

W201 The Individual and the State

Study notes on the Human Rights Act 1998

Human Rights

To have a Bill of Rights at all is a big step forward for the UK. Traditionally we have relied on a mixture of statute and case law as the source of our civil liberties. This has been very flexible but sometimes it has made it difficult to identify what rights a citizen has and there have been gaps (eg a right to privacy). The UK signed up to the European Convention on Human Rights in 1950. This did **not** incorporate it into our domestic law. Separately in EU law the European Court of Justice (**Nold v Commission** 1974) has indicated that the ECHR can supply guidelines which should be followed and generally the Convention is regarded as part of the general principles of EU law.

The position in the UK before the Human Rights Act 1998

By signing the Convention in 1950 the UK was signing a Treaty. It became binding on the UK in international law but individual citizens were given no directly enforceable rights in our courts. The most our courts did was to look at the Convention in the event of ambiguity. Where there was no ambiguity statute prevailed. **R v Secretary of State for the Home Department ex parte Brind** 1991 Lords.

Citizens were able to petition the European Court of Human Rights from 1965 onwards (assuming they had exhausted their domestic remedies). There remained the practical difficulties of cost and delay (a case could take five years to complete).

The Human Rights Act 1998

The Convention is now incorporated into UK law.

The way in which it has been done is important. There has been an attempt to devise a system that is compatible with parliamentary sovereignty.

1. It is unlawful for public authorities to act in a way which is incompatible with Convention rights unless a provision in an Act of Parliament means they could not have acted differently (**Section 6**).

This means that central and local government police prisons courts tribunals immigration authorities and privatised utilities may be challenged in judicial review proceedings if they do not comply.

Despite early hopes that the phrase “public authority” in Section 6 the Act would be treated as synonymous with the phrase “public body” in judicial review cases (ie the Court of Appeal in **R (Beer) v Hampshire Farmers Market Ltd** 2004 C A) the House of Lords has made it clear that the phrase “public body” is only a starting point. Lord Hope in **Aston Cantlow v Wallbank** 2004 Lords has said that although the domestic case law on judicial review might be helpful, it could not be determinative

of what is a core or hybrid public authority and "must be examined in the light of the jurisprudence of the Strasbourg Court" (quoted with approval by Lord Mance in **YL v Birmingham City Council** 2007 Lords).

Section 6(3)(b) extends the definition of public authority to cover hybrid public/private bodies. Any body "certain of whose functions are of a public nature" is included. Case law has generally interpreted this restrictively to deny legal redress against private companies carrying out contracted out central or local government responsibilities. In **YL v Birmingham City Council** 2007 Lords (by a majority of 3:2) an 84 year old Alzheimer's resident (mainly publically funded) of a private care home could not rely on Article 8 of the Convention when the care home attempted to remove her.

2. In civil proceedings private individuals and companies are not bound by the Convention but civil proceedings involving public authorities will be affected.
3. In criminal proceedings Convention rights can be invoked.

It is intended that the Convention should provide a new basis for **judicial interpretation** of all legislation past and future. It does **not** provide a basis for striking down any legislation. This is achieved by the use of the words 'so far as it is possible to do so' in the Act. **Section 3** states:

"so far as it is possible to do so...legislation must be read and given effect in a way which is compatible with Convention rights".

The courts will however have power to strike down **secondary** legislation (unless the parent statute prevents it) if there is a conflict with Convention rights.

The Act also provides that where there is a conflict with statute the High Court or above may make a declaration of incompatibility (**Section 4**) and then parliament will amend the law if it chooses by order in council (**Section 10**).

The decision whether to amend the law following a declaration of incompatibility is a political one for the government. To date government has responded by amending the statute in question. Terrorist legislation provides an example. Detention without trial of non-nationals under the Anti-terrorism, Crime and Security Act 2001 was the subject of a declaration of incompatibility in **A v Secretary of State for the Home Dep't** 2005 Lords. The government response was to abandon detention without trial for non-nationals and introduce control orders for both nationals and non-nationals under the Prevention of Terrorism Act 2005.

For future legislation there is a procedure whereby the government must make a statement to say whether the bill is compatible with Convention rights and if not whether the government wishes to proceed. This is a way of avoiding accidental conflicts (**Section 19**).

Other legal systems

The UK could have followed other methods of incorporation of the Convention:

1. In the UK EU law is incorporated by a provision (Section 2(4) of the European Communities Act 1972) that states that statutes have effect **subject to** the provisions in that Act.
2. In Canada a Charter of Rights in 1982 provides Courts with the power to invalidate legislation contrary to the Charter unless the legislation is expressly stated to take effect “notwithstanding” the Charter.
3. In Hong Kong a Bill of Rights in 1991 provided that prior legislation had to be construed consistently with the Bill while later legislation took precedence.
4. In New Zealand a Bill of Rights of 1990 provided that interpretation of statutes should **as far as possible** be consistent with the Bill. The UK has followed this example which is the weakest.

The European Court of Human Rights in Strasbourg

This will remain. If an individual has exhausted all domestic remedies they can still take their case to Strasbourg. In Strasbourg the Court has been streamlined to reduce delay and improve accessibility.

The status of decisions of the European Court of Human Rights following the Human Rights Act is as follows. Section 2 provides that UK courts must “take into account” inter alia judgments of the European Court of Human Rights. In other words they have persuasive authority. The House of Lords has made it clear that it will not ignore decisions of the European Court of Human Rights without good reason **R (Alconbury Developments Ltd) v Sec of State** 2001 Lords. If there is a conflict between a Lords’ decision and a decision of the European Court of Human Rights then a lower court must follow the House of Lords’ decision – **Kay v Lambeth** 2006 Lords.

How does an individual bring proceedings?

At present an individual must pay huge legal costs or seek legal aid. The Equality and Human Rights Commission can bring proceedings in areas where it has a function and can intervene in proceedings brought by others (it will choose a public interest case). It concentrates on equality or discrimination cases.