

Which sort of Human Rights Act?

Francis Bennion asks a last-minute question

Soon we shall have our very own Human Rights Act, when the Bill now going through Parliament comes into force. Which sort of Act will it be? There are still two possibilities open. Either it will mirror the European Convention on Human Rights (the Convention), producing much the same result as going to Strasbourg (the mirror-image Act), or it will be a free-standing affair waiting to be developed by our judges as they think fit (the free-standing Act).

Does it matter?

The mirror-image Act is what everyone has been led to expect. It requires the following four characteristics. (1) The rights protected by the Act should be exactly the same as the rights protected at Strasbourg. (2) The same exclusionary rules as at Strasbourg should govern the question of who can make an application under the new Act. (3) In British cases, the defendant at Strasbourg is always "the United Kingdom" (with an enlarged meaning), so it should be same under the new Act. (4) The British Government has without a single exception always implemented the findings of the Strasbourg court, even when hostile, so the same should apply under the new Act.¹

If the free-standing Act were adopted, none of that would follow. Even though the Act set out the relevant articles of the Convention (as the Human Rights Bill does in Schedule 1), they would not necessarily have the same meaning as at Strasbourg. Instead they would have whatever meaning our judges chose to put upon them, in the name of developing a distinctive "British" human rights regime. The persons entitled to apply under the Act would not be the same as those entitled to apply to Strasbourg. The defendant would not be "the United Kingdom" but whoever the judges elect to find suitable when construing the largely undefined term "public authority" used in clause 6 of the Bill. It is uncertain whether the British Government would without a single exception always implement the findings of our courts under the Act.

The story so far

The story begins with a consultation paper published in December 1996 entitled *Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into UK law*. The authors were two Labour MPs, Jack Straw and Paul Boateng. The paper explained that "Labour is committed to incorporating [the Convention] into UK law through a new Act of Parliament". That was how Labour would bring rights home, so that there would no longer be any need for people to go to Strasbourg. "The new Act will allow British people to assert and enforce their rights under [the Convention] through the ordinary UK courts and tribunals." That sounds very much like the mirror-image Act.

Next came the new Labour Government's white paper of October 1997 entitled *Rights Brought Home: The Human Rights Bill* (CM 3782). It opened with Tony Blair's pledge "based on bringing the European Convention on Human Rights into United Kingdom law". The paper went on to say that the Bill would give people in the United Kingdom opportunities to enforce their rights against the state under the

¹ This statement is challenged by Luke Clements in 'The Human Rights Act – A New Equity or a New Opiate: Reinventing Justice or Repackaging State Control?', 26 JLS (1999) 72, 82. However it is supported by a Government statement in *Rights Brought Home: The Human Rights Bill* (CM 3782), para 1.10.

Convention in British courts rather than having to incur the cost and delay of taking a case to Strasbourg. Again, what that promises is the mirror-image Act.

The Human Rights Bill has passed through the House of Lords, with some minor amendments, and awaits committee stage in the Commons. Does it deliver a mirror-image Act? I cannot in an article cover the whole field, so in answering this I shall stick to the four points already mentioned.

(1) Interpreting the Convention articles

The Convention is a treaty. Domestic law requires our courts to construe a treaty in the same way as courts in other countries construe it. In *Re H and others (minors) (abduction: acquiescence)* [1997] 2 All ER 225 at 234 Lord Browne-Wilkinson said: 'An international convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all contracting states'.

The Bill is confused on this point. It refers throughout to "the Convention rights" and defines these as the rights and fundamental freedoms set out in articles 2 to 12 and 14 of the Convention "as read with articles 16 to 18". (I ignore the protocols, which do not affect the argument.) The last words are odd, because the rule of interpretation is that a document must be read as a whole. If "the Convention rights" are to mean the same as the meaning found by the Strasbourg court, then the cited articles must be read along with the *entirety* of the Convention, not just articles 16 to 18.

Our courts will have to make sense of the specified articles. Government spokesmen on the Bill have constantly diverted questions as to its legal meaning by saying they must be left to the courts to decide. But the courts cannot successfully operate in a vacuum. What are they to conclude when told that they must not consider the entire Convention?

Another rule of interpretation is relevant. It is sometimes expressed in Latin phrases such as *expressum facit cessare tacitum* (no inference is proper if it goes against the express words) or *expressio unius est exclusio alterius*. (to express one thing is to exclude another thing not expressed). What these mean is that if you say, as here, that the specified articles are to be read with articles 16 to 18, that by implication means they are not to be read with any other parts of the Convention.

Yet they need to be read with the Preamble, which invokes the Universal Declaration of Human Rights and explains the Convention's purpose. They need to be read with article 1, which demands that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1', making clear that it is the European states themselves, and no one else, who have the duty of obeying the obligations imposed by the Convention.

