THE HUMAN RIGHTS ACT: ONE YEAR ON

The domestic Article 6 jurisprudence

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Introduction

1. Article 6 of the Convention has been one of the most frequently invoked provisions in domestic litigation. The main areas in which it has had an impact are:

   (1) The standards expected in relation to courts and tribunals to ensure that they are "independent and impartial" tribunals for Art. 6 purposes;

   (2) Administrative decision-making in areas which impact upon private rights;

   (3) The criminal law, especially in relation to the privilege against self-incrimination and the presumption of innocence;

   (4) Civil procedure.

   These are considered in turn.

Courts and tribunals as "independent and impartial"

2. Under the Strasbourg caselaw, courts are required to be independent of

both the executive and the parties to litigation; they are also required to be impartial judged on a subjective and an objective basis.

3. An early major shock to the UK legal system was *Starrs v Ruxton* 2000 SLT 42 (High Court of Justiciary) (the Scottish temporary sheriff case: insufficient guarantees of independence from the executive, where inadequate security of tenure). The heavy dependence of the legal system upon part-time judges appeared in jeopardy, even though there was some softening of the approach in civil cases in *Clancy v Caird* (Scottish Court of Session). But the judgments in *Starrs* were well-reasoned and a decision was taken not to appeal, but to adjust law and practice to strengthen the security of tenure for part-time judges and tribunal members in England.

4. The success of this approach was borne out in *Scanfuture v Secretary of State for Trade and Industry* [2001] IRLR 416 (EAT). In a case concerning the application of the Acquired Rights Directive, an appeal was launched on the basis that the employment tribunal's decision at first instance was not the decision of an "independent and impartial" tribunal for the purposes of Art. 6 and EC law. The EAT had to consider the guarantees of tenure for ET members appointed and paid by the DTI, hearing cases in which the DTI was a party. It held that under the older arrangements for appointment, there were insufficient legal guarantees of independence. But under new arrangements, introduced in the light of *Starrs* and modelled on the new arrangements of the Lord Chancellor's Dept for part time judges, the EAT held that ETs now did satisfy the requirements of Article 6.

5. The cases have confirmed that there is nothing intrinsically incompatible with the ECHR in the use of part-time judges. This appears again to have been endorsed by the ECtHR in its judgment of

21 December 2000, in *Wettstein v Switzerland.*

6. An important area in the debates about this aspect of Art. 6 has been the extent to which it is legitimate to have regard to executive practice in assessing whether a court or tribunal offers acceptable objective guarantees of independence and impartiality. The Strasbourg caselaw shows that practice is *a* relevant factor, but opinions appear to vary as to the weight which it is legitimate to attach to it. The Court of Session in *Starrs* and the EAT in *Scanfuture* were not prepared to find compliance with Art. 6 despite the (reasonably) strong practice of non-removal from office of part-timers. On the other hand, the Court-Martial Appeal Court was prepared to place reliance on practice as a guarantee of independence in Court Martials in *R v Spear* [2001] 2 WLR 1692 (permission has been granted for an appeal to the House of Lords).

7. The domestic courts have also adjusted the domestic law test of bias to bring it into line with the Art. 6 jurisprudence on the objective guarantees against bias: *In re Medicaments (No. 2)* [2001] 1 WLR 700 (CA). The old test of real danger of bias in *R v Gough* has been displaced by a test whether doubts as to independence or impartiality could reasonably, and on an objective basis, be entertained. English law has thus been brought into line with Strasbourg and, coincidentally, with most Commonwealth jurisdictions.

8. An issue remains as to the ambit of application of the test in *Medicaments*. Art. 6 itself only applies directly in certain defined court-type contexts, whereas the common law *Gough* test has been adapted and used in various administrative contexts as well. Will the *Medicaments* test be adapted to take account of the particular decision-making context in administrative areas, or will the rigours of Art. 6 be imported into those areas by the back-door? The early indications are

that the old common law approach in *Lloyd v McMahon* [1987] AC 625, emphasising flexibility in the content of common law procedural rules to take account of different contexts, will apply: see eg *R (Carroll, Al-Hasan and Greenfield) v Secretary of State for the Home Dept* [2001] EWCA Civ 1224; *R v Chief Constable of Merseyside Police, ex p. Bennion*, unrep. 4.5.01, CA.

