



The European Convention on Human Rights

Recent Developments

1 A recent report by Civitas, otherwise the Institute for the Study of Civil Society, under the title of ***‘Strasbourg in the Dock: Prisoner voting, human rights and the case for democracy’*** has trenchantly analysed some of the current problems with the European Convention on Human Rights (ECHR) and in particular with the functioning of the Court of Human Rights (CHR) in Strasbourg. It carries much the same message as the other recent report on the subject, ***‘Bringing Rights back home’*** by Michael Pinto-Duschinsky, which was published in February. That report drew attention to the shortcomings of the CHR, the fact that each of the 47 member states of the Council of Europe, including such tiddlers as San Marino and Liechtenstein, has the right to appoint one of the judges and many of those so appointed have little or no judicial experience or experience as practising lawyers. The same point is made by the Civitas report, which says that currently only 23 of the 47 judges have prior judicial experience.

2 The main recommendations of ***‘Bringing Rights back home’*** relate to the manner in which judges are appointed and it suggests that the UK should enter into negotiations with the other members of the Council of Europe to undertake substantial reforms in that direction. It then recommends that, if such negotiations fail, the UK should withdraw from the jurisdiction of the CHR and establish that the Supreme Court in London is the final appellate court for human rights law. The ECHR would continue to be incorporated into the UK’s domestic law.

3 Without any disrespect to the lay author of the February report, the Civitas report is the work of two lawyers distinguished in their field and contains much more in the way of substantial proposals for reform of the law. Dominic Raab MP is a solicitor who has worked for Liberty and as an international lawyer at the FCO. Lord Carlile of Berriew QC is a Liberal Democrat member of the House of Lords, a practising barrister and the Government’s independent reviewer of anti-terrorism legislation. The report recommends several amendments to the Human Rights Act 1998 with the objective of ensuring that the Supreme Court has the final say in the interpretation of ECHR rights and strengthening the will of Parliament by amending and using section 3 of the 1998 Act to prevent the courts from rewriting the express terms of primary or subordinate legislation in order to avoid any inconsistency with the ECHR.

4 Of special interest in relation to immigration control is a proposed amendment to section 33 of the UK Borders Act 2007. Section 32 provides for the automatic deportation of “foreign criminals”, defined as persons who are not British citizens and who are convicted of specified offences and sentenced to periods of imprisonment of at least 12 months. The Home Secretary must make deportation orders in respect of foreign criminals, other than in cases of numerous exceptions listed in section 33. Section 33(2) provides an exception in any case in which removal of the foreign criminal in accordance with such an order would breach his rights under the ECHR or the United Kingdom’s obligations under the 1951 Convention on the Status of Refugees (“the Refugee Convention”). In recent years there have been many cases in which deportation orders against convicted criminals have been defeated by reliance on one or other of the ECHR rights, notably the right to family life under Article 8. The Civitas report recommends that the ECHR

exception in section 33(2) should be deleted and replaced by a specific regime for handling claims that a deportee may be tortured or killed on return home. My own reaction is that this is unnecessary, since such a regime is already provided by the Refugee Convention, and section 33(2) will continue to protect the reference to that Convention as an exception to the regime of automatic deportation even if the reference to the ECHR is deleted.

The press release explaining the main proposals of the Civitas report is at

<http://www.civitas.org.uk/press/prStrasbourg.htm>

5 A recent pronouncement by the CHR to the effect that prisoners should have the right to vote has aroused much anger in Parliament and elsewhere. There was a very strong feeling that the Court had exceeded its jurisdiction. However, at the end of April there came the welcome news that the Council of Europe, at a conference in Turkey had issued a declaration adopted unanimously by all 47 member states announcing that the conference “invites the [CHR], when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and where these procedures are seen to operate fairly and with respect to human rights, to avoid intervening except in the most exceptional circumstances”. The clear message is that the court should not seek to overturn legislation on asylum and immigration enacted by democratically elected legislatures. Kenneth Clarke, Justice Secretary, is quoted as having said: “I believe it is for national parliaments and courts to protect the rights in the [ECHR]. Strasbourg should not be used as a court of appeal from our own Supreme Court – and it shouldn’t step in where cases have already been properly considered by independent reputable national courts.”

