

**UPDATE ON THE HUMAN RIGHTS ACT AND THE INCORPORATION OF THE
ECHR IN SCOTTISH AND UK LAW**

**RECENT ENGLISH CASE LAW OF RELEVANCE TO IMMIGRATION
PRACTITIONERS**

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1. OVERVIEW

There have been repeated judicial warnings against taking bad Convention points (eg **Walker v Daniels** [2000] UKHRR 648 and **R v Perry** (2000) *The Times*, 28 April). These warnings and the widespread training appears to have prevented a large number of early Human Rights Act 1998 challenges.

In **Barclays Bank Plc v Travert Linford Ellis and Maynette May Ellis**, unreported, CA, 9 August 2000 the Court of Appeal held that if counsel wish to rely on provisions of the 1998 Act then it is their duty to have available for the information of the court any material in terms of decisions of the European Court of Human Rights upon which they wish to rely or which will help the court in its adjudication. A mere reference in a case to an Article of the Convention does not help the court or enable the court in any way to do justice to a possible argument. To do an argument justice it needs to be formulated and advanced in a plausible way.

There is a reluctance to consider Convention arguments unless Strasbourg case law can be advanced that is directly on point. For example, in **R v Secretary of State for the Home Department ex p Mellor**, unreported, Forbes J, 31 July 2000 the judge considered Articles 8 and 12 when rejecting a prisoner's challenge to refuse his application for artificial insemination. It relied on the absence of any decided case showing a right to

artificial insemination.

Case law arguments must take account of **R v Central Criminal Court ex p the Guardian and others** [2000] UKHRR in which the court held that where a decision of the European Court of Human Rights, or group of decisions has been examined by the House of Lords or Court of Appeal, the Divisional Court is bound by the reasoning of the superior courts. The Divisional Court is not permitted to re-examine decisions of the European Court in order to ascertain whether the conclusion of the House of Lords or Court of Appeal may be inconsistent with those decisions, or susceptible to a continuing gloss. The principle of stare decisis cannot be circumvented or disapplied in this way, and if it were, the result would be chaos.

In **R v Davis, Rowe, Johnson** [2000] UKHRR the Court of Appeal held that it would be difficult to go behind an European Court of Human Rights decision arising out of the same factual background as the case before the domestic court without doing serious injury to the intent and purpose of the 1998 Act. At the same time the obligation contained in section 2 of the 1998 Act is to "take into account" which would seem to be something less than an obligation "to adopt" or "to apply".

The first English case giving any indication of how far the English courts will change their approach to statutory construction in the light of the 1998 Act is probably **R v Offen and other cases**, (2000) *The Times* 10 November 2000. The Court of Appeal held that automatic life sentences imposed on defendants who committed two serious sentences could be compatible with the Convention if the statutory provision governing such sentences was interpreted as meaning that exceptional circumstances existed in the case of a defendant who posed no risk to the public. Cf **R v Turner (Ian)** (2000) *The Times* April 4 in which the Court of Appeal came to the conclusion that the same statutory provision had the consequence that a judge could be compelled to pass a sentence of life imprisonment notwithstanding the fact that it offended his sense of justice. In **R v Offen and other cases**, above, the Court of Appeal justified their new interpretation by saying it accorded with the intention of Parliament.

2. PROCEDURAL ISSUES

2.1 THE COMMENCEMENT ORDER

The Immigration and Asylum Act 1999 (Commencement No. 6, Transitional and Consequential Provisions) Order 2000 (No 2444 of 2000)

Article 3(1) provides that:

Subject to Schedule 2 -

(a) the new appeals provisions are not to have effect in relation to events which took place before 2nd October 2000 and, notwithstanding their repeal by the provisions of the 1999 Act commenced by this Order, the old appeals provisions are to continue to have effect in relation to such events;

Schedule 2 provides, inter alia, that:

Section 65 (human rights appeals) is not to have effect where the decision under the Immigration Acts was taken before 2nd October 2000.

Pardeepan v Secretary of State for the Home Department (00TH02414)

The Immigration Appeal Tribunal held that commencement provisions prevented appellants raising human rights issues in appeals pending on 2 October 2000. It is important to be aware of the assurances given by the Home Office that the IAT relied on:

[W]e are assured by Mr Thompson, on behalf of the Secretary of State, that those whose appeals are refused, for example, on asylum grounds, will be given the opportunity to raise, if they think fit, human rights objections to removal, should the Secretary of State decide to remove them. We are equally assured that the Secretary of State will not seek to argue that they do not have a right of appeal under Section 65 in respect of such a subsequent decision to remove.

