

Equality and Human Rights Commission

Following Grenfell:

access to

justice



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Human Rights**
Commission

This briefing focuses on access to justice, including its meaning, relevant case law and its relevance to Grenfell. It forms part of a series explaining human rights issues raised by the Grenfell Tower fire: the right to life, adequate and safe housing, freedom from inhuman or degrading treatment, equality and non-discrimination, children's rights and access to justice.

What is access to justice and what is its source in international law?

Justice enables people to live in security, knowing that they will be protected and treated fairly by the law. Access to justice is a fundamental right in the common law as well as in international human rights law, and is an essential part of the rule of law. For rights to be effective, they have to be capable of being enforced; everyone should be able to seek legal redress for unlawful acts.

Access to justice covers several rights recognised in human rights law: the right to have access to an effective remedy, equality before the law and the right to a fair trial. These rights are protected through a number of international human rights treaties, for example, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The UK Government has signed up to these treaties and must abide by them under international law. The ECHR is binding in domestic law as it is incorporated into our law by the Human Rights Act 1998. It has been interpreted and applied extensively in domestic and European case law. The right of access to justice is also protected under the common law. The Supreme Court has recently described it as being 'deeply embedded in our constitutional law.'¹

At the European level, besides the protection through the ECHR, article 47 of the Charter of Fundamental Rights of the European Union contains a robust guarantee of the rights to a fair trial and to an effective remedy. This includes access to legal aid, where necessary, to ensure those who cannot afford it can access justice. However, the EU (Withdrawal) Act 2018 means that the rights in the Charter will no longer apply in the UK following Brexit.

Access to justice is a substantive right in itself as well as a procedural guarantee. It is an enabling right that allows those who feel their other rights may have been

¹ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, §64.

violated to enforce them and seek redress. The UN Committee on the Elimination of Discrimination against Women has, for instance, stated that the right of access to justice for women is ‘essential to the realization of all the rights protected under the Convention on the Elimination of All Forms of Discrimination against Women’ (CEDAW).^{2 3}

The justice system in England and Wales has been affected by a significant reduction in overall funding since 2010. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 introduced changes to the scope of legal aid, eligibility for legal aid and the rates paid for legal aid work, resulting in a substantial fall in legal aid spend. LASPO has been criticised for its adverse impact on access to civil and criminal justice, especially among disadvantaged groups and people with protected characteristics.⁴ We have called for the UK Government to assess whether changes to the legal aid system have undermined access to justice, including an examination of any disproportionate impact on groups sharing protected characteristics, and develop and implement action plans to remedy any negative impact identified.⁵ We are also carrying out an [inquiry into legal aid for victims of discrimination in England and Wales](#) in 2018-19.

What does access to justice mean in practice?

Access to justice is often used as shorthand to refer to a cluster of closely connected rights protected by a range of human rights treaties. These are the right to a fair trial,

² UN Committee on the Elimination of Discrimination against Women (2015), ‘General Recommendation No. 33 on women’s access to justice’, UN Doc. CEDAW/C/GC/33, para. 1. Available at:

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/33&Lang=en [accessed: 9 January 2019].

³ Access to justice is also protected by the other international human rights treaties, including the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC).

⁴ For further information, see EHRC (2018), ‘Is Britain Fairer? 2018’, chapter 6. Available at: <https://www.equalityhumanrights.com/en/publication-download/britain-fairer-2018> [accessed: 9 January 2019].

⁵ EHRC (2018), ‘Response to the Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012’. Available at: <https://www.equalityhumanrights.com/sites/default/files/consultation-response-on-post-implementation-review-of-laspo-september-2018.doc>. UK Independent Mechanism (2018), ‘Progress on disability rights in the UK’. Available at: <https://www.equalityhumanrights.com/en/publication-download/progress-disability-rights-united-kingdom>. EHRC (2018), ‘Pressing for progress: women’s rights and gender equality in 2018’. Available at: <https://www.equalityhumanrights.com/en/publication-download/pressing-progress-women%E2%80%99s-rights-and-gender-equality-2018>. EHRC (2018), ‘Progress on socio-economic rights in Great Britain’. Available at: <https://www.equalityhumanrights.com/en/publication-download/progress-socio-economic-rights-great-britain> [all accessed: 25 January 2019].

the right to an effective remedy, and equality before the law. These rights guarantee people's ability to access courts and tribunals, to have a fair determination of their legal claims, and to obtain a meaningful remedy if their rights have been violated.

