Human rights in the Isle of Man: the administrative/ judicial discretion debate

David Doyle

by David Doyle

The author considers the position under Isle of Man law prior to the implementation of the Human Rights Act 2001 and in particular whether references can be made to the Convention on Human Rights to inform the exercise of administrative as well as judicial discretion.

HUMAN RIGHTS ACT 2001

The *Human Rights Act 2001 (Appointed Day) (No 1) Order* 2001 of the Isle of Man brought into effect certain provisions of the *Human Rights Act* 2001 of the Isle of Man ('the Act') with effect from 1 March 2001. These provisions included the title of the Act, the definitions section for certain limited purposes and the provisions which confer powers to make subordinate legislation under the Act. It is unlikely that the substantive provisions of the Act will come into question before 2003.

The Isle of Man Government's intention, as was the case in the United Kingdom, is that there should be a lead-in time to allow Government Departments and Statutory Boards to renew all their legislation and practices and to allow for the training of staff. In the United Kingdom the lead-in time was about two years and the Isle of Man Government propose a similar lead-in time for the Isle of Man.

POSITION BEFORE THE IMPLEMENTATION OF THE ACT

What is the position in the meantime?

Before the substantive provisions of the Act become law references to the European Convention will be limited to three main areas:

(1) Those in which it is necessary to resolve an ambiguity in a Manx statute;

(2) To assist if there is uncertainty in the common law of the Island; and

(3) To inform the exercise of a discretion.

This short note poses the following the question: is the subject matter in area 3 above limited to judicial discretion (as in *O'Callaghan v Teare* 1981-83 MLR 103 – 'the *O'Callaghan* case') or does it also extend to administrative discretion?

The Staff of Government Division (the Island's Court of Appeal) in *Jones v The Queen* ('the *Jones* case' –2 DS 2000/1) in judgments delivered at Douglas on 8 May 2000 stated (at page 8):

'Accordingly Mrs Kelly properly accepted the Attorney General's submissions, which we unreservedly accept, that in the absence of statutory incorporation of the Convention into Manx domestic law, reference to the Convention is limited to where such is necessary to resolve ambiguity in statute or uncertainty in the Common Law or to inform the exercise of an ***administrative discretion****'* (author's emphasis).

This extract was repeated by the Island's Court of Appeal at page 19 of their judgment in *In the Matter of the Petition of Stephen David Galloway* – 'the *Galloway* case' (judgment given 29 August 2000, 2 DS 2000/17). Was the Island's Court of Appeal correct to unreservedly accept that reference to the Convention can be made to inform the exercise of an administrative, as opposed to a judicial, discretion?

POSITION IN ENGLISH LAW PRIOR TO THE IMPLEMENTATION OF THE ENGLISH HUMAN RIGHTS ACT 1998

Prior to the *Human Rights Act* 1998 (Act of Parliament) coming into force in October 2000, English commentators (for example Navtej Ahluwahia & Nuala Mole, *The Human Rights Act 1998–An Overview*, p.9) indicated that the Convention might only be used:

'(1) As an aid to the construction of legislation in cases of ambiguity (e.g., R v Secretary of State for the Home Department, ex parte Brind [1991] AC 696 at 760);

(2) To establish the scope of the common law (e.g. Derbyshire County Council v Times Newspapers [1992] QB 770 (at 812, 830);

(3) To inform the exercise of judicial (as opposed to administrative) discretion (e.g. AG v Guardian Newspapers (No 2) [1987] 3 All ER 316'.

At pages 15-16 the learned authors of *Human Rights Law and Practice* (Butterworths, 1999), Lord Lester QC and David Pannick QC, stated:

'Prior to the coming into force of the HRA 1998, the European Convention on Human Rights, although an

international treaty which binds the United Kingdom (and obliges the United Kingdom as a matter of international obligation to amend our laws and procedures where they are to be found to have breached the Convention), therefore has a limited, albeit important, effect in domestic law in creating rights and duties in particular:

(1) Courts seek to interpret ambiguous legislation consistently with the Convention;

(2) Courts seek to apply the common law (where it is uncertain, unclear or incomplete) and exercise judicial discretions, consistently with the Convention;

(3) Although public authorities, such as Ministers of the Crown, exercising discretionary powers have no duty to exercise such powers consistently with the Convention, the human rights context is relevant to whether the Minister or other public authority acted reasonably and had regard to all relevant considerations;

(4) Where a dispute concerns directly effective European Union law, the courts take account of the Convention because European Union law includes principles recognised by the Convention'.

In *Administrative Law* (7th ed., 1994), written before the implementation of the *Human Rights Act* 1998 (Act of Parliament), Wade and Forsyth stated at page 496:

'Unlike most of the other states who are parties, Britain has failed to incorporate the Convention into domestic law, so that its status is that of a treaty only and complainants must undertake long and expensive litigation in Strasbourg. But the courts, though unable to enforce the Convention directly have made some progress towards giving effect to it indirectly. They will take it into account in construing statutes or regulations in cases of ambiguity. In one case Lord Reid said that it was hardly credible that Parliament or any government department would act contrary to it. In the Court of Appeal it has several times been held that regard ought to be had to the Convention as an aid to interpretation and in one case under the common law, where arguments were evenly balanced, they treated the Convention as decisive. Distinguished judges speaking extra-judicially have suggested how this policy could be carried further; and in a case in the House of Lords Lord Griffiths acknowledged the responsibility the judiciary "to refuse countenance behaviour that threatens either basic human rights or the rule of law".'

