S.S. Law P.A.

The Social Security Law Practitioners Association

Minutes of the Meeting 25 June 2003

Chair (and Minutes) - Desmond Rutledge – Redbridge CAB
Guest Speaker – Conrad Haley – Public Law Project

In attendance:-

Miranda Bayliss - OSSCSC
John Beckley – Tower Hamlets Law Centre
Jackie Brown – Terrance Higgins Trust
Julie Hinnigan – Alexander & Partners
Sharon Howard – Terrance Higgins Trust
Ranjiv Khubber – 6 King's Bench Walk
Marina Sergides – 2 Garden Court
Fiona Seymour – Citizens Advice Specialist Support Unit
Jo Silcox – Free Representation Unit
Kate Smith – Citizens Advice Specialist Support Unit
Paul Stagg - No.1 Serjeants' Inn
Pauline Rowe – Newham Claimants Union
A Williams – CAB

Human Rights Arguments at Tribunal Level

Some General Themes

Conrad began his talk by making some general observations on using HRA 1998 in the social security context. Generally, running HR arguments is daunting. Everyone is coming to this area of law cold. There is also a dearth of research material. Current sources include: Rightsnet; Commissioners website [with search engine]; CPAG books; periodicals; Adviser; subscriptions services e.g. Casetrack; Counsel's Advice; PLP website; Judicial Studies Board.

The case law in Strasburg should not been seen as a ceiling – as far as the UK courts will go. Generally, advocates should not limit themselves to the Strasbourg jurisdiction. They can also have regard to fundamental principles. It is not helpful to treat Human Rights as separate and additional to the rest of the law. The common law recognises fundamental principles of legality [see R v (1) Secretary of State for the Home Department (2) Secretary of State for Work and Pensions, ex parte Anufrijeva [2003] UKHC 36 and fundamental or basic rights Lord Hoffmann's speech in R v Secretary of State for the Home Department, Ex parte Simms [2000] 2 AC 115. The fundamental

rights in the common law apply "beyond the four corners of the Convention".] Remember the JCWI case and destitute asylum seekers after IS was withdrawn.

There is not much difference between JR and HRA law. The courts tend to develop law incrementally – will cling on to familiar principles. Therefore it is sensible to show how case relates to domestic principles. Use domestic law (or EU influenced domestic cases) to inform HR law. In other words base arguments on familiar principles. This is illustrated in an immigration case concerning appeal rights where the court rejected the Article 6 argument but invoked the common law right to a fair trial instead: Saleem v SS Home Department [2001] 1 WLR 443. A recent study by the PLP showed that the HRA has not had a major impact on JR applications [The Impact of the Human Rights Act on Judicial Review: An Empirical Research Study: Varda Bondy June 2003].

HRA is primarily concerned with political rights; it is not aimed at social or economic rights – this is better put in Parliament. The courts will show 'deference' to the decisions of Parliament and the executive. [See R v DPP ex parte Kebilene [2000] 2 AC 326.] In the recent decision R (Carson) v Secretary of State for Work and Pensions [2003] EWCA Civ 555, in which the court refused to extend the uprate for retirement pensions to all ex-UK pensioners living abroad. The court held that the implication for public finances (£3bn) was a legitimate factor in justification. Laws LJ observed that in the field of macro-economic policy the constraining role of the courts was a modest one. Further, that the courts' duty under HRA 1998 did not mandate the "stark judicialisation" of the political function.]

The HRA provides mechanisms to target three different areas: Primary legislation/Acts; Secondary legislation/Regulations; and administrative schemes. Acts can be construed so as to comply with ECHR or they can be declared incompatible but the latter is really the 'wooden spoon' of the HRA as it is of little benefit to the client. When taking a human rights point it is important that advisers are clear about what they hope to achieve. Will the HRA 1998 give you something more than the domestic law? See section on damages below.

