5 The Convention and the United Kingdom

Hoffman, D. and Rowe, J. (2003) *Human Rights in the UK: A general introduction to the Human Rights Act 1998*, London, Pearson Longman.

The history of the Convention does not explain why it has only recently been incorporated into United Kingdom law. The significance of this is that under British Constitutional law, until a treaty has been incorporated into domestic law by an Act of Parliament it cannot be relied on directly in national courts by those who claim that it has been infringed by their government.

As we have seen, in 1950 the United Kingdom was opposed to giving the European Court jurisdiction over complaints from British individuals. In addition, it was not thought particularly necessary to increase human rights protection in the United Kingdom, because it was thought at that time that the law of the United Kingdom adequately protected the rights of its citizens. Indeed, the British involvement in the drafting of the Convention supported the government's view that the European Convention itself reflected the standards of protection provided by the tradition of English common law.

Britain was, however, the first country to ratify the Convention, although it did not sign up to the optional provisions, namely, submission to the jurisdiction of the European Court and the right of individual petition, which allowed individuals to complain directly to the Commission or the Court. Britain also extended the effect of the Convention (but not the First Protocol) to most of its colonies on 23 October 1953, although during the following decades before most of the colonies gained their independence a number of derogations were entered in various emergency situations.

Ironically, since it was largely responsible for the Convention coming into existence, Britain was also the subject of the first inter-state case to be brought under the Convention, which was a complaint to the Commission by Greece regarding the situation in Cyprus, brought in May 1956.[1] The complaint related to British actions taken and regulations imposed in response to the actions of the Greek-Cypriot group EOKA. Greece alleged that there had been breaches of a number of articles, especially Article 3 (freedom from torture) in relation to corporal punishment and treatment of detainees and Article 5 (prohibition of arbitrary detention). After a number of hearings and a visit to Cyprus by some of the Commission members in January 1958, the Commission reported in September 1958 into the regulations and systems in place in Cyprus.[2] The report found no

[1] Application 176/1956.

[2] Greece brought a second application in July 1957, which raised 49 individual cases of alleged torture or mistreatment. This application was overtaken by events, because there was a settlement over Cyprus in February 1959 between Greece and Turkey, so none of the complaints proceeded to a hearing by the Commission.

human rights infringements by the United Kingdom, but did make some criticisms. Between the making of the complaint and the report being produced, some laws which might have infringed the Convention had also been repealed as a result of political pressure to avoid a finding by the Commission of a breach of human rights. The Commission report was notable for introducing into the Convention jurisprudence the idea of the margin of appreciation, which is the important principle that states have some leeway to deal with, in particular, emergency situations, before they breach the Convention.

The Cyprus cases did not encourage the British government to be enthusiastic to sign up to the optional provisions relating to the Court and the right of individual petition. The Colonial Office, which administered the various British territories, had always taken the view that the Convention might cause difficulties if there were too close an examination of the various legal systems in place in some of the colonies. In this view, signing up to a right of individual petition and the jurisdiction of the Court would only encourage complaints by agitators, especially those who wished to encourage the independence of the colony in question. In the early 1960s there were a number of formal derogations from the Convention in place in respect of various colonies, which is to say formal statements that the Convention was being disapplied in certain instances, precisely to cover various legislative provisions designed to allow systems of administration which might not conform to the requirements of the Convention but were thought necessary to deal with various situations.

However, during the early 1960s, Britain was dismantling its empire in a fairly comprehensive way, and by 1964 most of the larger colonies had been granted independence. There was also some political pressure for signing up to the optional clauses; the issue was raised with the government, in particular by Lord McNair, the first British judge on the European Court, and also the first President of the Court. There was a change of government in 1964 and the new Lord Chancellor, Lord Gardiner, supported signing up to the optional clauses. By late 1965 there were even fewer colonies – the Colonial Office ceased to exist in 1966, replaced by the Commonwealth Office – and in December 1965, the Prime Minister, Harold Wilson, announced that Britain would sign up to the optional clauses, which was done in January 1966.

