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REPORT

THE INFLUENCE OF THE ECHR ON ENGLISH LAW: BEFORE AND AFTER THE HUMAN RIGHTS ACT

by
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A lecture given on the influence of the European Convention on Human Right (ECHR) on English law would have sounded very different 10 or 15 years ago. Although the United Kingdom had been influential in the formulation and adoption of the ECHR, that in itself did not give the ECHR any special role or status in English national law. The ECHR is an international treaty and an international treaty is not part of English law unless and until it has been incorporated by national legislation. Moreover, just as the ECHR was not part of English law, so decisions of the European Court of Human Rights were seen as "no more part of our law than the Convention itself". (see *R v Khan (Sultan)* [1997] AC 558, 581. In English law, the protection of human rights was a matter for the common law and national legislation. In some areas, for example with regard to the right to a fair trial, this was well developed. In other areas, for example in relation to privacy, it was conspicuously underdeveloped.

For as long as I can remember, there was a debate as to whether the ECHR ought to be incorporated into English law by national legislation. For a long time, many judges were opposed to such an incorporation. They were apprehensive about any politicisation of the judicial process. At the same time, governments were reluctant to subject public decision-making to any further judicial scrutiny than was developing with the growth of national administrative law through the process of judicial review.

By the early 1990's, the position in English law was clearly established by two cases. The first was *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. The case concerned an attempt to rely upon Article 10 of the ECHR in the English courts. Acting under national legislation, the Home Secretary prohibited broadcasting companies from broadcasting words spoken by persons who represented organisations which had been proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978. The intention was to deny spokesmen of such organisations exposure via the broadcast media. An application was made to the courts by a number of journalists claiming that the embargo contravened Article 10 of the ECHR. The application failed. The courts did not accept that, in the exercise of his statutory powers, the Home Secretary was constrained by Article 10. The fundamental position was not even seen as controversial. Thus, in the House of Lords, Lord Bridge of Harwich said (at page 747g):

> "It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it."

Of course, that might leave the United Kingdom in breach of its international obligations under the ECHR, but international obligations by themselves were of no concern to the national court.

What the *Brind* case nevertheless acknowledged was that if there is an ambiguity in English primary or subordinate legislation, the ECHR might be utilised for the purpose of resolving the ambiguity. This was repeated in the second of the two cases from the early 1990's, namely *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770. Where, in the Court of Appeal, Lord Justice Balcombe referred to three ways in which a provision of the ECHR might be used in English law. First, in order to help resolve some uncertainty or ambiguity in national law. Secondly, when considering the principles upon which the court should act in exercising a judicial discretion, for example as to whether or not to grant an injunction. Thirdly, when the common law is uncertain. In all these areas the rationale underlying the exceptional use of the ECHR was that in uncertain or borderline cases it was to be presumed that the law of England

was in a form which was consistent with our international treaty obligations rather than in breach of them.

By the late 1990's, the debate about the incorporation of the ECHR into English law was moving in the direction of change. The incoming Labour government had included in its election manifesto a pledge to legislate for the incorporation of the ECHR into national law. Moreover, by that time there was a growing, albeit not unanimous, enthusiasm among the senior judiciary for such a step.

In due course, the ECHR was incorporated into English law by the Human Rights Act 1998. Although the Act was passed on 9th November 1998, it did not come into force until 2nd October 2000. The main reason for this was to allow time for a training programme which all judges had to undertake to equip them for this radical change.

The Human Rights Act is a relatively short but subtle piece of legislation. Section 3 provides that, 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. That is a rule of construction, neither more nor less. Sometimes, by reason of the clarity of the language, it is simply not possible to construe a piece of national legislation in a way which is compatible with the ECHR. In such a case, the courts have not been given the power to strike down the national legislation. If, having done its best to construe a provision in a way which is compatible with the Convention, a court simply cannot do so, then it must apply English law to the case before it. However, the High Court and appellate courts above it, are empowered by section 4 to make a declaration that a particular provision of primary legislation is incompatible with the ECHR. Such a declaration does not apply the ECHR to the case before the court but undoubtedly puts pressure on the legislature to bring national law in line with the ECHR. Moreover the Human Rights Act provides a legislative fast track for remedial legislation of that kind (section 10). The subtlety to which I have referred therefore enables the ECHR to be incorporated into English law whilst at the same time preserving the sovereignty of Parliament which is the cornerstone of our unwritten constitution.

Section 6 of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. However, it remains the case that section 6 has no application where a provision of or made under primary legislation cannot be read or given effect in a way which is compatible with Convention rights and the public authority was acting so as to give effect to or enforce that provision. In such a case, all that the courts can do is to declare incompatibility under section 4.