Brown and another v Secretary of State for the Home Department (00TH02439)

The Tribunal came to the same conclusion.

2.2 APPLICATION OF ARTICLE 6 TO IMMIGRATION PROCEEDINGS

Salem v Secretary of State for the Home Department, (2000) *The Times* 22 June

In deciding whether an asylum appeal rule was ultra vires, Hale LJ noted that:

Immigration and asylum cases have not been held by the European Court of Human Rights to be 'the determination of his civil rights and obligations' for the purpose of article 6. Furthermore, article 6 does not guarantee a right of appeal. But if the State establishes such a right it must ensure that people within its jurisdiction enjoy the fundamental guarantees in article 6. It is for national authorities to regulate the procedures governing the exercise of such rights, but these requirements must not be such that 'the very essence of the right is impaired'. They must pursue a legitimate aim and the means employed must be proportionate to that aim: see, for example, Tolstoy v United Kingdom (1995) 20 EHRR 475, para 59. [Quote from transcript]

Maaouia v France, 5 October 2000, ECHR

The Court held by 15 votes to 2 that Article 6(1) (right to a fair hearing) did not apply to proceedings regarding deportation. The Court considered that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States had clearly intimated their intention not to include such proceedings within the scope of Article 6(1). In the light of that, the Court considered that the proceedings for the rescission of the exclusion order, which formed the subject-matter of the case before it, did not concern the determination of a "civil right" for the purposes of Article 6(1). The Court specifically noted that:

[D]ecisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.

This statement was, however, based on Protocol No. 7 which specifically relates to "expulsion".

MNM v Secretary of State for the Home Department (00TH02423) the Tribunal relied on the judgment in **Maaouia v France**, above, to hold that Article 6 did not apply to its proceedings. The Tribunal stated, however, that:

[W]hether Article 6(1) applies or not will make little if any difference. The fact is that the IAA provides an independent and impartial tribunal established by law. The hearing is in public and the procedures are designed to ensure that it

is fair. If there is any unfairness, the tribunal or the Court of Appeal will correct it. Thus any complaints that the special adjudicator conducted an unfair hearing fall to be considered by us and we apply the same tests as would be applicable if Article 6(1) applied. The only advantage which Article 6(1) might confer is the requirement that the hearing be held within a reasonable time. That does not arise in this case and should not, unless some disaster occurs, arise in any case having regard to the timetables and procedures laid down by the adjudicators and the tribunal.

Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106. The Inter-American Commission on Human Rights noted that procedural rights are inherently part of the right to claim asylum. In particular the Commission noted that:

[W]hile the right to seek asylum contained in Article XXVII implies no guarantee that it will be granted, it necessarily requires that the claimant be heard in presenting the application. This right to be heard is linked to the principle of respect for due process which underlies various provisions of the American Declaration, most pertinently Articles II (equal protection), XVII (recognition of juridical personality and civil rights), XVIII (fair trial) and XXVI (due process). While the right to be heard in presenting a claim does not necessarily presuppose the application of the same range of procedural guarantees that would apply, for example, in a criminal court case, it does require that the person concerned be accorded the minimum guarantees necessary to effectively state his or her claim.

That is consistent with recent decisions of the European Court of Human Rights that Article 3 implicitly incorporates procedural standards (eg **Selmouni v France**, unreported, 28 July 1999 and **Singh v United Kingdom**, unreported, 26 September 2000 in which the court noted that it would take account of facts that ought to have been known to the Contracting State at the time of the expulsion.

2.3 STANDARDS OF ARTICLE 6

There has been some recognition that the standards of fair trial will need to develop following the incorporation of Article 6 as the European Court of Human Rights appears to apply a more rigorous test to cases in which it is suggested that Article 6 rights have been infringed than that applied by domestic courts considering fair trial issues (eg Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 2 WLR 870; [2000] UKHRR 300 and R v Nangle, unreported, CA, 1 November 2000). Equally, however, it has been noted that the number of cases in which it will make a material difference may be limited.

The difference in approach can be shown in the tests applied by the courts when considering an alleged lack of impartiality. In De Cubber v Belgium (1984) 7 EHRR 236 the European Court of Human Rights held that:

In conclusion, the impartiality of the ... court [the considered the applicant's case] was capable of appearing to the applicant to be open to doubt. Although the Court itself has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation ..., it recognises ... that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part. ... [T]he Court recalls that a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention.

