THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

ARTICLE 6(1) of the European Convention on Human Rights and Fundamental Freedoms provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent tribunal established by law" (emphasis added). The reasonable time guarantee is an important protection that gives a defendant who is not guilty the opportunity to clear his name without excessive delay. It also prevents a guilty defendant from undergoing the additional punishment of protracted delay (see *Wemhoff* v. *Federal Republic of Germany* (1968) 1 E.H.R.R. 55, para. 18; *Stögmüller* v. *Austria* (1969) 1 E.H.R.R. 155, para. 5; *H* v. *France* (1989) 12 E.H.R.R. 74, para. 58). The House of Lords' decision in *Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 W.L.R. 1 is the latest domestic decision attempting to settle the vexed question of the precise scope of this guarantee.

In April 1998 there was a disturbance at an English prison. Proceedings were brought against several inmates, and when the matter finally reached court in January 2001, the judge stayed proceedings on the ground that there had been a violation of the reasonable time requirement in Article 6(1). The Attorney General referred the matter to the Court of Appeal, which held that a stay would have to be imposed if a fair trial were not possible; such cases apart, however, a stay would not normally be appropriate (*Attorney General's Reference (No. 2 of 2001)* [2001] EWCA Crim 1568, [2001] 1 W.L.R. 1869).

On the present application, the first question for the House of Lords was whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in circumstances where the accused cannot demonstrate any prejudice arising from the delay. In other words, does the breach lie in the holding of a trial after the lapse of a reasonable time, or solely in the State's failure to hold the trial within a reasonable time? Under the former construction, holding a trial is incompatible with the Article 6(1); under the latter, it is not.

As Lord Bingham observed (at para. [20]), many highly respected courts around the world have taken the former view. Significantly, the majority of the Privy Council held as a Scottish devolution issue in *H.M. Advocate* v. *R* [2002] UKPC D3, [2003] 2 W.L.R. 317 that in continuing to prosecute criminal charges after the lapse of a reasonable time, the Lord Advocate would act incompatibly with Article 6(1). The majority of the House of Lords

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(Lords Bingham, Nicholls, Hoffmann, Steyn, Hobhouse, Millett and Scott), however, declined to follow the Privy Council and held that breach consists in the delay that has accrued, not in the prospective hearing. This decision was based largely on the fact that once spent, time cannot be recovered and so if a breach of the reasonable time requirement is shown to have occurred, it cannot be cured. It would, Lord Bingham said, "be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other Article 6(1) rights" (para. [20]).

The effect of this decision is that criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in Article 6(1) only if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the accused. If neither of these conditions is met, the appropriate remedy will depend on the nature of the breach and all the circumstances, including the stage of proceedings at which the breach is established. Lord Bingham suggested that if the breach is established before the hearing, appropriate remedies would include public acknowledgement of the breach, action to expedite the hearing and perhaps, if the defendant is in custody, his release on bail. If the breach is established after the hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant (para. [24]).

With respect, this undermines the principle that the reasonable time requirement is a separate and independent guarantee and not simply part of the overriding right to a fair trial (see *Porter* v. *Magill* [2001] UKHL 67, [2002] 2 A.C. 357, 497). The opposite conclusion reached by the Privy Council in *H.M. Advocate* v. *R* and the (Scottish) minority (Lords Hope and Rodger) in the present case, is more attractive:

> [T]he fact that this particular breach of article 6(1) cannot be cured by holding a fresh hearing is not just some quirk of the Convention .... On the contrary, it stems from the very nature of the wrong which the guarantee is designed to counteract .... When the authorities delay unreasonably, months or years of the defendant's life are blighted. He cannot have them over again; they are gone forever. By signing up to article 6(1) states undertake to avoid inflicting this kind of harm. (para. [151], *per* Lord Rodger.)

