

Has the Human Rights Act Made a Difference?

Four years on, Janet Arkininstall looks at the impact of the *Human Rights Act 1998* on criminal law.

Many readers of CJM will recall the hysteria on the part of some sections of the media which accompanied the entry into force of the *Human Rights Act* in October 2000 – it was predicted that the sky would fall in on law-abiding citizens as hundreds of dangerous criminals took advantage of their new charter. Now is an opportune moment to reflect on whether developments in criminal justice in the last four years have borne out such a fear, or whether, as this article will argue, it has been pretty much business as usual for the criminal justice system, with changes in some aspects of the criminal law, these changes identifiable mainly in the way in which legal issues are examined rather than in the result.

That the latter position has prevailed will not surprise those aware of the fact that it was British lawyers, predominantly, who drafted the *European Convention on Human Rights*, and that the human right to a fair trial consequently embodies those values that have long been considered essential for a fair criminal law system. The main principle, set out boldly in art. 6(2), is the presumption of innocence, identified all those years ago in *Woolmington*¹ as the golden thread running through the web of English criminal law, and from which other standards (such as the privilege against self-incrimination) derive. Then article 6(3) creates certain practical rights – to be informed of the charge, time to prepare a defence, legal aid, confrontation of witnesses, an interpreter – that have generally been accepted in the UK as standard rights for some time.

Prison statistics certainly do not suggest that any great numbers of people have been released as the tabloids feared, or that sentences have become more lenient.

What practical effects have there been? One thing is clear – prison statistics certainly do not suggest that any great numbers of people have been released as the tabloids feared, or that sentences have become more lenient. On the positive side, the huge majority of criminal decisions have become more transparent because magistrates are now required to give reasons – and surely even a Daily Mail reader would find this no bad thing?

We have seen the eventual loss of the Home Secretary's power to set the minimum term for mandatory lifers, following a slow process of attrition in which each category of lifer prisoner had to make the laborious and costly legal journey to Strasbourg. Eventually the House of Lords held in *Anderson* that this law offended the principle that a criminal tribunal, even when exercising a sentencing function, must be 'independent and impartial' of the executive.² The resulting declaration of incompatibility, one of a handful made in relation to criminal justice issues, resulted in the Home Secretary losing his tariff-setting power. This, of course, was only to be replaced with a sentencing guideline for murder created by parliament in the

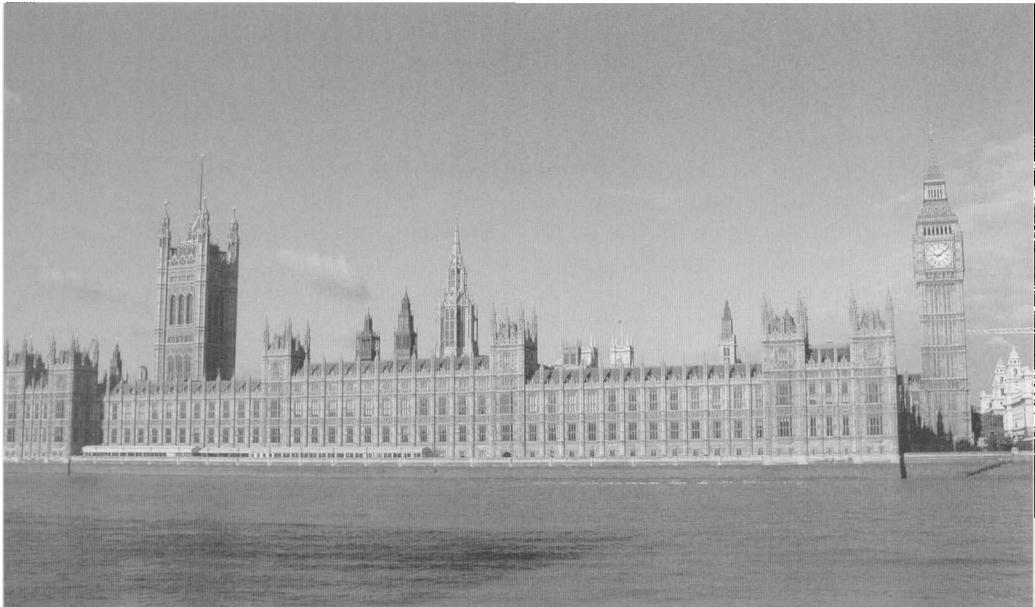
Criminal Justice Act 2003, something which probably will, in due course, be challenged.

