

## **W201 The Individual and the State**

### **Study notes on civil liberties: a comparison of English law and Articles 5 6 and 7**

The course requires

- an understanding of civil liberties law in England and Wales and
- an ability to compare English law with Convention rights.

#### **1 A lawful arrest**

English law

The grounds for arrest without warrant by a police officer are set out in Section 24 of the Police and Criminal Evidence Act (PACE) 1984 as amended by the Serious Organised Crime and Police Act 2005. A police officer must have reasonable suspicion that an offence (it can be any offence) has been committed and the person arrested is guilty of it. He must also have reasonable grounds to believe it is 'necessary' to make the arrest (ie to enable the offence to be investigated or to stop the person arrested disappearing).

Convention

Article 5 1 (c)

Everyone has the right to liberty and security of the person.  
No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence...

#### **2 Giving reasons for arrest**

English law

The common law right to reasons was established in 1947 in **Christie v Leachinsky** Lords and the law was codified in Section 28 of PACE:

## Section 28

(a) The person making the arrest must inform the arrested person of the fact of, and reasons for, arrest either immediately or as soon as is reasonably practicable afterwards;

(b) a police officer making an arrest must inform the person arrested of these matters even if they are obvious.

Subsequent cases have diluted these requirements.

**Murray v Ministry of Defence** 1988 Lords (Army patrol entered Mrs Murray's house intending to arrest her. When she asked whether she was under arrest she was not told till half an hour later. Held - the arrest was lawful since from the outset it must have been obvious she was under arrest.)

**Lewis v CC of S Wales Constabulary** 1991 (Two people were arrested and not told the reason straightaway. Held - the arrests were unlawful but became lawful once the reasons were given.)

## Convention

### Article 5. 2

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

**Murray v UK** 1995 (This case involving Mrs Murray went to the ECHR where the Court found no breach of Article 5 as despite not being told the reason for her arrest for half an hour she was told eventually.)

## 3 Length of detention without charge

### English law

#### Sections 41 42 43 & 44 PACE

These allow a person to be kept at a police station no longer than 24 hours without charge. The 24 hours can be extended by a senior police officer up to 36 hours for an indictable offence. After that application may be made to magistrates for further detention at a police station up to a further 36 hours and finally a further extension up to 96 hours in all. At the end of 24 hours (or any longer period) the suspect must be released or bailed if not charged.

Convention

Article 5. 3

Everyone arrested or detained ...shall be brought promptly before a judge... and shall be entitled to trial within a reasonable time or to release pending trial.

One area of challenge has been the provisions of the Prevention of Terrorism Acts which allow detention for longer periods than PACE.

In **Brogan v UK** 1988 ECHR four persons were held for periods from four days six hours to nearly six days seventeen hours. The Prevention of Terrorism Act allowed detention up to seven days. Held - there was a breach of the requirement of promptness in Article 5. 3 in all four cases.

#### 4 Challenging the lawfulness of detention

English law

Habeas Corpus is a writ which can be issued by a person imprisoned (or someone on his behalf). It originated in the time of Edward 1 (1272 - 1307). Today it is a means for challenging illegal detention used most often in immigration cases.

If a prima facie case of illegality can be made out it has procedural advantages for an applicant:

- it is speedy (courts deal with it first before other cases)
- if no court is sitting a judge will deal with it at home
- the burden of proof is on the person or body detaining the applicant.

An example is **R v Home Secretary ex parte Khawaja** 1984 Lords (This began as an application for habeas corpus and this was one reason why the burden was placed on the Home Secretary to show Khawaja was an illegal immigrant and not just suspected of being one.)

Habeas Corpus is a form of judicial review but being of ancient origin has different procedural rules. No leave is required and it is available against private individuals as well as public bodies and results in an applicant's immediate release.