Interpreting legislation under section 3 of the HRA 1998. Conrad referred to Mendoza v Ghaidan [2002] EWCA Civ 1533 as is a useful illustration of the application of the HRA 1998 within a specific domestic context. The case concerned rights of succession on a tenancy for a same-sex couple under the Rent Act 1977. The court was willing to read in words ["as if they were" his or her wife or husband] to make legislation ECHR compatible. See also discussion of section 3 in CI/4421/2000.

Article 6 (right to a fair hearing)

Fruitful area in social security. Many have noted that the DMA rules made by one of the parties – i.e. the Secretary of State [see discussion in at para 32 CI/4421/2000(*88/00)]. In relation to article 6 the Commissioners have been more willing to adopt Convention language in place of domestic concepts of natural justice; see CIB/2751/2002, and CJSA/5100/2001.

The courts have considered whether decisions made by administrative bodies such as local authorities. Such bodies are non-compliant with HRA but the right to JR may cure that defect. [See The Personal Representatives of Christopher Beeson v Dorset County Council & The Secretary of State for Health [2002] HRLR 15 concerned the relationship between Article 6 and a determination by a local authority that an individual had deprived himself of an asset which he could have used to fund his care in a residential home run by the local authority. Whether the local authority social services complaints procedure – which consists of an internal panel – was HRA 1998 compliant. See also R(Alconbury) v Secretary of State [2001] 2 WLR 1389 (HL) and Runa Begum v Tower Hamlets LBC [2002] EWCA Civ 239 – concerning the procedure for reviewing a homelessness decision under s.202 Housing Act 1996. Whether the right of appeal to a county court on a point of law was enough to make process compliant with Article 6. The court held that in social welfare schemes excess funds should not be consumed in the administration of legal disputes. Further, the cost is a consideration in article 6 and there is less protection in social welfare schemes as distinct from crime and private rights. For these sorts of decisions JR is adequate.]

In the social security context this has been followed in CIS/540/02 (& CIS/758/2002)(Mr Commissioner Howell). This concerned the exclusion of rights of appeal by regulation 4 of the Claims & Payments Regulations 1999. These were held to be contrary to Article 6 as there was no right of appeal to a tribunal.

Article 8 (respect for family life/home)

Leading case - Petrovic v Austria (1988) 4 BHRC 232 concerned a benefit payable to mothers who remained at home looking after children but not to fathers - attacked defects in legislation. In domestic law R (on the application of Barry Tucker and another) v the Carmarthenshire County Council Housing Benefit Review Board and another QBD 4th May 2001 challenged the rules preventing housing benefit being paid where the landlord was also the father of their child: Reg 7(1)(d) of HB(Gen) Regs 1987 on the basis of Article 8 coupled with Article 14. The claimant had received HB for 9 years prior to the amendment. The appeal was dismissed; the regulations pursued a legitimate aim; the eradication of abuse and differential treatment was proportionate to that aim.

The Court of Appeal in R (Carson) v Secretary of State for Work and Pensions [2003] EWCA Civ 555 emphasised that under the Convention there is no positive guarantee of a particular amount of benefit and therefore Article 8 could not extend to include "whole swathes of a State's social security system".

See also CH/5125/2002 et al, the reference in the Commissioner's decision does not rule on whether Article 8 is engaged but the Statement of Reasons is produced as an appendix where (all 45 pages) and at para 96 the Tribunal Chairman (Richard Poynter) held that the provision of HB by the UK is within the scope of Article 8, as HB is intended to protect and show respect for the individual's home and the conditions of entitlement are closely related to the occupation of a dwelling as the home (para 96).

