

Analysis of the uk human rights act



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The Human Rights Act contains certain provisions which have enacted to prevent busybodies, cranks and other mischief makers from bringing actions under the act. It will be argued that whilst this was the aim of the legislation, this has only in part been achieved.

Section 7 of the Human Rights Act permits Convention rights issues to be raised in any legal proceedings. However, S7 also provides that only a victim of an alleged infringement of the Convention may bring an action under the Act. This is a narrow concept and requires the claimants to be personally affected by the action being impugned. The ECHR test is more expansive than the notion of a private legal right which is used to govern the grant of standing for the declaration and injunction in English law. Complaints under the Convention must be brought by a person, non-governmental organisation (NGO) or group of individuals claiming to be the victim ' of a violation'. The term ' victim' refers to the person directly affected by the contentious act or omission. In the case of *Dudgeon v United Kingdom* (1981) 4 EHRR 149 the gay male applicant were regarded as victims of the countries criminalisation of homosexual practices even though he had not been subject to prosecution. However conversely in *Leigh, Guardian Newspapers Ltd and Observer Ltd v United Kingdom* (No 10039/82) (1984) 38 DR 74 the commission did not accept that all journalists were victims of a House of Lords decision to refuse to disclose documents to journalists even though the documents concerned had been read out in court. The " victim" test is narrower than the " sufficient interest" test for judicial review. The obvious question is how the court is to choose which test to apply in circumstances where both seem to be available.

With its locus standi requirement that one arguing that a public body has acted incompatibly with the Convention should be a victim of the violation, the Act allows challenge and intervention by a far narrower class of persons and interests than obtains for judicial review generally. Access to the courts in the formalised rights debates under the Act is correspondingly restricted. Calls for a ‘human rights culture’ and democratised debates about rights are all very well, but ultimately the very point of a judicially enforced Bill of Rights is that decisions are made in cloistered courts by judges who cannot, unlike ministers, be lobbied. As one recent, detailed study has concluded, the result is, if not the end of politics, then its legalisation. As Loughlin puts it, ‘judicial review [of statutes] must be seen as the retention of some form of aristocratic rule’ in a democratic state, where the aim is ‘no less than the elimination of the idea of the (political) sovereign and its replacement with the sovereignty of law[i]’.

It can therefore be seen that whilst it is suggested that the victim requirement is sufficiently narrow it does not obviously exclude the likes of busybodies and cranks from bringing action. The reason this difficulty arises can be demonstrated in the case of Dudgeon as above, that is that a person may not necessarily be a person who has been prosecuted or effected by the act but only has to be one that is likely to be so affected. This causes a multitude of problems and encompasses a plethora of applicants included those referred to as busybodies and cranks.

Question 2

The convention rights that are particularly important to gypsies are Article 8 – the right to a home and to respect for private and family life; and Article 14 – the right not to be discriminated against in relation to Convention rights. It is argued that gypsies can rely on these provisions in their search not only for protection of their homes.

The landmark decision in this field was that of *Buckley v UK* [1996] JPL 1018. In that case Mrs Buckley was a gypsy residing with her three children in caravans on land that she owned. She was refused retrospective planning permission and the council took enforcement action. She lost her appeal and took her case to Strasbourg. She argued that prevention of her continued residence on her land was a breach of her Article 8 rights. She further argued that the statutory regime enacted by the 1968 and 1994 Acts amounted to a breach of her Article 14 rights in that it prevented her from pursuing her traditional lifestyle. The Court held unanimously that Article 8 was applicable. However, the right is that there shall be no interference beyond that which is reasonably necessary in a democratic society. The court held that the interference with the Gypsies' right to a home, which they acknowledged existed, was justified on grounds of public policy. The court also rejected her Article 14 claim.

In *Chapman & Others v UK* (2001) *The Times*, January 30 the court held once again that there was no incompatibility with Article 8, again for much the same reasons, that the acknowledged infringement was justified on public policy grounds. However this time the court was considerably more critical of the UK government, stating (at para 96 of the original transcript):

“... although the fact of being a member of a minority with a traditional lifestyle different from that of the majority ... does not confer an immunity from general laws ... it may have an incidence on the manner in which such laws are to be implemented ... [The] vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases ... To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.”

The court made clear that the United Kingdom enjoyed a wide discretion in how it went about what were essentially political, rather than judicial, decisions. That discretion was however to be subject to important considerations, and failure to give proper weight to these considerations could make the decisions taken unlawful. Amongst these considerations, the court emphasised (at para 103), was the fact “ that if no alternative accommodation is available, the interference [with the right under Article 8] is more serious than where such accommodation is available”. In other words, it may prove very hard for local authorities to justify a failure to provide for adequate accommodation themselves, while at the same time setting out development plan policies that do not allow Gypsies to make their own provision.