At this stage there was no political pressure for the Convention to be directly incorporated into United Kingdom law. This was something which developed during the 1980s and 1990s, particularly after there had been a number of findings of infringements by the United Kingdom. These put paid to the view that United Kingdom law provided adequate human rights protection without the need for the Convention. However, the European Convention was not high on the political agenda, and it was only when it was made a matter of policy by the Labour Party, in opposition, in the mid-1990s that it gained any real political relevance.

The key event here was the delivery by John Smith QC, then leader of the Labour Party, of a lecture entitled 'A Citizen's Democracy' in March 1993. The Labour Party then published a consultation paper in December 1996 and then, after the Labour Party became the government, it published the White Paper 'Rights Brought Home'[3]: this was the start of the legislative process which resulted in the Human Rights Act 1998.

The arguments put forward for incorporation, both in the White Paper and by the government in Parliament, were based partly on the practical considerations of the cost and delay involved in taking a case to the European Court at Strasbourg, in the absence of a remedy in the local courts for an infringement of the Convention. But they were also based on the principled reason that it would allow the rights guaranteed by the Convention to more fully enter British law, in so far as they were not already protected. And it showed an acceptance that the argument used in the past, that in no situation did United Kingdom law require the assistance of the Convention to protect people's rights, could no longer be sustained, especially in view of the number of times where the provisions or application of United Kingdom law had been held by the European Court to involve a breach of the Convention rights.

Incorporating the Convention into our law would also allow our judges to contribute to the jurisprudence of the Convention, since there would now be domestic decisions on the Convention rights which could be cited before the European Court or other courts in Europe which had to consider questions of human rights. Further, it would limit the need for findings that a particular law infringed the Convention to be made by the European Court, since it would impose on our courts the duty to interpret our law in a way which is consistent with the Convention, and allow any laws which do not comply to be amended by Parliament. This should limit the number of cases taken to the European Court, and therefore the number of judgements against the United Kingdom, which will limit the political embarrassment such a judgement can cause.

Thus, after being passed by Parliament, the Human Rights Act received Royal Assent on 9 November 1998 and thereby became part of the law of the United Kingdom, 48 years after the United Kingdom signed up to the Convention. The Convention rights are now, for the first time, an integral part of our law, and the Act is sufficiently important to be considered part of our constitution, together with earlier declarations of rights such as Magna Carta and the Bill of Rights. Precisely how it fits into our constitution is the topic we shall consider in the next chapter.

The Act and parliamentary sovereignty

One general question which should be considered in respect of many of the individual cases that we will be discussing is the extent to which particular issues as to rights should be, and are, determined by the

[3] Cmd 3782, October 1997.

judges or by Parliament. The Act specifically preserves the sovereignty of Parliament: it does not allow the courts to declare that any statute passed by Parliament is unlawful and so of no effect. Thus it does not change the constitutional relationship between Parliament and the courts or give the courts the powers that, for example, the Supreme Court of the Unites States has to declare legislation to be invalid if it is unconstitutional. The courts can only declare that the provisions of the statute are incompatible with the Act – that is, one or more provisions of the statute in question infringe the human rights of some person or persons.

The Act therefore does not, in principle, infringe the sovereignty of Parliament – it does not interfere with democratic process, or prevent a government being able to pursue the policies it was elected to pursue, not does it allow judges to overrule Parliament. This is important in principle. The justification for this limitation on the scope of the Act is that judges are not elected – they are appointed on the basis of ability and experience – and therefore they are not accountable to the general population. They cannot be elected out of office as politicians can be. It is quite appropriate, and indeed desirable, to have judges decide legal disputes, questions about what the law says in a particular area, or how the law should deal with a difficult case, since the resolution of such questions is based on expertise in the law. Considerations of general principles of morality and justice apply only in so far as there is any doubt as to what the law is or any question as to what the law should be, which only occurs in rare cases. Usually the dispute in a case being heard is about what the facts in dispute are, and how the law applies to those facts; it is rare for the facts to be clear but the law to be vague, and it is only in those situations that the judges may have to decide what the right answer *should* be.

However, questions of human rights may well involve political questions of the sort which should be decided as a matter of policy by Parliament. Members of Parliament are elected on the basis of their, or their party's, political views on which policies should be adopted on a variety of important issues. They therefore have a democratic mandate to put forward certain views on contentious issues, and are accountable to the electorate for the way in which they present those views.