Our domestic courts

6 The restrictions now imposed by the member states of the Council of Europe on the CHR are an important step forward, but we are not yet out of the wood. Even though resort to the Strasbourg Court will not in future be so readily available as hitherto, the Human Rights Act 1998 continues in effect. The purpose of the Act was to make the ECHR directly justiciable in the United Kingdom courts, so that it was no longer necessary for parties wishing to invoke particular provisions of the ECHR to take their cases to Strasbourg. Section 3(1) of the Act states: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Since 1998 all new primary and subordinate legislation has been scrutinised to check whether any of its provisions might conflict with any of the rights conferred by the ECHR. Section 19 of the 1998 Act requires any Minister introducing a Bill in Parliament to confirm that the provisions of the Bill are compatible with the ECHR. However, section 3(1) applies to all legislation whenever it was enacted, which may result in consequences which would not have occurred to the minds of the legislators at the time and thus gives retrospective effect to the 1998 Act. Section 3(1) applies to all courts in the United Kingdom and to any government department, government agency, local authority or any other body which has to administer legislation. Section 4 of the Act applies to any proceedings in which a court, meaning in this case the Supreme Court, Court of Appeal, Court of Session in Scotland and the Northern Ireland Court of Appeal, has to determine whether a particular provision of primary legislation is compatible with a right arising under the ECHR. If the court forms the view that the provision in question is thus incompatible it may make a declaration of incompatibility. The provision thus impugned remains valid but the declaration imposes at least a political or moral obligation on the government and Parliament to pass legislation which will remove the incompatibility.

7 In recent weeks there has been much public concern expressed about injunctions and so called super injunctions being obtained by celebrities to prevent publicity being given to adulterous affairs and other peccadilloes. The Prime Minister has expressed concern that the courts might be making law rather than Parliament. Such criticism is clearly misplaced. The judges have had to have regard to Article 8 of the ECHR, which states: “Everyone has the right to respect for his private and family life, his home and his correspondence” and have had to decide cases accordingly. In the field of immigration it is notorious that

Article 8 has made it almost impossible to deport or remove anyone with a criminal record who has spent any length of time in the United Kingdom and who has built up relationships and created any sort of family. In a case discussed at length in [Legal Briefing Paper MW 220](#), the Supreme Court was obliged to find that a woman from Tanzania, who in the Court's own words had "an appalling immigration record" could not be removed because it would have meant separating her from her children. Other recent leading cases in which Articles of the ECHR have had to be taken into account are discussed in [Legal Briefing Paper MW 86](#).

8 Parliament's attempt to legislate to combat the mischief of sham marriages by section 19 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 came to grief partly because of its incompatibility with Article 14 of the ECHR, which states that the enjoyment of rights and freedoms shall be secured without discrimination on any ground. Section 19 required approval by the Home Secretary of any marriage to which one of the parties was subject to immigration control, but it applied only to civil and not to Church of England marriages. For this reason section 19 was declared incompatible and in due course, after the lapse of four years, the offending words were deleted by a remedial order. (See [Legal Briefing Paper MW 228](#) .) The requirement of a certificate of approval from the Home Secretary lapsed on 9 April 2011.

9 Although the recent declaration referred to in paragraph 5 should in principle remove or reduce future conflict between the government and CHR on matters relating to immigration and asylum, the Human Rights Act 1998 continues to pose problems in cases coming before the courts and other public authorities of the United Kingdom. The obligation on courts and other authorities to have regard to the Articles of the ECHR may be expected to continue to place obstacles in the way of :

- (a) deporting or removing convicted criminals and others who pose a threat to national security,
- (b), preventing the scourge of sham marriages and
- (c) otherwise exercising a proper level of immigration control.

The common law reinforces those obstacles to the extent that decisions of the Court of Appeal, Court of Session in Scotland, Northern Ireland Court of Appeal and the UK Supreme Court create binding precedents in future cases on similar facts. Thus for example cases showing similar facts to the Supreme Court case discussed in [Legal Briefing Paper MW 220](#) (the right to family life) will bind all UK courts hearing similar cases. The issue is a very live one and it remains to be seen whether the government has a mind to seek amendments to the 1998 Act which will help to remove these obstacles.

Harry Mitchell QC
Honorary Legal Adviser
Migration Watch

9 May, 2011