In *R. (on the application of Fuller) v. Chief Constable of Dorset Police* [2001] EWHC Admin 1057, December 12, 2001 Local councils had indicated that they would tolerate the continued presence of travellers on their land until the end of August. Following certain incidents the councils agreed with the

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police that the travellers would be required to leave. On August 29 the council and police visited the site. The council gave the travellers written notice to leave on August 31 and the police at the same time issued a direction under section 61 of the Criminal Justice and Public Order 1994. Four of the travellers sought a declaration that the direction under section 61 was invalid. Held, (i) that section 61 had to be construed narrowly since it created a criminal offence, and on its true construction a direction could not be issued until the trespassers had failed to comply with a valid request by the occupier of the land to leave; (ii) that a valid direction could not be given to vacate the land at some future date, and accordingly the direction was invalid; (iii) that section 61 was compatible with the ECHR; Articles 3 and 6 of the Convention were not engaged, Article 8 rights would not necessarily be infringed and Article 1 of the First Protocol was not infringed; (iv) that, if the travellers had failed to leave on August 31, a section 61 direction would have been lawful, save possibly in respect of one of the claimants who at the time was nine months pregnant.

Therefore the case law in this area demonstrates that by and large the regulation of the environment is left to executive and legislative authorities.

Question 3

What is due process? In *Thomas v. Baptiste* [2000] 2 A. C. 1 members of the Privy Council engaged in a dispute as to whether the phrase “ due process of the law” in the Constitution of Trinidad and Tobago meant anything more than what the dissenting judgment described as applying “ the law of the land as a matter of both substance and procedure” Due process invokes the

concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations that observe the rule of law” This raises the question of the impact of the ECHR’s incorporation into UK law via the Human Rights Act. It is argued that procedurally there has been a great amount of change to the UK situation and that this change is ongoing.

Under the Human Rights Act 1998 UK courts have to consider, taking account of the Convention jurisprudence under s2, to what extent, if at all, the freedoms may legitimately be curtailed. If, having striven to achieve compatibility, it is found to be impossible, a court of sufficient seniority can issue a declaration of incompatibility, although it will merely have to go on to apply the law in question.[ii] This is of course of profound effect on previous UK legal procedure where the courts would have had to apply the provision of the Act even if it breached the convention.

Incorporation of the Convention under the Human Rights Act has already had a number of procedural advantages. UK Citizens may obtain redress for human rights breaches without needing, except as a last resort, to apply to the ECtHR in Strasbourg. This obviously saves a great deal of time and money for the citizen and thus greatly improves access to justice. The range of remedies available under the Human Rights Act is the same as in any domestic court case, and so includes injunctions and specific performance where appropriate, rather than simply damages. British judges are already making a contribution to the development of a domestic Convention rights jurisprudence.[iii]

There is still some concern however that UK judges will improve procedural requirements and not regard the Convention rights as they should. The British judiciary are, in general, highly regarded, but they are an elite group, drawn mainly from a certain stratum of society and therefore, to varying degrees, out of touch with the working class. They have trained in techniques of legal analysis which included deciding cases without the responsibility of considering their human rights repercussions, although it is fair to say that their attitude to such repercussions was changing in the years leading up to the enactment of the Human Rights Act.

Apart from its implications for legislation, public authorities have been greatly affected by the inception of the Human Rights Act due to the requirements of s6. Under S 6, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. This is the main provision giving effect to the Convention rights; rather than the incorporation of the Convention, it is made binding against public authorities. Under s6(6), an act, includes an omission, but does not include a failure to introduce in or lay before Parliament a proposal for legislation, or a failure to make any primary legislation or remedial order. Section 6 (6) was included in order to preserve parliamentary sovereignty and prerogative power: in this case, the power of the executive to introduce legislation. Thus, apart from its impact on legislation, the Human Rights Act also creates obligations under s6 which bear upon public authorities. Such obligations have a number of implications. Independently of litigation, public authorities must put procedures in place in order to ensure that they do not breach their duty under s6.

[i] Loughlin M, (2000) *Sword and Scales: An Examination of the Relationship Between Law and Politics* Passim

[ii] For example see the case of *R (H) v Mental Health Tribunal North and East London Region and Another* [2001] EWCA Civ 415

[iii] *R v A* [2001] 2 WLR 1546; *R v Lambert* [2001] UKHL 37; *R v Offen* [2001] 1 WLR 253