Human rights

HUMAN RIGHTS ACT 1998BACKGROUND OF THE HUMAN RIGHTS ACT 1998 (HRA)On 4 November 1950 member states of the Council of Europe (which included UK) drew up the European Convention on Human Rights and Fundamental Freedoms (1950). This was based on the United Nations Declaration of Human Rights and is designed pro tanto.

The Convention was ratified by the United Kingdom in 1951 and came into force in 1953. Until 1966 UK did not permit her individuals to go to European Commission of Human Rights and ultimately European Court on human Rights for their redress re the Convention rights. Since then UK citizens are allowed to go to the Strasbourg but only upon exhausting all domestic remedies. THE STATUS OF THE CONVENTION UNDER ENGLISH LAW PRIOR TO THE HRA 1998The attitude of the United Kingdom courts towards the Convention has, in the past, been the traditional one adopted in relation to treaties. Treaties form part of international law and have no place within the domestic legal order unless and until incorporated into law (Kaur V Lord Advocate 1980).

The courts regarded the Convention as an aid to interpretation but had no jurisdiction directly to enforce the rights and freedoms under the Convention (Wadington V Miah). This could, however, of itself be significant. In Waddington v Miah (1974), Lord Reid stated -having referred to Article 7 of the Convention which prohibits retrospective legislation – that ??? it is hardly credible that any government department would promote, or that parliament would pass, retrospective criminal legislation??™.

However, in the War Crimes Act 1991, the opposite notion was approached by the parliament. While previously there was lacking in the domestic jurisdiction to enforce Convention rights, the English courts were nevertheless influenced by Convention provisions, for example of the influence of the Convention in R v Secretary of State for the Home Department ex parte Brind (1991). The House of Lords was prepared to accept that there was, presumption that parliament would enact laws that were in conformity with the Convention. Accordingly, it was accepted that, where a statute permits two interpretations, one in line with the Convention, the other contrary to it, the interpretation which fitted with the Convention should be preferred. The House of Lords, however, was not prepared to accept that where a discretion could be exercised, the presumption that parliament intended that it should be exercised having regard to the Convention must be applied. Lord Bridge stated that to do so would go beyond the resolution of ambiguity and would, in effect, compel the courts to enforce conformity with the Convention. In Brind, the court could find no ambiguity in section 29(3) of the Broadcasting Act.

The only basis for challenge therefore was that the Home Secretarys decision was unreasonable in the Wednesbury sense, that is to say, that the decision was so irrational or unreasonable that no rational or reasonable person could have reached the same decision. So, there were limits to the extent to which judges were able to protect rights, as the case of R v Inland Revenue Commissioners ex parte Rossminster Ltd (1980) revealed. In Rossminster, the House of Lords ruled that, where the meaning of a statute is clear and unambiguous, the court possessed no jurisdiction to go against

its unambiguous words, and was under a duty to uphold the will of parliament by giving effect to its words. The application of Convention provisions in the interim period between the passing of the Human Rights Act 1998 and its coming into effect in England and Wales was considered by the House of Lords in ex parte Kebeline and Others (1999). The House of Lords ruled, on an appeal by the Director of Public Prosecutions from a decision of the Divisional Court, that the decision of the Director of Public Prosecutions to proceed with a prosecution under section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989, which reverses the burden of proof in relation to tile possession of articles for purposes connected with terrorist activities and which is, arguably, contrary to Article 6 of the Convention, was not unlawful. BASIC FEATURES OF THE HUMAN RIGHTS ACT 1998??? 1.??” The Convention Rights.(1) In this Act ??? the Convention rights??? means the rights and fundamental freedoms set out in??”(a) Articles 2 to 12 and 14 of the Convention,(b) Articles 1 to 3 of the First Protocol, and(c) [Article 1 of the Thirteenth Protocol]1 , as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogationor reservation (as to which see sections 14 and 15).??? The Human Rights Act 1998 is an Act of Parliament of the United Kingdom which received Royal Assent on November 9, 1998 and came into force from 2 October 2000. The old Diceyian notion of individual rights which are supposedly to be protected adequately by the common law when necessary. In other words it emphasises on the negative approach to protect the individual rights, not expressly prohibited by statute law. The concept of

positive rights, such as the right to life (Art 2), prohibition of torture (Art 3), the right to privacy and the right to family life (Art 8), freedom of expression (Art 10), peaceful assembly (Art 11) etc are asserted by the HRA.

