

W G Hart Legal Workshop 2010 - Comparative Aspects on Constitutions: Theory and Practice - Day Two: Wednesday 30 June

Theme 2 – Transplants, Irritations, Migrations, Harmonization

14:00 Workshop 3: Comparative Law and Constitutional Transplants into National Constitutions

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Introduction

The ability of claimants to bring proceedings before a court to allege a violation of the constitution by a public authority, and obtain a remedy should a violation be found, is a key aspect of the effectiveness of that state's constitutional law. The United Kingdom's Human Rights Act 1998 (HRA), which gives further effect in domestic law to the majority of the Convention rights contained in the European Convention on Human Rights (ECHR), places a limit on who is able to bring a legal claim alleging that there has been a breach of their Convention rights by a public authority. Known as the "victim test", this limit is contained in s.7 of the HRA which provides that only the victim of an unlawful act may bring proceedings and further, that a person can be a victim only if he or she would also be considered to be a victim for the purposes of Art.34 of the Convention if proceedings were brought before the European Court of Human Rights.

In common with many other features of the HRA, this test was directly transplanted from the international context, to the national and was and remains different to the most closely

comparable “indigenous” standing test which is the sufficient interest test. This is the test which must be satisfied by a claimant in order to bring an application for judicial review. Pursuant to s.31(3) of the Supreme Court Act 1981, the High Court shall not grant leave to make an application for judicial review unless it considers that “the applicant has a sufficient interest in the matter to which the application relates.” Over the past ten years, there has been a significant liberalisation of this test as a result of judicial interpretation. However the s.7 victim test remains static, the subject of little judicial or academic discussion, and not an aspect of the HRA where potential claimants have attempted to push the boundaries. Whilst transplantation of the victim test has had some advantages for the legal protection of human rights at the domestic level, the problems inherent in a direct transplant from the international to the national context are also evident.

The victim test in practice

There has been very little judicial consideration of the section 7 test. In the few cases where it has been considered, it has been held that the HRA “was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg.”¹ In short, “the definition of ‘victim’ in s.7(7) turns on whether proceedings could be brought in the Strasbourg court in respect of the act complained of.”² In accordance with Strasbourg authority, it has been held that the *actio popularis* does not apply to applications under the Convention.

“There is no scope for proceedings to be brought by a person who has not himself been affected

¹ *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26 at [58] per Lord Rodger. See also *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546.

² *Eastaway v Secretary of State for Trade and Industry* [2007] EWCA Civ 425 at [54] per Arden LJ.

by the alleged violation”.³ In the only reported case on this point, *Director General of Fair Trading*⁴ it was confirmed that trade unions, or other representative bodies which have an interest on behalf of their members in general or are otherwise interested in the point at issue in the case but are not themselves directly affected are not “victims” within the meaning of section 7. There is now one exception to this. The Equality and Human Rights Commission, which commenced its work on 1 October 2007, is the only organisation in the UK to have been granted an exemption from s.7 of the HRA. S.30(1) of the Equality Act 2006 provides that the Commission shall have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function. S.30(3) provides that the Commission may, in the course of legal proceedings for judicial review which it institutes, or in which it intervenes, rely on s.7(1)(b) of the HRA (rely on the Convention right or rights concerned in any legal proceedings) and, for that purpose, “the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate”.⁵ But it may act “only if there is or would be one or more victims of the unlawful act”.⁶ No award of damages may be made to the Commission.⁷ To date the Commission has not brought a

³ *Eastaway v Secretary of State for Trade and Industry* [2007] EWCA Civ 425 at [49] per Arden LJ in reliance upon *Klass v Germany* (1978) 2 EHRR 214. See also *R (Johnson) v Secretary of State for Health* [2006] EWHC 288 (Admin)

⁴ *Director General of Fair Trading v Proprietary Association of Great Britain* [2001] EWCA Civ 1217, [2002] 1 WLR 269.

