

7 Happy birthday human rights

Gerry, A. (2005) 'Happy birthday human rights', *New Law Journal*, 155 NLJ 1469.

It's now five years since the Human Rights Act 1998 came into force. Alison Gerry considers whether the Act has managed to Strasbourg-proof UK law, or whether we're still a long way from bringing the Convention home.

The Human Rights Act 1998 (HRA 1998) was five years old last Sunday. On announcing its arrival, Jack Straw heralded it as 'one of the most important pieces of constitutional legislation the UK has seen'. There can be little doubt that HRA 1998 has influenced judicial decision-making in a wide range of cases. Its impact has at times been patchy and disappointing, but at other times dramatic.

The Act's impact on UK criminal law has been less than some predicted, although that is not to say there have not been some significant changes. For example, magistrates are now required to provide reasons for their decisions (Practice Direction (Justices: Clerks to Court) [2001] 1 WLR 18), although not when ruling on a submission of case of no answer, and it has become standard practice in both the Crown and magistrates' courts for reasoned judgments to be given on issues of admissibility and bail.

The courts have also accepted that a violation of Convention rights can amount to a defence to a criminal charge. For example in *Percy v DPP* [2002] Crim LR 835, where the defendant was charged with an offence under s 5 of the Public Order Act 1986 for burning a US flag, the court found that to criminalise the defendant's behaviour would violate her Art 10 rights as it was not a proportionate response. In *R v Shayler* [2002] 2 WLR 754, the House of Lords found that Art 10 was engaged but that procedures under the Official Secrets Act 1989, properly applied, provided sufficient and effective safeguards to satisfy Art 10(2).

Challenges involving breaches of Art 8 have been less successful in the criminal evidence field. For example, the House of Lords finding in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 that the retention of fingerprints and samples of individuals who had been subsequently acquitted did not violate Art 8 rights; any infringement of rights under Art 8(1) were found to be fully justified under Art 8(2).

The Act has had an important impact on mental health law, though, in particular on tribunal decisions and procedure. The incompatibility of parts of the Mental Health Act 1983 (MeHA 1983) with Convention rights had been known for some time. The coming into force of HRA 1998 has led to parts of MeHA 1983 being slowly re-interpreted and amended to bring it into line with the European Convention on Human Rights. One of the first to reach the courts was *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary of State for Health, Ex Parte H* [2001] 3 WLR 512, where ss 72 and 73 MeHA 1983 were found to be incompatible with Arts 5(1) and 5(4) as in effect they

required the patient to prove they no longer needed to be detained rather than requiring the state to prove that they did.

Whether HRA 1998 has created for the first time a right to privacy, and the balance to be struck between Art 8 and Art 10 rights, have been hotly contested questions. In *Campbell v MGN Ltd* [2004] 2 AC 457 the House of Lords (by a majority) found that the newspaper had violated the model's right to privacy under Art 8 by publishing facts about her private life.

However, the courts have also upheld a newspaper's right to freedom of expression. For example in *Re S (A Child)* [2005] 1 AC 593, the House of Lords found that no injunction should be made to restrain the publication of the identity of the defendant in a murder trial in order to protect the privacy of her child. Lord Steyn in his judgment stated 'neither Article has as such precedence over the other ... where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.' In *Carr v News Group Newspapers Ltd & Ors*, 24 February 2005 (unreported), the court was, however, willing to grant an injunction restricting press freedom where Art 2 rights were engaged.

One area of law that has been affected, possibly more than others, is inquisitorial law. There has been a major shift in the way that inquests are conducted, in particular those involving deaths in custody. There is now much more willingness to provide pre-inquest disclosure to the families, to conduct a more wide ranging inquiry into the wider circumstances of a death, and an increased use of narrative verdicts, in order to comply with Art 2. It is doubtful that the inquiry currently being conducted into the circumstances of the tragic death of Zahid Mubarek at Feltham Young Offenders Institute would have occurred had it not been for HRA 1998.

Turning to the constitutional impact of the Act, it has been interesting to see that the courts have been willing to use their new powers of interpretation under s 3, HRA 1998 to interpret statutes compatibly with the Convention, even when to do so has clearly been contrary to the intention of Parliament, for example in *R v A* [2002] 1 AC 45, *Attorney-General's Reference (No 4 of 2002)*, and in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. But the courts have also recognised its limitations, for example in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger* [2003] 2 AC 467.

However, the most important and significant decisions concerning the constitutional impact of HRA 1998 have surely been those that have involved the degree of deference to be observed by our courts to Parliament and the executive, most notably in cases involving national security.

Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2001] 3 WLR 877 and in *R (Prolife Alliance)* [2004] 1 AC 185 argued that there is a legal limit to the court's jurisdiction under HRA 1998, based on the principle of the separation of powers. However, in giving the leading judgment in the important case of *A (FC) & Ors v Secretary of State for the Home Department* [2005] 2 AC 68 – involving the detainees in Belmarsh prison – Lord Bingham, with whom six members of the House of Lords agreed, acknowledged the need for courts to defer to the executive on matters of national security, but importantly did not endorse the view that this introduced a legal limit to the court's jurisdiction.

Over the coming years there are likely to be many more challenges involving the degree of deference. It is here that the real constitutional significance of HRA 1998 will emerge and whether it can be hailed as one of the most important pieces of constitutional legislation.