THE
CAMBRIDGE LAW JOURNAL

VOLUME 59, PART 1 MARCH 2000

CASE AND COMMENT

PLACING THE ONUS BACK ON THE TRIAL

GIVEN the importance of the case, it is unsurprising that the House of Lords should reach so rapid a decision in *R.* v. *Director of Public Prosecutions, ex p. Kebilene* [1999] 3 W.L.R. 972 (on appeal from the Divisional Court, noted at (1999) 58 C.L.J. 468). It will remembered that the Divisional Court granted a declaration that the D.P.P.'s decision to continue his consent to prosecutions under the reverse onus provisions of the Prevention of Terrorism Act 1988 (P.T.A.) was unlawful. According to the lower court, these provisions were in irreconcilable conflict with Article 6(2) of the European Convention on Human Rights which provides that: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

The House of Lords agreed with the Divisional Court in holding that the defendants had no legitimate expectation that the D.P.P. would exercise his discretion in accordance with the Convention and (with the exception of Lord Hobhouse of Woodborough) that section 29(3) of the Supreme Court Act 1981 did not prevent the court from reviewing the decision to prosecute. However, the House unanimously allowed the D.P.P.'s appeal on the ground of the common law presumption that the court will not judicially review a decision to prosecute unless there are exceptional circumstances, such as dishonesty or bad faith. The rationale for the presumption appears to be to provide the most effective remedy to the defendants and, more importantly, to avoid disruption to the criminal process. The appropriate forum in which to raise their challenge would therefore be at trial and on appeal rather than by

https://doi.org/10.1017/S0008197300210015 Published online by Cambridge University Press

halting the prosecution and invoking the supervisory jurisdiction of the High Court.

The House did not question the power of the Divisional Court to examine the legality of the advice upon which the Director had proceeded, but differed from the lower court on the appropriate conclusion to be drawn from it. Lord Steyn (with whom Lords Slynn of Hadley and Cooke of Thorndon agreed) left open the question of whether it was possible to eliminate the apparent incompatibility between the P.T.A. and the Convention through interpretation. Lord Hope of Craighead felt that further guidance was needed having regard to the importance of the issues raised by the appeal, the likelihood of similar challenges to reverse onus provisions in other legislation and the need to advise bodies such as the Scottish Parliament which are already bound by those Convention rights contained in the Human Rights Act 1998. Lord Hope therefore set out a structure for analysing whether reverse onus provisions could be interpreted in a manner consistent with Article 6(2) rights. His Lordship's scheme requires the court to examine whether Parliament intended to shift the persuasive or the evidential burden, whether the presumption of guilt is mandatory or discretionary, whether the onus is reversed in relation to an essential element of the offence or merely an exception or proviso, how much evidence is required of the prosecution before the burden is shifted and the appropriate balance between the interests of the individual defendant and those of society generally. In relation to this last factor, his Lordship noted the singular nature of terrorist crime and "the threat which ... [it] ... poses to a free and democratic society" (at 1000B).

The length and complexity of this analysis, in the face of apparently incompatible statutory norms, reveals how seriously at least some members of the House of Lords wish domestic courts to take the obligation to interpret legislation "so far as it is possible to do so" in conformity with Convention rights (Human Rights Act, s. 3). This fits well with Lord Hope's statement that "incorporation of the European Convention ... into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary" (at 988E). However, it would be misleading to suggest that the tenor of Lord Hope's speech was entirely in favour of judicial activism. One area of controversy concerning the incorporation of the Convention is whether it is legitimate for domestic courts to adopt the concept of the "margin of appreciation" from Strasbourg doctrine. The better view is that this notion is confined to the jurisprudence of supranational legal bodies when confronted with an issue to which

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the domestic legal systems within the relevant international legal order give too diverse a range of responses to permit the formulation of a uniform rule. Lord Hope correctly rejects incorporation of the margin of appreciation, but does introduce the notion of "the discretionary area of judgment" which he defines as:

> questions of balance between competing interests and issues of proportionality ... where ... difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. (at 994A-B)

Although the P.T.A. is soon to be replaced by a permanent Act, the courts are unlikely to be able to avoid this issue for long. The Terrorism Bill presented to the House of Commons on 2 December 1999 contains provisions in Clauses 55 and 56 which substantially replicate the old law. Interestingly, the Home Secretary felt able to preface the Bill with a statement of its compatibility with Convention rights.

IVAN HARE

HUMAN RIGHTS IN THE HOUSE OF LORDS: WHAT STANDARD OF REVIEW?

THE applicants in *R.* v. *Secretary of State for the Home Department, ex p. Simms* [1999] 3 W.L.R. 328 were convicted murderers whose applications for leave to appeal had been refused but who continued to protest their innocence. To this end they gave interviews to investigative journalists, hoping that this would ultimately result in their cases being referred back to the Court of Appeal. However, paragraph 37 of the Prison Rules 1964 provides that professional visits by journalists to prisoners should not generally be allowed and that any journalist wishing to visit a prisoner *qua* relative or friend must undertake not to publish anything disclosed during the visit. Paragraph 37A stipulates that if, exceptionally, a journalist is permitted to make a professional visit, he must undertake to abide by any conditions prescribed by the prison governor. In the instant case the prison authorities, pursuant to a Home Office policy directing prison governors to impose a blanket ban on all visits by journalists in their professional

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