The impact of Art. 6 on administrative decision-making

9. The civil limb of Art. 6(1) applies to the determination of a person's "civil rights and obligations". The Strasbourg caselaw indicates that a distinction between public law and private law underlies the civil limb of Art. 6(1). Determination of private law rights falls within the Article, application of public law does not: see eg Clayton & Tomlinson, *The Law of Human Rights*, paras. 11-172 and 11-173. But from early on in its jurisprudence the ECtHR has held that Art. 6 *will* apply in the context of a public law dispute where that dispute is directly decisive of civil (private law) rights and obligations: eg *Ringeisen v Austria* (1971) 1 EHRR 455 (validity of a private law contract dependent on administrative decision-making); *Benthem v Netherlands* (1986) 8 EHRR 1 (grant of licence – public law - to engage in private commercial activity).

10. The ECtHR has taken a very wide view of what qualifies as private rights and obligations for these purposes. For example, in the planning context, the relevant private right was identified simply as the right to enjoy one's property in a very broad sense, which would inevitably be "determined" in various ways by a variety of administrative decisions in the implementation of planning controls: *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 and subsequent judgments. Accordingly, the ECtHR has taken an expansive view of the circumstances in which Art.

6(1) will apply in an administrative decision-making context.

11. In most domestic legal systems of the Contracting States in many contexts the first line of decision-makers are administrative bodies with links to the executive, which do not themselves satisfy the requirements of Art. 6. It is a common feature of the domestic legal systems of Contracting States that the grounds of review of such decisions by a court are circumscribed in ways similar to the conventional restrictions on judicial review in English law (ie there is no full appeal on the merits before the court).

12. The ECtHR's wide view of the application of Art. 6 has thus come into conflict with these traditional boundaries between executive and judicial decision-making, and the resulting tension has required the development of a compromise position in the ECtHR's jurisprudence. The ECtHR first confirmed that administrative decision-making at first instance was compatible in certain contexts with Art. 6, provided there was then an appeal to a fully Art. 6 compliant court with "full jurisdiction" in relation to both facts and law: *Le Compte, Van Leuven & de Meyere v Belgium* (1982) 4 EHRR 1; *Albert & Le Compte v Belgium* (1983) 5 EHRR 533. Next, the ECtHR held that in certain contexts and subject to certain safeguards appeal to or review by a fully Art. 6 compliant court on limited grounds only (equivalent to traditional English judicial review grounds) would, looking at the process overall, satisfy the requirements of Art. 6.

13. The leading case is *Bryan v UK* (1996) 21 EHRR 342 (Art. 6 was satisfied in the context of a planning decision by an Inspector, who was not himself an independent tribunal, with appeal to the High Court on a point of law only, including irrationality in any decision on the facts). The decision taken involved the Inspector resolving disputed points of

fact; nonetheless the ECtHR held that limited review of his decision on these points in the High Court was compatible with Art. 6, having regard to (a) "the specialised area of law" in question and (b) the procedural safeguards offered by the Inspector.

14. This is the Strasbourg background to the decision of the House of Lords in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389. This can claim to be the first major constitutional decision of the House of Lords under the HRA, addressing as it does the proper areas for decision-making by the executive and the judiciary respectively. The appeals concerned planning decisions "called in" by the Secretary of State for decision by him personally, after review and report by an Inspector (contrast *Bryan*, in which the decision in question was to be that of the Inspector, not the Secretary of State). The House of Lords, reversing the Divisional Court in a leapfrog appeal, held that the *Bryan* composite approach to the satisfaction of Art. 6 applied, and that the decision-making by the Secretary of State, subject to appeal or review by the High Court on a point of law, would be compatible with Art. 6. This was an important decision, which upheld the integrity and Convention compatibility of the UK's system of planning control, which relies heavily on decision-making by the democratically accountable executive at the levels of both local government (local planning authorities) and central government (the Secretary of State).

15. However, domestic law continues to grapple with the two pre-conditions of the *Bryan* composite approach. In *Alconbury*, the House of Lords did not have to address the parameters of condition (a), the concept of "specialised area of law", since it was well established that planning decisions qualified. It seems that decision-making in areas which call for judgments about policy matters as well as on the facts of particular

cases will qualify. In *R (Johns and McLellan) v Bracknell Forest DC*, unrep. 21 December 2000, Longmore J applied the *Bryan* composite approach to decision-making by local authorities whether to terminate introductory tenancies on the grounds that the new tenants on probation had proved themselves to be a nuisance to their neighbours. The county court would have no discretion but to order re-possession of a property where proper notice had been given; but the decision of a local authority to activate that procedure would be subject to judicial review, which satisfied Art. 6. The appeal was heard in the summer term and judgment is awaited.

