

## CHAPTER FIVE

### The Government of Wales Act 1998 and Human Rights

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The final provisions of the Government of Wales Act 1998 took effect on 1 July 1999.<sup>1</sup> Elections to the Assembly took place on 6 May; and on the 26 May the “subject committees” required by section 57 of the 1998 Act were formed and the members assigned to their committees (it is likely that each Assembly member will be a member of at least three committees). Thirty-five days later the Assembly “went live” and 5,000 ministerial powers were transferred to it. All this was accomplished without any shadow period and effectively no new resources.

Initially it was anticipated that the Human Rights Act 1998 would come into force some time in 1999; this then changed to the suggested date of 1 January 2000; a “new Act for a new millennium”. The rumour then was maybe 1 April 2000; it is now to be October 2000. The reason, we are told, is judicial training (for which the Lord Chancellor has earmarked over £4.5 million), although there are suggestions that it is evidence of a faltering commitment to open government.<sup>2</sup>

Notwithstanding the English implementation problems, as an immense expression of confidence in the intellectual and administrative capabilities of the new Assembly members and the judiciary in Wales, Parliament has decreed that the Human Rights Act 1998 should come into effect in Wales on 1 July 1999. Section 107 and Schedule 8 are the human rights provisions of most relevance in the Government of Wales Act 1998 (a copy of section 107 and the relevant part of Schedule 8 are annexed to this chapter).

#### 1 Section 107

Section 107(1) provides that the Assembly has no power:

- (a) to make, confirm or approve any subordinate legislation, or
- (b) to do any other act,  
so far as the subordinate legislation or act is incompatible with any of the Convention rights.

The phrase ‘Convention rights’ is defined (by section 107(5)) as having the same meaning as in the Human Rights Act 1998.

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1 Commencement orders for most of the Act having already taken effect; see SI Nos. 2244 and 2789 (1998) and SI 1999 No. 118.

2 L. Clements, “The Human Rights Act – A new Equity or a new Opiate?” (1999) 26 *Journal of Law and Society* 000-000.

## 2. Schedule 8

Schedule 8 provides for the procedures to be followed when what is known as a “devolution issue” arises.<sup>3</sup> A “devolution issue” is defined in paragraph 1 of the Schedule. Initially the paragraph suggests that the phrase is to be given a restricted meaning, since sub-paragraph (a) describes it as including any question as to “whether a function is exercisable by the Assembly”. Professor David Foulkes describes this as the “narrow *vires* issue – can the Assembly exercise this particular function at all?”<sup>4</sup>

Sub-paragraphs (b), (c) and (d) however extend the meaning to include any question as to whether an act or omission (or purported or proposed act) of the Assembly is in accordance with its statutory duties and in particular whether such acts or omissions are compatible with any of the Convention rights. Potentially (as we shall see below) such a definition has very wide implications.

Schedule 8 details the procedures by which the courts may become seized of a devolution issue. Paragraph 2 states that proceedings may be instituted by the Attorney General or any other person (who is a victim of such an alleged *ultra vires* act – section 107(2)) and paragraph 3 provides for the Assembly to be served with notice of such proceedings and to have the right to be joined as a party. Paragraphs 6-11 of the Schedule enable the lower courts to refer “devolution issue” questions to higher courts for determination; essentially the Magistrates’ and Crown Court may make reference to the High Court. The Schedule also provides for appeals and the possibility of a leapfrog procedure, now detailed in ‘Practice Direction : Devolution Issues (and Crown Office applications in Wales)’ 30 June 1999.

In order to appreciate the likely human rights impact of the Government of Wales Act 1998, I propose to consider as a case example, a situation which may arise. Although in the short term we will have the application of the Government of Wales Act 1998 alone, I will consider the case example in the context of both this Act and the Human Rights Act 1998 being in force.

