

The Right to Clean Air: the Legal Case

Introduction

This note considers the legal basis for the right to clean air now enshrined in the Clean Air (Human Rights) Bill.

For the purposes of this note “clean air” means air that does not contain pollutants at levels that are harmful to human health. The harm of the pollutants is either direct, through making air harmful to breathe, or indirect as a result of their contribution to climate change and/or by causing degradation of the natural environment on which human beings depend.¹

The Human Rights Act 1998 sets out the rights and freedoms to which everyone resident in the UK is entitled and incorporates into UK law the rights set out in the European Convention on Human Rights (ECHR). It is the means by which human rights are implemented and enforced in the UK.

The ECHR itself was adopted in 1950, at a time when there was limited awareness of environmental issues. Consequently, there is no specific reference to the environment in the ECHR² but the rights still provide protection from environmental harm. This is the basis on which the Clean Air (Human Rights) Bill is built.

However, since then, numerous international instruments have elaborated on the relationship between human rights and the protection of the environment, including through the concept of ‘sustainable development’.³

In particular, the Preamble to the Aarhus Convention, of which the UK is a member, presupposes that protection of the environment is essential to the enjoyment of human rights, including the right to life and recognises “that every person has the right to live in an environment adequate to his or her health and well-being” and a duty to protect and improve the environment for the benefit of present and future generations.⁴

Most recently, the UN is currently considering the adoption of the Global Pact for the Environment, drafted by jurists from around the world.⁵ Article 1 of the Global Pact sets out the right of every person “to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment”.

¹ Precise levels of relevant pollutants can be found in the Clean Air (Human Rights) Bill. These are to be amended in accordance with best national and international scientific knowledge and guidance, including from the World Health Organisation (WHO), the International Organization for Standardization (ISO) and the United Nations Economic Commission for Europe (UNECE).

² The same is true of a number of other international human rights instruments adopted at the same time. See, for example, the Universal Declaration of Human Rights, 10 December 1948.

³ See, for example, the Stockholm Declaration, 16 June 1972; United Nations Framework Convention on Climate Change (UNFCCC), 9 May 1992; The Rio Declaration on Environment and Development, 14 June 1992; the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998; Johannesburg Declaration, 4 September 2002; Charter of Fundamental Rights of the European Union, 1 December 2009.

⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), preamble.

⁵ Draft Global Pact for the Environment, June 2017, available at <https://globalpactenvironment.org/uploads/EN.pdf>. It was taken up for discussion by UN General Assembly resolution of 10 May 2018.

Furthermore, the ECHR, like all UK law, is a living instrument that is constantly being interpreted and updated in light of modern standards and understanding through the case law of the European Court of Human Rights (the ECtHR). The Court's interpretation of rights in the context of the environment and in particular clean air is considered in more detail below.

Clean air and the right to life (Article 2)

The right to life is protected under Article 2 of the ECHR. This Article requires States not only to refrain from deliberately taking life but also imposes a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. This positive obligation requires States to take specific steps in the context of dangerous activities, whether they are carried out by the State or by private actors.⁶

In the context of the environment, where certain activities endangering the environment are so dangerous that they also endanger human life, Article 2 will apply.⁷ This includes situations involving the release of toxic emissions.⁸

The Court has elaborated various principles in this context, including the "primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".⁹ This framework includes:

1. making regulations which take into account the special features of a situation or an activity and the level of potential risk to life;
2. placing particular emphasis on the public's right to information concerning such activities;
3. providing for appropriate procedures for identifying shortcomings in the technical processes concerned and errors committed by those responsible.¹⁰

In general, the extent of the obligations of public authorities depends on factors such as the harmfulness of the dangerous activities and the foreseeability of the risks to life.

Consequently, to the extent that emissions from any source pose a threat to life, the State is obliged to put in place a legislative and administrative framework to protect against such a threat. This would therefore apply to particularly harmful emissions or emissions in particularly harmful concentrations.

The purpose and effect of the Clean Air (Human Rights) Bill is to introduce a comprehensive and clear law and regulations to fulfil the states' duties.

⁶ *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, para. 36; *Paul and Audrey Edwards v. the United Kingdom*, judgment of 14 March 2002, para. 54; *Öneryıldız v. Turkey* [GC], judgment of 30 November 2004, para. 71; *Budayeva and Others v. Russia* 29 September 2008, para. 128; *Brincat and Others v. Malta*, 24 July 2014, para. 79.