⁵ S.30(3)(a)

⁶ S.30(3)(b)

⁷ S.30(3)(d)

It has also been held that s.7 must be given a generous interpretation as befits its human rights purpose.⁸ In accordance with Strasbourg authority, both indirect victims and potential victims have been recognised as victims by the domestic courts, although, as is later explained, neither category has yet reached the limits set by the ECtHR.

The advantages of a “constitutional transplant”

Although the United Kingdom ratified the ECHR in 1953, and accepted the jurisdiction of the European Court of Human Rights (“ECtHR”) and the European Commission of Human Rights, until this date domestic courts had fairly limited powers in relation to the ECHR. The HRA was designed to remedy this deficiency, its purpose “to make more directly accessible the rights which the British people already enjoy under the Convention” in short to “bring those rights home.”⁹ On 2 October 2000, the Human Rights Act 1998 (“HRA”) came fully into force in the United Kingdom empowering domestic courts to determine whether or not the activities of public authorities were compatible with the particular Articles of the European Convention on Human Rights (“ECHR”) to which it had given further effect.¹⁰ Although it was not clear at the time, later in October 2007 the Lord Chancellor, in the consultation paper *The Governance of Britain*, announced plans for a British Bill of Rights and Duties describing the HRA as a ‘first, but substantial step towards a formal statement of rights’.¹¹ Part of this first step was to utilise

⁸ Re S [2002] UKHL 10, [2002] 2 WLR 720 at [48] per Lord Nicholls.

⁹ *Rights Brought Home: The Human Rights Bill* (Cm 3782) (London, TSO, 1997) at [1.19].

¹⁰ Articles 2 to 12 and 14 of the ECHR, Articles 1 to 3 of Protocol No.1 to the ECHR, and Articles 1 and 2 of Protocol No.6 to the ECHR (as read with Articles 16 to 18 of the ECHR). These are referred to throughout this article as the “Convention rights”.

¹¹ *The Governance of Britain*, Cm 7170 (2007) [205].

most of the procedural aspects of the ECHR at the national level. Later it became clear that British courts were also keen to utilise substantive Convention jurisprudence.

Adopting a test which had been utilised at the international level for more than fifty years carried with it a number of advantages. It was cheap – particularly when compared to processes followed in Canada, South Africa, Northern Ireland and elsewhere when developing a domestic, home grown, bill of rights. It suited the theme, “rights brought home”. It was a model which was employed exclusively in a human rights context and was suited to that context given the test of proportionality often requiring individual victim consideration. And it assuaged government fears about floodgates being opened to a torrent of new test claims brought by public interest groups. However, from the outset there were concerns.

The problems with transplanting a test for standing

Errors in translation

When a foreign body of law is directly transplanted to the national system, there is always the risk that there will be errors in translation. This is particularly evident in relation to the victim test where errors have been committed by judges but also the pool of would be claimants under the HRA. Knowledge problems with the HRA are well known. For example, in January 2008 the Ministry of Justice published the *Human Rights Insight Project*¹² conducted by its previous incarnation, the Department for Constitutional Affairs (DCA), from December 2004 to May 2006 to provide an evidence base for human rights policy development. There were a number of

¹² Ministry of Justice Research Series 1/08, January 2008 <http://www.justice.gov.uk/docs/human-rights-insight-full.pdf>. Throughout this document it is stated that it was prepared to stimulate discussion and it does not represent Government policy.

key findings relating to the HRA. In particular, “the term ‘human rights’ has mainly positive associations . . . but there is little understanding of the application of human rights / the HRA to normal life / public service delivery.” Absorbing more than fifty years of ECtHR jurisprudence concerning the meaning of “victim” is an obvious part of this and is reflected in the limited and conservative victim status of those claimants who bring proceedings. A full survey of Convention jurisprudence concerning the meaning of victim is beyond the boundaries of this paper but briefly, it is clear that the ECtHR, and the former Commission, have approached the test very liberally.

