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THE HUMAN RIGHTS ACT- 2 YEARS ON

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(1) The scope of the Human Rights Act

Introduction

(1) The Human Rights Act did not incorporate the European Convention on Human Rights into English law. Instead the Government chose to give effect to Convention rights:

- by introducing a strong rule of construction under section 3; and
- imposing an obligation on public authorities not to act incompatibly with Convention rights under section 6.

(2) The Act carries into effect the Convention rights specified in Schedule 1 of the Act. The one significant omission is the decision not to implement the right to an effective remedy under Article 13.

(2) The status of Strasbourg decisions

(3) Section 2(1) of the Act provides:

> A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take account of any—

(4) The Act therefore differs from the European Community Act which states that the English courts are bound by ECJ decisions.

(5) In *R(Anderson) v Secretary of State for the Home Department*[2] the claimants challenged the controversial role of Home Secretary in fixing tariff for mandatory life prisoners where executive is effectively exercising a judicial sentencing function. The difficulty they faced was an earlier and somewhat unsatisfactory decision of the European Court of Human Rights in 1994. In Wynne *v United Kingdom* [3] the Court held that the procedure satisfied the requirements of Article 5(4). It was accepted by the Court of Appeal in *Anderson* that the claimant's arguments were correct and that Wynne was wrongly decided; and the Court of Human Rights itself reversed its views in *Stafford v United Kingdom*.[4]

(6) Nevertheless, in *Anderson* Simon Brown LJ said :

"In the end there are two factors which have persuaded me to regard the Strasbourg case law as for the present determinative. First, that whatever advantage we might enjoy through our domestic knowledge and experience of the mandatory life sentence regime could perhaps be thought balanced (or even conceivably outweighed) by the Etcher's deeper appreciation of the true ambit and reach of Articles 5(4) and 6(1) of the Convention. It is, after all, not the characterization of the mandatory life sentence in abstract, but rather its characterization in the context of the application of these two Articles, which lies at the heart of this case.

The second factor which weighs with me is that of comity. True, this court is not bound by Ector judgments, any more than that court is bound by them. Where, however, as here, the ECtHR itself is proposing to re-examine a particular line of cases, it would seem somewhat presumptuous for us, in effect, to pre-empt its decision. For my part, I shall be surprised if the present regime for implementing mandatory life sentences survives the ECtHR's re-examination of the issue in *Stafford.[5]* The final decision, however, I am persuaded should be theirs."

(7) Similarly, in *Anderson* Buxton LJ[6] took the view that:

"The Convention is a broadly stated international treaty, applying to a wide range of countries. Not only is it the objective of the Convention to bring its benefits to all of those countries, but also fairness between the citizens of those different countries requires that its terms have a uniform and accessible meaning throughout the member countries. The principal machinery for achieving that end is to be found in the court, and in the interpretative rulings that it gives. There may well be many cases facing a national court where the jurisprudence of the Court of Human Rights is unclear, or on the particular point in issue non-existent. Then the national court has to do the best that it can. But that is not this case. Here, there is clear and consistent jurisprudence of the Strasbourg court. If we are to say that that jurisprudence is wrong, we will be creating in England and Wales a different set of Convention rules from those that apply in other countries who are signatories to the Convention. That will be a clear departure from international comity within the Convention, and a step that should only be taken in extreme circumstances …

The second and different reason why we should exercise restraint is that where an international court has the specific task of interpreting an international instrument it brings to that task a range of knowledge and principle that a national court cannot aspire to. I of course recognise that the relationship between the national court and, on the one hand, the Court of Human Rights and, on the other hand, the European Court of Justice is very different, in terms both of domestic and of international law. However, I would venture to refer to the observations as to the proper modesty of the national court in the face of international experience that fell from Bingham J in *Customs and Excise Comrs v ApS Samex* [7]. I am not prepared to hold that such considerations should be set aside just because it appears to an English lawyer that the issue in this case is wholly contained within the understanding and categorisation of an English legal institution, the mandatory life sentence."

(1) By comparison, in *R(Amin) v Secretary of State for the Home Department[8]* the Court of Appeal stressed that it was not bound to apply Strasbourg case law, particularly in relation to an adjectival provision which was not expressly set out in the

Convention (the duty to investigate under Article 2). Laws LJ in *Tower Hamlets LBC v Begum[9]* also emphasised that the terms of section 2 were designed to encourage the development of domestic principles.

(2) The degree to which section 2 entitles domestic courts to depart from Strasbourg case law is open to question. Disappointed litigants will be able to apply to the Court of Human Rights. The issue which will chystalise is whether English decision not simply whether the English courts have correctly applied Convention principles; [10] tut whether the decision is within the domestic states's margin of discretion

(3) The rule of statutory construction[11]

(8) Section 3 of the Act provides:

> "So far as possible to do so, primary legislation and secondary legislation should be read and given effect in a way which is compatible with Convention rights."

