

## A Human Rights Act Provision Now in Force

### FRANCIS BENNION

We have been told that the Human Rights Act 1998 will not be brought into general operation until 2000. For that reason many practitioners think it can be ignored for the time being. This is a mistake. I now describe a provision of the Act which has been in force since royal assent was given on 9 November 1998 and is of wide application. For reasons that will appear, I am going to refer to it as "the section 22(4) provision". To explain how it operates requires close examination of some highly complex, not to say turgid, statutory provisions. Unfortunately this has to be borne if, as is obviously desirable, the reader is to come out on the other side in a state of enlightenment So let us now take a deep breath.

#### **The section 22(4) provision**

Section 22(4) applies section 7(1)(b). This says: "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may . . . rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act". Section 6(1) says: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." Section 1(1) says a Convention right is a right set out in the main provisions of the European Convention on Human Rights and its Protocols. Section 22(4) says that section 7(1)(b) "applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place", but otherwise does not apply to an act taking place before the coming into force of section 7. Section 22(3) says that section 7 shall come force on an appointed day (not likely to arrive until 2000). Section 6(6) says that generally speaking references to an "act" include a failure to act.

How can all this be simplified? I suggest the following as a basic version of the section 22(4) provision that keeps as nearly as possible to the words of the Act.

*When is the provision applicable?* In legal proceedings brought by or at the instigation of a public authority.

*What is the subject-matter?* A relevant act or omission by the public authority which was incompatible with a Convention right and took place before the coming into force of section 7.

*What is the effect?* In relation to the act or omission, a party to the proceedings can rely on the Convention right concerned.

#### **Meaning of "Public Authority"**

The above basic version is still not sufficiently clear, because we have not considered what is meant by "public authority". The 1998 Act is unsatisfactory on this, telling us not what a public authority is but what it is not. Section 6 says the term includes a court or tribunal, and any person certain of whose functions are of a public nature, but does not include Parliament. Section 6 also excludes "private" acts or omissions.

This use of the term "public authority" without proper definition aroused widespread criticism when the Bill was going through. I joined in this.<sup>1</sup> The nub of the difficulty is that at Strasbourg an application for breach of human rights under the Convention can only be brought against one of the High Contracting Parties, but this is not so under the Act. An official notice of the European Commission of Human Rights dated 5 January 1998, issued for the guidance of Strasbourg applicants, says-

"You can only complain . . . about matters which are the responsibility of a public authority (legislature, administration, courts of law, etc) of [the state in question]. The Commission cannot deal with complaints against private individuals or private organisations."

In the second sentence of this, "private" is contrasted with a meaning of "public" which equates it with *belonging to the state*. So a British organisation which is in ordinary usage "public" (such as a public limited company or p.l.c.) cannot be the subject of an application under the Convention because it is not a manifestation or emanation of the British state. Strangely, the 1998 Act does not reproduce this restriction and in it "public authority" has a much wider, though uncertain, meaning (it has even been suggested that it includes an NHS general practitioner practice). No satisfactory explanation has been given of this discrepancy. As tends to happen with governments possessing an overwhelming parliamentary majority, the provision was bulldozed through.

#### **Mysteries of the Section 22(4) Provision**

It was much the same with the section 22(4) provision. I find the reason which induced the Government to insert this into the Act elusive and mysterious. It was bulldozed through without explanation. It seems to have escaped all attention during the proceedings on the Bill. It was not referred to by any of the Government spokespersons, nor was it picked up by any of the numerous Opposition and back-bench participants in the debates. So there is nothing about it in Hansard. All I have been able to discover is what the Government's Notes on Clauses say about it, namely-

"This means that it will be possible for an individual to rely on Convention arguments after commencement in any civil or criminal action brought by a public authority irrespective of when the events took place or whether the proceedings had already started. Otherwise, however, acts of public authorities committed before [section 7] comes into force will not be capable of challenge."

One mystery is that this refers to "an individual", whereas section 22(4) is not limited to proceedings against individuals. Another mystery is that it says section 7(1)(b) applies "whenever the act in question took place" yet on a literal interpretation section 7(1)(b) applies only to an act done after section 6(1) comes into force. An act done before then cannot be "made unlawful by section 6(1)".