16. Might the same approach apply when the fact-finding tribunal is a specialist body, better equipped to assess the facts than a court, even though no questions of policy arise directly? The EAT in *Scanfuture* declined to apply the *Bryan* composite approach in the case of ETs, but on the basis of an erroneous reading of the judgment in *Bryan* (assuming that it did not apply in the context of disputed issues of fact – an error exposed in particular by the speech of Lord Hoffmann in *Alconbury*). Compare, on the other hand, *Stefan v UK* (1998) 25 EHRR CD130.

17. As to condition (b), adequate procedural safeguards, the House of Lords again did not have to explore in any great detail the parameters of what procedural safeguards at first instance would be acceptable under Art. 6. This is because the decision-making by the Secretary of State, after inquiry by an Inspector, would in the context of *Alconbury* have involved a very high level of procedural safeguards. The House of Lords simply found that the procedural safeguards were adequate, and did not have to decide what would be the *minimum* level of procedural safeguards required under the *Bryan* composite approach. This is thus an area left for examination by the lower courts, presumably in the light of the

Strasbourg caselaw applying the *Bryan* approach.

18. There have been a number of domestic authorities which represent a range of views about what procedural safeguards will be required under Art. 6, but (with respect to the judges) none of them yet appear to have taken fully into account the full set of Strasbourg authorities. In *R (Kathro) v Rhondda Cynon Taff County BC*, unrep., 6 July 2001, Richards J suggested (obiter) that the *Bryan* composite approach would only be acceptable after some form of independent public inquiry. On the other hand, in *R (Vetterlein) v Hants CC*, unrep. 13 June 2001, Sullivan J suggested (also obiter) that the requirement of a public hearing could be satisfied by a public meeting held by the council itself. In *R (Bewry) v Norwich City Council* [2001] EWHC Admin 657, Moses J held that decision-making by a housing benefit review board (which included members of the council) did not satisfy Art. 6 on the *Bryan* composite approach, because of the absence of fact finding by an independent person like an inspector, even though the procedures employed by the board were fair. But it is doubtful whether the Strasbourg authorities which have applied the *Bryan* approach require such a quasi-independent fact-finding procedure as one of the procedural safeguards: see *X v UK* (1998) 25 EHRR CD88 (decision-making on facts determined directly by the Secretary of State); *Stefan v UK*, supra (decision-making on facts determined directly by the GMC); *Kingsley v UK*, ECtHR, judgment of 7 November 2000, approving *X v UK*; and, prior to *Bryan*, *Zumtobel v Austria* (1994) 17 EHRR 116. The issue about the application of these authorities arose directly in *R (Friends Provident) v Norwich CC*, before Forbes J: judgment is expected to be delivered on 5 October 2001.

19. In contexts in which the *Bryan* composite approach is not applicable, and appeal or review by a fully Art. 6 compliant court is required on

both fact and law, what does such appeal or review require? It seems that jurisdiction to reverse a decision on facts and the merits will be sufficient, even though that jurisdiction is typically exercised on the papers and without a hearing *de novo* of all the evidence: *Ghosh v GMC* [2001] UKPC 29. (The main limit to the application of this type of composite approach to satisfaction of Art. 6 is that it cannot be applied to determination of serious criminal charges, where the determination at first instance must be before a fully Art. 6 compliant court).

20. This raises the issue how a judicial review court should respond to a case in which the *Bryan* composite approach (review on a point of law) is insufficient to satisfy Art. 6, and fuller *Ghosh* type review on the merits would be required in order to satisfy the requirements of Art. 6. Should the judicial review court exercise a more intensive form of review, on *Ghosh* principles, in order to ensure that the individual's rights under Art. 6 are satisfied? Where the review or appeal has a statutory basis, under s. 6(1) and (2) of the HRA the review or appellate court will have no warrant for expanding its jurisdiction unless the statutory provision can be expanded under s. 3(1) of the HRA. But the courts may feel that such an exercise would amount to illegitimate legislation as opposed to interpretation: the Divisional Court in *Alconbury* declined to apply s. 3 HRA to expand the statutory planning review power under which it had jurisdiction, and although the point did not have to be determined in the House of Lords in light of the way in which the House decided the case, Lord Clyde appeared to express sympathy with the Divisional Court's approach (para. 169). On the other hand, the House of Lords has since emphasised the strength of the interpretative obligation, in *R v Lambert* [2001] UK HL 37; 3 WLR 206; and in *Tehrani v UKCC* [2001] IRLR 208 (Court of Session) the court was prepared to use s. 3(1) of the HRA to expand its statutory jurisdiction where necessary to do so to safeguard rights under Art. 6.