They also need to be read with article 34 (formerly article 25), which states: "[t]he court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention . . ." The effect of this has been described in D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995), page 630, as follows: "While 'non-governmental organisations' and 'groups of individuals' are broad categories they do not cover, for example, bodies such as municipalities, other local government organisations or semi-state bodies." Even the word "person" in article 34 does not include one of these bodies, which cannot therefore object that "the United Kingdom" has infringed its rights.

Because the presumption from the wording of clause 1 of the Bill is that the specified articles are *not* to be read with the rest of the Convention it seems that our judges are meant to have a free hand in construing them. This is confirmed by clause 2, which requires a court applying a Convention article to *take into account* rulings on its meaning given by the Strasbourg court without being bound by them. This is in line

with the civil law, which has no doctrine of binding precedent. It permits allowance to be made for the "margin of appreciation" which is permitted under the Convention jurisprudence. On this the Lord Chancellor said in a debate on the Bill that "[o]ur courts must be free to develop human rights jurisprudence by taking into account European judgments and decisions, but they must also be free to distinguish them and to move out in new directions in relation to the whole area of human rights law" (HL Deb. 24 November 1997, col. 835). Definitely a flavour of the free-standing Act there.

The first question asked above was whether the rights protected by our new Act will be exactly the same as the rights protected at Strasbourg. The answer has to be no.

(2) Who can apply?

The second of the four questions to be used for establishing whether the Act will be a mirror-image Act is who will be able to apply to our courts to have their rights protected? Not everyone is entitled to go to Strasbourg, so will the same exclusory rules govern an application under the new Act? Here the answer lies in clause 7 of the Human Rights Bill. If we were intended to have a mirror-image Act, one would expect to find here something equivalent to article 34 of the Convention (set out above). We do not.

Instead we find clause 7(1) stating, with one caveat that I shall come to, that *any* person with a claim will be entitled to pursue it. Here of course "person" is used with its wide English-law meaning, including all natural and artificial persons, and not with the narrower meaning which, as I have said, is applicable to article 34. The caveat I mentioned is that the applicant "is (or would be) a victim of the unlawful act". What does that curious expression mean? We are told in clause 7(6). A person is a victim only if he or she would be a victim for the purposes of article 34 of the Convention!

So we are brought back to article 34 after all, but the position is not as clear as it might be. The Notes on Clauses say of clause 7(6): "[t]his attracts the Convention jurisprudence on 'victim'. In particular, the person must be directly affected by the act" (my italics). The suspicion is that this talk of a "victim" is merely intended to exclude persons indirectly affected, such as interest groups, and does not have in mind the exclusion of directly-affected persons *of the wrong type*, such as local authorities. This reading is borne out by statements in debate by Government spokespersons (see eg the Lord Chancellor in HL Deb. 24 November 1997, col. 831: "The wording of clause 7 therefore reflects the terms of the Convention, which stipulates that petitions . . . will be ruled inadmissible unless the applicant is the victim of the alleged violation").

We may have to await a certain answer until some body such as a local authority tries to bring a claim under the new Act, as assuredly they will.

(3) Will the defendant always be "the United Kingdom"?

The third of our four questions to be used for establishing whether the future Human Rights Act will be a mirror-image Act is: Will the defendant always be, as at Strasbourg, "the United Kingdom"? Here the answer has to be no, though as we shall see it still may be possible occasionally to make the United Kingdom, or the Crown, the defendant. The follow-up question is: Who then will the defendant be? Here in many cases the answer is not obvious.

At Strasbourg, an application for breach of human rights can only be made against one of the High Contracting Parties. The Human Rights Bill is concerned only with cases where the High Contracting Party is the United Kingdom. An official notice of the European Commission of Human Rights dated 5 January 1998, issued for the guidance of applicants under the Convention, says: "You can only complain . . . about matters which are the responsibility of a public authority (legislature, administration, courts of law, etc) of [the state]. The Commission cannot deal with complaints against private individuals or private organisations." In the second sentence of this, "private" is contrasted with a meaning of "public" which equates it with *belonging to the state*. So an organisation which is in ordinary usage "public" (such as a

public limited company or p.l.c.) cannot be the subject of an application under the Convention because it is not a manifestation or emanation of the British state.

Clause 6 of the Bill says that, subject to exceptions, that it is unlawful for a "public authority" to act in a way which is incompatible with a Convention right. It does not say that here "public authority" has the same meaning as in the Convention. Indeed it does not say what meaning it has, though it says what meaning it does *not* have. Its meaning does not, for example, include either House of Parliament, nor presumably (though it does not say so) the Queen in Parliament, the source of our primary legislation. This cuts out the very first type of body (legislature) which as we have seen is named by the Commission as an example of a public authority to which the Convention applies. Strike one against the mirror-image Act.