The ability of the criminal law to stifle political dissent has arguably lessened. The right to freedom of expression was instrumental in the quashing of a conviction for an offence of causing harassment, alarm or distress³ to US soldiers arising from the denigration of an American flag during a protest, on the ground that the conviction was incompatible with article 10.⁴ A similar argument failed in respect of a conviction for the religiously aggravated offence of displaying a poster which was threatening, abusive or insulting. A BNP member had displayed a poster of the Twin Towers in flames, with a crescent and star in a prohibited sign, and the words 'Islam Out of Britain'. The court found that marking out his conduct as criminal was a necessary restriction of his qualified right to freedom of expression in order to protect two of the interests set out in article 10(2), namely, the prevention of disorder and crime and the protection of the rights of others.⁵

The rights of victims and witnesses were in issue in the infamous 'rape shield case', in which the House of Lords adopted the interpretive technique of reading down legislation to make it compliant with the *Human Rights Act*.⁶ The law in question prevented the defence from adducing any evidence from an alleged rape victim about her prior sexual conduct, in an effort to cause her less embarrassment and humiliation, including prior conduct with the accused. The Lords recognised that in some circumstances evidence of sexual conduct between

the victim and the accused could be relevant to the defence of consent, and found therefore that the blanket nature of the exclusion was a disproportionate restriction on the right of the defendant to a fair trial. However, it was possible to interpret the legislation compatibly if the default position of a ban on admitting the evidence was tempered by allowing its admission if relevant to a consent defence, and where it could be demonstrated that a failure to admit would endanger the fairness of the trial. Some commentators have suggested that such an interpretation has subverted parliament's clear intent; others argue that the case indicates that the interpretive obligation in section 3, to read and give effect to legislation in a way that is compliant with human rights 'so far as it is possible to do so', is a powerful and effective way to ensure that criminal trials are conducted fairly depending on their individual facts.

Subsequently, this interpretive obligation has been applied in various other criminal law contexts. In relation to sentencing powers, the Court of Appeal held that to impose an automatic life sentence, pursuant to section 109 of the *Powers of Criminal Courts (Sentencing) Act 2000*, on an offender who did not



constitute a significant risk to the public, would be disproportionate and breach the article 5 right to protection from arbitrary detention.⁷ The section 3 obligation to interpret legislation compatibly required that where the offender was not a risk this fact would constitute 'exceptional circumstances' so that section 109 would not apply, and thus allow the court to avoid the life sentence.

A number of cases have concerned the legislative technique of imposing on the defendant the burden of proving a defence, a favoured way of reducing the right of the defendant to the presumption of innocence and making it easier for the prosecution to prove a charge. In *R v Lambert*⁸ the House of Lords held that an attempt to do this in relation to a defence of lack of knowledge of drugs located in a container was compatible with article 6(2) only if the legislation was interpreted as imposing an 'evidential burden', that is a duty on the accused to adduce some evidence of his state of mind indicating lack of knowledge, with the prosecution then having to prove knowledge beyond doubt. Imposing a legal burden on the accused, so that to secure an acquittal they must prove on balance that they did not know of the drugs, was inconsistent with the presumption of innocence. Subsequent cases have considered a range of offences in which burdens are imposed on the defence, culminating in the recent case of *Attorney General's Reference (No 1 of 2004)*,⁹ in which the Court of Appeal laid down guidance to assist courts in determining whether a legal burden on the accused was proportionate and justifiable, or not, in which case it should be read down to an evidential burden if this was possible, or declared incompatible with article 6(2) if it was not.

The meaning of 'criminal charge' in article 6(2) and (3) has been in issue in a number of cases. Labelling proceedings as something other than criminal (i.e. administrative or civil) is one way states attempt to avoid the more onerous criminal protections, and the Strasbourg Court has developed the 'autonomous concept' doctrine to prevent this occurring unfairly.

In *McCann*,¹⁰ for example, the defendants argued that to classify proceedings for an anti-social behaviour order as civil, rather than criminal, with consequences that the standard of proof of the alleged misbehaviour was on the lesser balance of probabilities and that hearsay evidence was admissible, was inconsistent with article 6 and European Court jurisprudence. The House of Lords disagreed, and found that the predominant purpose of an ASBO was preventative rather than punitive, despite the very serious consequences of breaching an order. As such, the civil classification was correct. Although finding that hearsay evidence could be admitted, in view of the serious penalties for breach of an order, the House found that a heightened civil standard of proof, in practice indistinguishable from proof beyond reasonable doubt, should apply. Alternatively, in *International Transport v Home Secretary*¹¹ the imposition of a flat £2000 fine on lorry drivers in respect of any person found to be hiding on board to avoid immigration control was held to amount to a criminal charge.