INCORPORATION OF EUROPEAN CONVENTION OF HUMAN RIGHTSThe Convention was not part of English domestic law and, therefore, not directly enforceable in our courts, until the Human Rights Act 1998 came fully into force in England and Wales on 2 October 2000. It is widely accepted that rights and freedoms are incorporated into the English law. But scholars like Professor Zander, Michael, contradicts the notion (Michael Zander, the Law-Making Process, Butterworths; Barnett, Hilaire, Constitutional and Administrative Law, 2009 Cavendish).

HRA AND DOCTRINE OF BINDING PRECEDENT??? 2.??” Interpretation of Convention rights.(1) A court or tribunal determining a question which has arisen in connection with a Conventionright must take into account any??”(a) judgment, decision, declaration or advisory opinion of the European Court of HumanRights,(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to theproceedings in which that question has arisen.??? Section 2 of HRA provides a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (i) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (ii) opinion of the European Commission of Human Rights, (iii)

decision of the Commission, or (iv) decision of the Committee of Ministers, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. Evidence of any judgment, decision, declaration or opinion of which account may have to be taken is to be given in proceedings before any court or tribunal in such manner as may be provided by rules. In short a court or tribunal determining a question which has arisen in connection with a Convention right must take into account ECHR jurisprudence.

Thus it appears that UK courts are not bound by the rulings of the ECtHR. However, there is clear indication that, virtually, the English courts liberal enough to provide an obligation as Slapper suggested that it should be. But in Price v Leeds City Council (2005). The court held that they were not bound to follow Connors in order to satisfy the obligation to take into account the decisions of the ECtHR. In that case the local authority contended that the decision in Connors had no significance because it had been decided on the basis of the government??™s concession that Art 8 was engaged and all that it demonstrated was that there was one area of English law that was incompatible with the Convention, namely that dealing with a local authority??™s right to recover possession of land forming part of a gypsy site; the court was bound to follow the decision of the House of Lords in Qazi (2003). In most of the senses it is a logical conclusion of the section itself as it is very interpretation.

INTERPRETATION OF THE LEGISLATION AFTER ENACTMENT OF HRA??? 3.??” Interpretation of legislation.(1) So far as it is possible to do so, primary legislation and subordinate legislation must be readand given effect in a way

which is compatible with the Convention rights.(2) This section??”(a) applies to primary legislation and subordinate legislation whenever enacted;(b) does not affect the validity, continuing operation or enforcement of any incompatibleprimary legislation; and(c) does not affect the validity, continuing operation or enforcement of any incompatiblesubordinate legislation if (disregarding any possibility of revocation) primary legislationprevents removal of the incompatibility.??? Section 3(1) provides that a court or tribunal called upon to do so must interpret primary legislation and subordinate legislation in a way which is compatible with the Convention rights. This duty applies whether the legislation was enacted before or after the coming into force of the Human Rights Act 1998.

Hence a new rule of interpretation emerges. But this could be treated as a final step from court??™s perspective as Lord Steyn held in Ghaidan v Godin-Mendoza: ???[w]hat is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course.??? On the other hand Lord Hope, in Shayler, cogently stated that where legislation cannot be interpreted to remove an incompatibility under HRA s 3, ??? the position whether it should be amended so as to remove the incompatibility must be left to Parliament??? and the only option left to the courts is to issue a DOI. But, at least, resort is no longer had to the ECHR in cases of ambiguity domestic legislation must be read subject to it. PARLIMENTARY SOVEREIGNTY AND HRA??? 4.??” Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision ofprimary legislation is compatible with a Convention