If such a construction is not possible, then the court has the power to grant a declaration of incompatibility under section 4

(9) Section 3 imposes an interpretative obligation on the court- even in cases between private litigants. In *Cachia v Faluyi[12]* the word "action" in s 2(3) of the Fatal Accidents Act was interpreted to mean "served process" in order to permit dependent children bringing proceedings based on a second writ issued within the limitation period where the first writ had been issued but not served. In *Goode v Martin[13]* CPR 17.4 was interpreted under section 3 to allow the claimant to amend her pleadings after the expiry of the limitation period where the amendment consisted of a response to the defendant's version of events.

General principles

(10) The leading cases on the proper approach to section 3 remain two decisions of the House of Lords, *R v A (No 2)[14]* and *R v Lambert*.[15]

(11) *R v A(No 2)* is a particularly striking case. It demonstrates that in the criminal field, the courts will intervene unhesitatingly if they take the view that a judicial discretion is being circumscribed on unpersuasive policy grounds.[16] *R v A (No 2)* concerned the rape shield enacted in section 41 of the Youth Justice and Criminal Evidence Act. This provision severely restricts cross examination of a rape victim about her sexual conduct which might otherwise be relevant to a defence alleging consent. The House of Lords unanimously held that section 41 had to be read subject to section 3; and that the test of admitting such evidence is whether it was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial in breach of Article 6 of the Convention.[17]

(12) However, the reasoning for this conclusion is difficult to disentangle. The leading speech was given by Lord Steyn who stated[18]:

> the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: *R v Director of Public Prosecutions ex p Kebilene*[19], per Lord Cooke[20]; and my judgment[21]. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see *Rights Brought*

Home: The Human Rights Bill.[22] The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties[23]. Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention"[24] For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of section 3 against the executive.[25] In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on Convention rights is stated in terms, such impossibility will arise: *R v Secretary of State for the Home Department ex p Simms.[26]*.

(13) By contrast, Lord Hope took a more cautious analysis[27] (which he re-iterated in *R v Lambert[28]*):

> The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators. As Lord Woolf CJ said in *Poplar Housing Association v Donoghue*[29] section 3 does not entitle the court to legislate; its task is still one of interpretation. 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. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament: see Lord Hoffmann's observations in *R v Secretary of State for the Home Department ex p Simms.[30]*

No general principles can be extracted from the judgments of Lords Slynn, Clyde and Hutton.

(14) However, Lord Hope's approach in *R v A(No 2)* was adopted by the House of Lords in *In Re S (Care Order: Implementation of Care Plan).[31]*

(15) Where a court is asked to construe legislation in accordance with section 3, it should proceed as follows:

- It is necessary to identify with precision the particular statutory provision which is said to contravene Convention rights.[32]
- The court should next ascertain whether, absent section 3, there is any breach of Convention rights.[33]

- When the court comes to apply section 3, the touchstone is compatibility with Convention right
- The principal focus is to identify possible meanings to be given to the legislation in question.
- The court can interpret legislation under section 3 by "reading in" Convention rights (by implying words in a statute). For example, in *R v Offen*[34] the Court of Appeal interpreted section 2 of the Criminal (Sentences) Act[35] to take a broad view of the meaning of "exceptional circumstances" in making the power to impose a life sentence following a conviction for a second serious offence compatible with the prohibition from inhuman and degrading treatment.
- The court can also interpret legislation by "reading down" (by applying a narrow interpretation in order to ensure that the legislation remains valid). Thus, the House of Lords in *R v Lambert*[36] construed a reverse onus provision in the Misuse of Drugs Act as imposing the evidential burden on the defendant.
- It is not possible under section 3 to interpret legislation compatibly if the construction conflicts with its express words.
- It is also not possible under section 3 to interpret legislation compatibly if it conflicts with a statute by necessary implication.

Legislation vs interpretation

(16) There is a tension between the scope of the interpretive obligation placed on the court by section 3 and the extent to which Parliament has a discretionary area of judgment.[37] The proper limits of this role have figured prominently in several recent cases.

(17) In *In Re S (Care Order: Implementation of Care Plan)*[38] the House of Lords examined the reinterpretation of the Children Act given by the Court of Appeal,[39] purportedly under section 3 of the Human Rights Act. The Court of Appeal had formulated a new procedure, requiring the local authority to notify the child's guardian if a child failed to achieve a starred milestone within a reasonable time; and entitling the local authority or guardian to apply to the court for directions once it did so

(18) Lord Nicholls[40] emphasised that where a court is being asked to give a meaning which is substantially different from an Act of Parliament, it is likely to have crossed the boundary line between interpretation and amendment. The Children Act had been reinterpreted contrary to one of its cardinal principles, that the courts had no power to intervene in the way local authorities carried out their responsibilities to children under care orders. The Court of Appeal had therefore attempted to construe section 3 beyond the implied limitations of the statutory scheme created by the Children Act.