Article 14 (discrimination)

There has been more success with Article 14. Picking on illogical bits of system, for example see WFTC case in which a tribunal dis-applied the regulation preventing a child placed for adoption counting as a member of the claimant family [See www.publiclawproject.org.uk/recentlit.html for details]. One issue that has caused difficulties for complainants is the process of showing that there has been a difference in treatment. The article refers to discrimination occurring on account of the complainant's 'status'. This was taken up in the case law. [See St Brice v Southwark LBC [2001] EWCA Civ 1139 and applied in Beeson v Dorset CC & the SS for Health [2002] HRLR 15. and which held that a personal characteristic (status) was a necessary condition for a claim in discrimination. A criteria was suggested in Barber v Secretary of State for Work and Pensions [2002] EWHC 1915 Admin a case concerning the shared care of children and an argument that CB should be split.] These decisions seem to suggest that you cannot bring a claim for discrimination unless you can point to personal characteristic. However, in Carson Laws LJ suggested an alternative test for 'comparators' which is more straightforward and potentially broader than the Barbar test. Laws LJ suggests the matter can be put in the form of a "compendious question". "There can be no discrimination unless its alleged victim can point to other persons who are in analogous or relevantly similar situation, yet are treated more favourably. If there is no such analogous situation, any difference in treatment between X and Y has no legal significance for the purposes of Article 14 (para 51).

Does discrimination in Article 14 cover indirect discrimination? Mr Commissioner Jacobs in CH/5125/2002 et al holds that it does (paras 36 – 55), though this is *obiter* (not binding on future cases).

Damages for breach of HRA 1998

The leading case is R(Bernard) v Enfield LBC [2002] EWHC 2282 Admin The case concerned a severely disabled woman and her husband. They lived in accommodation that was unsuitable. They were assessed by the LA as requiring alternative accommodation but housing failed to act on the report for 20 months. The court held that there had been a breach of article 8, awarded £10,000 in total; decision looked a level of awards for maladministration awarded by the Ombudsman as useful comparator; cf reports in LAG on ombudsman damages.

See also R v (On the application of (1) Hooper (2) Whitney (3) Naylor (4) Martin v Secretary of State for Work and Pensions [2002] EWCA Civ 813 on damages for no payment to widowers between HRA 1998 coming into force and introduction of bereavement benefits in April 2001.

UAT and the Commissioners do not have the power to award damages. County Court? But if less than £5,000 – small claim – then no legal help for court work

See also R (N) v SS for the Home Department [2003] EWHC 207 – did not process appeal for 10 months, finally won appeal after 2 years. Breach of Article 8, damages awarded.

Is there an argument for complete withdrawal of last resort benefit e.g. for living together decisions or HRT. Asylum seekers have nowhere else to go – but domestic have Children Act payments. What if family made homeless due to delays in processing HB claim. Conrad concluded that HRA concentrates on civil and political rights not the type of issues raised within social security legislation. As a result progress will be slow and incremental.

Questions and Information Exchange

Marina Sergides (2 Garden Crt) raised the question of 'characteristic' in relation to Article 14 discrimination. Is it a question of stripping away the individual characteristics and then you are left with their 'status'. Currently arguing a HB case where client has been refused HB because 'absent from home' as he was in custody. Client on bail, but cannot live in a bail hostel – due to health reasons.

CH suggested that the composite question in Carson provides a broader approach. Status – restriction on liberty – being subject to bail.

Paul Stagg (No.1 Serjeants' Inn) raised the issue whether it is correct to ask a tribunal to strike down a regulation which in effect gives the power to make the payment of benefit itself.

CH suggested that a less drastic approach is to ask the tribunal to 'read in' additional words to make it HRA compatible. Lessons can be drawn from how the English Courts responded to European Union Law – see Lister v Forth Dry Dock & Engineering Co. Ltd [1990] 1 AC 546.

