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“The proper role of judges where
primary legislation is not compatible
with Convention Rights”

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Introduction

This essay examines the role of judges to interpret primary legislation, when not compatible with Convention Rights. The essay consist of a introduction of the HRA 1998, section 3, an analysis of the boundaries of the judges in their interpretation of legislation in relation to making it compatible with the ECHR, a discussion of whether judges have been too activist in the use of the HRA, section 3 or not, and a conclusion.

HRA 1998, s. 3

Section 3(1) of the HRA 1998 obliges judges to “*read and give effect*” to primary legislation, so far as it is possible, “*in a way which is compatible with the Convention Rights*”. This power to interpret primary legislation is very strong¹, and gives the judges a new tool to interpret the legislation in a way compatible with ECHR. The judges can use the statutory interpretation in section 3, even with “*no ambiguity in the language in the sense of the language being capable of two different meanings*”², which could, if used without caution, change the power-balance between courts and Parliament. From a democratic point of view it is an interesting question how the rights in the ECHR, that can be used to protect the “victims” against the state, should be protected through a “*strained interpretation of the language of a statute, or the implication of matters into it*”, instead of using HRA 1998, section 4 and leave it to Parliament to amend the legislation to be ECHR-compatible.

According to HRA, section 3(2), the judges cannot declare the legislation null and void, but only interpret in a way that gives effect to the protection of the rights in ECHR. The

¹ Lord Steyn in *R v A* [2001] UKHL 25, para. 44, [2001] 3 All ER 1, p. 17.

² Ibid p 17.

question arising is how far the judges can go in the interpretation of legislation without acting as legislators and going against the principle of parliamentary sovereignty.

Analysis of the boundaries of interpretation

Since the phrase: “*So far as it is possible to do so*” in the HRA 1998, section 3, is not very accurate and does not give a specific set of boundaries to the interpretation, it is necessary to look into the case law to find answers.

In *R v A* the House of Lords found the right to a fair trial in Art. 6 ECHR, to be violated, since the Youth Justice and Criminal Evidence Act 1999, section 41, prohibited certain types of cross-examination of the complainant in a rape-trial. The political reasons for making this rule were to protect the complainant’s privacy about her or his sexual history, and this way make it “easier” for rape victims to go to court. The House of Lords changed the meaning of section 41, using HRA 1998, section 3, so cross-examination became possible where a judge considered this to be in the name of justice. The House of Lords departed from the intention of Parliament, and took the power to decide “*what is “fair” within Art. 6*”³. This approach from the judges is quite aggressive, since it does not only give a different meaning to words of the statute, but went further than that⁴.

The case of *R v Lambert*, dealing with incompatibility with Art. 6 ECHR as well, was dismissed since the HRA 1998 does not apply to appeals that happened earlier than 2 October 2000⁵. The House of Lords did, however, comment on the defendant’s arguments. The judges read the word “*prove*” as “*give sufficient evidence to raise an*

³ Stone, Richard. (2010) “Civil Liberties and Human Rights” (8th edition Oxford University Press, Oxford, 2010) p. 53.

⁴ Ibid p. 53.

⁵ Ibid p. 53

issue”, which is not as aggressive interpretation as in the case of *R v A*, since the meaning of the word is changed not the entire sentence.

The case of *In re S (FC)* could be seen as an outline of the boundaries of section 3, since The House of Lords found that The Court of Appeal had crossed the boundary and was amending law instead of interpreting it. The difference between *R v A* and *In re S* is not obvious, but the element in *In re S* concerning new rights and responsibilities makes the judges be more reluctant to aggressive interpretation as seen in *R v A*.

In the leading case *Ghaidan v Mendoza* the House of Lords found that section 3 could be used to change the phrase “*marriage*” into “*living together*” to make the Rent Act 1977 compatible with Art. 8 ECHR read with Art. 14. This is a quite aggressive approach from the judges as seen in *R v A*. The *Ghaidan v Mendoza* case does, however, give indications of where the boundaries are, since Lord Nicholls, Lord Millett and Lord Rodger⁶ set up the first boundary: “*convention-compatible interpretations are impossible where they require the court to contradict a fundamental feature of the statute*”⁷. The second boundary is when: “*the interpretation concerns an area that is unsuited to the court*” as seen in the case of *Bellinger v Bellinger*⁸.

The cases does not draw clear lines, but it seems like the aggressive approach in *R v A* and *Ghaidan v Mendoza* is as far as the judges can go in relation to the first boundary. In relation to the second boundary it is more uncertain, but it “*exclude interpretations which have “exceedingly wide ramifications” or “important practical repercussions”*”

⁶ *Ghaidan v Mendoza* [33] (Lord Nicholls), [67] (Lord Millett) and [115] (Lord Rodger)

⁷ Young, L. Alison (2005) “Ghaidan v Godin-Mendoza: avoiding the deference trap” P.L. 2005, Spr, 23-34

⁸ Ibid section named “A clear constraint?”

or where the legislation concerns “issues of social policy which ought to be left to Parliament and not decided by judges”⁹.