Some limitations of judicial review apply also to Habeas Corpus. A decision of the Home Secretary may be non justiciable because of national security even though personal liberty is involved. In **Chahal v UK** 1996 ECHR the Home Secretary decided Mr Chahal a Sikh was to be deported from the UK as an alleged terrorist. Mr Chahal was held in a UK prison for 6 years pending resolution of his case. Held - there was a violation of Article 5. 4 as the Court would not consider evidence of national security when the issue

was raised by a public authority in judicial review proceedings based on Habeas Corpus.

Convention

Article 5. 4

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Habeas Corpus was found to be sufficient remedy required by Article 5. 4 in **Brogan v UK** 1988 ECHR but compare this with **Chahal v UK** where Habeas Corpus was insufficient. Article 5. 4 clearly provides wider protection.

When is a person deprived of his liberty? In **Secretary of State for the Home Department v JJ** 2007 Lords a control order made under the Prevention of Terrorism Act 2005 was capable of contravening Article 5 based on the degree of confinement and restriction involved (18 hour curfew and other restrictions). In **Secretary of State for the Home Department v AP** 2010 SC a control order confining AP to a flat for 16 hours a day in a Midlands town 150 miles from his family in London constituted an Article 5 deprivation of liberty.

The convention requires that persons can test the lawfulness of their detention **after conviction** as well as before (see Article 5. 1 (a) read in conjunction with Article 5. 4).

In **Hussain v UK** 1996 ECHR the applicant (convicted when 16) had been sentenced to be detained during her Majesty's pleasure and was unable to have the lawfulness of his detention reviewed by a court after he had served the tariff period of 15 years. Because only the Home Secretary not the Parole Board had the ultimate power to order release and because in any event the Parole Board could not conduct an oral hearing with an adversarial procedure there was a breach of Article 5. 4 on both grounds.(This case involved the period of detention **after** the tariff had expired).

More recently in **T v UK** and **V v UK** 1999 ECHR in the Bulger case the Court found breaches of Article 5. 4 because Thompson and Venables could not obtain review of their sentence by a judicial body since no tariff period had been set six years after conviction. (The Home Secretary had set a tariff of 15 years initially but this had been quashed by the House of Lords in 1997 because he had ignored the progress of the child offenders and not remained detached from public opinion. No further tariff had yet been set.))

Most recently in **Stafford v UK** 2002 ECHR the Court found a breach of Art 5.4 where the Home Secretary authorised renewed detention of a life sentence prisoner on commission of a further offence after release on licence. Detention required consideration by a **judicial** body not just a member of the executive.

Compensation for unlawful arrest or detention

Section 8 (1) of the Human Rights Act 1998 provides:

In relation to any act of a public authority which the court finds is unlawful it may grant such relief or remedy...as it considers just and appropriate.

Article 5. 5 requires:

Everyone who has been the victim of arrest or detention in contravention of this article shall have an enforceable right to compensation.

## **5 The right of silence**

English law

Before arrest everyone has the right to refuse to answer police questions. In **Rice v Connolly** 1966 a prosecution of such a person for obstructing the police in the execution of their duty failed. The duty of the citizen to assist the police is a moral not a legal duty.

The position used to be the same after arrest but the law was controversially changed by the Criminal Justice and Public Order Act (CJPOA)1994. Now if an accused fails to mention when questioned a fact which he later relies on in court there may be an adverse inference drawn (Section 34 CJPOA). This reform represents a halfway house. An accused is not obliged to answer questions and still has the benefit of the burden of proof at trial. Looking at the increase in legal representation of suspects at police stations since 1984 and the introduction of the Duty Solicitor scheme it can be argued that the removal of the absolute right to silence has been offset by a general increase in the level of legal representation placing many suspects in a fairer position during interview.

A practical problem for the suspect and his legal adviser is that it is rarely clear in the police station whether remaining silent will result in an adverse inference being drawn. **R v Argent** 1997 C A sets out six formal conditions before an adverse inference can be drawn.