right.(2) If the court is satisfied that the provision is incompatible with a Convention right, it may makea declaration of that incompatibility.(3) Subsection (4) applies in any proceedings in which a court determines whether a provision ofsubordinate legislation, made in the exercise of a power conferred by primary legislation, iscompatible with a Convention right. (4) If the court is satisfied??”(a) that the provision is incompatible with a Convention right, and(b) that (disregarding any possibility of revocation) the primary legislation concernedprevents removal of the incompatibility, it may make a declaration of that incompatibility.??? Firstly, if a legislation provision is found by the House of Lords, the Judicial Committee of The Privy Council, the Court Martial Appeal Court, the Court of Appeal or the High Court to be incompatible with one or more of the Convention Rights, the court will be able to make a declaration of incompatibility. In the white paper, ??? Rights Brought Home: The Human Rights Bill 1997???, the government concluded that the doctrine of parliamentary sovereignty was too important for our courts to be allowed to nullify statutes. Accordingly, the Human Rights Act does not give the courts the power to set aside Acts of Parliament which are inconsistent with the Convention rights but merely allows higher (from High Courts to upwards) courts to make declaration of incompatibility. A declaration of incompatibility will not affect the validity, continuing, operation or enforcement of the incompatible provision, and will not be binding on the parties to the proceedings in which it is made.

Secondly, as a general proposition, parliament will be expected not to pass legislation, which interferes with the Convention rights, and a Minister of the Crown in charge of a Bill in either House of Parliament will be required to

make in writing, before Second reading of the Bill, either a statement of compatibility to the effect that in his view the provision of the Bill are compatible with the Convention rights or a statement that although the Minister is unable to make a statement of incompatibility, the government nevertheless wishes the House to proceed with the Bill (s 19). This will also be treated as an effort to bind UK parliament but Parliament can make or unmake any law as already we have seen that they can do that if they ??? wish???. So it may be said that parliamentary sovereignty is still intact on this point.

However, comparatively recently, the court ruled that the doctrine of implied repeal had no application to constitutional statutes: R v Secretary of State for the Home Department, Simms and O??™Brien (1999 HL) and R (on the application of Anufrijeva) v Secretary of State for the Home Department, ex p Anufrijeva (HL 2004). PROCEDURAL ASPECTS OF HUMAN RIGHTS IN A COURTWhere a court is considering whether to make a declaration of incompatibility, a Minister of the Crown, or a person nominated by him, will be entitled to be joined as a party to proceedings (s 5). FIRST TRACK PROCEDURE by ORDER in COUNCIL for ??? REMEDIAL ORDERS??™ UNDER the HRA 1998??? 10.??” Power to take remedial action.(1) This section applies if??”(a) a provision of legislation has been declared under section 4 to be incompatible with aConvention right and, if an appeal lies??”(i) all persons who may appeal have stated in writing that they do not intend to doso;(ii) the time for bringing an appeal has expired and no appeal has been broughtwithin that time; or(iii) an appeal brought within that time has been determined or abandoned; or(b) it appears to a Minister of the Crown or Her

Majesty in Council that, having regard toa finding of the European Court of Human Rights made after the coming into force of thissection in proceedings against the United Kingdom, a provision of legislation is incompatiblewith an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding underthis section, he may by order make such amendments to the legislation as he considers necessaryto remove the incompatibility.??? A Minister of the Crown will be able to remove the incompatibility from the Act of Parliament and therefore to amend the legislation by making a order in council (one kind of subordinate legislation), (and any other affected legislation) (s 10). But the order in council has to be approved by a resolution of both House of the Parliament within 120 days otherwise it would be ceased to have effect but without affecting anything previously done under either order or the power to make a fresh remedial order. So it appears that without enactment of parliament a Minister of Crown may make a law even against the will of it at least theoretically (Schedule 2). (Please go through Zander, Michael, the Law-Making Process).

