Constitutional Crisis: Special Report 6

Human Rights Act May Be Amended - Official

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Government Anxiety

It is now officially admitted that the Human Rights Act 1998 (HRA) may need to be amended in an attempt to get rid of a pernicious human rights culture that has grown up since it was passed.[1] The Prime Minister, Tony Blair, said of the recent court decision not to return a group of hijackers to their home country on HRA grounds:

> "It is not an abuse of justice for us to order their deportation. It is an abuse of common sense to be in a position where we can't do this".[2]

In an interview with James Naughtie the Lord Chancellor, Lord Falconer, said there is real concern about the way the HRA regime is operating in practice, adding: "It's absolutely plain that in particular areas the result being reached as a result of pressure from human rights arguments is not remotely sensible".[3]

Not remotely sensible, that's telling them! Telling who? you may ask. Lord Falconer claims he is not complaining about the Judges.[4] But who else but the Judges turns in the results that the Government are so strenuously objecting to? An unreasonable human rights culture could not flourish unless the Judges supported it.

The particular feature of this culture, warmly supported by today's Judges (it was not always so) is the elevation of the individual above the public interest. This is ironic, since the public are nothing but a collection of individuals. Just after writing that I came across a confirmatory quote from the respected former Labour minister John Denham MP: "human rights law seems to focus almost entirely on the risks to the individual at the expense of wider concerns for public safety".[5] I return to this point below.

In his interview with Lord Falconer the robust left-winger James Naughtie bridled at the thought of anyone meddling with his precious HRA. Naively he said to the

Lord Chancellor, in his challenging way, "Judges have to implement the law ***as it is***". He thinks Judges perform a function akin to that of the slot machine: put in your coin and out rolls a judgment. If only it were that simple.

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[1] For previous reports in this series see 169 JPN (2005) pp. 651, 812, 913 and 989, and p. 326 above. All these are on www.francisbennion.com.

[2] *The Observer*, 14 May 2006, p. 27.

[3] Interview on BBC Radio Four *Today*, 13 May 2006.

[4] *Ibid.*

[5] *The Guardian*, 15 May 2006, p. 35.

As we lawyers know very well, Judges possess an almost infinite discretion when faced with one of the vague, general, HRA articles. Lord Woolf reminded us of that when he said that our courts have a responsibility to develop their own code of human rights jurisprudence, adding-

> "A code that will pay a proper regard to the jurisprudence being developed at Strasbourg and elsewhere. A code that will be in tune with that jurisprudence, but which at the same time will recognise that our code should also fully reflect where it is appropriate to do so our own cultural traditions and, perhaps unique historic perspective of the importance of individual freedom within society."[6]

Another media failure to understand the legal realities was shown by a leader in *The Observer*.[7] This said:

> "If government agencies are losing cases brought under the Human Rights Act – and getting results that 'defy common sense' it is because they are failing to argue effectively in court. They need new lawyers, not new laws."

This shows a touching (and wholly unrealistic) faith in the ability of powerful advocates to overbear recalcitrant judges.

Mr Blair seems to think the overbearing needs to be done by Act of Parliament. In a leaked letter of instructions to his new Home Secretary, Dr John Reid, the Prime Minister apparently indicated that he is planning a radical overhaul of the HRA to stop it putting the rights of criminals above the rights of victims "to ensure the law-abiding majority can live without fear", and also to give the Government power to override court rulings which are "inconsistent with other EU countries' interpretation of the European Convention on Human Rights".[8]

A Downing Street spokesman was reported as saying that an option under consideration by the Government is to amend the HRA so as to require "a balance between the rights of the individual and the rights of the community to basic security". The spokesman added that "although British Judges should already take that balance into consideration, it is clear that sometimes they don't".[9]

The Government's Own Fault?

Before blaming other people the Blair Government should pause to consider whether it might not itself carry some blame for a human rights culture that has got out of hand. From the very beginning of its campaign to import the European Convention into British law the Government has placed most of the emphasis on rights and little if any on duties. The triumphalist white paper[10] introducing the Bill for the HRA was famously titled *Rights Brought Home*. Nothing about duties being brought home; that would have struck the wrong note for Mr Blair. In his preface to the white paper he said he believed it was proper "to increase individual rights".[11] Again nothing about duties.

It is not only duties that are overlooked. Few of the rights conferred by the European Convention are unlimited. Even the right to life has an exception for necessary force in self-defence, effecting an arrest etc. There are six exceptions to the right to liberty of the person. The right to respect for private and family life is subject to exceptions provided by law which are "necessary in a democratic society", and so on. Nothing about these exceptions is mentioned in headline Government propaganda.

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[6] Cited F A R Bennion, 2005 Supplement to *Statutory Interpretation* (4th edn, 2002), p. S54.
[7] 14 May 2006, p. 26.
[8] *The Observer*, 14 May 2006, p. 1.
[9] *Ibid.*
[10] CM 3782.
[11] Page 1.