(19) The Court of Appeal confronted a similar issue by *Adan v Newham LBC.*[41] A local authority had breached Article 6 in handling a homelessness claim because its review officer was not independent and impartial. An appeal was then made to the county court which exercised powers akin judicial review under section 204 of the Housing Act 1996; and the critical issue was whether this jurisdiction was sufficient to cure a breach of Article 6 where the primary facts were disputed.[42]

(20) Even though section 204 is confined to a "point of law", it was argued that it was possible to interpret the provision so that the county court could decide disputed issues of fact, making the procedure Article 6 compliant. Brooke LJ reviewed the authorities but concluded that this approach would blur the distinction between the judicial role and the legislative one[43], stating[44] that:

> I do not consider it constitutionally open to us to do it. It would involve a judicial sleight of hand to enlarge the jurisdiction of the county court beyond that given to

> it by Parliament. Parliament has decided that the local authority should be the final arbiter on the facts, not the courts, and the courts do not, in my judgment, have the power to put these arrangements into reverse.

Hale LJ and David Steel J agreed. However, Hale LJ went on to hold that it was possible to construe section 204 more narrowly under section 3, by conferring jurisdiction on the county court to decide if the decision process as a whole complied with Article 6 in the particular circumstances of the case.[45] Brooke LJ[46] and David Steel J[47] again rejected this construction, stating that Parliament had decided that local authorities, not the courts should be the final arbiter of the facts.

(21) The reasoning of Brooke LJ and David Steel J in *Adan* is open to question. They rejected a construction which was possible to achieve compatibility with Article 6 on the basis that it would be constitutionally improper to do so, perhaps because the local authority had the power to contract out its review process so that the court was not boxed into the corner of either giving such an interpretation or making a declaration of incompatibility.[48]

(22) Nonetheless, their approach is problematic. *Adan* was not a case where a section 3 interpretation was contradicted by necessary implication. And the constitutional objection to interpreting legislation in a Convention compliant manner does not take its root from the Human Rights Act itself. *Adan* show that as the reasons for disavowing section 3 interpretations increase, the human rights protection afforded by the Act will diminish.

Declarations of incompatiblity

(23) A number of declarations of incompatibility have been made.[49] In *Wilson v First County (No 2)[50]* the Court of Appeal held that the absolute bar on enforcing a credit agreement which did not contain the prescribed terms under section 127(3) of the Consumer Credit Act was a disproportionate interference with the right of access to the court. The Court of Appeal in *R v Mental Health Review Tribunal ex p H* also made a declaration that sections 72 and 73 of the Mental Health Act were incompatible with Articles 5(1)(4) because they imposed the burden of proof on a mental patient to establish that one of the criteria for lawfully continuing his detention is no longer satisfied; however, the Court of Appeal's approach to the construction of section 3 is difficult to reconcile with those expressed in *R v A(No 2)* . In *R(International Transport Roth) v Secretary of State for the Home Department [51]* the Court of Appeal held that the statutory scheme which penalised carriers of illegal immigrants into the UK under the Immigration and Asylum Act breached Article 6 and made a declaration of incompatibility.

(24) Section 6(2)(b) applies where a public authority is acting to give effect to or enforce a statutory provision which cannot be read or given effect to in a way which is compatible with Convention rights. The scope of section 6(2)(b) has been considered in several cases.

(25) In *R v Kansal (No 2)*[52]Lord Hope rejected the argument that it was open to a prosecutor to exercise his discretion authorising the use of evidence from compulsory questioning by choosing *not* to adduce the evidence. Similarly, in *R(Alconbury) v Secretary of State for the Environment [53]* the Divisional Court decided it was not legitimate to read down a legislative discretion so as to *extinguish* it.

(26) By contrast, in *R(Friends Provident) v Secretary of State for the Environment [54]* Forbes J *obiter* accepted the submission that the Secretary of State's discretion to call in a planning inquiry to ensure compliance with Article 6 only arose in some cases, where, for example, there were significant issues of fact to be decided. Thus, not every refusal to call in a planning application was not necessarily incompatible with Article 6; and section 6(2)(b) did not apply.

(27) These authorities were extensively analysed by Moses J in *R(Wilkinson) v IRC*.[55] In *Wilkinson* it was argued that section 6(2)(b) arise because primary legislation could be read or given effect in a way which was compatible with Convention rights: a discretionary provision to grant widow's bereavement allowance to a widower could be read down so that it only authorised the exercise of the power in a way which was compatible with Convention rights. However, Moses J held that compatibility could not be achieved by removing the power altogether; and treating the provision conferring a power to give equal treatment to widowers as if it was a duty to treat them equally.

Declarations of incompatibility and positive obligations.