21. Where the review court is called upon to review its common law review powers, it is difficult to see what would prevent it adopting a more intensive mode of review if that was required to safeguard the Art. 6 rights of an individual before it. Section 6(1) of the HRA requires the court as a public authority to act compatibly with the Convention rights (including Art. 6), and in the absence of any relevant incompatible primary legislation the limitation on that duty under s. 6(2) of the HRA can have no application. Although this argument has been presented by the Government on a number of occasions, no court has yet had to decide a case on the basis of it.

22. There are certain situations in which Art. 6 will not apply at all. The boundary of such areas may be of vital importance in determining whether a particular decision-making process infringes the Convention or not. Challenges have been brought under Art. 6 to the prison disciplinary system, under which prison governors can determine charges against prisoners relating to their behaviour in prison and award "additional days" to be spent in prison before their release date determined under the Criminal Justice Act 1991. The Court of Appeal has held that these are determinations of disciplinary charges, falling outside the scope of Art. 6, rather than determinations of criminal charges or civil rights: *R (Carroll, Al-Hasan and Greenfield) v Secretary of State for the Home Dept,* supra. But note parallel proceedings before the ECtHR on the same point, in *Ezeh and Connors v UK* – whether there is an appeal to the House of Lords is likely to depend upon the outcome of those proceedings.

Criminal law

23. Art. 6 contains important substantive rights for accused persons in the

context of criminal charges brought against them. In particular, there is an implied right against self-incrimination and an express right (under Art. 6(2)) to be presumed innocent. In addition, there are express procedural rights under Art. 6(3) for those accused of criminal offences. All these points may make the classification of proceedings as criminal or civil of some significance.

24. There have been a series of cases which have tested the boundaries of the concept of a criminal charge for the purposes of application of the criminal limb of Art. 6. Generally, measures designed to be preventive in some way rather than penal have been held not to be criminal penalties, even when they are imposed in the context or against the background of criminal proceedings: see in particular *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084 (CA) (application for anti-social exclusion order, civil proceedings); *B v Avon and Somerset Constabulary* [2001] 1 WLR 340 (application for sex offender order, civil proceedings); *McIntosh v Lord Advocate* [2001] 3 WLR 107 (PC) (proceeds of crime confiscation order, civil proceedings – declining to follow the Court of Appeal decision in *R v Benjafield* on this point; and see now the decision of the ECtHR in *Phillips v UK*); *S v Miller* 2001 SLT 531 (order to keep child in secure accommodation, civil proceedings); *Goldsmith v Customs & Excise Comrs* [2001] 1 WLR 1673 (confiscation proceedings were civil). But the courts have emphasised that the standard of fairness required under the civil limb of Art. 6 will increase depending on what is at stake for the individual.

25. On the other hand, proceedings hitherto classified as civil in domestic law have been held to be criminal proceedings for the purposes of Art. 6, where there object is penal: *Han & Yau v Customs & Excise Comrs*, unrep., CA, 3 July 2001 (civil proceedings for recovery of penal rates of interest for non-payment of tax).

26. The substantive elements of Art. 6 in relation to criminal proceedings have had a major effect on the content of criminal offences and the way in which they may be proved. The higher courts have now had to examine on a number of occasions the circumstances in which it may be legitimate and compatible with Art. 6(2) of the Convention for domestic law to reverse the onus of proof in relation to certain elements of an offence. A reverse onus of proof will be compatible with the Convention in limited circumstances, where a fair balance between the interests of the community and the interests of the individual is maintained: the leading Strasbourg authority is *Salabiaku v France* (1988) 13 EHRR 379. A preliminary indication of the factors which would be taken into account by the domestic courts in applying that test was given in the speech of Lord Hope in *R v DPP ex p Kebilene* [2000] 2 AC 326. But the test is highly impressionistic, and it is difficult to predict how the judiciary will apply it in any given context. The leading domestic authority is now *R v Lambert* [2001] 3 WLR 206 (HL), in which the interpretative obligation under s. 3(1) of the HRA was employed to convert a legal burden upon the accused under drugs legislation into a mere evidential burden. But there are many reverse onus provisions throughout our law, and the legitimacy of each one has to be judged in the light of its particular context.