I sought enlightenment from the Home Office, who were courteous enough to send me the following reply-

"Subject to what I say below, the Act has effect only in relation to acts and omissions occurring after, or omissions dating from when, the Act comes into force. This is the position as far as the institution of civil or tribunal proceedings challenging the act or omission of a public authority is concerned.

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<sup>1</sup> See Bennion, "Which sort of Human Rights Act?" 148 NLJ [1998] 488.

"The position is different in a case where proceedings have been instituted by a public authority. Although section 6(1) only applies to acts committed after commencement, section 22(4) makes clear that section 7(1)(b) (and by necessary implication section 6(1)) is applicable in proceedings of the kind detailed in section 22(4) as if those sections had been in force before commencement. The outworking of this is that from the commencement of the Act, it will be possible to raise in one's defence in any proceedings before a court or tribunal brought by a public authority, or in an appeal (including a case-stated or judicial review) from a decision of a court or tribunal in such proceedings, any Convention argument available under the Act irrespective of whether the act or failure to act giving rise to the Convention argument took place before or after the Act comes into force.

"This could mean that it is, for example, only in his appeal against his conviction that a person can for the first time run a Convention argument in his defence or only after the Act comes into force that a ground of appeal becomes available to him."

This gives the Government's answer to one of my "mysteries", that arising from the fact that section 22(4) says section 7(1)(b) applies "whenever the act in question took place" yet an act done before section 6(1) comes into force cannot be "made unlawful by section 6(1)". The Home Office assert that the meaning they desire is given "by necessary implication". It remains to be seen whether the courts will uphold this.

### **An Example**

An example of how the section 22(4) provision might work is furnished by an item in the Times of 8 February 1999. Frances Gibb reported that-

"A key legal weapon in the fight against terrorism would be lost if a test case next month by four alleged bombers is successful. Lawyers for the Middle Eastern men claim that the Prevention of Terrorism Act is in breach of the new Human Rights Act. They say that it forces the burden of proof on to the defendants, who can be found guilty unless they can prove an innocent reason for having materials that can be turned into bombs . . . The Act is not yet in force but the men are arguing that, were their case to come to trial, then the prosecution could be successfully be contested under that Act, which is likely to be in force by next year. The men have won High Court leave to bring judicial review proceedings against the Crown Prosecution Service . . ."

Ms Gibb does not mention the section 22(4) provision in her piece. However if the prosecution she refers to were to be instituted before section 7 comes into force the section 22(4) provision might apply in the following way. (I repeat the analysis given above.)

*When is the provision applicable?* In legal proceedings brought by or at the instigation of a public authority. [The CPS is clearly a "public authority".]

*What is the subject-matter?* A relevant act or omission by the public authority which was incompatible with a Convention right and took place before the coming into force of section 7. . . [It might be argued that initiating the proceedings was contrary to the Convention if the Convention gave the Middle East defendants a watertight defence.]

*What is the effect?* In relation to the act or omission, a party to the proceedings can rely on the Convention right concerned. [This would entitle the Middle East defendants to rely on the Convention.]

### **Conclusion**

A very wide range of bodies may be held to be public authorities within the meaning of the 1998 Act. All of them are liable to find that under the section 22(4) provision their acts or omissions occurring before the Act was passed, or during the period between royal assent and general commencement in 2000, become relevant in legal proceedings brought by them, or brought at their instigation, if the acts or omissions can be said to have contravened the Convention.

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BY FAX ONLY

Dear Adrian,

I have only one point on your faxed note on *Kebilene*. It is this.

You say on page 5, just above the middle, "Its retrospectivity could only be relied upon when section 7(1)(b) came into force". This does seem to be what the court held. However it may be worth pointing out in your note that this is contrary to the Home Office view mentioned in my article. It shows the prescience of the following observation in the article-

"This gives the Government's answer to one of my 'mysteries', that arising from the fact that section 22(4) says section 7(1)(b) applies 'whenever the act in question took place' yet an act done before section 6(1) comes into force cannot be 'made unlawful by section 6(1)'. The Home Office assert that the meaning they desire is given 'by necessary implication'. It remains to be seen whether the courts will uphold this."

Best wishes.