Cf the “real danger of bias” test applied by English courts (R v Gough [1993] AC 646 adopted in the context of other fair trial issues in R v Secretary of State for the Home Department ex p Q [2000] UKHRR 386).

See, however, Walker v Daniels [2000] UKHRR 648 in which the use of Article 6 arguments was criticised as they added nothing to the Civil Procedure Rules and R v An Immigration Officer ex p Quaquah [2000] UKHRR 375 in which the Turner J appeared to hold that the Civil Procedure Rules were consistent with Article 6.

In **R v An Immigration Officer ex p Quaquah** [2000] UKHRR 375 Turner J held that the Secretary of State erred by trying to remove a person who was preparing for the trial of an action against the Secretary of State. The basis of this decision was, inter alia, the appearance of bias.

2.4 WAIVER OF ARTICLE 6 RIGHTS

In **MNM v Secretary of State for the Home Department**, above, the Tribunal appeared to accept that Article 6 rights might be waived but endorsed the comment of the Court in **Locabail (UK) Ltd v Bayfield Properties Ltd**, above, that:

It isclear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not.

They concluded that in the particular circumstances Article 6 had not been waived as:

there must be freedom of choice in the sense that the party alleged to have waived the irregularity must not have been subject to any improper pressure. We take the view that the special adjudicator's approach that an adjournment would be offered but, if it was not accepted, she would act as she had indicated was to apply improper pressure because it put [the appellant's counsel] in an impossible position if her instructions were, as we are told they were, that there should then be no adjournment.

2.5 ARTICLE 13 AND JUDICIAL REVIEW

Since the start of this year there has been a recognition that Article 13 will require the High Court to lower the threshold of irrationality in cases involving issues of proportionality. In **Turgut v Secretary of State for the Home Department** [2000] UKHRR 403 Simon Brown LJ noted that:

if ... the domestic court is prepared to regard a policy as justifiable whether or not it answers a pressing social need or is proportionate to the aims pursued, then this approach ... accords insufficient weight to interference with human

rights. It is plain that by October 2000, the threshold of irrationality will have to be lowered in cases of that sort.

Then in **B v Secretary of State for the Home Department** [2000] UKHRR 498 the Court of Appeal went further and held that the issues of law in that case included whether deportation was a proportionate response to the appellant's offending. Once the court had taken the primary facts from the Immigration Appeal Tribunal (whose decision was subject to appeal), it was as well placed as the Tribunal to determine issues of law including proportionality. The precise extent to which the Courts will be prepared to review decisions regarding proportionality is still unclear. Although the domestic courts should not apply the margin of appreciation to decisions of primary decision makers regarding proportionality, there has been some suggestion that it may be appropriate to defer to the primary decision maker (See, for example, Human Rights - Law and Practice, *Lester and Pannick*, Butterworths para. 3.20 and 3.21).

The standard of review in judicial reviews considering other areas of human rights law appears to have become more demanding upon the state. In particular in **Turgut v Secretary of State for the Home Department**, above, in the context of a judicial review in relation to Article 3 the court held that:

this is not an area in which the Court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here - the right not to be exposed to a real risk of Article 3 ill-treatment - is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind.

2.6 BAIL ISSUES

In **R v Governor of Brockhill Prison, ex p Evans (No 2)** [2000] 4 All ER 15, [2000] UKHRR the court held that the first question when considering an alleged breach of Article 5 is whether the detention is lawful under domestic law. Any detention which is unlawful in domestic law will automatically be unlawful under article 5(1). It will thus give rise to an enforceable right to compensation under article 5(5), the provisions of which are not discretionary but mandatory. The second question is whether, assuming that the detention is lawful under domestic law, it nevertheless complies with the general requirements of the Convention. These are based upon the principle that any restriction on human rights and fundamental freedoms must be prescribed by law. They include the requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction. The third question is whether, again assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate.

R v Governor of Brockhill Prison, ex p Evans (No 2), above, clearly suggests (which is not surprising given the terms of the 1998 Act, sections 8 and 9) that it will be easier to obtain damages for immigration detainees who have been unlawfully detained.

R v Wirral Justices ex p Allen, unreported, Henriques J, 31 October 2000 in which an application for judicial review was adjourned (for the respondent to be represented) in a case in which the application contained a claim for damages based on an alleged breach of Article 5(1), arising out of an alleged failure of justices to inform the applicant of her right to be legally aided. This, however, needs to be compared with **R v Secretary of State for the Home Department ex p Chahal** [2000] UKHRR 215 in which the Court took the view that the mere fact that a person, in breach of his rights under paragraph (4), was deprived of the right to challenge the lawfulness of his detention before a Court did not have as its automatic consequence that to deprive him of his

liberty, even after the time when he should have been able to challenge the legality of his detention before a court, was to act in breach of his rights under paragraph (1). As a consequence it was not clear that a person would be entitled to damages.