⁷ *Öneryıldız v. Turkey* [GC], judgment of 30 November 2004, para. 71; *Budayeva and Others v. Russia* 29 September 2008, paragraph 128.

⁸ *Brincat and Others v. Malta*, para.80. The case itself concerned asbestos poisoning but the Court also stated that toxic emissions from a fertiliser factory, as was the case in *Guerra and Others v. Italy*, 19 February 1998, could engage the positive obligations of states.

⁹ *Öneryıldız*, para. 89, *Budayeva and Others*, para. 129; *Kolyadenko and Others v. Russia*, 28 February 2012, paras. 157-161; *Vilnes and Others v. Norway*, 5 December 2013, para.220; and *Brincat and Others*, para.101.

¹⁰ *Id.* and see also Manual on Human Rights and the Environment, Council of Europe, 2012, p.38.

Clean air and the right to respect for private and family life (Article 8)

Environmental problems that do not pose a threat to life may nevertheless, if not controlled, undermine the enjoyment of 'private and family life' under Article 8 ECHR.

Article 8 extends to respect for the quality of private life as well as the enjoyment of the amenities of a persons' home. Consequently, Article 8 protects individuals' physical and psychological health as well as their enjoyment of their living space.¹¹ Breaches of this right can therefore stem from noise, emissions, smells or similar forms of interference.¹²

Environmental degradation per se does not necessarily involve a violation of Article 8 because there is no express right to environmental protection or nature conservation.¹³

For Article 8 to be engaged, the environmental factors must directly and seriously affect private and family life or the home. Consequently:

1. there must be a causal link between the activity and the negative impact; and
2. the adverse impact must have reached a certain threshold of harm.

In relation to the link between the impact and the harm, the ECtHR in *Fedayeva v. Russia* found that toxic emissions from a steel plant amounted to a violation of Article 8. The Court held that although there was limited evidence of actual damage to the health of the applicant, the fact that pollution levels exceeded safe limits near the applicant's home and that these pollutants were generally recognised to be potentially harmful was sufficient to find a violation of Article 8 both on the ground that it inevitably made the applicant more vulnerable to various illnesses and that it adversely impacted on her quality of life at home.¹⁴

The assessment of the minimum threshold depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects, as well as on the general environmental context.¹⁵ However, there is no requirement that the nuisance in question must seriously endanger an individual's health.¹⁶

As with Article 2, Article 8 can also involve positive obligations to prevent harm caused by State or private actors. Consequently, the protection of the individual right to the peaceful enjoyment of one's possessions may require the public authorities to take positive measures to ensure certain environmental standards.

Whether the State has interfered with the enjoyment of Article 8 rights or has failed to act to protect such rights, the principles are broadly similar and, a fair balance must be struck between the interests of the individual and the interests of the community.¹⁷

States enjoy a certain margin of appreciation in determining where the balance should be struck. However, the Court has made various pronouncements concerning the limits of this discretion, including in the context of environmental cases. An important aspect is whether the environmental policy pursued is consistent, properly substantiated and in line with national laws and regulations. In a number of instances, the ECtHR has been willing to make

¹¹ *Cordella and Others v. Italy*, judgment of 24 June 2019, para.157.

¹² *Moreno Gómez v. Spain*, judgment of 16 November 2004, para. 53; and *Deés v. Hungary*, judgment of 9 November 2010, para 21.

¹³ *Kyrtatos v. Greece*, judgment of 22 May 2003, para. 52; *Dubetska and Others v. Ukraine*, para. 105

¹⁴ *Fadeyeva v. Russia*, judgment of 9 June 2005, paras.87-88.

¹⁵ *Fadeyeva v. Russia*, judgment of 9 June 2005, para. 69.

¹⁶ *Lopez Ostra v. Spain*, judgment of 9 December 1994, para.51.

¹⁷ *Lopez Ostra v. Spain*, judgment of 9 December 1994, para.51.

an in-depth assessment of the situation and to indicate what measures States should have taken or should take.¹⁸

In *Cordella and Others v. Italy* the ECtHR stated that national authorities must address the issue “with due diligence and have considered all competing interests”.¹⁹ The Court went on to reiterate “that it is for the State to justify by precise and circumstantial elements the situations in which certain individuals must bear heavy burdens in the name of the interests of society”.²⁰

In *Dubetska and Others v. Ukraine* the ECtHR considered the impact on the applicants’ Article 8 rights of a nearby coal mine and factory. The Court held that, although environmental hazards inherent to life in every modern city are not within the scope of protection offered by Article 8, living in an area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health in violation of Article 8.²¹

Furthermore, in *Tătar v. Romania*, the ECtHR emphasized the importance of the precautionary principle, arguing that the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures.²²

There is an abundance of scientific evidence as to the harmful impact of emissions on human health. There is therefore an obligation on the government to take positive steps, including by putting in place effective and proportionate measures, to protect persons resident in the UK from harmful levels of pollution.

