

Human rights update

Ian Rogers examines five key House of Lords cases and the principles on which they have shed light



ON 2 OCTOBER 2005 IT WAS THE FIFTH

anniversary of the entry into force of the Human Rights Act 1998. This article selects five key cases decided by the House of Lords, which have significantly elucidated the following general principles of the autonomous domestic human rights jurisdiction created by the HRA:

- proportionality;
- the discretionary area of judgment;
- the interpretative obligation under s 3;
- horizontal effect; and
- the obligation to 'take into account' Strasbourg jurisprudence under s 2.

The five cases are considered in the order in which they were decided:

(1) *R (Alconbury Developments) v Secretary of State for the Environment* [2003] 2 AC 295 (May 2001)

(2) *R v Secretary of State for the Home Department, ex p Daly* [2001] 2 AC 532 (May 2001)

(3) *Campbell v MGN Ltd* [2004] 2 AC 457 (May 2004)

(4) *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (June 2004)

(5) *A v Secretary of State for the Home Department* [2005] 2 AC 68 (December 2004)

Section 2 and *Alconbury*

This deceptively simple provision requires a court or tribunal, when determining a question that has arisen in connection with a Convention right, to "take into account" relevant Strasbourg case law. It embodies both a constraint and an invitation to go its own way. The constraint reflects the retention of the right to petition the Strasbourg Court, which will apply its case law. The invitation element reflects the fact that the Strasbourg Court is not bound by its own judgments and that the UK courts enjoy a margin of appreciation in developing a human rights jurisdiction that may need to find national solutions to national problems. Furthermore, it accommodates the principle that the level of rights protection provided by Strasbourg jurisprudence represents a floor, not a ceiling, for the protection of rights in the UK.

In *Alconbury*, Lord Slynn stated:

"Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions, it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence."

This passage was subsequently relied upon by Lord Bingham in *R (Anderson) v Home Secretary* [2003] 1 AC 837 as authority for the proposition that "the House will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber". That case demonstrates that the House of Lords, at least, will carefully scrutinise the coherence of the reasoning of a Strasbourg judgment before following it.

The House has yet to address the question of whether s 2 requires a reconsideration of the principle of *stare decisis* in human rights cases, but will do so shortly. The Convention is itself a living instrument and has to be interpreted in the light of present day conditions. In December, the House will consider whether a judge of a domestic court is bound to apply a decision of a superior domestic court if that decision is inconsistent with a more recent decision of the Strasbourg Court (*Leeds City Council v Price* [2005] 1 WLR 1825, CA). The Court of Appeal held that the decision of the House of Lords in *Harrow London Borough Council v Qazi* [2004] 1 AC 983 on an ECHR issue was incompatible with the subsequent decision of the Strasbourg Court in *Connors v UK* (2004) 40 EHRR 189. It rejected the argument that s 2 required it to follow *Connors* and not *Qazi*. To do so, it held, would infringe *stare decisis* and could result in chaos. The correct approach was to follow the House of Lords decision, but grant per-

mission to appeal to the House of Lords. But if no permission is sought in such a case, does that not also cause uncertainty? When the case is heard in December, the House may re-examine the obligation under s 2 and the delicate issue of the hierarchy of the courts on ECHR issues in the UK's domestic human rights jurisdiction. By ss 6(1) and 6(3) HRA, Parliament has required that courts must not act in a way that is incompatible with a Convention right. Arguably, a lower court that follows a decision of the House of Lords, notwithstanding its incompatibility with Convention rights has been demonstrated subsequently, is in breach of s 6 HRA.

Proportionality and *Daly*

The principle of proportionality as a ground for review was mapped out by Lord Steyn in *Daly*. He did so by recalling a three-stage test from Privy Council case law, that the court should ask itself whether:

- "(i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Having stated this structured approach to proportionality, Lord Steyn also emphasised that "context is everything". As is true of the Strasbourg Court's approach, proportionality review is applied on a sliding scale of intensity. It is clear that the court may be required to assess the balance struck by the decision-maker and the relative weight accorded to considerations, but this does not mean a shift to merits review. The doctrine of deference is a necessary aid in determining the appropriate intensity of proportionality review in a given case. Indeed, it would be a mistake to analyse one without the other.

Horizontal effect and *Campbell*

In contrast with the other issues of general

principle, the House of Lords took some time before addressing the question of horizontal effect, which had dominated academic discourse. It was always likely that the House would reject direct horizontal effect, but support a form of indirect horizontal effect, based on the courts' obligation under s 6 HRA and their status as public authorities, to act compatibly with Convention rights. Thus, their role as public authorities in adjudicating on disputes between private parties and developing the common law should reflect their obligations to respect and prevent violations of Convention rights.