Thus questions such as how much money should be spent by the government in different areas such as defence or social security or whether the government should pursue a policy of building roads or railways to assist with transport are political, rather than legal. This is because these are questions on which there are a range of possible answers, where general principles of right and wrong do not lead to conclusions on the detail, and where the question is not what the law says (if anything), but what it ought to say. So, it may be a worthy general principle that we should all contribute to the funding of public transport, but that does not answer the political question as to how much money should be allocated to different areas.

In addition, political questions are not usually appropriate to the type of process used in judicial decision-making. This is because judges are there to decide the questions that relate to the dispute between the two parties before them: the right answer for that case on those facts. The sort of matters that we think of as political questions are typically ones where a more general approach is required, since there are invariably more than two different views on the right answer, and more than two parties or groups who will be affected by the solution chosen. There will also often be questions where getting to the best answer will involve much specialist or expert input. Courts have to rely on the expert evidence put before them by the parties to the dispute, whereas politicians and civil servants can be more proactive in seeking relevant information and have access to a wider variety of sources of information, not just those arguments put before them by the parties interested in any given issue.

There is, of course, often no clear distinction between legal and political questions and many questions will be one of degree. For example, where the law is not clear and there is a discretion to be exercised by the judges deciding a case, because their existing cases would support more than one answer, the judges may find themselves making a 'political' decision as to what the right answer should be. This will be especially so if the law is being challenged in the highest court, the House of Lords, where it may effectively be argued that the law should be changed: the Lords will then have to consider the more general implications of the decision they are making, and the policy which they would be implementing by taking a particular view. In such cases there may well be a difference of opinion precisely on whether such a decision should be made by the courts or by Parliament, and whether or not it is appropriate for the courts to be making that sort of decision.

An example of a situation where the courts expressly considered that a policy decision was being taken, and also an example of judicial review under the Act, is the case of *Alconbury*.[4] Here, what was being challenged was a ministerial decision under statutory powers to decide a question as to whether or not planning permission should be given for a number of proposed developments. What was being argued was that the Environment Secretary was not an independent and impartial tribunal within the meaning of Article 6(1) and therefore his power to decide these questions was incompatible with the Convention.

The House of Lords rejected this argument. The role of the Secretary of State was quite appropriate since the decision at issue was one of administrative policy under the planning legislation. It would be undemocratic for the courts to determine planning questions themselves, since that was not the scheme of the legislation adopted by Parliament: the constitutional role of the Secretary of Sate was not a judicial role to which Article 6 applies, but involved a political, policy decision. However, overall Article 6 was complied with because the

[4] *R (Alconbury Developments Limited) v Secretary of State for the Environment*, Transport and the Regions [2001] 2 WLR 1389.

decision of the Secretary of State could be judicially reviewed, to ensure that he complied with the relevant statute, that he had followed the necessary procedural steps, and so on. There was therefore protection to ensure that the decision was *legal* and procedurally proper; but it was not for the court to say whether it was *correct*.

Questions of basic rights raised by the application of the Human Rights Act will often include what are here termed political questions – questions about what solution society should adopt to a particular problem. This means that the question of whether a particular rule infringes someone's rights is not an isolated question. We will see in our discussion of the various Articles of the Convention that most of them make allowances for situations where rights can be legitimately interfered with in the general interest. The way the Act brings the Convention into our law ensures that where Parliament has adopted a particular position on a political issue, the judges will have to apply the law as Parliament has set it out, even if they consider that this statute infringes one or more Convention rights of parties affected by the legislation.

However, the fact that Parliament can pass legislation which does not conform to the Convention rights does not mean that having the Act as part of our law serves no useful purpose. On the contrary, it does ensure that Parliament must at least expressly consider the possible effects of its legislation on individual rights. Thus there will be political pressure on the government and Parliament not to propose or pass laws which infringe rights and to change those that do. It means that Parliament, in passing legislation, has to focus directly on any issues as to potential infringements of rights which arise. The preservation of Parliamentary sovereignty has been one of the main reasons why incorporating the Convention into domestic law has been politically contentious over the years. The method adopted by the Act, that Parliament is free if it wishes to disregard the Act's provisions, preserves the existing constitutional balance between Parliament and the courts. The Act has constitutional significance; it is not a new constitution.