Bennion's *Statutory Interpretation* (2nd ed.), stating the law prior to the implementation of the *Human Rights Act* 1998, says at page 567:

'It follows that the Convention does not directly govern the exercise of powers conferred by or under an Act'.

Lord Bridge in *R v Secretary of State for the Home Department* ('the *Brind* case' – [1991] 1 All ER 720, HL) stated (at 722-23):

'But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the convention, the courts will presume that Parliament intended to legislate in conformity with it. Hence, it is submitted, when a statute confers upon administrative authority discretion capable of being exercised in a way, which infringes any basic human rights, protected by the convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations, which the convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating that it must be exercised within the convention limits, to presume that it must be exercised within convention limits would be to go far beyond the resolution of an ambiguity ... and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.'

PREVIOUS REFERENCES TO THE EUROPEAN CONVENTION IN ISLE OF MAN LAW

The judiciary in the Isle of Man have over the years considered submissions in respect of the application of the European Convention of Human Rights in Manx law. In the *O'Callaghan* case the Staff of Government Division held that when the courts were exercising their sentencing discretion it was appropriate that they should adopt a policy, which conformed to treaty obligations as far as possible, while at the same time being consistent with Manx law.

In *Sallis v R* (1987-89 MLR 329) the Staff of Government Division accepted that in some cases of allegations of gross indecency between consenting males in private – and they emphasised the word some – it may be right for the Deemster to remind the jury that whilst the question of whether an act was one of gross indecency or not is one of fact for them to decide, they should have regard to views prevailing in other civilised countries, and in particular they should have regard to the views of the European Court of Human Rights.

In *R v Gray* (1990- 92 MLR 74) an Acting Deemster was unimpressed by submissions in respect of Article 6 of the European Convention for the Protection of Human Rights 'by which the Island is bound' (page 89) and also Article 14 of the United Nations Covenant on Civil Rights. The Acting Deemster dismissed these submissions as adding nothing to the common law position.

His Honour Deemster Kerruish, in his judgment delivered on the 24 July 2000 regarding *In the Matter of the Petition of Peter Michael Bond* (24 November 1999, CP 1999/168), also dealt with submissions in respect of the

European Convention on Human Rights (see also the chapters which the author of this note contributed to *Solly's Government and Law in the Isle of Man* (1994) Chapter VI, 'European Convention for the Protection of Human Rights and Fundamental Freedoms', pages 189-211; *Isle of Man Partnership Law* (1996), Chapter III, 'Nature and Sources of Manx Law' pages 82 - 156, and pages 127-151 re: European Convention, which endeavours to summarise the position prior to the Act coming into full force).

WAS THE STAFF OF GOVERNMENT DIVISION CORRECT IN REFERRING TO THE ADMINISTRATIVE DISCRETION POINT?

Were the Staff of Government Division in the *Jones* case (as repeated in the *Galloway* case) correct to indicate that the Convention could be referred to 'to inform the exercise of an administrative discretion'? Or should they have deleted 'administrative' and inserted 'judicial', or should they have simply added the words 'or judicial' after the word 'administrative'?

On *Frankland* (1987-89 MLR 65) principles do we treat the English decisions, such as the House of Lord's *Brind* case (which appear to limit the reference to judicial discretion rather than administrative discretion) as highly persuasive, or do we follow the *Jones* case and the *Galloway* case (are they clear decisions to the contrary)? Should the Isle of Man courts follow the comments of the Judges of Appeal in the *Jones* case and the *Galloway* case and allow the Convention to be referred to 'inform the exercise of an administrative discretion'? Or should the Isle of Man courts follow the comments of Lord Bridge in the *Brind* case to the effect that to do so 'would be a judicial usurpation of the legislative function'?

The author's own view, for what it is worth, is that we should follow the stance taken by our Staff of Government Division (the Island's Court of Appeal) in the *Jones* case and the *Galloway* case rather than the stance taken by Lord Bridge in the *Brind* case. We should allow reference to the Convention to inform the exercise of judicial and administrative discretion.

If allowing reference to the Convention to inform the exercise of administrative discretion is considered unacceptable, the fall back position would be to accept that the human rights context is relevant to whether the relevant body exercising the administrative discretion acted reasonably and had regard to all relevant considerations. To limit reference to the Convention to inform only the exercise of judicial discretion would appear to be an unduly restrictive stance to take.

The administrative/judicial discretion debate will be academic as soon as the substantive provisions of the Act come into operation but in the meantime the Island's Court of Appeal – Staff of Government Division should clarify the position at the earliest available opportunity.

David Doyle

Chairman, Isle of Man Law Society's Human Rights Committee; Head of Commercial Department, Dickinson Cruickshank & Co, Advocates, Isle of Man (http://www.dc.co.im)

Globalisation and private international law: reviewing contemporary local law

by Olusoji Elias

Primarily because territory necessarily features as an important basic denominator for cross-border interaction across national legal systems, there is a clear material affinity between private international law and the legal dimensions of globalisation. They both have a common root, firstly, in factors, characteristics and considerations concerning the scope of relevant laws, and also in the context and the terminology of localism and externalism. The complexity and the inclusive bearing of globalisation pose contemporary problems, and a recognisable broadening of the scope of private international law to meet the realities of a rapidly globalising world keeps with world-wide trends in which trans-national laws form an important primary focal point, whether or not as they are