Similarly if an accused decides to remain silent at his trial and not give evidence an adverse inference may also be drawn (Section 35 CJPOA). If an adverse inference is allowed the consequences can be serious. Eg **R v Friend** 1997 (Fifteen year old with mental age of nine did not give evidence in court. Held - an adverse inference could be drawn and a murder conviction was upheld.)

Section 58 (1) PACE sets out a right of an arrested person to consult a solicitor privately at any time subject to limited exceptions in serious cases.

At trial a confession may be excluded if the prosecution can not prove it was not obtained

by oppression or in consequence of anything said or done likely to render it unreliable (Section 76 PACE).

An example is **R v Paris, Abdulahi and Miller** 1994 CA. M (IQ of 75) was bullied and hectorred verbally (he denied involvement over 300 times during 13 hours of interview over 5 days before making 3 admissions). The Court of Appeal found the interviews oppressive and the admissions unreliable within Section 76.

In addition any evidence (including a confession) may be excluded if the court considers it unfair (Section 78 PACE).

### Convention

Article 6. 1 provides:

..everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal...

In **Murray (John) v UK** 1996 the Commission found no violation of Article 6. 1 where a trial court drew an adverse inference from a failure to give evidence. In **Saunders v UK** 1996 ECHR the Court found a breach of Article 6 where Ernest Saunders of Guinness plc had been obliged to answer questions by DTI inspectors under Companies Act powers. It infringed his fundamental right not to incriminate himself.

The provisions of Section 34 CJPOA are not likely to fall foul of Article 6. 1 because the suspect has a choice still whether to remain silent or not.

Article 6 covers civil as well as criminal proceedings. A 'fair hearing' includes legal advice before the hearing. **Golder v UK** 1975 (A prisoner was prevented from consulting a solicitor when he wished to sue a prison officer for defamation.)

Denial of legal aid in a criminal case affected the fairness of a hearing in **Grainger v UK** 1990 (Refusal of Legal Aid on appeal against conviction on a charge of perjury.)

The hearing must take place in a reasonable time. **Huber v Austria** 1970 (Proceedings took over 12 years. Held - too long.)

An 'independent and impartial tribunal' established by law was not provided in Scotland by a trial before a temporary Sheriff whose appointment was renewable annually and who had no security of tenure. **Starr v Procurator Fiscal Linlithgow** 1999 High Court of Justiciary Scotland (where the Convention had been incorporated already in the Scotland Act 1998). This decision has resulted in changes to the system of temporary Sheriffs in Scotland and Assistant Recorders in England and Wales to ensure greater security of tenure and independence.

In **T v UK** and **V v UK** 1999 ECHR a breach of Article 6.1 was found where the Home

Secretary was involved in setting a tariff for children convicted of murder. He did not represent an 'independent' tribunal. In **R (Anderson) v Secretary of State for the Home Department** 2002 Lords the decision of the Home Secretary in setting a tariff for an adult murderer made under UK legislation was found to be in conflict with Article 6.1. A declaration of incompatibility was made.

## **6 Retrospective offences and punishment**

English law

Whilst parliamentary sovereignty implies that a retrospective law could be passed in the UK it would be unusual and there is a presumption of statutory interpretation that in the absence of clear words parliament does not intend to legislate retrospectively. The War Crimes Act 1991 is a rare example of retrospective legislation.

Convention

Article 7

No one shall be held guilty of any criminal offence on account of any act ... which did not constitute a criminal offence... at the time when it was committed. Nor shall a heavier penalty be imposed...

In **Welch v UK** 1995 a confiscation order made under the Drug Trafficking Offences Act 1996 contravened Article 7. The power came into force after the offence was committed.

Article 7 did not assist the first men to be convicted of raping their wives in 1989 and 1990 following the decision of the House of Lords that the long established immunity was obsolete. In **SW v UK** and **CR v UK** 1995 The Court found that it was a reasonably foreseeable development of the law and not the equivalent of retrospective legislation.