(3) It has been suggested *obiter* in several cases that the declaration of incompatibility procedure cannot extend to breaches of positive rights. In *In Re S (Care Order: Implementation of Care Plan)*[56] Lord Nicholls considered a potential breach of the right of access to the court under Article 6 under the Children Act where, for example, a child was unable to bring proceedings because there was no parent or guardian willing and able to question the local authority's care decision. He pointed out:[57]

> The Convention violation now under consideration consists of a failure to provide access to a court as guaranteed by article 6(1). The absence of such provision means that English law may be incompatible with article 6(1). The United Kingdom may be in breach of its treaty obligations regarding this article. But the absence of such provision from a particular statute does not, in itself, mean that the statute is incompatible with article 6(1). Rather, this signifies at most the existence of a lacuna in the statute.
>
> This is the position so far as the failure to comply with article 6(1) lies in the absence of effective machinery for protecting the civil rights of young children who have no parent or guardian able and willing to act for them. In such cases there is a statutory lacuna, not a statutory incompatibility. "

(4) In *R(J) v Enfield LBC*[58] Elias J also took the view *obiter* that the declaration of incompatibility procedure could not be invoked where there was a breach of a positive right. In that case the claimant proved that the failure of a local authority to accommodate herself and her child breached Article 8. The family was subject to immigration control and the local authority had no power to provide accommodation. He concluded that it would be inappropriate to grant a declaration because it was a body of legislation taken together which is incompatible with Article 8; and also rejected the argument that the court ought to identify the particular statutory provision which is most closely linked to the Convention right infringed so that the fast track procedure could be utilised.

(28) The difficulty about applying the declaration of incompatibility procedure to primary legislation arises because of the definition of 'primary legislation' in s 4. Primary legislation as defined by ss 4(1)(2) is framed on the basis that a particular provision of primary legislation is incompatible with Convention rights: unlike the position with secondary legislation defined under section 4(3)(4). Nevertheless, there are counter arguments indicating that the declaration of incompatibility procedure can cover breaches of positive rights. S 4(2) should be read and given effect under s 3 so far as it is possible to make it compatible with Convention rights. Furthermore, the Human Rights Act should be interpreted in a broad and generous way to give effect to fundamental rights

(4) The obligation on a public authority under s 6

(29) Section 6(1) imposes an obligation on a public authority not to act incompatibly with Convention rights.

(30) The Government favoured a broad view of public authorities when the Act was before Parliament.[59] Section 6 contemplates pure public authorities (such as central or local government) and hybrid public authorities. Hybrid authorities are bound by the Act where they have "functions of a public nature"[60] and are not carrying out an act of a "private" nature.[61]

(31) The definition of who should be a public authority and what is a public function for the purposes of section 6 should be given a generous interpretation[62]

(32) However, the fact that a body performed an activity which otherwise a public body would be under a duty to perform did not mean that such performance was necessarily a public function. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*[63] the Defendant had been granted a tenancy of a property by the London Borough of Tower Hamlets pending a decision as to whether she was intentionally homeless. The property had subsequently been transferred to the Claimant housing association. Following a determination by the council that the Claimant was intentionally homeless, the association issued a summons for possession under section 21(4) of the Housing Act 1996. The defendant alleged that this amounted to a breach of Article 8. The Court held that in all the circumstances of this "borderline" case[64] the housing association was so closely assimilated with the council that it was performing public and not private functions..

(33) In *R (Heather) v Leonard Cheshire Foundation*[65] the Court of Appeal, considered whether the defendant care provider constituted a "public authority" under section 6. Pursuant to a power under the National Assistance Act 1948, a local authority engaged the Defendant to provide residential accommodation to the Claimants to meet its statutory obligation. The Claimants argued that the defendant's decision to close the home was contrary to Article 8. Lord Woolf CJ held that, "on the approach adopted in *Donoghue*," the defendant was not performing a public function. The local authority was contracting out to a voluntary service provider which had no statutory powers of its own; and, with the exception of the source of funding, there was no material distinction between the nature of the services provided by the Defendant to residents funded by a local authority and those provided to residents funded privately. The Defendant was not "standing in the shoes of the local authorities" The Court in *Heather* observed that the result of its ruling was that the defendant, was not subject to challenge under the Human Rights Act 1998, even though the local authority would have been if it had been responsible for making the same decision. The claimants' submission that this circumstance militated in favour of a finding that the function was public was, however, dismissed as circular, the Court choosing to emphasise, as it had done in *Donoghue* (at para 60), the continuing obligation of the local authority to the individual(s) concerned under the Convention in respect of that function, regardless of the delegation of its performance.

(34) The managers of a private psychiatric hospital which was registered both as a mental nursing home under the Registered Homes Act 1984, and to receive patients liable to be detained under the Mental Health Act 1983, were held to be a public authority in *R (A) v Partnerships in Care*[66]). The claimant challenged the decision by the managers to cease the treatment of personality disorders in one of its wards. In support of that ruling, Keith J remarked that under the 1983 and 1984 Acts, the managers were a body "upon whom important statutory functions are devolved"[67] and that, by virtue of regulations made under the 1984 Act, "the statutory duty… to provide adequate professional staff and adequate treatment facilities was cast directly on the hospital" .[68]

(5) Proportionality and judicial deference

(35) An interference is proportionate under the HRA where the public authority can show (see *R(Daly) v Secretary of State for the Home Department* [69]; *R(Samaroo) v Secretary of State for the Home Department*[70]):

- that the objective of the interference is sufficiently important to justify limiting the right;
- that the measures designed to meet the objective are rationally connected with it;
- that the means used to impair the right is no more than is necessary to accomplish that objective; and
- that the interference does not have an excessive or disproportionate effect on the affected individual.

