HUMAN RIGHTS COMMISSION AND LAW SOCIETY OF IRELAND

CONFERENCE ON NEW HUMAN RIGHTS LEGISLATION

ISSUES FOR THE JUDICIARY IN THE APPLICATION OF THE ECHR ACT, 2003

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The Human Rights Commission and the Law Society are to be congratulated on organising this conference on new human rights legislation. Since legislation in this area, in the form of the European Convention on Human Rights Act, 2003, is already on the statute book in Ireland and will be in force later this year, an awareness of how legislation of a somewhat similar nature has been operating in the neighbouring common law jurisdictions since it was enacted three years ago, will obviously be of considerable assistance in this context.

The Act, it will be noted, resembles the corresponding legislation in the United Kingdom – The Human Rights Act, 1998 – in at least some respects. At the most fundamental level, it adopts the same approach as the 1998 Act in refraining from incorporating the European Convention in domestic law. In this jurisdiction, in contrast to the position of the United Kingdom, that would undoubtedly have necessitated the amendment by referendum of the Constitution, since, in the absence of any such amendment, any provisions of the Convention which were in conflict with any provisions of the Constitution could not be given legal effect by legislation simpliciter.

The 2003 Act seeks to give what is described in the long title as "*further effect*" to the Convention by the adoption, broadly speaking, of three strategies. First, it requires the courts, in interpreting and applying any statutory provisions or rules of law, to do so "*in a manner compatible with the State's obligations under the Convention provisions*". Secondly, it obliges the organs of the State to perform their functions in a manner compatible with the State's obligations under the Convention and provides for an award of damages in the High Court or the Circuit Court where there is a breach of this requirement. Thirdly, it enables the High Court or the Supreme Court, where no other legal remedy is "*adequate and available*", to make a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

While any view by a serving judge at a gathering such as this as to how an enactment may be applied by the courts must be provisional in nature, since judges have always found it necessary to make clear that they cannot be bound in the exercise of their judicial functions by any extra-curial comments they may make from time to time, some general observations can safely be made.

I consider first the obligation imposed by s. 2 as to the interpretation of existing or future law in the light of the Convention. Section 2(1) provides that

> *"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."* **[Emphasis added]**

Even in the absence of an express statutory provision of this nature, Irish courts have considered themselves entitled to have regard to the provisions of the Convention in interpreting and applying the law. Thus, in *The State (Healy) –v- Donoghue* [1976] I.R. 325, O'Higgins C.J., in considering whether the provisions of Article 38 of the Constitution, in requiring a criminal trial to be conducted "in due course of law", imported a requirement that an accused person should have an adequate opportunity to defend himself, drew attention to Article 6 para 3(c) of the Convention which acknowledges that every person charged with a criminal offence shall have the right

> *"to defend themself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."*

In coming to the conclusion that the courts, in upholding the right of an accused person to a trial in due course of law, should ensure that an accused person had appropriate legal assistance in resisting a serious charge, he drew support from the provisions of the Convention as indicating that this was a right widely acknowledged throughout the western world.

Again, in *O'Domhnaill –v- Merrick* [1984] I.R. 151, the majority of the Supreme Court were of the view that the courts, in deciding whether they should decline to allow civil proceedings to continue where there had been inordinate and inexcusable delay in their prosecution, were entitled to have regard to the international obligations

which the State had assumed under the Convention. Addressing the relevant provisions of the Statute of Limitations, 1957, Henchy J. observed:

> *"Apart from implied constitutional principles of basic fairness of procedures, which may be invoked to justify the termination of a claim which places an inexcusable and unfair burden on the person sued, one must assume that the Statute was enacted (there being no indication of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations. The relevance of that rule of statutory interpretation in this case lies in the fact that Article 6(1) of the [Convention] provides:-*
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> > *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law."*

Similarly, it was held in *The State (D.P.P.) –v- Walsh* [1981] I.R. 412, that our law as to criminal contempt of court should be presumed to be in conformity with Articles 5 and 10(2) of the Convention. (Article 5 provides that no one is to be deprived of his liberty save in the cases specified in the Article and in accordance with procedures prescribed by law and Article 10 guarantees the right to freedom of expression [see also *Desmond –v- Glacken* (No. 1) [1993] 3 I.R. 1.)

It is also of interest to note that Barrington J., speaking for the Supreme Court in *Doyle –v- Commissioner of An Garda Síochána* [1999] 1 I.R. 249, indicated that it could be helpful to an Irish court to have regard to the Convention when it was attempting to identify the unspecified rights guaranteed by Article 40.3 of the Constitution.

Thus, while it might be going too far to say that s. 2(1) is no more than declaratory of the existing law, it is not as innovative in its effect as a first reading might suggest. It also embodies an important caveat, i.e. that the court must apply the section "*subject to the rules of law relating to such interpretation and application*".