Ranjiv Khubber – (6 KBW) referred to Saleem common law right to court hearing – common law must be analogous. Re: S [2002] 2 WLR 720 has emasculated the scope for reinterpreting legislation under section 3 of HRA. RK referred to ongoing 'on arrival' case CIS/2702/2000 (R.J.C. Angus) which is shortly due to arrive in the Court of Appeal. This concerned an asylum seeker who put herself in the hands of an agent when passing through immigration control. The Commissioner held that in the absence of duress, the claimant had not made an application for asylum at the earliest practicable opportunity (CIS/2719/1997). The case raised points in relation to Article 31 of the United Nations Convention on the Treatment of Refugees as applied in R v Uxbridge Magistrates Court ex parte Adimi (2000) 3 W.L.R. 434. But it also raised arguments on Articles 3 and 14 of ECHR – are the use of vouchers degrading? But threshold low – see R (on application of Q) v SS Home Department [2003] EWCA Civ 364 homelessness is not enough. Decision on claim before October 2000; so raised the issue does HRA 1998 has retrospective effect. RK suggested that despite a series of negative decisions from the Commissioner on this point there were still arguments to be put on this issue.

Commissioner Angus has granted leave to appeal. May benefit from recent decisions on NAS support, see R (on the application of Husain) v Asylum Support Adjudicator [2001] EWHC Admin 852. This held that a destitute asylum seeker who was receiving support under the NASS scheme had a right to support and this was a civil right within the meaning of Article 6. There was little practical difference between support under NASS and support under ordinary social security provisions. See also R (on the application of Q and others v SS Home Department 19 Feb 2003 Admin Crt (Adviser 98).

A Williams – CAB raised a case where a prisoner had lost entitlement to IB. Agreed that incapacity can be 'backdated' so as to satisfy the qualifying period for IB based on IS, but wanted to know if the loss of right to contributory benefits IB was in breach of HRA. IS was not an option because in receipt of industrial injury benefit. ECHR case law suggests not a breach to withdraw contributory benefits whilst in custody.

CH raised another issue concerning IB. Where IB is stopped for failure to attend a medical exam (PCA) but the award was made on the grounds that claimant exempt from having to undergo a PCA. Claimant only finds out that award is limited in time based on estimate given by medical adviser who estimates how long before next medical examination. If deemed incapable for an indefinite period in law but in fact review after a fixed period is still attached to the award.

RK explained how he had raised Articles 8 and 14 in several recent habitual residence cases but the matter had been resolved before reaching tribunal – was this a coincidence?

Julie Hinnigan (Alexander & Partners Solicitors) - raised the issues of delay at TAS if you told them that you wished to use HRA 1998 arguments. This seemed to cause extra delay – as the case could be allocated to special listing [see President's Protocol 6 www.appeals-service.gov.uk/advisory_centre/internal_guidance.] CH said this raised the general issue of how the pace of proceedings was dictated by one of the parties – relationship between TAS and the Secretary of State. TAS – cases listed in chronological order – no system for expediting cases. JH wondered if there was an analogy with speedy hearing for mental health patients where court held there was a duty to hear applications as soon as reasonably practicable R (on the application of KB and others) v Mental Health Review Tribunal [2003] EWHC 1094 Admin.

John Beckley – Tower Hamlets Law Centre told the meeting that he had recently been involved in a case before Mr Commissioner Turnbull regarding Article 6 delay CIS/4220/2002. In that case the claimant had been in receipt of IS when he travelled to Bangladesh for seven months. He returned in June 1996 and the Benefit Agency discovered he had been absent in September 1996, nonetheless, the matter was not referred to the overpayment section until July 2000 and the appeal was heard two years later. The Commissioner held that for Article 6 purposes time did not run until the overpayment decision was made in 2000. DR observed that the case did establish the principle that that time could run from the decision on the claim or a supersession and does not necessarily start to run only at the time the claimant appeals to a tribunal.

P Stagg mentioned old transitional offset cases before Oct 2000. Now that CA has ruled reg 104 does not have retrospective effect. Member's attention was also drawn to the new website specialising in housing benefit issues: www.hbinfor.org

Meeting closed; with thanks to speaker and contributions from the floor. The group also announced its intention to increase membership and participation in the practitioner's group and extended an invitation for new members and for members to join the executive committee. Anyone interested to joining the group can e-mail: jo.silcox@fru.org.uk for further information.

Next meeting to be announced in the autumn.