(5) The first three requirements established in *Daly* were re-iterated by the House of Lords in *R v Shayler*.*[71]*

(6) The proportionality issue which arose in *Gough v Chief Constable of Derbyshire*[72] is rather different. The court will have to consider cases where public authorities are plainly on their face acting disproportionately: see, eg *R(Daly) v Secretary of State for the Home* Department[73]where a policy that required prisoners always to absent themselves when legally privileged material was disproportionate; and *A v Secretary of State for the Home Department*[74] where the Special Immigration Appeals Commission decided that that the power to detain foreign nationals only on national security grounds was discriminatory and breached Article 14 because it was disproportionate. In *Gough*, however, it was unclear whether the public authority would necessarily be acting disproportionately. Lord Phillipps MR at paras 84 to 86 said:.

> **…**In our judgment these statutory provisions, if given their natural meaning, are capable of being applied in a manner which is harsh and disproportionate. If a low standard of proof is applied at the first stage, there is a danger of individuals being made subject to banning orders on evidence which is too slender to justify the restrictions on their freedom which these entail. The requirement to demonstrate "special circumstances" could also lead the FBOA, or the magistrates' court on appeal, to refuse to grant permission to leave the country for a purpose which, while innocuous, would not naturally be said to constitute "special circumstances".
>
> However, the question is not whether the statutory provisions are capable of being interpreted in a manner which has disproportionate effect. The question is whether they are capable of being interpreted in a manner that is proportionate. Those who have to apply them are under a duty to give them an interpretation which is compatible with the requirements of European Community law and of the Human Rights Convention if this can be achieved.
>
> We have concluded that the scheme itself, if properly operated, will satisfy the requirements of proportionality**"**

(7) Thus, a public authority is obliged to interpret provisions which might potentially be disproportionate in a Convention compatible way. It is probably immaterial whether this obligation arises because the public authority is duty bound to interpret legislation compatibly under s 3 or duty bound to apply it compatibly under s 6.

Judicial deference

(8) In a number of cases it has been emphasised that deference should be accorded to the decisions of the legislature where the context justifies it.

(36) In his dissenting judgment in *International Transport Roth GmbH v Secretary of State for the Home Department* [75] Laws LJ formulated some general principles to be applied when judges ascertain the degree of deference judges to be paid to the democratic powers of government:

- greater deference should be paid to an Act of Parliament than the decision of the executive or a subordinate measure;
- there is more scope for deference where the Convention itself requires a balance to be struck and much less so where rights are expressed in unqualified terms;[76]
- greater deference will be due where the subject matter is peculiarly within the constitutional responsibility of democratic government;[77]
- greater deference is due where the subject matter lies more readily within the actual or potential expertise of the democratic powers

(6) Horizonality

(9) A striking example of a tribunal failing to regulate its own procedures to act in conformity with the Convention is provided by *R (A) v Lord Saville (No 2)*[78]. The Court of Appeal held that the Bloody Sunday Inquiry tribunal had breached the rights of soldier witnesses under Article 2 of the Convention by requiring them to give evidence in Londonderry.

(37) Section 12 of the Human Rights Act requires the court to satisfy itself of certain specified matters if it is considering whether to grant "any relief which, if granted, may affect the exercise of the Convention right to freedom of expression". In *A v B plc*[79] the Court of Appeal was required to consider the balance between the Claimant professional footballer's Article 8 rights and the Defendant newspaper's Article 10 rights in deciding the Defendant's appeal against an interim injunction to prevent publication of stories addressing the Claimant's extra-marital affairs. In the course of allowing the appeal, the Court laid down detailed guidelines for the exercise of judicial discretion in the light of the provisions both of section 12 of the Human Rights Act, and of Articles 8 and 10 of the Convention.

(38) The principle of direct statutory horizontality has been applied, for example, in *Wilson v First County Trust*[80] and *Wilson v First County Trust (No 2)*[81]where the Court of Appeal decided that the bar against enforcing a credit agreement breached the right of access to the court under Article 6 and the right to enjoy property under Article 1 of the First Protocol.

(39) There has been some debate about whether the courts would feel obliged to recognise a new tort of breach of privacy following the coming into force of the Human Rights Act. The recent case law reveals three distinct views about the availability and desirability of a new tort of invasion of privacy:

- That there is no common law tort of invasion of privacy and the courts are prevented by binding Court of Appeal authority from developing one: see *Wainwright v Home Office*.[82]

- That there is no tort and no need to develop one because in "the great majority of situations, if not all situations, where the protection of privacy is justified … an action for breach of confidence now will … provide the necessary protection": see *A v B plc* .[83]

- That a new tort is required and is now available or at least developing, in part at least as a result of the impetus provided by the Human Rights Act 1998: see *Douglas v. Hello!* .[84]

(7) The limits of the *Alconbury* principle

(40) One of the most significant constitutional cases under the Human Rights Act has been *R(Alconbury) v Secretary of State for the Environment*.[85] In *Alconbury* the House of Lords decided that applications for planning permission which were called in or recovered by the Secretary of State satisfied the fair trial requirements of Article 6(1) of the Convention- even though the court which reviewed his conclusions could not fully examine the merits of those decisions. The crucial question is whether an unfair procedure which contravenes Article 6 can be cured by a subsequent court hearing which did not allow the claimant to dispute primary facts; and the ramifications of the decision are still being worked out.[86]

(41) The fundamental problem arises out of the interaction of two Article 6 principles: the scope of the phrase "civil rights and obligations"[87] (which, together with a "criminal charge" trigger an entitlement to fair trial rights) and the implied right of access to the court under Article 6.[88] The position was described in *Albert and Le Compte v Belgium*[89] in the context of disciplinary proceedings:

> the Convention calls for one of the following two systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1) or they do not so comply but are subject to control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).