Articles 2 and 8 and climate change

The ECtHR has yet to consider a case concerning the threat to human rights posed by climate change.

In the absence of a ruling from the ECtHR, some national courts of States party to the ECHR have refused to elaborate on whether these rights are infringed as a result of threats posed by climate change.²³

Other national courts however have been more forthright, recognising that based on the jurisprudence of the ECtHR, under Articles 2 and 8 ECHR, States have both positive and negative obligations relating to the interests protected by these articles, including the positive obligation to take concrete action as regards climate change to prevent a future violation of these interests.²⁴

¹⁸ See, for example, *Öneryildiz v. Turkey*, judgment of 30 November 2004.

¹⁹ *Cordella and Others v. Italy*, judgment of 24 June 2019, para.161.

²⁰ *Id.*

²¹ *Dubetska and Others v. Ukraine*, judgment of 10 February 2011. See also, *Jugheli and Others v. Georgia*, judgment of 13 July 2017, where air pollution caused by a nearby thermal power plant also resulted in a violation of the applicants’ rights under Article 8.

²² *Tătar v. Romania*, judgment of 27 January 2009

²³ *Friends of the Irish Environment CLG v. Government of Ireland* [2019] IEHC 747, para.139

²⁴ *Urgenda Foundation v. State of the Netherlands*, judgment of Hague Court of Appeal of 9 October 2018 upholding decision of the District Court. The case is now pending before the Supreme Court of the Netherlands

On 13 September 2019 the Procurator General issued a formal opinion recommending that the Supreme Court uphold the decision.²⁵ The Opinion highlights that the existing case law of the ECtHR requires States to take preventive action where there is a real and immediate risk to persons albeit that this requirement must not impose an impossible or disproportionate obligation.²⁶

The Opinion points to the case of *Taşkin and Others v. Turkey* to argue that even risks threatening to occur in the long term, including several decades, may require the government to take preventive measures.²⁷ It also refers to the ECtHR's adoption of the precautionary principle to note that imminent damage and a causal link is not necessary to require positive action by the State, a "real risk" is sufficient.

Furthermore, the Opinion notes that the obligation to protect persons is not confined to the protection of specific persons but can apply to society in general.

The reasoning of the Netherlands' Court of Appeal and the Procurator General highlights the way in which the reasoning of the ECtHR supports the notion that Articles 2 and 8 of the ECHR can require States to take positive action to prevent against violations of the right to life and to the enjoyment of private and family life caused by climate change.

Related rights: access to information, appropriate decision-making processes and access to justice

Both Articles 2 and 8 may also involve related rights such as the right to adequate information in relation to environmental issues, proper decision-making processes and access to justice and an effective remedy for harm caused.

The right to information may entail ensuring an effective and accessible procedure for individuals to seek all relevant and appropriate information. Moreover, if environmental and health impact assessments are carried out, the public needs to have access to those study results.

During the decision-making process, the interests of individuals affected must be taken into account and those individuals must be involved in the process. Appropriate investigations and studies are also required.

Individuals who have an arguable claim that their rights have been violated also have the right to access a court and to an effective remedy (Articles 6 and 13).

These rights are also guaranteed through the UK's ratification of the Aarhus Convention and through domestic law provisions, such as, the Environmental Information Regulations 2004.

In the context of clean air, such rights could require:

1. adequate monitoring of emissions;
2. publication of data, studies and other results relating to air quality;
3. appropriate consultation procedures when setting air quality targets and legislating;

²⁵ An unofficial translation of the Opinion is available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190913_2015-HAZA-C0900456689_opinion.pdf

²⁶ Opinion, para.2.54, citing *Osman v. Turkey*, (GC) Judgment of 28 October 1998.

²⁷ *Taşkin and Others v. Turkey*, judgment of 10 November 2004. In this case the Turkish government argued that the risks associated with the operation of the gold mine in the case were 'hypothetical' because they could only emerge in 20 to 50 years,

4. fair, accessible and timely procedures when rights have been breached capable of resulting in an effective remedy.

If we want to link this specifically to the Clean Air (HR) Bill we could point to the specific provisions which implement these rights in relation to clean air.