If you go to human rights on the present Directgov official website what do you find at the beginning? Let me set it out. First there is the announcement that "16 basic human rights have been incorporated into UK law". Then follows:

"The Human Rights Act 1998 gives legal effect in the UK to certain fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR). There are 16 basic rights taken from the European Convention on Human Rights. These rights not only affect matters of life and death like freedom from torture and killing but also affect your rights in everyday life: what you can say and do, your beliefs, your right to a fair trial and many other similar basic entitlements. The rights include:

- right to life
- prohibition of torture
- prohibition of slavery and forced labour
- right to liberty and security
- right to a fair trial
- no punishment without law
- right to respect for private and family life
- freedom of thought, conscience and religion
- freedom of expression
- freedom of assembly and association
- right to marry
- prohibition of discrimination
- protection of property
- right to education
- right to free elections
- abolition of the death penalty."

There you have it. That's it. Nothing about duties. Nothing about exceptions. Nothing but rights pure and simple. Of course if you go on to access links to more detailed information you will get more of the story. But how many people do that?

The *Chagos* case

I suggested above that the essence of the current disagreement between the Government and the Judges is

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that the Judges can be said to elevate the individual too far above the public interest. This is well illustrated in the recent *Chagos* case, where the Administrative Court, in deciding against the Government, showed just how far the Judges have extended the scope of judicial review.[12] The judgment of the court was delivered by Hooper LJ.

The claimant in the *Chagos* case was one of a group of people known as Chagossians who, on 9 June 2004, had a right to enter and remain in the British Indian Ocean Territory (BIOT) (other than on the island of Diego Garcia), a right which had been reaffirmed by the British Government in 2000. The BIOT consists of the islands of the Chagos Archipelago, lying isolated in the middle of the Indian Ocean.

The claimant was born of Chagossian parents in 1964 on Peros Banhos, one of the outer islands within the Chagos Archipelago. By the early 1960s, the islands' population was in decline, as low wages, monotonous work, the lack of facilities and the great distance to Mauritius and the Seychelles discouraged recruitment or the retention of labour. The plantations suffered from a lack of investment.

[12] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin).

On 10 June 2004 the British Indian Ocean Territory (Constitution) Order 2004 ("the Constitution Order") made by Her Majesty in Council declared that no person had the right of abode in BIOT nor the right without authorisation to enter and remain there. By virtue of the British Indian Ocean Territory (Immigration) Order 2004 ("the Immigration Order"), also made by Her Majesty in Council, presence within the Territory without a permit became an offence punishable by 3 years' imprisonment.

The reason for making the orders was that the isolated, almost deserted islands were urgently needed for defence reasons by Britain and its ally the United States. An American base was built on Diego Garcia, a part of the Archipelago. The *Chagos* case judgment records the following statement by a US official:

> "The use of the facilities on Diego Garcia in major military operations since September 11, 2001, has reinforced the United States' interest in maintaining secure long-term access to them. The United States has an interest in preserving the security of the Archipelago and in protecting Diego Garcia's strategic value.
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> Diego Garcia is a vital and indispensable platform for global U.S. military operations, as demonstrated by the important role it played for U.S. and coalition military forces in Operations Enduring Freedom and Iraqi Freedom, as well as by its continuing role in the Global War on Terrorism. The Chagos Archipelago's geographic location, isolation and uninhabited state make it unique among operating bases throughout the world. Our governments' facilities on Diego Garcia have exceptional security from armed attack, intelligence collection, surveillance and monitoring, and electronic jamming.
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> We believe that an attempt to resettle any of the islands of the Chagos Archipelago would severely compromise Diego Garcia's unparalleled security and have a deleterious impact on our military operations, and we appreciate the steps taken by Her Majesty's Government to prevent such resettlement. A decline in Diego Garcia's military utility would have serious consequences for our shared defence interests. Your actions to prevent resettlement anywhere in the Chagos Archipelago have safeguarded our ability to conduct current and future military operations from the islands in support of our national security objectives."[13]

It is clear that no permit will be granted to allow Chagossians to resume living in any of the islands. The Chagossians are thus effectively exiled. The claimant sought a declaration that the orders are unlawful and void on the ground of irrationality. The court upheld his claim.

The source of the power to make the Order in Council was the Royal prerogative. The Queen in Council acts upon the advice of a Minister, in the present case, the Secretary of State for Foreign and Commonwealth affairs. In reality the order was that of the Secretary of State although, of course, the Queen formally assented to it. So the court were once more ruling against the Government or in other words the Executive.

The *Chagos* case is too complex to be examined in detail here. I shall therefore restrict my treatment of it to the aspect concerning the judiciary's gradual enlargement of its own powers over the years. This is recounted in detail in the judgment, beginning with the following:

> "We turn now to what is for us a central issue in this case: May the Orders be challenged in the light of the modern approach to judicial review of executive action? If they are so challengeable (and given the assumptions we have made), the claimant wins."[14]

The CCSU Case

[13] Paragraph [96].
[14] Paragraph [144].