The margin of appreciation

The margin of appreciation is an important concept in the European Court's approach to deciding cases and an important part of the European Court's view of the relationship between it and the national state authorities and state courts. The central idea of the margin of appreciation is that there are some areas where different states may take different approaches to particular rights. This is based on the principle that individual states have a certain measure of autonomy under the Convention ('appreciation' here is used in the sense of allowing a measure of understanding or leeway). This is thought appropriate because the states that are bound by the Convention cover the whole of Europe and have different cultures and histories, different dominant religions, different traditions about how people should behave

and when and to what extent state interference is justified. In some areas there may be no general consensus across Europe about what should be tolerated and what should not, and what would suggest to the judges of the European Court that states should be given some scope for expressing the popular feelings of their citizens about a particular issue.

The European Court in this way accepts that different people may have different views on moral issues which are not necessarily 'right' or 'wrong'. Another way of putting this is that it is based on the principle of subsidiarity, that matters should be decided at the most local level appropriate. The principle of a margin of appreciation recognizes that national courts may be best placed to make an initial assessment of the needs and standards of their own societies; or in some cases, that different countries have evolved different solutions to similar problems, especially on social and moral issues. But it should be emphasized that states will not be given a margin of appreciation on all issues, only where the European Court considers that there is a genuine difference of opinions across Europe and the right in question is one which permits different interpretations to be applied. There is no margin of appreciation to allow torture or slavery, for example, in breach of Articles 3 and 4. It is only on difficult moral issues that states may have a margin of appreciation.

One example is abortion: this is a difficult moral question on which people from different cultures and religions take different views. Under the Convention, the right to life contained in Article 2 is not qualified. However, different states have different laws about abortion. Some states prohibit abortion altogether, for example Ireland because of its predominantly Roman Catholic population; others, like the United Kingdom, allow abortion up to a certain stage of pregnancy. If the European Court was asked to consider whether abortion was an interference with the right to life or whether banning abortion was an interference with the rights of the mother, this is an area where an application of the margin of appreciation is likely, because there is no European consensus as to what is morally acceptable and what is not. This question has been considered by the European Commission, who have taken broadly this approach: they have taken the view that an unborn child does have some rights, but these are bound up with the rights of the mother.

The principle also reflects an important aspect of the function of the European Court. The European Court will only consider whether or not the judgments of the national courts, and the decisions of the national governments and officials, are in accordance with the principles of the Convention. If a judgment or decision causes a citizen to suffer a breach of his or her human rights, then the court will step in, by declaring that there has been a breach. But the European Court will not substitute its judgment for that of the national court on the application of national law, so it will not reach a decision as to whether or not the national law has been applied correctly. Nor will it review the admissibility or

relevance of the evidence adduced in the national court. It is in this sense a supervisory jurisdiction.

In the case of *Handyside v UK*,[5] the European Court was asked to consider the bringing of a prosecution in England for obscenity arising out of the publication of the Little Red Schoolbook, a book which was aimed at children and was prosecuted for its frank discussions of sexual matters. The publisher complained that his rights to freedom of expression under Article 10 had been infringed. The United Kingdom argued that any infringement was justified in the interest of the protection of morals.

The European Court decided that, although the book had not been prosecuted in some other European countries where it had been published, it was within the margin of appreciation allowed to the United Kingdom authorities to consider that this book was unlawful in Britain. In particular, there was no uniform European conception of morals and on this ground of justification, state authorities were better placed than the European Court to give an opinion. The Court stated that the protection established by the Convention is in that sense subsidiary to the national system safeguarding human rights. The Court stressed, however, that allowing a margin of appreciation goes hand in hand with European overall supervision, in particular the limiting requirement of proportionality between the infringement of the right and its justification.

It should also be noted that the European Court has developed its ideas over time as the popular morality of Europe has changed. This is because the European Court treats the Convention as a developing instrument. This has affected what issues are considered to be ones where states have a margin of appreciation at any one time.