PUBLIC AUTHORITY AND HRA6.??” Acts of public authorities.(1) It is unlawful for a public authority to act in a way which is incompatible with a Conventionright.(2) Subsection (1) does not apply to an act if??”(a) as the result of one or more provisions of primary legislation, the authority could nothave acted differently; or(b) in the case of one or more provisions of, or made under, primary legislation whichcannot be read or given effect in a way which is compatible with the Convention rights, theauthority was acting so as to give effect to or enforce those provisions.

(3) In this section ??? public authority??? includes??”(a) a court or tribunal, and(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection withproceedings in Parliament.(4) In subsection (3) ??? Parliament??? does not include the House of Lords in its judicial capacity. (5) In relation to a particular act, a person is not a public authority by virtue only of subsection(3)(b) if the nature of the act is private.

(6) ??? An act??? includes a failure to act but does not include a failure to??”(a) introduce in, or lay before, Parliament a proposal for legislation; or(b) make any primary legislation or remedial order.??? Under s 6 of the Human Rights Act 1998 it is unlawful for a public authority to act in a way which is incompatible with a Convention right, provided (as the result of one or more provisions of primary legislation) the authority could not have acted differently. This is wide ranging enough to include the privatised industries and voluntary bodies such as housing associations who perform functions supported by public subsidy.

As there is no clear, exhaustive or conclusive definition of ??? public act??? all official acts of a minister, a statutory body, the police and armed forces and possibly any charitable body are arguably public acts (Alder, John, Constitutional and administrative Law). In short the 1998 Act creates a new ??? head??™ of judicial review. A ??? victim??™ (s 7 of the 1998 Act) can now invoke the European Convention on Human Rights in proceedings against a public body if he feels that it has failed to comply with its duty under s 6.

Given that public bodies are frequently making decisions concerning the rights and obligations of citizens in situations where there is no subsisting contractual or private law duty of care, disputes about non-compliance with the s 6 duty will inevitability be litigated by way of an application for judicial review. Hence the European Convention on Human Rights is brought directly into the heart of judicial review. On balance the UK courts are more prone to the stricter approach of section 6 of HRA. In YL v Birmingham City Council, the House of Lords decided that a private body providing publicly funded residential care is not engaged in ??? functions of a public nature??? under the Human Rights Act 1998 (HRA), s 6(3)(b).

The significance of this issue is that it determines whether those providing such care must conform with the Convention rights under the Act. It is a matter that has been the subject of some controversy in recent years. HORIZONTAL EFFECTS and VERTICAL EFFECTSECHR itself contains the vertical effects but it is unclear whether HRA has vertical or horizontal effects. However, Professor Munro argues that (he cites the Parliamentary debate of the HRA Bill) Convention rights do not have the horizontal effects; victim cannot enforce his or her rights against private companies or individuals.

But now see Venables.[1]DEROGATION AND RESEARVATION??? 14.??” Derogations.(1) In this Act ??? designated derogation??? means any derogation by the United Kingdom from anArticle of the Convention, or of any protocol to the Convention, which is designated for the purposesof this Act in an order made by the [Secretary of State]..(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the [Secretary of State] from exercising his power undersubsection (1) to make a fresh designation order in respect of the Article concerned.(5) The [Secretary of State] must by order make such amendments to Schedule 3 as he considersappropriate to reflect??”(a) any designation order; or(b) the effect of subsection (3).(6) A designation order may be made in anticipation of the making by the United Kingdom of aproposed derogation.??? 15.??” Reservations.(1) In this Act ??? designated reservation??? means??”(a) the United Kingdoms reservation to Article 2 of the First Protocol to the Convention; and(b) any other reservation by the United Kingdom to an Article of the Convention, or ofsubsection (1)(b) to make a fresh designation order in respect of the Article concerned. any protocol to the Convention, which is designated for the purposes of this Act in an ordermade by the [Secretary of State] .(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.(4) But subsection (3) does not prevent the [Secretary of State] from exercising his power under (5) The [Secretary of State] must by order make such amendments to this Act as he considersappropriate to reflect??”(a) any designation order; or(b) the effect of subsection (3).————————–[1] Horizontal effect: When rights can be enforced against the private individuals or bodies. Vertical effect: When rights can be enforced only against the public authority