Pre-trial delay where the accused is held in custody is the subject of extensive regulation (see, *e.g.*, Prosecution of Offences (Custody Time Limits) Regulations 1987 (S.I. 1987 No. 299) as amended; *R.*

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v. *Manchester Crown Court, ex p. McDonald* [1999] 1 W.L.R. 841). But where the accused is not in custody, protection against dilatory prosecution is minimal. The interpretation of Article 6(1) favoured by the minority would have remedied this and had a salutary effect on the criminal justice system. The failure of the House of Lords to follow the Privy Council's lead makes it imperative that Parliament should intervene and enact the relevant standards to ensure expedition as well as fairness in prosecutions (for further discussion in the context of youth justice see J. Jackson, J. Johnstone and J. Shapland, "Delay, Human Rights and the Need for Statutory Time Limits in Youth Cases" [2003] Crim.L.R 510).

The second question for their Lordships was an important practical point: in determining whether a criminal charge has been heard within a reasonable time, when does the relevant time period commence? Their Lordships were unanimous; the relevant time period commences at the earliest time at which a defendant is officially alerted to the likelihood of criminal proceedings against him, which in England and Wales will ordinarily be when he is charged or served with a summons.

Finally, the minority's interpretation of Article 6(1) raised an interesting additional question. Section 57(2) of the Scotland Act 1998 provides that a member of the Scottish Executive, including the Lord Advocate as public prosecutor, has "no power" to act in a way that is incompatible with a Convention right. Thus in *H.M. Advocate* v. *R*, having held that continuing with the prosecution would be incompatible with the defendant's Convention right, the Privy Council had no choice but to impose a stay. Must the same result follow under section 6(1) of the Human Rights Act 1998 which provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right"?

The majority held that it must, since section 6(1) prohibits public authorities from acting incompatibly with Convention rights (see also M.C. Elliott, "Human Rights as Interpretative Constructs: The Constitutional Logic of the Human Rights Act 1998" in C.F. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford 2000)). The minority rejected the notion that section 6(1) imposes *a vires* control on public bodies, holding instead that "Section 6(1) makes acts which are incompatible with the Convention unlawful simply so that the courts can grant a remedy in terms of section 8(1). In other words, taken together, these provisions make up the mechanism by which our courts are to grant remedies for breaches of people's Convention rights" (para. [174] *per* Lord Rodger).

This is a novel interpretation of section 6(1), but can it have been the intention of Parliament, in enacting section 6(1) HRA

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1998 and section 57 SA 1998, to introduce qualitatively different schemes of protection for Convention rights in England and Scotland? More fundamentally, notwithstanding the remedial provisions of section 8(1) HRA 1998, one ought to question whether it is right in normative terms that public authorities acting incompatibly with Convention rights should be regarded as acting intra vires.

RICHARD MOULES

RECOGNITION OF DIVORCE WITHOUT RECOGNITION OF STATEHOOD

IN 2001 Sumner J., sitting in the Family Division, acknowledged the validity of a divorce effected under the law of the Turkish Republic of Northern Cyprus (TRNC), in *Emin* v. *Yeldag* [2002] 1 F.L.R. 956. This decision created a precedent in English law concerning recognition of acts of entities not recognised as States, yet it went almost unnoticed, perhaps indicating its timeliness.

The TRNC is a Turkish-Cypriot entity in the northern part of Cyprus, which in 1983 purported to secede from the Republic of Cyprus. Following UN Security Council Resolution 541 (1983) which declared the purported secession illegal and invalid, the TRNC has remained unrecognised by all States except Turkey.

The marriage of the applicant wife (Emin) was dissolved by a court in the TRNC in accordance with the law and practice of the TRNC. The applicant requested that the overseas divorce be recognised in England, so that she could be granted leave to apply for financial relief. The arguments therefore revolved on the validity of the divorce decree in English law, given that the UK Government does not recognise the TRNC as a State.

A. Non-recognition in English law

It was for long established in English law, that where the executive withheld recognition from a purported State or government, courts should follow suit. This meant not only that they should not make their own determination on statehood, but also that they could not attribute any validity to the acts of the entity in question insofar as those were dependent on the unrecognised status. The rationale for this policy was that the judiciary and the executive should speak with one voice, so that the judiciary did not frustrate the executive's exercise of non-recognition (*A.M. Luther* v. *James Sagor & Co. (No. 1)* [1921] KB 456).

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