It would have been a pointless exercise to have brought the ECHR into English law without at the same time acknowledging the importance of the European Court of Human Rights. Such acknowledgment is provided by section 2 of the Human Rights Act which requires an English court or tribunal, when determining a question which has arisen in connection with a Convention right, to take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights and any opinion or decision of the European Commission of Human Rights, whenever made or given. It is to be noted that the requirement is that the national court or tribunal "takes into account" such judgments, decisions, declarations and opinions, not that it is obliged to give effect to them. As you would expect, our courts generally afford enormous respect to what comes out of Strasbourg but there are a few instances of our declining to follow in particular some rather vague or unclear admissibility decisions of the Commission.

All this demonstrates why I said at the outset that my presentation about English law and practice today is very different from what it would have been prior to the coming into force of the Human Rights Act. I believe that, conceptually and structurally, our Human Rights Act takes a unique approach to the incorporation of the ECHR into national law. That is why I have felt it appropriate to describe it in some little detail. I shall now try to describe by way of example how the influence of the ECHR on English law has grown from one operating on the margins of ambiguity and uncertainty to something very much greater. The first observation is that, even before the Human Rights Act had passed through Parliament and come into force there was a sense in which the courts were beginning to anticipate it. There are examples in the mid and late 1990's of the courts resorting to the ECHR and Strasbourg jurisprudence to explain and justify the development of the common law. This had been acknowledged in the *Derbyshire County Council* case. Similarly in *R v Mid-Glamorgan Family Health Services ex parte Martin* [1995] 1 WLR 110 , 118H, Lord Justice Evans said:

> "The fact that the Convention does not form part of English law does not mean that its provisions cannot be referred to and relied on as persuasive authority as to what the common law is, or should be."

There are other utterances from the period between the enactment and the coming into force of the Human Rights Act in which judges "accepted that the common law should seek compatibility with the values of the Convention in so far as it does not already share them" and "the Convention is persuasive authority as to the content of the common law".

Now that the Human Rights Act has been in force for five years its influence across a wide range of our national law is apparent. Perhaps I can illustrate that by reference to the areas with which I am most familiar. These are related to issues of immigration, asylum and counter-terrorism.

The first example concerns the issue of financial support for asylum seekers whose applications for asylum have not been finally determined. By section 55 of the Nationality Immigration and Asylum Act 2002 financial support was limited to those who apply for asylum "as soon as reasonably practicable after arrival in the United Kingdom". In most cases it is reasonably practicable to apply at the port of entry. Failure to do so would therefore disqualify an applicant from financial support. As it happens, many asylum seekers do not apply immediately on entry for a number of reasons, often related to what they are told by agents who arrange their entry. If they apply for asylum soon after entry but are denied financial support because of the "as soon as reasonably practicable" test, and if the immigration authorities take weeks or more usually months to determine their applications, the question arises as to how they are expected to live in the meantime. They are not entitled to work and earn a living. In most cases they will have no private or other means. Soon after the coming into force of section 55, arguments began to be advanced to the courts that to keep asylum seekers in a state of destitution pending the final determination of their applications amounted to inhuman and degrading treatment within the meaning of Article 3 of the ECHR. As section 55 was enacted after the coming into force of the Human Rights Act, it included a provision to the effect that it "shall not prevent … the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of person's Convention rights". In a series of cases our courts decided that Article 3 has a role to play in this context, at least when the destitution produces or is about to produce consequences of sufficient severity. The interesting point is that in order to define the threshold, the courts resorted to the test propounded by the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1, which related to the very different context of the alleged right of a terminally ill person to die with dignity. The Strasbourg Court had said:

> "Where treatment humiliates or debases an individual showing lack of respect for, or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3."

In the case of *Q and others* [2003] 3 WLR 365 the Court of Appeal held that Article 3 could avail a destitute asylum seeker where he established that he was "verging on" the condition described in *Pretty*. By reference to this approach, thousands of asylum seekers who did not apply for asylum at the port of entry have nevertheless succeeded in obtaining financial support from the state, notwithstanding the enactment of section 55. This is an illustration of the Human Rights Act in action which also demonstrates the way in which the English courts will draw on the jurisprudence of the Strasbourg court to support a conclusion, notwithstanding the difference in the factual circumstances between the two cases. I should add that, even now, the asylum support cases are controversial and only last week the matter was being argued before the Judicial Committee of the House of Lords. The decision of the House is awaited.