27. The right against self-incrimination was in issue in the other major leading decision in this area in the period: *Brown v Stott* [2001] 2 WLR 817, PC (as with a number of the authorities, a case coming to the Privy Council as an appeal from the Scottish courts on a devolution issue under the Scotland Act). This was concerned with the ability of the police to require a person accused of a traffic offence to answer whether they had been driving the car at the time of an alleged offence, under s. 172 of the Road Traffic Act 1988, and the ability of the prosecution to

use the answer obtained as evidence in a criminal trial. The High Court of Justiciary had ruled that use of the answer would infringe the rights of the accused under Art. 6. The Privy Council reversed that decision, their lordships delivering careful speeches focused intensely upon the particular nature of the power in question and the context in which it fell to be used. The decision of the High Court of Justiciary had appeared to threaten the efficacy of speed cameras in controlling traffic crimes, and in early comment on the HRA in the media was held up as an example of possible unpalatable decisions now to be expected from the courts. The speeches in the Privy Council contain important observations about the respect to be accorded by the judiciary to the democratic legislature in seeking to strike a fair balance between the interests of the community as a whole and the interests of individuals.

28. In another important decision, critical for the smooth functioning of the criminal justice system as a whole, the Divisional Court in *R (DPP) v Havering Magistrates' Court* [2001] 1 WLR 805 held that Art. 6 was not directly applicable to proceedings relating to the imposition of bail conditions and imprisonment if they were breached. The underlying criminal charge would be determined at the full trial, so satisfying the accused's rights under Art. 6; and under Art. 5 it was not necessary to justify detention whilst awaiting trial for the underlying facts to be proved to the criminal standard of proof.

Civil Procedure

29. Various claims have been made, relying on Art. 6, to the effect that the civil courts should alter their procedures in some way, or should require the provision of legal aid in some form for litigants before it. In general, the courts have not been impressed by such arguments.

30. In *Director General of Fair Trading v Proprietary Association of Great Britain*, CA, unrep. 26 July 2001, the Court of Appeal rejected the claim of the Proprietary Association for payment of its costs of the hearing before the Restrictive Practices Court which had proved abortive as a result of the Court's decision in *Re Medicaments (No. 2)*, supra. The Court of Appeal held that its own previous decision and the remission of the case to the Restrictive Practices Court had itself satisfied the Association's rights under Art. 6, and that it had no right under Art. 6 to the payment of the costs it had incurred in the abortive hearing. Also see *R (Shields) v Crown Court at Liverpool* [2001] EWHC Admin 90 (absence of legal aid for leading counsel, no breach of Art. 6).

31. However, in *R v Legal Services Commission ex p Jarrett* [2001] EWHC Admin 389 Burton J was prepared to supervise more closely than before the exercise of discretion by the LSC, with a view to ensuring that legal aid should not be withheld in cases where it would make it practically impossible for a case to be presented in court or would lead to obvious unfairness. On the other hand, in *Re Kingsley Healthcare*, unrep., 25 Sept. 2001, Neuberger J, the judge was unwilling, on the basis of Art. 6, to vary a freezing order with respect to payment of legal costs.

32. Other domestic civil procedures have survived challenges under Art. 6 thus far. In *R v Bow County Court ex p Pelling* [2000] UKHRR the Divisional Court rejected complaints about certain county court possession proceedings being held ordinarily in private. In *Ebert v Official Receiver*, CA, unrep., 14 March 2001, the court affirmed the compatibility with Art. 6 of domestic legal provisions controlling the access of vexatious litigants to the courts. In *St Brice v Southwark LBC*, CA, unrep., 17 July 2001, the Court of Appeal held that it was legitimate to have a procedure before an Art. 6 compliant court which would involve a possession order being made against an individual

without a hearing on the merits, but subject to a right on the part of that individual to require the court to conduct a full hearing subsequently on the merits before the order was enforced.

Conclusions

33. Overall, a review of the domestic courts' application of Art. 6 shows them treading a middle course between validating all domestic legal arrangements as compliant with Art. 6 and extreme judicial activism, requiring the modification of domestic law to allow for wider scope for judicial rather than executive or legislative decision-making.

34. The avowed aim of the Convention is to promote democracy subject to the rule of law. This implies respect for decision-making as a result of democratic procedures, or subject to democratic accountability, as well as decision-making by the judiciary. As Lord Hoffmann pithily put it in *Alconbury,* the Convention is concerned to preserve the rule of law, not the rule of lawyers.

35. In the leading authorities, the higher courts show an acute awareness of the factors which impact upon the legitimacy of decision-making by the executive or legislature and upon the legitimacy of decision-making by the courts in difficult areas. The cautious middle path charted so far reflects a healthy consciousness of the constitutional dangers of both excessive and too little judicial activism. In the course of this spate of domestic decisions on Art. 6, the courts are in substance articulating an implicit theory of the separation of powers, suitable for the particular constitutional arrangements in this country and subject to the overarching framework supplied by the Convention and the ECtHR. This discourse has replaced the silent assumptions made for so long under domestic law prior to the enactment of the HRA.