The Court has commented on the importance of the test describing it as “one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention.”¹³ It applies the test in a liberal and flexible way, without excessive formalism¹⁴, noting that the “procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious”.¹⁵ The Court also takes into account the merits of the application holding that it has discretion as regards “the granting of victim status when the complaint relates to an issue of general interest”.¹⁶ Such a situation has been held to arise in particular where an application concerns the legislation or a legal system or practice of the defendant state.¹⁷ In 2005 it stated:

¹³ *Klass v Germany*, 6 September 1978, Application no.5029/71, at [34].

¹⁴ *İlhan v Turkey*, Application no. 22277/93, 27 June 2000 at [51]

¹⁵ *ibid*

¹⁶ *Micallef v Malta*, Application no 17056/06, 15 January 2008 at [30]

¹⁷ *ibid*

Human rights cases before the Court generally also have a moral dimension, which it must take into account when considering whether to continue with the examination of an application after the applicant has ceased to exist. All the more so if the issues raised by the case transcend the person and the interests of the applicant . . . The Court has repeatedly stated that its judgments in fact serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interests, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention states.¹⁸

Given the application of these principles, over time, in addition to the straightforward victim, who is able to demonstrate a “sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation”¹⁹, categories of other victim have developed. Most important, to the domestic context, are the categories of indirect victim and potential victim the examples of which before the Court are far broader than anything which has been considered in the domestic context.

¹⁸ *Capital Bank AD v Bulgaria*, Application no 49429/99, 24 November 2005 at [78]-[79]. It is also possible for the Court to join consideration of victim status to its consideration of the merits. See for example *Siliadin v France*, Application no. 73316/01, 26 July 2005 and *Novikov v Russia*, Application no. 35989/02, 18 June 2009.

¹⁹ *Lizarraga v Spain*, Application no. 62543/00, 27 April 2004 at [35].

Errors in translation have also affected the judicial approach to the s.7 test. One recent example is Lord Scott's observations in *Savage*²⁰ that he was "unable to understand how a close family member can claim to be a 'victim' in relation to an act, in breach of the article 2(1) negative obligation, or in relation to an omission, in breach of the article 2(1) positive obligation, that had led to the death."²¹ His Lordship did not see it "as any part of the function of article 2(1) to add to the class of persons who under ordinary domestic law can seek financial compensation for a death an undefined, and perhaps undefinable, class composed of persons close to the deceased who have suffered distress and anguish on account of the death."²² Whilst it was not a point dispositive of the action, his Lordship doubted the legitimacy of the claimant's prosecution of the action²³, in this instance, a daughter claiming a breach of Art.2 in relation to the suicide of her mother who had absconded from Runwell Hospital where she was being treated as a detained patient. His Lordship's comments in this case are entirely inconsistent with the consistent case law of the Court on indirect victims where it has been held that individuals, who are the next-of-kin of persons who have died in circumstances giving rise to issues under Article 2 of the Convention, may apply as applicants in their own right. "[T]his is a particular situation governed by the nature of the violation alleged and considerations of the effective implementation of one of the most fundamental provisions in the Convention system."²⁴

²⁰ *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74

²¹ [5]

²² [5]

²³ [5]

²⁴ *Biç v Turkey*, Application no. 55955/00, 2 February 2006 at [22]

This is also the position in relation to potential victims where both claimants and courts have not yet reached the limits set by the Strasbourg institutions. There are very few examples of potential victims bringing a claim under the HRA. The most high profile to date has been the case of *Rusbridger*²⁵ where the House of Lords adjudicated in the proceedings brought by *The Guardian* for a declaration that s.3 of the Treason Act 1848, when read in light of the HRA, did not apply to persons who evinced in print or in writing an intent to depose the monarch or deprive her of her imperial status or to establish a republican form of government unless their intent was to achieve this by acts or force, constraint or other unlawful means. *The Guardian* had published articles which advocated republicanism and the editor sent a copy to the Attorney General. No prosecutions were brought, therefore it was questionable whether *The Guardian* had the requisite victim status under section 7 to bring the proceedings. A majority of the House of Lords held that this did not matter:

The Guardian do not have to demonstrate that they are ‘victims’ under s.7 of the Human Rights Act 1998. That much is conceded and, in any event, obvious on a proper view of the place of s.3 in the scheme of the Human Rights Act 1998.²⁶

Attention was drawn to the broad approach adopted by the European Court of Human Rights and the example given was *Norris v. Ireland*²⁷ where a homosexual man complained that the criminalisation of homosexual conduct in Ireland violated his Article 8 right to respect for his private life, although he accepted that the risk of being prosecuted was remote. The Court accepted that he was a victim. Following this judgment, the majority in the House of Lords

²⁵ R (on the application of *Rusbridger*) v Attorney General [2003] UKHL 38, [2004] 1 AC 357.