The conflict between the right to privacy of those convicted or suspected of offences and the need for the authorities to share and disseminate information to protect the public from perceived risk has been the subject of many human rights challenges. Most recently, a Chief Constable's decision to release information relating to an unproved allegation of sexual offences made against a social worker to his potential employer was upheld.¹² The Court of Appeal held that the police were under a duty to disclose such information unless there was a good reason for not disclosing it. Although the Court recognised how damaging disclosure was to X, there was a public interest in the information being made available to a potential employer which outweighed X's right to privacy. An 'offender naming scheme' operated by the Essex Police was in issue in *R (Ellis) v Chief Constable of Essex Police*.¹³ Although the High Court expressed considerable concern at the negative effects such a policy could have in terms

Continued on page 39

Continued from page 19

of an offender's rehabilitation and upon his family, as well as the discrimination between offenders who were publicised and who would rightly see this as an additional punishment, and those who were not, the court declined to declare that such a scheme was incapable of being operated lawfully. However it warned that the police would have to undertake considerable care in investigating the circumstances of those they wished to name.

Contrary to some judicial comment in earlier Human Rights Act cases that suggested that incorporation of the European Convention on Human Rights into domestic law would create no change in the criminal law and justice system whatsoever, four years on it is clearly possible to identify some significant changes. But the fear that the chief beneficiaries of the Human Rights Act would be those accused and convicted of criminal offences has not been borne out. Sadly, the hysteria referred to in my opening paragraph does not seem to have faded – in August the Shadow Home Secretary announced a pre-election Tory commission into the operation of the Act, much of which will no doubt focus on its impact on crime, as the Conservatives vie with Labour to be the most reactionary party in relation to law and order.

Janet Arkinstall is the Director of Criminal Justice policy at JUSTICE, a human rights and law reform organisation.

References

- ¹ *Woolmington v DPP* [1935] AC 462
- ² *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837
- ³ section 5 Public Order Act 1986
- ⁴ *Percy v Director of Public Prosecutions* [2001] EWHC Admin 1125, [2002] Crim L R 835
- ⁵ *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin)
- ⁶ *R v A (No 2)* [2002] 1 AC 45
- ⁷ *R v Offen* (2001) 1 WLR 253
- ⁸ *R v Lambert* [2002] 2 AC 545
- ⁹ *Attorney-General's Reference (No 1 of 2004)*, *The Times*, April 30, 2004
- ¹⁰ *Clingham v Kensington & Chelsea Royal LBC; R (McCann) v Crown Court at Manchester* [2003] 1 AC 787
- ¹¹ [2002] 3 WLR 344
- ¹² *R (X) v Chief Constable of West Midlands Police* [2004] EWCA Civ 1068
- ¹³ [2003] EWHC 1321 (Admin)

Notes for Contributors

- Each quarterly issue of CJM focuses on a special area of criminological interest. CJM 58 will cover 'Crime and Technology'. CJM 59 will be our issue on the media. Contributors are advised to discuss their ideas with Valerie Schloredt before submission. Please ring the office or email: valerie.schloredt@kcl.ac.uk
- Articles (max length: 1200 words) should be jargon free, with no more than six references, and written to appeal to a well-informed, but not necessarily academic audience. Photos or illustrations are particularly welcomed. Publication, even of invited articles, cannot be guaranteed and we reserve the right to edit where necessary. Articles, letters and reviews can only be accepted on this basis.
- Editorial policy for CJM is determined by the editorial board, which is in turn accountable to, and appointed by, the council of the Centre. The views expressed by contributors are their own and are not necessarily the views of the Centre.
- CJM is sent free to all members of the Centre and additionally to a growing number of independent subscribers, both nationally and internationally. Advertising is welcomed. Please contact Julie Grogan on 020 7848 1688.

CRIMINAL JUSTICE MATTERS ISSN: 0962 7251

Number Fifty Seven, Autumn 2004. Copyright 2004 CCJS.

Criminal Justice Matters is published by the Centre for Crime & Justice Studies,
Law School, King's College London, 26-29 Drury Lane, London WC2B 5RL. Tel: 020 7848 1688 Fax: 020 7848 1689
E-mail: ccjs.enq@kcl.ac.uk Web-site: <http://www.kcl.ac.uk/ccjs> Registered Charity No. 251588

Editorial Board: Valerie Schloredt (Editor),

Una Padel, Rob Allen, Hazel Croall, Peter Francis, Penny Fraser, Barry Loveday, Rob Mawby, Andrew Sanders,
Clare Sparks, Kevin Stenson, David Wall.

Director: Una Padel; Office Manager: Julie Grogan; Publications Editor: Valerie Schloredt

Research Director: Roger Grimshaw; Admin Assistant: Sylvia Kusi-Appouh

Research Officer: Rose Smith; Information Officer: Lee Delaney; Events Organiser: Sunita Patel

Typesetting and production: Amberwood Graphics. Printing: Anglebury Press Ltd.

Unless otherwise indicated, photographs are illustrative only and their use in no way suggests any criminal association or involvement on the part of the subjects.