A recent example of the European Court developing the margin of appreciation is in the Court's consideration of the rights of transsexuals, that is, people who undergo a sex-change operation. In the case of *Goodwin v UK*[6] the Court decided that there had been violations of Articles 8 (privacy) and 12 (right to marriage) in respect of two transsexuals. The Court recognized an international trend towards increased social acceptance of transsexuals and increased legal recognition of their new sexual identity, and came to the view that this could no longer be regarded as a matter of controversy. It was therefore no longer open to the United Kingdom to claim that their treatment of transsexuals fell within the margin of appreciation. This was particularly so given the lack of review which appeared to have been undertaken by the United Kingdom government since previous European Court decisions on the subject, notwithstanding changes in attitudes in society. The United Kingdom did however retain a margin of appreciation as to how the rights of transsexuals should be recognized and what changes to domestic law were required as a result.

[5] (1979–80) 1 EHRR 737.
[6] *Goodwin v UK* (2002) 35 EHRR 18.

Deference to the legislature

It is, however, important to realise that the margin of appreciation, although an important principle for the European Court, has no direct appreciation when a case is being decided by a national court. So, for example, if a Scottish court were asked to decide whether or not an interference with freedom of association is justified by considerations of public safety, it will not apply a margin of appreciation, since it will have to either accept or reject the justification: it will have to decide whether or not there is an infringement of the right to freedom of association. Unlike the European Court, it is not being asked to consider whether it is appropriate for there to be different answers to the question in different legal systems across Europe, but what the correct answer is under Scottish law. This difference arises out of the different roles of the national courts and the European Court.

However, the domestic courts are still likely to give some discretion as to action to those they are reviewing, although this is not strictly speaking a margin of appreciation. This will apply where, for example, the court considers that Parliament in passing a statute or a decision-maker making the decision under review is better placed to reach a proper conclusion about the matter being considered. Another aspect which the courts will have to consider is to what extent the decision being made is based on a democratic mandate, for example in considering legislation passed by the devolved assemblies: the very fact that these are bodies elected to decide certain matters may have an effect on how much margin the courts allow them in choosing solutions to difficult questions. Comments to this effect have already been made by the House of Lords in a number of cases.

For example, in the case of *Kebilene*,[7] Lord Hope recognized that the United Kingdom courts will not expressly apply the margin of appreciation as used by the European Court. However, the rights provided by the Convention are expressions of fundamental principles, and not just a set of rules. Therefore, where there are competing interests:

> In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention [...]. It will be easier for it to be recognized where the issues involved questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.

This was also referred to in the case of *Brown v Stott*.[8] This concerned the question of whether a statutory obligation on the owner of a vehicle, to provide information about who was driving the vehicle when

[7] *R v Kebilene* [2000] 2 AC 326.
[8] [2001] 2 WLR 817, Privy Council.

an offence was committed, infringes the Article 6 protection against self-incrimination and if so, whether any infringement is justified. The justification would be based on addressing the social problem of reducing traffic accidents, part of which involves ensuring that those responsible for accidents are prosecuted, which requires identification of the person driving the car. The Privy Council here held that there was no infringement of Article 6. One of the factors referred to by Lord Steyn was that Parliament was in as good a position as a court to assess the gravity of the problem and the public interest in addressing it, in requiring the identity of the driver to be disclosed.

Again in a different context altogether: in the case of *Popular Housing v Donoghue*,[9] the court had to consider the statutory scheme for providing social housing. The Court Appeal considered that:

The Court has to pay considerable attention to the fact that Parliament intended [...] to give preference to the needs of those dependent on social housing as a whole over those in the position of the defendant. The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference. The limited role to the court [...] is a legislative policy decision. The correctness of this decision is more appropriate for Parliament than the courts and the Human Rights Act 1998 does not require the courts to disregard the decisions of Parliament in relation to situations of this sort when deciding whether there has been a breach of the Convention.

It is important that in complex areas, requiring political decisions as to the best of a range of permissible solutions, the courts do give weight to the decision of Parliament. However, it will also be important for the courts to ensure that they do not defer to Parliament too much. Deference to Parliament should not prevent the courts from intervening in situations where Parliament has gone beyond the boundaries of what is permitted by the Convention rights.

[9] *Popular Housing and Regeneration Community Association Ltd v Donoghue* [2001].