The subsequent case law has examined the implications of this approach.

(42) Thus, in the leading case of *Bryan v United Kingdom*[90] the Court held that a planning appeal confined appealing on a question of law[91] was sufficient to ensure that a planning inspector's decision complied with Article 6, stating that:[92]

> In assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which the decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

(43) These principles were applied by the House of Lords in *Alconbury*. Lord Hoffmann explained the importance of procedural safeguards (such as the right to a hearing before an independent and impartial hearing[93]) as follows:

> If, therefore, the question is one of policy or expediency, the 'safeguards' are irrelevant. No one expects the inspector to be independent or impartial by applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy Article 6 has nothing to do with 'safeguards' but depends on the *Zumtobel*[94] principle of respect for the decision of an administrative authority on questions of

expediency. It is only in coming to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that safeguards are essential for the acceptance of a limited review of fact by the appellant tribunal.

(44) The European Court of Human Rights[95] and the Commission[96] therefore take the view that the classic exercise of administrative discretion in the public interest does not require a full factual review of administrative decision. The exceptions to this general principle arise where a factual determination must be made which affect an individual's rights. In *W v United Kingdom*[97] the Court held that a parent's right of access to a child in public care required a full examination of the merits. Similarly, an dispute between employer and employee challenging the lawfulness of a suspension required a court to apply a more intensive form of review.[98]

(45) The courts under the Human Rights Act have attempted to apply these principles. Judicial review will not satisfy fair trial rights where the administrative body is making an adjudication affecting the claimant's rights or interests and, more controversially, in decisions affecting the public where the primary facts are in dispute.

(46) The case law in this area is inconsistent and unclear:

- There have been several planning cases where absence of a public fact finding inquiry has not resulted in a breach of Article 6.[99]
- Judicial review would be insufficient to cure breaches of Article 6 by a housing benefit review board[100] and by an asylum support adjudicator.[101]
- There are conflicting decisions as to whether the judicial review principles applied by the County Court in homelessness appeals is sufficient to comply with Article 6; in *Adan v Newham LBC[102]* the Court of Appeal held that the Council's internal procedure breached Article 6 but the Court of Appeal declined to follow the decision in *Tower Hamlets LBC v Begum.[103]*
- More questionably, the Court of Appeal in *McLellan v Bracknell Forest BC[104]* concluded that a council decision to terminate an introductionary tenancy was a decision made on public interest grounds where judicial review was sufficient to comply with Article 6.

(47) This issue will soon be considered by the House of Lords. The critical issue depends upon whether the dispute of primary fact arises in relation to an individual's rights or interests or whether it raises an issue which depends on evaluating the public interest.

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[1] Co-author *The Law of Human Rights* (Oxford University Press, 2000).

[2] [2002] 2 WLR 1143 at 1161, 1162

[3] (1994) 19 EHRR 333.

[4] Judgment 28 May 2002

[5] See above..

[6] Above at 1168, 1169:

[7] 1983] 1 All ER 1042, 1055-1056

[8] [2002] 3 WLR 505, para 62.

[9] [2002] 1 WLR 2491 para 17

[10] Eg in *Holding and Barnes v United Kingdom* App No 2352/02 the Court ruled as inadmissible a complaint made following the House of Lords' decision in *R(Alconbury) v Secretary of State for the Environment*

[11] My views are set out at greater length in R Clayton 'The limits of what's possible: statutory interpretation under the Human Rights Act' [2002] EHRLR 559.

[12] [2001] 1 WLR 1966.

[13] [2002] 1 All ER 620.

[14] [2002] 1 AC 45.

[15] [2001] 3 WLR 206: see, in particular, Lord Hope at 233 to 235 paras 79 to 81.

[16] See also *R v Offen* [2001] 1 WLR 421 which is discussed below.

[17] Fn 5 at 69 para 46 per Lord Steyn.

[18] *Ibid*, at 67, 68 para 44.

[19] [2000] 2 AC 326.

[20] *Ibid*, at 373.

[21] *Ibid*, at 366.

[22] (1997) (Cm 3782), para 2.7

[23] (1980) (Cmnd 7964)

[24] Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading).

[25] Lord Steyn ' *Pepper v Hart*; A Re-examination' (2001) 21 Oxford Journal of Legal Studies 59; see also Professor J H Baker, 'Statutory Interpretation and Parliamentary Intervention' (1993) 52 CLJ 353.