The right to a fair trial

The key elements of the right to a fair trial, as set out, for example, in ECHR article 6 and ICCPR article 14, provide that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial national authority, court or tribunal⁶ established by law. Judgment should be pronounced publicly. However, the press and public may be excluded from all or part of the trial in the interests of morals, the protection of children or privacy, public order or national security in a democratic society, or to the extent strictly necessary in the opinion of the court in special circumstances.

Everyone charged with a criminal offence should be presumed innocent until proven guilty according to law. They also have the following minimum rights:

- to be told as early as possible, in a language they understand, what they are accused of
- to have adequate time and facilities to prepare their defence
- to defend themselves in person or through legal assistance of their choice or, if they cannot afford to pay for legal assistance, to be given it free when required by the interests of justice
- to question witnesses both against them and on their behalf under the same conditions, and
- to have the free assistance of an interpreter if they cannot understand or speak the language used in court.

Generally, the availability of legal assistance often determines whether or not a person can effectively access proceedings or participate in them in a meaningful way. States should provide free or low-cost legal aid and advice, in criminal and other cases, for people who need it to seek redress from the courts.

⁶ The exact wording varies from treaty to treaty.

The right to an effective remedy

The right to an effective remedy (judicial or other), protected under ECHR article 13⁷ and ICCPR article 2(3), recognises that people are entitled to seek effective redress for violations of their rights. This means they should be able to take their case to court to seek a judgment. To be effective, remedies must be available in practice and in law, accessible, capable of providing adequate redress, and offer reasonable chances of success.

Access to courts

The rights to a fair trial and to effective remedies include the right of access to a court, or other non-judicial avenues, to seek redress. This right is not limited to citizens only, but must be available to everyone who is in the territory or subject to the jurisdiction of the UK, regardless of nationality or status.

The right of access to a court is not absolute. It can be limited, for example, by the imposition of reasonable time limits on bringing a claim, or a requirement to pay court fees. However, any legal or administrative barriers must be proportionate and not affect the essence of people's right to access a court.

Moreover, the right requires the state to take proactive steps to enable people to access mechanisms of redress. States can establish procedures to regulate eligibility for legal aid (taking into account the complexity and seriousness of the legal issues at stake, whether the claimant is in a vulnerable situation, and whether adequate alternative means of representation are available), but they must not be arbitrary or disproportionate, or interfere with the essence of the right to access a court.

Non-discriminatory access to courts and equality before the law

The principle of non-discrimination, which is contained in all international human rights treaties, also applies to access to justice. It requires public bodies, including judicial, prison and police staff, not to discriminate against any party to a dispute in an unjustified way ([see our briefing on equality and non-discrimination](#)). It also requires the state to take proactive steps to ensure 'equality of arms' between the parties to a case. This means that both parties need to have a reasonable opportunity to set out their legal case in conditions that do not unreasonably disadvantage one of the parties.

⁷ While the ECHR has largely been incorporated into UK law by the Human Rights Act 1998, article 13 (the right to effective remedies) is not contained in the Act.

The Convention on the Rights of Persons with Disabilities (CRPD), for example, sets out in article 12 that disabled people must have access to justice on an equal basis with others. In other words, disabled people must have equal standing in courts and tribunals, and states are required to make necessary adjustments and provide appropriate training for judicial, police and prison staff.

Access to remedies in the context of housing

In the context of the right to adequate and safe housing, the UN Committee on Economic, Social and Cultural Rights has stated that this right requires, among other things, the availability of mechanisms of redress for people affected by eviction orders; the possibility of filing complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and discrimination; and complaints against landlords concerning unhealthy or inadequate housing conditions.

Access to remedies at the international level

As stated above, the ECHR has been incorporated into UK law. This means people can rely on the ECHR to bring claims in UK courts, and resort to the European Court of Human Rights if necessary once all domestic remedies have been exhausted.