²⁶ at [21] per Lord Steyn, with whom Lords Scott and Walker agreed.

²⁷ (1989) 13 EHRR 186.

concluded that “for present purposes it is sufficient that The Guardian has an interest and standing. That is the threshold requirement.”²⁸ However, certain limits were also put in place. It was held that save in exceptional circumstances, it was not appropriate for a member of the public to bring proceedings against the Crown for a declaration that certain proposed conduct was lawful and name the Attorney General as the formal defendant to the claim. Whilst the majority held that the facts here were possibly within the exceptional category²⁹ it concluded that the matter ought not to be heard again by the Administrative Court:

The idea that s.3 could survive scrutiny under the Human Rights Act is unreal. The fears of the editor of The Guardian were more than a trifle alarmist. In my view the courts ought not to be troubled further with this unnecessary litigation.³⁰

Furthermore it was noted that sections 3 and 4 of the HRA are “intended to promote and protect human rights in a practical way, not to be an instrument by which the courts can chivvy Parliament into spring-cleaning the statute book, perhaps to the detriment of more important legislation. Such a spring-cleaning process might have some symbolic significance but I can see no other practical purpose which this litigation would achieve.”³¹ By contrast from very early on, the ECtHR has accepted that it is possible for an individual to be a victim, even if the law, policy or practice in question has not been applied to him or her, provided they run the risk of being

²⁸ at [21] per Lord Steyn.

²⁹ at [25] per Lord Steyn.

³⁰ at [28] per Lord Steyn; at [40] per Lord Scott.

³¹ at [61] per Lord Walker.

directly affected by it.³² Over the years, the concept of the potential victim has been deployed in a variety of contexts and often the pool of potential victims has been very wide. For example, in *Norris v Ireland*³³ The applicant, an active homosexual, complained to the Court about the existence in Ireland of laws which made certain homosexual practices between consenting adult men criminal offences. In *Open Door*³⁴ the Court concluded that all women of child bearing age in Ireland were potential victims of an injunction imposed by the Irish Courts on two companies set up to counsel pregnant women which restrained them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland. In *Burden and Burden v United Kingdom*³⁵ the Grand Chamber confirmed that the unmarried sisters who lived together and faced liability to inheritance tax if one of them died were potential victims as it was “open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted . . . or if he is a member of a class of people who risk being directly affected by the legislation”.³⁶

Not in keeping with domestic law - the remaining ban on representative standing

Whilst the ECtHR is liberal in its interpretation of victim when it comes to individuals, the Commission and Court have been clear that an organisation can only be a victim and have

³² *Klass v Germany*, 6 September 1978, Application no 5029/71; *Johnston v Ireland*, Application no. 9697/82, 18 December 1986.

³³ Application no 10581/83, 26 October 1988

³⁴ *Case of Open Door and Dublin Well Woman v Ireland*, Application no 14234/88, 14235/88 29 October 1992

³⁵ Application no 13378/05, 12 December 2006

³⁶ *Burden v United Kingdom*, Application no 13378/05, 29 April 2008 at [34]

standing before the Court if its own rights have been affected. A recent example is *Georgian Labour Party v Georgia*³⁷ where the Court held that the party, being a corporate entity, could not run for the presidential election and was not actually affected by the contested electoral mechanisms and results of the presidential election. “[T]he applicant’s complaints about the electoral mechanisms of the presidential election rather express concern on behalf of the electorate at large and constitutes therefore a clear instance of *actio popularis*, the institution of which is not provided for under the Convention system”. However, it was possible for it to be a victim in relation to complaints that the repeat parliamentary election were incompatible with Art.3 of Protocol No.1, in particular the amendment to the voter registration system which resulted in the alleged disenfranchisement of two electoral districts.