That caveat is of importance because of the well-established principles of statutory construction. While the primary task of a court in construing a statute is to determine as best it can what the intention of the legislature was, it is, as a rule, confined in ascertaining that intention to considering the actual language used in the statute, even though it might be surmised that this leads to a result not intended by legislature. However, there has also been a marked tendency in the later cases to depart from a literal construction where an obvious absurdity would result and to adopt the teleological or purposive approach favoured in the jurisprudence of the European Courts of Justice. (See, for example, *Nestor –v- Murphy* [1979] I.R. 326.) Nevertheless, the provision of this caveat, conspicuously absent from s. 3(1) of the U.K. Human Rights Act, 1998, may inhibit courts in doing violence to the actual language used by the Oireachtas in an attempt to bring a statute into conformity with the Convention.

The second strategy is embodied in s. 3(1) which requires that

> *"Every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."*

The President, the Oireachtas and the courts are all excluded from the definition of "*organ of the State*" by s. 1. (In contrast, under the U.K. 1998 Act, courts are expressly included in the corresponding provisions.)

Section 3(2) which empowers the High Court and [within its jurisdiction] the Circuit Court to award damages for breaches of this provision does not constitute as radical extension of our law as might at first appear. Since the decision of the Supreme Court in *Meskell –v- C.I.E.* [1973] I.R. 121, it has been accepted that a private law remedy in the form of an action for damages lies in respect of the breach of a constitutional right and that the plaintiff in such circumstances does not have to bring his proceedings within the framework of the existing law of torts by relying on an already existing tort . However, since a comparison of the terms of the Convention with the fundamental rights provisions of the Constitution indicates a substantial degree of overlapping in the rights guaranteed, the range of cases in which a new cause of action will be afforded to injured parties will be correspondingly confined.

Thus, to take those rights and freedoms guaranteed by the Convention which could reasonably be regarded as the most significant in practical terms, the Constitution protects the right to life and the liberty of the person, the right to a fair trial, the right to respect for private and family life, the right to property, freedom of assembly and

association and of movement, the right to marry and the right to earn one's livelihood.. (Four of these – the right to privacy, freedom of movement and the right to marry and earn one's livelihood– belong to the category of unenumerated rights, but that does not relieve the courts of their obligation to uphold them or affect the capacity of the person whose right has been violated to an appropriate remedy, including damages: see *Kennedy –v- Ireland* [1987] I.R. 587.)

It remains to be seen whether, as Lord Justice Laws suggests, the omission of the courts from the organs of state affected by the new provision means that , in the case of an action for damages for breach of a convention right, as distinct from a constitutional right, there will not be available a horizontal private law remedy against another citizen.

It is also undoubtedly the case that Article 40.6.1 of the Constitution, guaranteeing the right of citizens to express freely "*their convictions and opinions*" is couched in considerably more restricted terms than Article 10 of the Convention. It could also be said that the right to education guaranteed in Article 2 of Protocol No. 11 to the Convention might be construed as being in broader terms than the right to free primary education guaranteed by Article 42.4 of the Constitution. In the other areas with which the Convention deals, it is not easy to envisage circumstances in which a person could obtain an award of damages under s. 3 where he or she would be unable to recover damages for the breach of the corresponding constitutional right.

The third strategy adopted is the provision for a declaration of incompatibility in s. 5. A similar procedure is, of course, contained in the United Kingdom 1998 Act. Since the doctrine of parliamentary sovereignty, central in British constitutional law, would

not permit the striking down by the judiciary of legislation, it was thought that conformity with the Convention could best be achieved by enabling courts to grant such declarations.

The consequences, however, in the two jurisdictions are significantly different. In the United Kingdom, where such a declaration has been made, the relevant Minister, if he considers there are compelling reasons for so doing, may by order make such amendments to the legislation as he considers necessary to remove the incompatibility. It was clearly not possible for the Irish legislation to include such a provision, given the exclusive role of the Oireachtas in the making of laws under Article 15.2.1. The sole consequence of the granting of such a declaration would seem to be that, where a party has suffered injury or loss or damage as a result of the incompatibility, the government may make an *ex gratia* payment of compensation to the person concerned.

No doubt it will become standard practice in High Court proceedings challenging the constitutional validity of legislation to include a claim for a declaration of incompatibility with the Convention under s. 5 of the new Act. However, since, for the reasons I have already suggested, in a vast range of cases a person who suffers injury or loss as a result of the breach by the State in its legislation of a Convention right will be able to recover damages for the breach of his constitutional rights, the conferring on the government of an *ex gratia* power to award him compensation for a breach of the Convention right would seem to be of similarly limited significance.

While one can never predict with complete confidence the manner in which relatively novel legislation will operate in practice, it would seem to me that, given the extensive overlap between the protection afforded by the Constitution to fundamental rights and freedoms and the corresponding protection afforded by the Convention, the issues presented for the judiciary by the European Convention on Human Rights Act, 2003 may be less daunting than a casual acquaintance with the legislation might suggest.