The judgment in the *Chagos* case then cited *Council of Civil Service Unions and others v. Minister for the Civil Service* ("CCSU").[15] In that pregnant 1985 case Lord Fraser rejected the contention that an instruction given in the exercise of a delegated power conferred by the sovereign under the prerogative enjoys the same immunity from judicial review as if it were itself a direct exercise of prerogative power. He said that such powers are normally subject to judicial control to ensure that they are not exceeded, adding that by normally "I mean provided that considerations of national security do not require otherwise."[16]

Lord Scarman agreed with Lord Fraser:

> "Like my noble and learned friend Lord Diplock, I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise

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> of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power."[17]

Lord Scarman noted that formerly judicial review of the prerogative power was limited to inquiring into whether a particular power existed and, if it did, into its extent.[18] He added that "this limitation has now gone, overwhelmed by the developing modern law of judicial review".

Lord Diplock said:

> "My Lords, the English law relating to judicial control of administrative action has been developed upon a case to case basis which has virtually transformed it over the last three decades. The principles of public law that are applicable to the instant case are in my view well established by authorities . . "[19]

He continued with the following very well-known passage:

> "I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds . . ."

Lord Roskill said:

> "Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described - by no means critically - as an upsurge of judicial activism . . . [prerogative orders] have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government."[20]

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[15] [1985] AC 374.
[16] P. 399. In the *Chagos* case they did so require.
[17] P. 407. Note that the remark on whether the matter is justiciable begs the question.
[18] He cited as authority for this *Attorney General v. De Keyser's Royal Hotel Ltd*. [1920] A.C. 508, which when I first studied law was regarded as sacrosanct.
[19] P. 407.
[20] P. 414. The complacent words "by no means critically" are open to question.

Colonial Laws Validity Act 1865

The *Chagos* case judgment went on to say that the only remaining obstacle to declaring the orders void for irrationality was the fact that the Colonial Laws Validity Act 1865 s. 3, abolishing an ancient doctrine, provides that colonial laws (which the orders were) shall not be void or inoperative on the ground of repugnancy to the law of England.

This might be thought an insuperable obstacle, but the Divisional Court in *Chagos* was undeterred. They admitted that:

> "The 1865 Act when removing the fetter of repugnancy to English Law, did not leave in existence a fetter of repugnancy to some vague unspecified law of natural justice. Parliament in enacting the 1865 Act intended to deal with the whole question of repugnancy (*Liyanage v The Queen* [1967] AC. 259 PC at page 284-5, Lord Pearce). In *Liyanage* Lord Pearce approved the following passage from *The Sovereignty of the British Dominions* by Professor A. Berriedale Keith:
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> > 'The essential feature [of the 1865 Act] is that it abolished once and for all the vague doctrine of repugnancy to the principles of English Law as a source of invalidity of any colonial Act . . . the boon thus secured was enormous; it was now necessary only for the colonial legislator to ascertain that there was no Imperial Act applicable and his field of action and choice of means became unfettered.'"

One would have thought that to be conclusive. The judgment achieved the opposite result by bold assertion:

> "In our judgment the 1865 Act does not preclude the public law irrationality challenge which we have upheld. We are not here concerned with repugnancy. As we have already said, 'the act in question [was] the act of the executive'. As such it is amenable to judicial review."

The decision in the *Chagos* case was an astonishing rebuff for the Government, but there can be little confidence that it would be reversed on appeal. Mr Blair, wishing on grounds of the public interest to prevent the Chagossians going to live in the outer islands of the Chagos Archipelago, where no facilities exist for their support, will be tempted to repeat his remark quoted at the beginning of this article: "It is an abuse of common sense to be in a position where we can't do this".

It is the courts that have put the Government in that position by stretching what had been considered to be firmly established law. One of the absurdities is that in the *Chagos* case the court held that the orders were void for *irrationality*. It may be thought that the irrationality was displayed by the Divisional Court not the British government, particularity in its finding that irrationality must be judged by reference to the interests of BIOT, a virtually uninhabited territory, and not those of the United Kingdom.[21]

Conclusion

I have explained that the Government is minded to amend the HRA, or enact some other measure, with a view to curtailing the ability of the Judges to frustrate its

legislation. It will not be easy to achieve this ambition. The Government recently agreed a Concordat with the judiciary guaranteeing their independence. As noted above, Mr Blair is on record as saying it is desirable "to increase individual rights". Again as noted above, there has been a prolonged "upsurge of judicial activism" which has not been resisted by successive Governments since the 1950s.

[21] Paragraph 118.

The only weapon Mr Blair has is legislation. The HRA, particularly in the notorious section 3 perverting the usual rules of statutory interpretation, gives orders to the judiciary about how they are to interpret certain types of legislation. Perhaps it is time for the Queen in Parliament to use this method to prune the luxurious (even rank) growth of judicial review, fertilized and watered as it has been by the zeal of the judiciary, and of questionable constitutional validity.