FOCUS

HUMAN RIGHTS LAW

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SECTION 22(4) OF THE HUMAN RIGHTS ACT 1998

Because a great deal of preparatory work is required in the training of judges, magistrates and officials, most provisions of the Human Rights Act 1998 will not be brought into force until 2000 or perhaps even 2001. However there is an important provision of the Act which has been in force since royal assent was given on 9 November 1998. This is section 22(4), which is explained in this article. Unfortunately section 22(4), and the provisions it applies, are highly complex and the effect is not entirely beyond doubt.

Details of section 22(4)

Section 22(4) of the Human Rights Act 1998 reads-

> "Paragraph (b) of subsection (1) of section 7 [of this Act] applies to proceedings brought by or at the instigation of a public authority whenever the act [or omission] in question took place; but otherwise that subsection does not apply to an act [or omission] taking place before the coming into force of that section."

This applies section 7(1)(b) of the Act, and one therefore needs to begin there. Section 7(1)(b) reads: "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". This takes us to section 6(1) of the 1998 Act, which says that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

We are here confronted with three terms of art, "public authority", "victim" and "Convention right", which I will next endeavour to explain. I will leave "public authority" to the last as it is somewhat complex. The term "victim" has a fairly narrow technical meaning worked out in case law by the European Court of Human Rights at Strasbourg (see s. 7(7) of the 1998 Act). A "Convention right" is a right comprised in the main provisions of the European Convention on Human Rights and its Protocols, which are set out in Schedule 1 to the 1998 Act. The meaning of "public authority" requires more space to explain.

What is a "public authority"?

Section 6(3) of the 1998 Act says the term "public authority" includes a court or tribunal, and any person certain of whose functions are of a public nature, but does not include Parliament or the House of Lords in its judicial capacity. Section 6(5) says that in relation to a particular act or omission a person or body is not a public authority if the nature of the act or omission is private. The complex and incomplete definition creates difficulty. In deciphering it our courts are likely to rely on the jurisprudence at Strasbourg, where the term "public authority" is commonly used.

The main difficulty over "public authority" arises because at Strasbourg an application under the Convention can only be brought against one of the High Contracting Parties whereas this is not so under the 1998 Act, which is intended to apply to a wider range of defendants. 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."

Here "private" is contrasted with a meaning of "public" which regards it as meaning *belonging to the state*. So a British company which we would regard as "public" may not be able to be taken to Strasbourg under the Convention because it is not regarded as a manifestation or emanation of the British state. The 1998 Act fails to reproduce this restriction so in it "public authority" has a much wider, though uncertain, meaning. It has even been suggested that it includes an NHS medical practice, but on questions of this kind we shall not know the answers for certain until our courts have pronounced on the Act.

The effect of section 22(4)

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 or 2001). I would summarise the effect of section 22(4) as follows.

It applies, in legal proceedings brought by or at the instigation of a public authority, to 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.* The effect of section 22(4) is that, in relation to the act or omission, a party to the proceedings can rely on the Convention right concerned even though breach of the right took place before the coming into force of section 7.

The reason which induced the Government to insert section 22(4) into the 1998 Act is not clear. The provision 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 commented on by the Opposition and back-bench participants in the debates. So there is nothing about it in Hansard. The Government's Notes on Clauses say this about it-

> "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 puzzle is that section 22(4) 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 (which is likely to be on the same date in 2000 or 2001 that section 7 comes into force). An act done before then cannot be "made unlawful by section 6(1)". I enquired of the Home Office, who kindly sent me the following explanation-

> "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.

> "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 [on a day in 2000 or 2001], 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.
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> "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."

Another puzzle is why, since section 22(4) is now in force, a person entitled to its protection should have to wait until the general commencement of the Act to rely on it.

The Kebilene case

The sort of impact section 22(4) can have before the 1998 Act is brought generally into force in 2000 or 2001 is shown by the decision of the Divisional Court in ***R v Director of Public Prosecutions, ex p Kebilene and others*** [1998] The Times, 31 March. The case concerned a prosecution brought under the Prevention of Terrorism (Temporary Provisions) Act 1989 ss 16A and 16B, as inserted by the Criminal Justice and Public Order Act 1994 s 82, for possession of articles useful to terrorists. The prosecution required the consent of the Director of Public Prosecutions, which had been given. The defendants applied to the Divisional Court for a ruling that, since ss 16A and 16B cast the onus of proving innocent possession on the accused, they contravened the Convention right relating to the presumption of innocence conferred by article 6.2, and that in the light of section 22(4) of the Human Rights Act 1998 the Director should review his decision to consent to the prosecution.

The application to the Divisional Court was successful. Lord Bingham of Cornhill CJ said that although section 22(4) did not give rise to a "legitimate expectation" that article 6.2 would be implemented before such time as the 1998 Act was brought generally into force in 2000 or 2001, it should cause the Director to think again about his consent to the prosecution. He could reasonably suppose that the 1998 Act would be brought into force in time for section 22(4) to operate on the appeals of the applicants, assuming they were convicted. He added: "If at the time of the appeal hearing the central provisions [of the 1998 Act] were in force, the applicants would be entitled to rely on sections 7(1)(b) and 22(4), and the convictions, on the basis of inconsistency [with article 6.2], would probably be quashed, at some not inconsiderable cost to the public purse . . ."

Lord Bingham went on to add as an additional reason for second thoughts by the DPP, that even if the 1998 Act had not been brought into force by then (and there was no guarantee that it would) "the applicants would show a violation of the Convention by the United Kingdom and so obtain a decision in their favour in the European Court of Human Rights and perhaps recover compensation and achieve their release". Leave to appeal was given. If the decision is right it answers the two questions raised above: (a) section 22(4) applies even though the act or omission was not contrary to s 6(1), and (b) notice cannot be taken of section 22(4) until the general commencement date has arrived.

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 under section 22(4) that their acts or omissions occurring before the Act was passed, or during the period between royal assent and general commencement in 2000 or 2001, 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.

1999.007 "The Human Rights Act 1998" 7 CLW 16/99.