The full effects of the HRA on disputes between private parties have yet to be worked out. Indeed, the subject has troubled many supreme courts with constitutional and fundamental rights traditions and given rise to voluminous academic commentary and jurisprudence. It may well be a concept that will be tweaked and refined by the House over many years, taking into account the Strasbourg case law on positive obligations affecting the private sphere. For now, it was for practical purposes settled in *Campbell* that the HRA does not support any concept of direct horizontal effect (although only Baroness Hale and Lord Carswell of the majority were clearly against the concept; Lord Hoffmann was clearly against, but formed part of the minority). Broadly, the majority showed support for a concept of indirect horizontal effect.

Interpretation of legislation under s 3 HRA and *Ghaidan*

When is an interpretation of a statute a 'possible' one? It should have been tolerably clear from *R v A (No 2)* [2002] 1 AC 45 that the obligation to interpret legislation "so far as it is possible to do so" in a way which is compatible with Convention rights goes far beyond ordinary principles of statutory interpretation and the declaration of incompatibility was intended as a remedy of last resort.

It became apparent in subsequent cases that the strength of the interpretative obligation had been underestimated by the courts. In *Ghaidan*, Lord Steyn attached empirical evidence to his opinion, showing that the courts had used the interpretative power in ten cases, but the declaration of incompatibility under s 4 HRA in 15 cases. His Lordship suggested that the law may therefore have taken a wrong turn. *Ghaidan* put beyond doubt the principle that the interpretative power is the primary remedial measure, with a s 4 declaration only to be made as a last resort. Parliament had given the courts

a democratic mandate to read down statutes and read in words, notwithstanding linguistic objections. The draftsman of the HRA had modelled the text on the EU law obligation to interpret national legislation in the light of the wording and purpose of a directive. The *Marleasing* judgment of the ECJ (Case C-106/89 [1990] ECR I-4135) is therefore to be regarded as a significant signpost to the meaning of s 3.

This is an area in which lawyers and judges will have to gain confidence by experience and impression, rather than the application of a rigid formula. However, the analogy with the duty in *Marleasing* should throw further light on the problem of Convention-compliant interpretation.

Discretionary area of judgment and *A v Home Secretary*

It was clear from the illuminating early analysis in *R v DPP, ex p Kebilene* [2000] 2 AC 326, HL (October 1999) and *Brown v Stott* [2003] 1 AC 681, PC (December 2000), that the courts would develop a doctrine of deference, which would be analogous to, but logically not the same as, the 'margin of appreciation' accorded by the Strasbourg Court to contracting states. The principle is that the national courts must show a degree of deference to the relevant decision-maker to make a legitimate choice. The breadth of the discretionary area of judgment depends on the context. The context includes consideration of the separation of powers and the relative institutional competence of the court to review the proportionality of the decision. A checklist of factors to determine how the discretionary area of judgment is to be determined in a given case would improve legal certainty, but the House has shied away from developing such a formula. Indeed, Lord Walker stated that, as the HRA is still in the bedding-down stage, it might be a mistake for the House of Lords to go too far in attempting a comprehensive statement of principle (*R (ProLife Alliance) v BBC* [2004] 1 AC 185). There may well be no consensus at present on what is a complex issue of democratic principle and constitutional law.

The momentous decision in *A v Home Secretary* raised the issue of the separation of powers and deference in stark terms. Lord Bingham, who delivered the leading opinion and with whom six others (of the nine) agreed, affirmed the right of the judiciary in principle to intervene even in the most sensitive of cases, where Convention rights are engaged. His Lordship reiterated that the court's role under the HRA is as guardian of

human rights and that this responsibility cannot be abdicated. Indeed, Parliament has determined that this should be their role by enacting the HRA. Such comments suggest that the majority wished to avoid setting any legal or jurisdictional limit on their power to review certain executive and legislative decisions – an argument which had attracted some support from Lord Hoffmann in *ProLife* (at paras 75-76). In *A v Home Secretary*, Lord Bingham held that the assessment of the threat to the nation resulting from the 11 September attacks was an issue that fell "very much at the political end of the spectrum" and was therefore less likely to be appropriate for judicial decision. He did not refer to a jurisdictional bar to reviewing the assessment of the threat, rather it was held that the appellants had not shown a ground "strong enough" to displace the Home Secretary's decision (para 29). As to the matter of the response to the threat to the nation, namely the Home Secretary's decision to make an order derogating from Art 5(1) ECHR and an Act of Parliament which created a power to detain people indefinitely without charge or trial, this was clearly an area in which the courts were democratically mandated by the HRA to protect Convention rights and ensure that the response went no further than the exigencies of the situation strictly required. Intensive scrutiny was applied to the response, even though this was an issue of national security. The response was held to be disproportionate.

Conclusion

In the first five years of the HRA, the House of Lords has laid the foundations for sophisticated analysis of the general principles of the HRA, which will, at last, make a worthy UK contribution to global human rights jurisprudence. On some other issues, less progress has been made – for example, the meaning of 'public authority' and 'functions of a public nature' in s 6. Concepts such as horizontal effect and deference are likely to be considerably elucidated in the next five or 10 years, as lessons from the first five, predictably controversial, years are absorbed. As *A v Home Secretary* indicates, the House is taking its role as guardian of human rights seriously.

Ian Rogers is a barrister at Monckton Chambers.