One issue that is still unresolved is the failure of the Secretary of State to implement section 54 of the Immigration and Asylum Act 1999. This clearly leaves a group of detainees without a right to apply for bail. It is questionable whether this complies with Article 5(4).

3. DECISIONS IN RELATION TO THE SUBSTANTIVE ARTICLES

In many respects it is still too early to derive any clear principles from the decided English case law applying the Convention.

This is not a comprehensive list of cases but it is selected for its potential relevance to immigration practitioners.

3.1 Article 2

In re A (Minors) (Conjoined Twins: Medical Treatment), (2000) *The Times* 10 October

The Court considered the right to life in the context of a case involving conjoined twins. The Court held, inter alia, that the doctor's purpose in performing the operation was to save life, even if the extinction of another life was a virtual certainty. As a consequence Article 2 was not violated as Article 2 provides that "[n]o one shall be deprived of his life intentionally".

In the matter of Thomas, High Court in Northern Ireland, Coghlin J

The Court considered whether international human rights treaties such as United Nations Convention on the Rights of the Child 1989 gave rise to a legitimate expectation. It held that there was only a legitimate expectation that the Convention

would be taken into account. The Court quashed a decision of the Secretary of State to remove the Applicant as the Secretary of State had erred in his approach to the risk of suicide which was relevant to Article 2 of the European Convention on Human Rights and other Convention rights. The Court applied the approach set out in **R v Secretary of State for the Home Department ex p Turgut** [2000] 2 UKHRR 403.

3.2 Article 3

R v Governor of HMP Frankland ex p Russell, Lightman J, 10 July 2000

The judge considered the decisions of the European Court of Human Rights regarding Article 3 when concluding that a policy regarding food for prisoners was unlawful. The judge noted that the policy arbitrarily cuts down for an indeterminate period to one third the provision of food to the prisoners affected without any or any proper or sufficient regard to the entitlement of prisoners to adequate food. As a consequence the policy may well breach the fundamental rights protected by Article 3.

R v An Immigration Officer ex p Xuereb, Turner J, 26 May 2000

The judge rejected arguments that the applicant's removal from the United Kingdom would amount to a violation of Article 3 (prohibition of inhuman or degrading treatment or punishment) as a result of the impact that removal would have on the applicant's mental health. The transcript is difficult to understand but the judge apparently concluded that it was not unreasonable for the Secretary of State to conclude there was no breach of Article 3 where the ill-treatment feared was the consequence of removal which would not have happened had the applicant not entered the United Kingdom in the first place.

The Queen on the application of Acosta v IAT, unreported, Elias J, 9 October 2000
in which the judge noted in obiter remarks that:

I also have significant doubts whether the extent of the ill-treatment meted out to prisoners in Ecuador would be considered sufficient to establish a breach of Article 3, even if I were to conclude that there were substantial grounds for

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believing that the applicant would be prosecuted and imprisoned.

Despite an earlier finding that:

There is evidence before me, as indeed there was before the Special Adjudicator (who did not deal with an Article 3 argument because it was not before him) that the treatment of prisoners in Ecuador is far from satisfactory. There is certainly evidence of some torture and some inhumane and degrading treatment in the reports that I have seen.

Fetiti's Application for Judicial Review, unreported, CA, 19 October 2000 in which permission was granted to challenge the vires of the Asylum Support (Interim Provisions) Regulations 1999 on the basis that they violate Articles 3, 6, 8 and 14. The applicant relied on the fact that the Regulations may cause "indefinite destitution".

Also note

Zhu v United Kingdom, 12 September 2000, ECHR

The applicant was an asylum seeker who stated that during the 18 months he was detained in prison, he was locked in his cell for 18 to 19 hours a day, with only one hour of exercise. On four or five occasions the prison officers forgot to let the applicant out of his cell for meals. He stated that on a number of occasions he was assaulted by other inmates. Whilst eating he had to sit apart from the other prisoners in order to prevent them throwing food at him. The applicant stated that he would suffer verbal racial abuse from other prisoners on a daily basis. For the majority of the period the applicant was isolated, in that there were no Mandarin speakers in the prison, save for a six month period when there was another Mandarin Chinese speaker in detention. The applicant, who had a history of mental health problems, stated that his health deteriorated in prison and he became depressed to the point of suicide. He stated that after a suicide attempt he was put into a ground floor cell without blankets for a week. The Court declared the complaint inadmissible as the "minimum level of severity" proscribed by Article 3 was not reached.

