vulnerable situations. Our HRA and Article 8 provided them with the protection that they desperately needed. Jeopardising this is very dangerous.

### **What next?**

We now have the Rights Removal Bill which will implement these changes (and many others we are very concerned about). It is really important that everyone works to raise awareness of the risks to our human rights from the proposals and stands up for our human rights!

We especially need to hear the voices of people accessing services who would be impacted by the Rights Removal Bill as well as public officials themselves who use our Human Rights Act to create positive change every day. Sadly, this lived experience is rarely part of the debate in the UK, conveniently ignored by this government, and yet these are real life stories of how our Human Rights Act is working well for people and needs to stay.



## Get involved!

Write to your [MP](#) to raise your concerns and show much you care about human rights (you can use our customisable template letters!)

Come along to our [HRA Reform events](#).

Follow us on [Twitter](#) to keep up with what BIHR are doing to raise awareness and protect our HRA.

Write us a blog about [Why Our Human Rights Act Matters](#) to you, email [hwalden@bihr.org.uk](mailto:hwalden@bihr.org.uk).

Find out more about what the reform could mean on our HRA Reform [hub](#). On this hub we will post all of our up to date resources and campaigns.

Sign up to our [enews](#).