The limit on representational standing is different to the test of sufficient interest which allows for representational standing. For example, in 1988 the Child Poverty Action Group and the National Association of Citizens Advice Bureaux argued that the Secretary of State for Social Services had wrongly interpreted sections of the Social Security Act 1975. Whilst *locus standi* was not argued, the Court of Appeal held that it was in no doubt that it had jurisdiction to hear the application and that if it had been an issue before them, it would have been granted.³⁸ In 1993 Greenpeace brought an application for judicial review of a decision by Her Majesty’s Inspectorate of Pollution and the Minister of Agriculture Fisheries and Food to grant applications by British Nuclear Fuels for variations of authorisations under the Radioactive Substances Act

³⁷ ECtHR, Second Section, 22 May 2007, application no 9103/04

³⁸ *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1989] 1 All ER 1047.

1960 to discharge radioactive waste from BNFL's premises at Sellafield.³⁹ Taking into account the nature of the applicant, the extent of the applicant's interest in the issues raised, the remedy sought to be achieved and the nature of the relief sought, the Divisional Court concluded that Greenpeace had standing. Particular note was taken of the national and international standing of Greenpeace and its integrity. Also taken into consideration was the fact that if Greenpeace were denied standing, those they represented might not have an effective way to bring the issues before the court. "Consequently a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties."

Continuing the ban on representational standing practiced by the ECtHR in the domestic context has impacted negatively upon the effective legal protection of human rights. From the government's perspective, its effect has been costly. The absence of test claims has led to a proliferation of the same type of claim⁴⁰. And it is obvious that many important cases have not been brought. Legislating in this way, not in keeping with the domestic model, has actually now resulted in further change to bring the HRA more into line the comparable judicial review model. As noted above, the Equality and Human Rights Commission may bring proceedings under the HRA. The Government amendment inserting what is now s.30 of the Equality Act 2006 was moved during the report debate in the House of Lords. Lord Falconer confirmed that the

³⁹ R v HM Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, ex p Greenpeace [1994] 4 All ER 329.

⁴⁰ See for example the litigation concerning the limit on asylum seeker benefits, *R. (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

amendments would provide the Commission “with an express power to rely on the convention rights in judicial reviews that it has instituted – or in which it intervenes – and disappplies the victim test to that end. However, paragraph (b) of new subsection (2A) requires that the commission may act only if there is or would be one or more victims of the unlawful act – the effect being that there should still be a victim as before, but that the commission may bring the case. This amendment will therefore not create any new opportunities for litigation under the Human Rights Act, or permit purely hypothetical cases to be brought. . . The amendment is not about making the commission a major litigating body in respect of human rights. Its role remains essentially promotional. . . granting the commission a limited power such as this allows it to bring strategic cases to clarify important points of law. In many such cases, the facts of the case will be agreed . . but the legal framework will be in dispute. It is more efficient and more cost effective for the commission to be able to seek a clear declaration on a point of law in such circumstances, instead of requiring a victim to bring a case in their own right and for the commission then to intervene.”⁴¹ Lord Falconer hoped that the commission would use its power wisely and strategically to “contribute to the continued development of the body of human rights jurisprudence produced by our domestic courts under the Human Rights Act.”⁴²

Conclusion

Effectively transplanting a bill of rights from an international system to a domestic one carries with it obvious risks as well as benefits. The s.7 victim test is one element of the overall picture but clearly illustrates some of the problems which can ensue. To develop a domestic bill of rights, carefully and over a long period of time, would possibly avert many of these problems.

⁴¹ HL Deb vol 674 col 804 19 October 2005

⁴² Ibid at cols 804-805

There would be fewer errors of translation as it would not be necessary to rapidly absorb a vast body of case law; and the process itself would provide knowledge and education. Any test for standing produced by such a process would likely be much more in keeping with what is accepted domestically for similar types of claim.