Strike two is the exclusion from the future Act of cases (not of course excluded by Strasbourg) where under prevailing United Kingdom law the public authority complained against "could not have acted differently".

Strike three is the apparent Government view that bodies like the Press Complaints Commission (PCC) will be public authorities under our new Act. The PCC is certainly not a public authority under the Convention, because it is considered to be privately constituted. (I was assured of this by lawyers of the Commission when I raised the point with them.) The Government has shuffled its feet on this one, as indicated by Sir Nicholas Lyell: "Is the Press Complaints Commission a public authority? At one moment the Government said it was not, but they took advice from David Pannick QC and then said it was." (Commons Hansard 16 February 1998, col. 855.) Lyell received no distinct reply from the Government spokesperson, but the conclusion from Government answers generally is that though it will be for the courts to decide the answer is probably in the affirmative.

It is obvious that on the test of the third point the new Act will not be a mirror-image Act but a free-standing Act which even from the start gives markedly different answers to those laid down by the Convention.

(4) Will the Government always implement rulings?

The last of the four questions to be used for establishing whether or not Britain is to get a mirror-image Act concerns the fact that our Government has *without a single exception* always implemented the findings of the Strasbourg court, even when hostile. [See above though.] Will the same apply under the new Act?

In the debates on the Human Rights Bill the Home Secretary, Mr Jack Straw, was asked the following question by Simon Hughes of the Liberal Democrats (Commons Hansard 16 February 1998, col. 774): "If a Government introduced legislation [banning such as GCHQ workers] from belonging to a trade union would they be able to go to a British court immediately for a remedy . . ." The answer, though Mr Straw did not give it straight out, is no. Instead Mr Straw explained that the policy of the Bill is to accept that Parliament is supreme (even though since the passing of the European Communities Act 1972 it is not in practice supreme). However he added: "According to 50 years of practice on both sides, we always put the action right, and bring it into line with the Convention". [Cf note above.] The burden of his remarks was that this policy of implementation *might* be continued, though he could not bind his successors.

The truth

The truth emerges that, as the Bill stands, the Human Rights Act we are about to be given will be more a free-standing Act than a mirror-image Act. This is unsatisfactory, because it means that in some cases at least a different result will be obtainable at Strasbourg than can be got at home. It also gives a blank cheque to our judges to develop the Convention's open-textured articles as seems good to them. The state is likely to suffer, as well as legal certainty. Here the following quotation is apposite.

"In recent years . . . it has been difficult for the State to obtain justice from the judges of the High

Court . . . the weight of prejudice against the State in the minds of many members of the Court of Appeal and Judges of the High Court has been such as seriously to affect the Administration of Justice."

This might be thought a recent utterance, but the capitals give it away. It was addressed to the Lord Chancellor of 1929 by his permanent secretary (cited by Robert Stevens in *The Human Face of Law* (1997), pp 245-6). Some may think it has grown truer over the years, and that if we get this free-standing Act it will grow truer still.

Perhaps the biggest objection to the Bill as it stands now is that under it an applicant will probably not be able, as can be done at Strasbourg, to proceed against the United Kingdom on the ground that there is a lacuna on some aspect of British law. Many articles of the Convention require a state's law to include certain provisions. Our courts should be able to make a declaration (akin to a declaration of incompatibility under clause 4) where a necessary law is absent.

I use the word "probably" in the preceding paragraph for this reason. As the term "public authority" in clause 6 is essentially undefined it would be possible to argue that it includes the United Kingdom, or at least the Crown, and proceed in that way where our law is deficient. One cannot sue either House of Parliament, but the court might possibly hold that one can sue the Crown and at least obtain a declaration. Then, in line with existing practice regarding Strasbourg rulings, the government would be expected to promote the necessary legislative change.

Conclusion

I conclude by listing the main amendments needed to the Human Rights Bill to ensure that the Act we get is a mirror-image Act and not a free-standing Act.

1. Amend clause 1(1) (meaning of "the Convention rights") to require the relevant articles of the Convention to be interpreted by our courts as they would be by the Strasbourg court, allowing for the national "margin of appreciation".
2. Widen clause 4 (court declaration that a provision of legislation is incompatible with the Convention) to include the case where neither the common law nor our legislation includes a provision required by the Convention.
3. Amend clause 6(3) (meaning of "public authority") so as (1) to exclude any person who under the Convention would not fall to be treated by the Strasbourg court as an emanation of the United Kingdom, and (2) so as to include the Crown in cases where the law of the United Kingdom is challenged.
4. Amend clause 7(1) (description of persons who may complain of a breach of their convention rights) so that it excludes a person who does not fall within the phrase "any person, non-governmental organization or group of individuals" contained in the new article 34 of the Convention.

In addition a Government statement should be made that it is intended to continue, in relation to court findings under the new Act, the present invariable practice of giving effect to the rulings of the Strasbourg court.

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