[26] [2000] 2 AC 115, 13, per Lord Hoffmann.

[27] Above at 86, 87 para 108.

[28] Above at 233, 234 para 79.

[29] [2001] QB 48.

[30] [2000] 2 AC 115, 131.

[31] [2002] 2 WLR 720 at 731, paras 39, 40 per Lord Nicholls.

[32] See *R v A (No 2)* Fn 5 per Lord Hope at 1582, 1583 para 110 and again in *R v Lambert* Above at 234 para 80; see also *In Re S (Care Order: Implementation of Care Plan) ibid* per Lord Nicholls at 731, 732 para 41.

[33] *Poplar Housing Association v Donoghue* Fn 20 at 72 para 75.

[34] Above

[35] Now s 109 of the Powers of Criminal Courts (Sentencing) Act 2000.

[36] Above

[37] *R(International Transport Roth) v Secretary of State for the Home Department* Above Jonathan Parker LJ para 144.

[38] Above

[39] (2001) 2 FLR 582.

[40] Above at 731 para 40.

[41] [2002] 1 All ER 931.

[42] Note that in *Tower Hamlets LBC v Begum* [2002] 2 All ER 668 the Court of Appeal declined to follow *Adan* and held that the judicial review jurisdiction under s 204 was sufficient to satisfy Article 6.

[43] Above at 945 para 42.

[44] *Ibid*, at 946 para 49.

[45] *Ibid* at 954, 955 paras 75, 77-79.

[46] *Ibid*, at 947 para 50.

[47] *Ibid*, at 958 para 94.

[48] *Ibid*.

[49] The declaration of incompatibility in *R v Secretary of State for the Environment ex p Alconbury* made by the Divisional Court (see The Times, 24 January 2001) that the planning system breached Article 6 was reversed by the House of Lords (see [2001] 3 WLR 1389. Similarly, the decision of Keith J in *Matthews v Ministry of Defence* (see The Times, 30 January 2002) that the bar on taking proceedings against the Crown under s 10 of the Crown Proceedings Act breached the right of access to the court under Article 6 was reversed by the Court of Appeal (see The Times, 31 May 2002).

[50] [2001] 3 WLR 42 following the adjourned hearing in *Wilson v First County* [2001] QB 407. Leave to appeal was granted to the House of Lords: see [2001] 1 WLR 2238.

[51] The Times, 26 February 2002.

[52] [2002] AC 69 at at 113, 114 para 88.

[53] [2001] JPL 291

[54] [2001] 1 WLR 1450 at *obiter* at paras 98 and 100.

[55] [2002] STC 347

[56] [2002] 2 AC 291 at 322 para 82

[57] Ibid at 322 paras 85, 86.

[58] (2002) 2 FLR 1

[59] When the Lord Chancellor, Lord Irvine moved the Bill at the second reading, he stated (Hansard HL 3 November 1997, cols 1231, 1232):

> "We decided ... that we should apply the Bill to a wide rather than a narrow range of public authorities so as to provide as much protection as possible to those who claim their rights have been infringed. [Section] 6 is designed to apply not only to governmental bodies and the police but also to bodies which are public in certain respects but not others."£

The Home Secretary, Jack Straw MP, said (Hansard HC 17 June 1998, col 409, 410):

> "We decided the best approach would be by reference to the concept of a public function .... [section] 6 accordingly provides that a public authority includes a court or tribunal and 'any person certain of whose functions are functions of a public nature'. The effect of that is to create three categories, the first of which contains organisations which might be termed 'obvious' public authorities, all of whose functions are public. The clearest examples are Government Departments, local authorities and the police .... The second category contains organisations with a mix of public and private function. One of the things with which we had to wrestle was the fact that many bodies, especially over the last 20 years, have performed public functions which are private, partly as a result of privatisation and partly as a result of contracting out .... The third category is organisations with no public functions- accordingly, they fall outside the scope of [section] 6 .... it will be for the courts to determine whether an organisation is a public body .... The courts will consider the nature of the body and the activities in question."

[60] S 6(3) of the Act.

[61] S 6(5) of the Act.

[62] see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 67, para 58 (*per* Lord Woolf CJ)

[63] Ibid

[64] para 66

[65] [2002] 2 All ER 936

[66] The Times 23 April 2002

[67] para 17

[68] para 24

[69] [2001] 2 AC 532

[70] (2001) UKHRR 1622

[71] [2002] 2 WLR 754, at para 56

[72] [2002] 3 WLR 289

[73] [2001] 2 AC 532

[74] 30 July 2002

[75] [2002] 3 WLR 344 at paras 81 to 87

[76] See *R v DPP ex p Kebilene* [2002] 2 AC 326 at para 80 per Lord Hope

[77] such as the defence of the realm: see eg *Chandler v DPP* [1964] AC 763 at 790, 798 per Lord Reid and Viscount Radcliffe; *Marchiori v Enviromental Agency* [2002] EWCA Civ 3 at paras 31 to 38 or immigration control)

[78] [2002] 1 WLR 1249

[79] [2002] 3 WLR 542

[80] [2000] QB 407

[81] [2001] 3 WLR 42

[82] [2002] 3 WLR 405

[83] [2002] 3 WLR 542

[84] [2001] QB 967

[85] [2001] 2 WLR 1389.

