

Is there still a grey area in the operation of sections 3 & 4 HRA 1998, or is the relationship crystal clear two years' on?

The 2nd October 2002 marks the second anniversary of the Human Rights Act 1998. Darren Sylvester¹ assesses the section 3 & section 4 cases that have come before the Courts since the Act's inception to ascertain whether there are now clear lines of demarcation between making legislation Convention compatible and issuing a Declaration of Incompatibility.

Background

The Human Rights Act 1998 gives further effect to the rights and freedoms that are guaranteed under the European Convention on Human Rights (ECHR).

When the Act was introduced on 2nd October 2000, it created fundamental law that was superior to ordinary law subject to the ultimate sovereign power of the Westminster Parliament; it mandated ministers, civil servants and all public officers to exercise their powers in ways that were compatible with Convention rights; furthermore, and what the substance of this article is about, is that the Act afforded judges sufficient powers to remedy the majority of human rights abuses by s.3 as they are bound, where possible, to read and give effect to old and new pieces of legislation so as to conform with Convention rights. Where the former could not be achieved by judges, the courts using their powers under s.4 can declare the statute incompatible with Convention rights and the offending statute can remain in force unless and until the Government and Parliament decide to amend it.

The interpretive obligation and R v. A²

Section 3(1) of the Human Rights Act reads as follows:

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”

The proper interpretation of section 3(1) generated debate in the House of Lords in *R v. A (No 2)*³ as it was the first case that tested the interpretive obligation and effects of section 3. The case concerned the compatibility of s.41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 with Article 6 of the ECHR. While a defendant

¹ My thanks to Professor Brigid Hadfield at the University of Essex whose lectures on this topic facilitated huge discussions which enabled the sharing of ideas to take place, many of which have assisted in the writing of this article

² [2001] 2 W.L.R. 1546

³ *ibid.*

could only cross-examine a rape complainant about a previous sexual relationship in certain circumstances, the House of Lords held that the ‘litmus test’ for a defendant to be able to cross-examine a rape complainant about a previous sexual relationship was whether such questioning was relevant to the issue of consent that to exclude it would raise questions of the fairness of the trial under Article 6 of the ECHR.

Lord Steyn espoused⁴ that:

“In accordance with the will of Parliament it will sometimes be necessary to adopt an interpretation which linguistically will appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the reading down of provisions. A declaration of incompatibility is a measure of last resort and must be avoided unless it is plainly impossible to do so”.

Lord Hope of Craighead set out his terms of disagreement with Lord Steyn⁵, in the following way, by emphasising that the rule of construction set out in section 3 was:

“...only a rule of interpretation. It does not entitle the Judges to act as legislators...the compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible”

Therefore, what Lord Hope was saying, was that if a contradiction exists, he would make a declaration of incompatibility and leave it to Parliament to take whatever action it saw fit. It is interesting to note that Lord Hope reiterated this point when later disagreeing with Lord Steyn in the case of *R v. Lambert*⁶ where he said that the task of interpretation of the legislation under section 3(1) belonged, as it always had done, to the judges and further continued to mention:

“But it is not for them to legislate. Section 3(1) preserves the sovereignty of Parliament”.⁷

Lord Hope, at para.80, stated that to achieve certainty of section 3(1), clear and precise language should be used by the judiciary, and so far as it possible, suggested that judges attach the same attention to detail when using language to express the effect of section 3(1) as a parliamentary draftsman would have done if he had been amending the statute; and if such words can not be replaced or substituted into the statute without making the statute unintelligible or unworkable, the technique would have failed and it is then left to Parliament to amend the statute by making a section 4 declaration of incompatibility.

Even though this was the first case to reach the House of Lords on the point, it was inevitable that the precise limits or demarcations of/between section 3 and section 4 would be fully ironed out. Further, it has been argued that a wide interpretation as proposed by Lord Steyn is needed to fit the section 3 definition to construe legislation

⁴ At para 44

⁵ At para 108

⁶ [2001] UKHL 37

⁷ At para 79

so far as it is possible to do so; however, a counter argument is that section 4 must carry with it some limitations on the otherwise all embracing powers section 3 affords judges, as Lord Hope has stated. In fact, Lord Hope himself and other commentators have suggested that the House of Lords in *R v. A*⁸ did over-interpret the section 3 obligation to an extent where it was used too creatively.

