Human Rights Act Webinar: Proposals Relating to HRA Sections 3-4

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Section 3: IHRAR

- Preservation of status quo: Amend section 3 to clarify the order of priority of interpretation, coupled with increased transparency in the use of section 3, an enhanced role for Parliament in particular through the JCHR, and the introduction of a discretion to make ex gratia payments where a declaration of incompatibility is made. Otherwise no changes to sections 3 and 4, IHRAR p 180;
- Rationale: existing regime generally working fine; the interpretive power in s 3 is unusual, but warranted; it is not used excessively broadly by courts; and Parliament still has option to enact legislation contrary to judicial interpretation made pursuant to s 3.

Section 3: MOJ Consultation Paper

- Premise behind approach to s 3 reform: ‘Our view is that the Act, as it has been applied in practice, has moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament’, [233]. See also [116]-[123].
- The MOJ proposals are grounded on the assumption that ‘Section 3 compels the court to expand the scope of its interpretive duty beyond what is appropriate for an unelected body’, such that ‘if a court decides that a clear provision in primary legislation is incompatible with human rights, then its role is to declare it incompatible with Convention rights’ and then allow Parliament to decide how to address the incompatibility, [235].

Section 3: MOJ Consultation Paper

- Two difficulties with this premise:
- 1st: there are different views as to the meaning of s.3 and what can be achieved through interpretation, but the courts have been mindful of the limits of s 3 pursuant to *Ghaidan* and the MOJ regards as the high-water mark of the judicially expansive approach the decision in *R v A (No.2)* at the turn of the millennium, 20+ years ago, [118];
- 2nd: if the current interpretation of s.3 were problematic in the manner suggested by the MOJ then one would expect parliamentary intervention to amend legislation interpreted pursuant to s.3 in a manner that was felt to depart from Parliament's intention. There is, however, scant, if any, evidence of such parliamentary intervention over the 20+ years post the HRA. This then signifies either that Parliament is content with the courts' decisions, or that it might disagree with a particular decision, but could not be troubled to enact the necessary amending legislation.

Section 3: MOJ Proposals

- Option 1: Repeal s.3 and do not replace it: the common law presumption would then be applicable, such that it would be assumed that Parliament did not intend to legislate in breach of its Treaty obligations, such as the ECHR. This presumption would be applicable where the legislation was ambiguous.
- Option 2: Repeal s.3 and replace it with a provision that legislation should be construed compatibly with the rights in the Bill of Rights, where such interpretation can be done in a manner that is consistent with the ordinary reading of the wording and overriding purpose of the legislation.
- Appendix 2, [5]-[8]: is predicated on the assumption that Option 2 is chosen, such that there is a replacement for s.3. The Appendix then provides two options as to the form that the replacement should take

Section 3: MOJ Proposals

- If there is reform: Option 2 is preferable to Option 1 for reasons of legal certainty. It would be problematic for a revised HRA to contain no section that addresses the interpretive duties of courts pursuant to the Act, and simply to rely on residual common law presumptions.
- Option 2B is preferable to Option 2A: The difference, as noted, in Appendix 2, p 98, is that Option 2B does not require the legislation to be ambiguous. Whether legislation is ambiguous can often be dependent on background assumptions and values, not merely black letter text. It is, therefore, preferable not to regard ambiguity as a condition precedent to invocation of the interpretive duty.
- In any event: both Option 2A and 2B turn on consistency with the ‘ordinary reading of the words used’ in the legislation, -- this can inevitably be contentious.

Section 3: MOJ Proposals

- MOJ Questions/proposals: MOJ asks for views on parliamentary role in engaging with s 3 judgments:
- 1st: The IHRAR suggestion that there should be a database of s 3 judgments so that Parliament can be kept apprised is a good one;
- 2nd: There should be some systematic mechanism whereby the JCHR and the relevant department consider such s.3 rulings. The suggestion made by IHRAR [200] should be taken forward building by analogy on mechanisms used for s 4. This would then mean that if the government department were minded to depart from a court decision interpreting legislation to be compatible with the HRA pursuant to s.3, because it did not agree with how the legislation had been interpreted to render it HRA compatible, it would submit any suggestion for amendment to the legislation to the JCHR for comment prior to making the amendment.

Section 4: MOJ Proposals

- MOJ: considering whether declarations of incompatibility should be made available beyond the area covered by HRA s 6(2).The wording of the MOJ proposal in [250] is ambiguous.
- However: there is no sound conceptual reason why declarations of incompatibility should be the only remedy available for secondary legislation, over and beyond that in the circumstances specified in the current law. The assumption in Question 15 is that even if the secondary legislation is not mandated by the primary legislation, it should nonetheless be immune from invalidation under s.6 HRA where it is incompatible with Convention rights.
- There is no sound normative rationale for this: Such secondary legislation is, by definition, not demanded by the primary statute; such secondary legislation is prima facie ultra vires the primary statute, where it is not demanded by the latter and where it infringes Convention rights. If there are practical problems caused by invalidation they should be addressed through remedial mechanisms.

Section 4: MOJ Proposals

- Remedial discretion: IHRAR supported the idea that the proposals for suspended and prospective quashing orders in the Judicial Review and Courts Bill should be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights;
- Remedial discretion: This is a good idea, subject to the caveat that this should be a discretion accorded to the courts, and should not be transformed into a duty, whereby the courts can only award such a suspended or prospective quashing order.

Section 4: MOJ Proposals

- Proposal: to remove Henry VIII remedial mechanism in HRA, whereby infirmities in primary can be addressed through secondary legislation;
- Rationale: such clauses undemocratic, since they facilitate ‘executive legislation’.
- Response: This is correct, but MOJ’s solicitude for parliamentary sovereignty in this area strikes an odd chord, given the recent proliferation of such clauses attached to broad delegated power in, eg, Brexit legislation;
- Response: if the Henry VIII remedial mechanism is replaced by ordinary parliamentary method for amending primary legislation, how much real parliamentary scrutiny will there actually be?