Judicial activism

To discuss whether judges have been too activist in the use of HRA 1998, section 3, it is necessary to compare the boundaries of the judges in their interpretation and the political considerations and ideas behind the legislation from Parliament.

The purpose of HRA 1998, section 3 is to protect the rights in the ECHR, and by doing this judges are given the power to read and give effect to primary legislation so it is compatible with ECHR. The analysis above showed that the judges in some areas were quite aggressive in their approach to interpretation under section 3¹⁰. Lord Irvine of Lairg L.C. said in his Tom Sargent Memorial Lecture on 16 December 1997¹¹, that: *“the courts must strike a balance, going neither too far nor not far enough”* and that: *“the courts will be required to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so”*. This leaves the judges with a hard job, since the interpretation of the legislation inevitable is a difficult balance to make. The case law discussed above shows a quite aggressive approach, but also that the judges are aware of their role, and do not want to compromise with the principle of Parliament sovereignty. When Parliament made the HRA they left some space for the judges to work with in section 3, by placing the phrase “possible” there. The judges have not been too activist from a legal point of view, but some might have the opinion that it is a way of legislating that is connected with uncertainty, which is not predictable.

⁹ Ibid section named “A clear constraint?”

¹⁰ *R v A*

¹¹ 2000.053 ‘Applying section 3(1) of the Human Rights Act’ 2000 JSBJ Issue 11

Conclusion

It is not possible at this point to clarify what proper role of the judges are, since the phrase “possible” is unclear and there is not case law that draws sharp lines. The object of this essay is not to discuss whether judicial activism is a good thing or not, but to discuss whether the judges have been judicial activists. The case-law showed that the judges have a aggressive approach in their interpretation¹², but that there are some boundaries that cannot be crossed¹³. The boundaries are not clear at all, since the case of *R v A* seems to be changing a fundamental feature in the Youth Justice and Criminal Evidence Act 1999 as well as it does in the case of *In re S*, but with another outcome. The interpretation in *In re S* was however changing important practical repercussions, which is a part of one of the two boundaries mentioned in *Ghaidan v Mendoza*.

The HRA 1998, section 3 has impact on a big amount of cases, where Convention Rights are being infringed. The problems connected to HRA 1998, section 3, such as the judges could be seen as legislators and violate the principle of sovereignty and the fact that the justice of the victims could be violated since it is in the hands of judges to make justice when the legislation is incompatible with ECHR, instead of the legislators are important. The first problem, dealing with sovereignty, is important because it could be a problem to have judges that are not 100% bound by the law and the Acts of Parliament, since it should be a political process to create legislation that protects the Convention Rights, and the role of judges to declare the legislation incompatible and send it to back to Parliament to be amended. Judges are not elected by the public, and cannot be “fired” in an election if the public does not like their actions. The second problem, dealing with the judges as protector of justice, is a problem because it creates uncertainty for the victims, when a law is not accurate and predictable. These problems

¹² *R v A*

¹³ *In re S (FC)*, *R v Secretary of State for the Home Department* and *Bellinger v Bellinger*

have to be kept in mind looking at the positive things related to section 3: The interpretation under HRA 1998, section 3 protects the “victims”, since a declaration of incompatibility under section 4 would make it impossible for the “victims” to be protected right away. In that way section 3 is the oil in the HRA-machine that makes the system smooth for the “victims”. Lord Steyn sees a declaration of incompatibility as a measure of last resort¹⁴. It does not seem possible to point out where the boundaries are and what “possible” means, and therefore the HRA 1998, section 3, must be said not to be a unsuccessful tool in relation to certainty. It is the role of the Parliament to amend legislation not compatible with ECHR, not the role of judges when it is “possible”. Section 3 brings uncertainty to the legal system, and it will take a long time before case law can tell where the boundaries of the interpretation are and what the phrase “possible” in the HRA 1998, section 3 actually means.

¹⁴ Lord Steyn in *R v A* [2001] UKHL 25, para. 44, [2001] 3 All ER 1, p. 17.

Tables of Authorities

Legislation

United Kingdom

HRA 1998

Treaties

ECHR

Cases

United Kingdom

Bellinger v Bellinger [2003] UKHL 21, [2003] 2 A.C. 467

Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411

In re S (FC) [2002] UKHL 10, 14 March 2002

R v A [2001] UKHL 25, [2001] 3 All ER 1

R. (on the application of Anderson) v Secretary of State for the Home Department
[2002] UKHL 46, 25 November 2002

R v Lambert [2001] UKHL 37, [2001] 3 All ER 577

Bibliography

Books

Stone, Richard. (2010) "Civil Liberties and Human Rights" (8th edition Oxford University Press, Oxford, 2010)

Journals

Young, L. Alison (2005) "Ghaidan v Godin-Mendoza: avoiding the deference trap" P.L. 2005, Spr, 23-34

Websites

<http://www.francisebennion.com/> - 2000.053 'Applying section 3(1) of the Human Rights Act' 2000 JSBJ Issue 11