As Lords Slynn, Clyde and Hutton did not expressly state which approach they favoured in *R v. A*⁹, the precise parameters to the relationship between section 3 and 4 are still uncertain. The only pieces of substantive guidance can be found from dicta in other cases that have come before the Courts relating to this issue. For example, in *Donoghue*¹⁰, Woolf CJ stated that:

“Section 3 does not entitle the courts to legislate; its task is still one of interpretation but interpretation in accordance with the direction contained in section 3”¹¹

In *Wilson v. First County Trusts Limited*,¹² The Court of Appeal found that s.127(3) of the Consumer Credit Act¹³ was incompatible with Article 6 ECHR. The relevant quotation was that:

“The Court is required to go as far as, but not beyond, what is legally possible. The court is not required, or entitled, to give words a meaning which they cannot bear; although it is required to give to words a meaning which they can bear if that will avoid incompatibility, notwithstanding that this is not the meaning which they would be given in a ‘non-convention’ interpretation”.¹⁴

In the above case, it seems that the Court of Appeal struggled to give s.127(3) of the Consumer Credit Act¹⁵ a Convention compatible interpretation. It is thus contended, in view of the difficulties experienced in *Wilson*¹⁶, that should Lord Steyn’s creative approach as defined in *R v. A. (No.2)*¹⁷ be adopted in future cases, such an approach would riddle the law with uncertainty and inconsistency whilst not being able to remove the limits of what may be conceivably achieved under section 3 before a section 4 declaration of incompatibility is sought.

The section 4 cases

Section 4(2) is invoked in proceedings where a court determines whether a provision of primary legislation is compatible with a Convention right. Section 4(2) states:

“If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility”.

⁸ Op.cit

⁹ Op.cit

¹⁰ *Donoghue v. Popular Housing and Regeneration Association Limited and the Secretary of State for the Environment* [2001] 3 W.L.R. 183

¹¹ At para 75 et seq.

¹² (No.2) [2001] 3 W.L.R. 42

¹³ 1974

¹⁴ At Para 42, Judgement of the Court

¹⁵ Op.cit

¹⁶ Op.cit

¹⁷ Op.cit

To date only five declarations of incompatibility have been made¹⁸, which appears truly representative of the fact that a declaration is only made in circumstances where no other option is available to the court.

In the early stages of the Human Rights Act 1998 the lower courts arguably took a different approach to the one taken by the House of Lords in *R v. A.*¹⁹ However, it appears that the early approach the courts adopted in construing their section 3 and section 4 obligations were very short lived. For example, a declaration of incompatibility by the Divisional Court was made in *R v. (Alconbury Developments Limited) v. Secretary of State for the Environment, Transport and the Regions*²⁰ but was then reversed by the House of Lords on the grounds that a strict reading of the Convention jurisprudence revealed that no incompatibility arose.

Conversely, the *International Transport Roth* case²¹ concerning Part II of the Immigration and Asylum Act²² illustrates that an attempt to give words a meaning to avoid a declaration of incompatibility cannot always be possible. The rationale behind *Roth*²³ was to impose penalties for asylum seekers coming to the UK through carriers; and if a carrier was suspected of transporting asylum seekers then the reverse burden of proof applied coupled with a £2,000/= fine²⁴. In issuing the declaration of incompatibility, Lord Steyn remarked that although the goal pursued by the Act was a desirable one, the regime prescribed amounted to legislative overkill. It therefore followed that a comparable interpretation with section 3 HRA 1998 was not possible as “the legislative reinterpretation required to guarantee fair trial rights of those affected would turn the statutory language inside out”.

In view of the wording of section 4(2), it should be remembered that the court is afforded a lot of discretion in deciding whether to make a section 4 declaration of incompatibility as it is not bound to issue a declaration; moreover, section 4(6) provides that even where a declaration of incompatibility is made, it does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given. To this end, its total use is that of a judicial signal informing the Government that certain legislation needs amending and leaving it for the Government via Parliament or even a Minister of the Crown to change the offending statute via a Remedial Order²⁵

Conclusion

In light of the above-mentioned cases, it would appear that clearer principles of guidance have now developed in terms of the Courts being able to effectively

¹⁸ Source: Doughty Street Chambers, Human Rights Act Review Project, www.doughtystreet.co.uk

¹⁹ Op.cit

²⁰ [2001] 2 W.L.R. 1389

²¹ *International Transport Roth GmbH v. Secretary of State for the Home Department*, *The Times Law Review*, December 11th 2001, Judgement December 5th 2001

²² 1999

²³ Op.cit

²⁴ Such a fine would be paid to the Home Secretary unless the carrier could show he was acting under duress or that he did not know, and had no reasonable grounds to suspect, that an asylum seeker wishing to enter the UK was, or might be, concealed in the carrier.

²⁵ See s.10 HRA 1998

demarcate between section 3 compatibility and section 4 incompatibility. Whilst the contended grey area seems to have faded, it is felt that proper and substantive demarcation will only become crystallized when the Appellate Committee of the House of Lords amalgamates and applies the principles already developed as a result of previous cases into a lucid and authoritative ruling.

Whether two further anniversaries of the Human Rights Act 1998 will have to pass before such an authoritative statement is declared depends entirely upon the nature of cases that arrive before the House of Lords. Until such a case arrives before their Lordships, *R v. A* will doubtless continue to feature in forthcoming articles on this issue as being the first cases to squarely consider the relationship between section 3 & section 4 HRA 1998; nevertheless, as this intriguing area continues to develop together with subsequent cases emerging, one can be quite confident in advocating that *R v A*. will not be the last word on the subject.

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