[86] My own views are set out at greater length in 'The Limits of the *Alconbury* Principle' in Schiemann LJ and M Andenas (ed) *Policy Making and Decision Taking: Human Rights and English Public Law after Alconbury* (British Institute of Comparative Law, 2003).

[87] As Lord Clyde pointed out in *R(Alconbury) v Secretary of State for the Environment* [2001] 2 WLR 1389 at para 150 Article 6 is engaged where a decision is given in the exercise of a discretionary power provided it directly affects civil rights and obligations and is of a genuine and serious nature. The Court of Human Rights has therefore interpreted the phrase broadly to include eg issues concerning planning: see *Bryan v United Kingdom* (1995) 21 EHRR 342; the right to engage in commercial activity: see eg *Tre Traktorer Aktiebolag v. Sweden* (1989) 13 EHRR 309 (restaurant liquor licence) *Pudas v. Sweden* (1987) 10 EHRR 380 (public service licence for private passenger carrier); *Axelsson v Sweden* (1989) 65 DR 99 (taxi licence); *Benthem v. Netherlands* (1985) 8 EHRR 1 (licence to operate a liquid petroleum gas installation); the right to obtain compensation for monetary loss resulting from illegal state acts: see eg *X v. France* (1992) 14 EHRR 483 (claim for damages for negligence of the government authority in the administration of a blood transfusion resulting in contraction of AIDS came within Article 6); *Editions Periscope v. France* (1992) 14 EHRR 597 (losses resulting from a wrongful refusal of a tax concession); the right to liberty: see *Aerts v Belgium* (1998) 29 EHRR 51; and welfare benefits: see *Schuler-Zgraggen v. Switzerland* (1993) 16 EHRR 405, para 46) where the Court held that Article 6(1) will apply to all welfare benefits- whether contributory eg *Lombardo v. Italy* (1992) 21 EHRR 188 (a police officer's public service pension not associated with a private employment contract); *Nibbio v. Italy* (1992) A 228-A (a disability pension); *McGinley & Egan* v. *UK* (1998) 4 BHRC 421 (an invalidity pension)- or noncontributory: see *Salesi v. Italy* (1993) 26 EHRR 187, para 19).

[88] *Golder v United Kingdom* (1975) 1 EHRR 524.

[89] (1983) 3 EHRR 533 para 29.

[90] (1995) 21 EHRR 342; see, also *Zumtobel v Austria* (1993) 17 EHRR 116 where it was held that the judicial review principles applied by the Administrative Court concerning the public interest in relation to expropriation proceedings affecting the highway were sufficient to satisfy the right of access to the court under Article 6(1).

[91] Under s 289(1) of the Town and Country Planning Act 1990.

[92] (1995) 21 EHRR 342, para 45.

[93] Ibid, para 117.

[94] *Zumtobel v Austria* (1993) 17 EHRR 116.

[95] See eg *Chapman v United Kingdom* Judgment 18 January 2001; *Kingsley v United Kingdom* The Times, 9 January 2001 (where the inability to remit the case back to the original decision makers resulted in a breach of Article 6).

[96] Where proceedings were brought following eg a determination by the Secretary of State that the applicant was not a fit and proper person to be the managing director of an insurance company (*X v United Kingdom* (1998) 25 EHRR CD 88); where the Investment Managers Regulatory Organisation found that the applicants were not fit and

proper persons to carry on investment business (*APD v United Kingdom* (1998) 25 EHRR CD 141); and where a doctor appealed to the Privy Council by a doctor from the General Medical Council (*Stefan v United Kingdom* (1997) 25 EHHR CD 130; *Wickramsinghe v United Kingdom* [1998] EHRLR 338).

[97] (1987) 10 EHRR 29 para 82.

[98] *Obermeier v Austria* (1990) 13 EHRR 290 para 70.

[99] See *Vetterlein v Hampshire CC* [2001] EWHC Admin 560 (14 June 2001); *R(Maister) v Ipswich BC* [2001] EWHC Admin 711 (17 August 2001); *Friends Provident v Secretary of State for Transport* [2002] 1 WLR 1450; but see *R(Kathro) v Rhonda Cybnon Taff CBC* [2002] Env LR 15 where Richard J held obiter that the absence of any public inquiry in the decision making process of a local planning authority meant there was a real possibility that, in certain circumstances, a decision of a authority which was not itself an independent tribunal would not be subject to sufficient judicial control to satisfy Article 6.

[100] *R(Bewey) v Norwich CC* (2002) HRLR 15 but see *R(Bibi) v Rochdatel MBC* [2001] EWHC Admin 967 (27 November 2001).

[101] *Husain v Asylum Support Adjudicator* (2002) HRLR 2 per Stanley Burnton J obiter.

[102] [2002] 2 All ER 668.

[103] [2002] 2 All ER 931.

[104] [2002] 1 All ER 899.