3.3 Article 5

The Queen on the application of Acosta v IAT, above, in Elias J held:

I do not consider that a mere breach of Article 5 would justify asylum being granted. It seems to me that the applicant would have to make good a claim based on Article 3.

Cf **Hilal v The United Kingdom**, unreported, 8 February 2000, ECHR in which the Court declared the applicant's complaints under Article 3 (prohibition of inhuman or degrading treatment or punishment), 6 (right to a fair trial) 8 (right to respect for family life) and 13 (right to an effective remedy) admissible. The applicant complained that his removal to Tanzania would result in breaches of the Convention in the light of the treatment that he might expect as a consequence of his political activity in Tanzania.

R v Secretary of State for the Home Department ex p Sarsfield, Richards J, 21 September 2000 in which the judge concluded that Article 5(4) is not concerned with questions of where a prisoner is held or in what conditions he is held: it is concerned with the question of whether he may be held at all or should be released.

3.4 Article 6

See above

Holland v Lampen-Wolfe [2000] UKHRR

The House of Lords held that Article 6 forbids a contracting state from denying individuals the benefit of its powers of adjudication; it does not extend the scope of those powers. Article 6 requires contracting states to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting states have the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting states adjudicative powers which they do not possess.

R v Davis, Rowe, Johnson, above, in which the Court of Appeal held that the European

Court of Human Rights is principally concerned with interpreting an International Treaty and as such does not express any opinion on the question of whether a conviction in domestic law is safe or unsafe. The Court of Appeal is concerned with the safety of the conviction. That the first issue may intrude upon the second is obvious. To what extent it does so will depend upon the circumstances of the particular case. Therefore a finding of a breach of Article 6(1) by the European Court of Human Rights does not lead inexorably to the quashing of the conviction.

3.5 Article 8

In the matter of F (Adult Patient) [2000] UKHRR

The Court of Appeal held that the family life for which Article 8 requires respect is not a proprietary right vested in either parent or child: it is as much an interest of society as of individual family members, and its principal purpose, at least where there are children, must be the safety and welfare of the child. It needs to be remembered that the tabulated right is not to family life as such but to respect for it. The purpose is to assure within proper limits the entitlement of individuals to the benefit of what is benign and positive in family life. It is not to allow other individuals, however closely related and well-intentioned, to create or perpetuate situations which jeopardise their welfare.

R v Secretary of State for the Home Department ex parte Montana, Turner J, 21 December 1999

The judge rejected arguments that Article 8 of the Convention could entitle the child of a British citizen to British citizenship. The judge found that there had never been any greater difficulty in obtaining entry clearance for the son's visits to the United Kingdom than the need to complete an entry clearance application. Permission to appeal has been granted.

R v London Borough of Newham ex p Bibi and Al-Nashed, unreported, Turner J, 28 July 2000

In allowing a judicial review application that related to homelessness the judge noted

that "Article 8 and the right to respect for a person's home are directly involved. It is self evident that both applicants and their families have been denied one of the most fundamental of rights, namely that of secure and suitable accommodation".

R v Secretary of State for Health ex p L (M), unreported, Scott Baker J, 11 October 2000

The Applicant argued, inter alia, that the directions and guidance for visits by children to patients in high security hospitals are contrary to Article 8. The judge held that it was unable to accept that family life was established with which the Directions will interfere. The judge was also satisfied that directions are "necessary in a democratic society". The Secretary of State had to achieve a difficult balance between the interests of patients and the interests of children. Article 8 entitled him to do this.

3.6 Article 10

Hutchinson v Newbury Magistrates, DC, unreported, 9 October 2000

The Court rejected an argument that the conviction of a protestor against nuclear weapons who cut a fence to gain access to weapons base was contrary to Article 10. The Court held that Article 10 gave the appellant no right, to express herself in whatever mode she chose, whatever the damage or inconvenience to others.

3.7 Protocol 1, Article 2

R v The Secretary of State for the Home Department ex p Henryk Holub and Eva Holub, Carnwarth J, 8 October 1999 holding that the right to education does not guarantee a particular standard of education, but, secondly, it does imply a right to reasonable enjoyment of existing institutions within any country without unjustified discrimination. Permission to appeal has been granted.