Additionally, the UK Government has accepted an individual complaints procedure for rights contained in some international human rights treaties. This is the case for the CRPD and CEDAW. Victims of alleged human rights violations can file a complaint with the UN committee monitoring the treaty once they have exhausted all domestic remedies or if appropriate domestic remedies are not available.

However, the UK has not accepted the complaints procedures under the other human rights treaties, for example under ICCPR.

Access to justice in action

There is a lot of jurisprudence relating to access to justice at international and domestic level. A few examples are provided below.

In 2017, the **UK Supreme Court** ruled that the imposition of disproportionate tribunal fees can violate the right of access to the courts, and confirmed that this is a core common law right:

The value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable. [...] Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question (see *R (Unison v Lord Chancellor) [2017] UKSC 51*).

In 2016, the **UN Committee on the Rights of Persons with Disabilities** held that the refusal to provide a person with steno-captioning to enable him to perform jury duty was discriminatory and in violation of article 5 (equality before the law), as it amounted to a denial of reasonable adjustments. The Committee reiterated that discrimination can result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate, but that disproportionately affects disabled people (see *Michael Lockrey v Australia*).

In 2015 and 2016, the **UN Human Rights Committee**, the **Committee on Economic, Social and Cultural Rights** and the **Committee on the Rights of Persons with Disabilities** called on the UK Government to:

- ensure that changes to the legal aid system do not undermine the right of access to courts and effective remedy
- review the impact of the changes with a view to ensuring access to justice and the provision of free legal aid services, in particular for disadvantaged groups, and
- provide appropriate legal advice and support, including through reasonable and procedural adjustments for disabled people.

See the *UN Committees' Concluding Observations on the UK*.

In 2010, the **UK Upper Tribunal** found a violation of an individual's right to a fair hearing of his appeal against a decision to refuse him Employment and Support Allowance, taking into account inadequate advice he received from Jobcentre Plus and his mental health condition (see *DG v Secretary of State for Work and Pensions (ESA)* [2010] UKUT 409).

In 1999, the **European Court of Human Rights** held that to be effective, the remedy required by ECHR article 13 must be available in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities (see *Çakıcı v Turkey*). In 2003, the Court added that the adequate nature of a remedy can be undermined by its excessive duration (see *Doran v Ireland*).

In 1975, the **European Court of Human Rights** held that fair trial rights were violated when the Home Secretary prevented a prisoner from instructing a solicitor with a view to bringing a defamation claim against a warden. The Court reasoned that article 6 should be read as entailing the right to access a court and legal counsel (see *Golder v UK*).

How is access to justice relevant to Grenfell and the work of the Grenfell inquiry?⁸

The Grenfell Tower fire raises a number of concerns in relation to residents' and survivors' access to justice. The inquiry should consider:

- the availability and adequacy of complaints mechanisms and redress before and after the fire: Were residents, including disabled residents and children, made aware of their rights? Were they able to take legal action to raise concerns about fire safety effectively, and were their complaints acted upon?
- the availability and adequacy of legal advice provided for tenants and residents before and after the fire, including through free legal advice services and legal aid, and
- whether the absence of legal advice may have affected residents' ability to progress complaints about the risk of fire.

⁸ The scope of the inquiry is set out in the [terms of reference and list of issues](#), both of which are available online [accessed: 7 January 2019].

Residents' access to justice may also have been affected by the legal aid cuts in recent years. The inquiry should examine the extent to which those cuts had an impact on the ability of residents to access legal aid to make complaints about housing and safety concerns prior to the fire. Certain categories of housing claims are no longer eligible for legal aid under the cuts introduced by LASPO.

The inquiry process also raises issues relating to access to justice. We are aware of a number of concerns that have been raised regarding restrictions on legal aid. A large number of concerns have also been raised about the inquiry process itself. These concerns include restrictions on participation, restrictions on the ability of Grenfell survivors, and other participants in the inquiry, to put questions directly to witnesses, and limitations on disclosure. All of these matters have the potential to impede effective access to justice.

Further information on our work following the Grenfell inquiry is available on our website at: <https://www.equalityhumanrights.com/en/following-grenfell>.

If you have any queries on human rights in relation to the Grenfell Tower fire, please contact grenfell@equalityhumanrights.com.

Contacts

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