The second and most graphic illustration comes from the area of anti-terrorism legislation. It is the decision of the House of Lords in *A and others v Secretary of State for the Home Department* [2004] UKHL 56. It is sometimes referred to as the "Belmarsh" case after the name of the prison in which the appellants were being detained. It is perhaps the most important public law case to have been decided in our courts in a generation. The appellants were foreign nationals present in the United Kingdom who were suspected of involvement in terrorism but in respect of no whom no criminal proceedings were outstanding because it was considered that it would not be possible to prove a case against them in the criminal courts. The simple expedient of removing them to their home countries was considered impossible because they would face execution, torture or at least inhuman and degrading treatment upon return. No safe third country would be willing to receive them. In the aftermath of 9/11 Parliament enacted the Anti-Terrorism Crime and Security Act 2001. It permits the detention without trial of a suspected international terrorist subject to the supervision of the Special Immigration Appeals Commission (SIAC) to which a detainee can appeal on a periodic basis. In a specially devised procedure, SIAC could consider the material upon which the Secretary of State directed detention, although the more sensitive parts of the material would not be disclosed to the detainee but only to a specially approved advocate. Plainly the procedure was an exceptional one. On the face of it, it offended Article 5 of the ECHR but just prior to the enactment of the 2001 Act the Secretary of State had issued an order under section 14 of the Human Rights Act in effect permitting a derogation because of the perceived state of emergency.

When the detainees sought to challenge the legality of their detention, SIAC found in their favour but the Court of Appeal allowed an appeal by the Secretary of State. The case then went to the House of Lords where, because of its obvious constitutional importance, the Appellate Committee contained nine Law Lords rather than the usual five. By a majority of eight to one the House of Lords allowed the appeal of the detainees. It quashed the derogation order and made a declaration under section 4 of the Human Rights Act that section 23 of the Anti-Terrorism Crime and Security Act was incompatible with Articles 5 and 14 of the ECHR "in so far as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status". That is to say, the provision discriminated between suspected terrorists who were foreign nationals and those who had British nationality. Alas, the latter exist, as the events of 7th July in London were later to demonstrate.

I make these observations. Prior to the coming into force of the Human Rights Act 1998, the national courts would have been powerless to intervene in that way. Secondly, the lengthy judgments of the Law Lords provide copious illustrations of the ways in which the English courts now deploy Strasbourg jurisprudence. The leading judgment of the senior Law Lord, Lord Bingham of Cornhill, draws heavily on Strasbourg cases throughout. In so doing, he was "taking it into account" in accordance with section 2 of the Human Rights Act. On the other hand, Lord Hoffmann, when considering Article 15 of the ECHR and the concept of "public emergency threatening the life of the nation" said (at paragraph 92):

> "Nor do I find the European cases particularly helpful."

He added that the language of the Strasbourg court in *Lawless v Ireland (No.3)* (1961) 1 EHRR 15 to the effect that there must be "a threat to the organised life of the community of which the state is composed" was "a rather desiccated description". He concluded that

> "We, as a United Kingdom court, have to decide the matter for ourselves."

In a much quoted and often criticised passage he said that there was not a "public emergency threatening the life of the nation" and therefore not a basis for derogation. He said (at paragraph 97)

> "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."

In other words, the derogation did not even pass the threshold test and section 23 was incompatible with Article 5.

As an English judge who was not involved in any of the Belmarsh litigation I take great pride and sustenance from its outcome. It shows just how far we have come in the few years since the Human Rights Act was passed. If I may say so, I prefer the approach of Lord Bingham and the majority to that of Lord Hoffmann. Whereas the majority were prepared to defer to the Secretary of State on the assessment of the threat to the life of the nation, Lord Hoffmann felt compelled to go further.

What, you may ask, has been the consequence of the decision of the House of Lords? It did not result in the immediate release of the detainees. The declaration of incompatibility could not have that effect. However, its political effect soon materialised. Eventually they were released. New legislation was passed as a result of which they were subjected to "control orders" which are a form of supervision, surveillance and restriction of liberty but not detention. They too are now the subject of challenge and this will be considered by the courts in due course. At the same time, the government is seeking to resolve the problem by satisfying itself that the home countries of the men in question would not execute, torture or mistreat them if they were to be returned. Moreover, the government is considering changes to our criminal law and procedure which would if enacted and sanctioned, provide a greater prospect of success if such men were to be prosecuted in our courts.

I am starting to stray from my brief. I have done so thus far in the belief that these illustrations, and particularly the Belmarsh case, demonstrate the reach of the ECHR in current English law and the methodology by which that reach is being achieved. I believe that it is also an object lesson for all judges who have to deal with human rights law. It is easy to be liberal when

nothing much turns on the outcome of an individual case. However, it requires great judicial courage to protect fundamental human rights when the government may be hostile and the public at best sceptical. However, that is what the independence of the judiciary is all about. We compromise it at our peril. At the same time, it behoves all constitutional judges to remind themselves that they are not politicians and that their sole concern is with the lawfulness of executive action. The balance is not always easy to maintain.