It is necessary therefore to remind ourselves of the main provisions of the Human Rights Act 1998. A brief resume of the Act is also annexed to this chapter, but most importantly for the present discussion:

- (a) section 3 provides that the Courts will be bound to interpret legislation so as to uphold the Convention rights and this rule of construction will apply to past as well as future legislation.
- (b) section 4 provides that the High Court does not have the power to quash primary legislation but will instead have power to declare it ‘incompatible’ with the Convention and this will almost invariably lead to parliamentary action leading to statutory amendment.
- (c) section 6 makes it unlawful for a public body to act in a way which is incompatible with the Convention

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3 Pursuant to section 109.

4 In his *Current Law Statutes Annotated* annotations to the Act.

- (d) section 8 provides that anyone who is materially affected by such an unlawful act will be able to bring proceedings against the authority including a claim for damages.

### 3 The Impact of the Convention

The example I would like to consider involves the re-run of a 1985 case concerning the recently departed and much lamented Mid-Glamorgan County Council. In 1982 the European Court of Human Rights held that the United Kingdom's policy of permitting corporal punishment in state schools was contrary to Article 1 of the First Protocol of the European Convention on Human Rights (*Campbell & Cosans v United Kingdom*<sup>5</sup>). Whilst the U.K.'s response to such judgments has not always been noted for its alacrity, in 1986 we brought our law into line with this decision via sections 47 and 48 of the Education (No. 2) Act 1986 which effectively outlawed corporal punishment in state schools.

Midway between these two events, Mrs Jarman refused to send her son to the local school in mid-Glamorgan on the grounds that he might there be the victim of corporal punishment. She was convicted and went by way of case stated to the Divisional Court. There counsel argued that that she could not be guilty in such circumstances since that would fly in the face of the European Court's decision. As was so often the experience of the young Mr Sedley, the Court was not moved; it held that the section created in effect an absolute offence.

Imagine the scene in England after the Human Rights Act 1998 has come into force. A frail single mother is being prosecuted in the magistrates' court for failing to ensure that her strapping 12 stone 15 year old son goes to school.<sup>6</sup> She explains that he refuses to go and he explains that he has no intention of going to school and there is nothing she can do to make him. The local authority lawyer recites the fact that the offence is an absolute one; every justices clerk knows this to be the case and if there is any doubt a quick reference to Stone's Justices Manual will confirm this; the authority being *Jarman v Mid-Glamorgan Education Authority*.<sup>7</sup> *Jarman* is just one of hundreds of precedents that we as lawyers unconsciously rely upon every day as we tip toe through our domestic common law system. All this will change, come the implementation of the Human Rights Act 1998 and the Government of Wales Act 1998.

The parents' lawyer will explain to the court, in equally simple terms, that by virtue of sections 2 and 3 of the Human Rights Act 1998, it is under a duty to construe legislation so as to ensure that it is in compliance with the Convention and is obliged to have regard to *Campbell & Cosans v UK* and other relevant cases. The Human Rights Act 1998 is an Act which on day one of its implementation comes with 30 years of judicial precedents attached.

Quite simply the lawyer explains, the Justices are not only not bound by the High Court decision in this case, they are obliged to reject its interpretation. That by virtue of section 3 of the Human Rights Act 1998 the court must construe section 444 of the Education Act 1996 so as to conform with the Convention and clearly it cannot be right that his client be

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5 4 E.H.R.R. 293 (25 February 1982), Series A No.48.

6 Education Act 1996, section 444.

7 *Law Society's Gazette* (1 May 1985), p. 1249.

compelled by the domestic law to use physical force on a child;<sup>8</sup> that it is contrary to Article 6 that she be punished because of the *mens rea* of another person.<sup>9</sup> He will argue that had the Divisional Court considered the Convention when it came to its decision in 1985 it could not possibly have come to the same conclusion. The lawyer might add for good measure that if the Justices were to decline to accept this line of argument, then the case might eventually end up at the Court of Appeal and there is a good chance that someone called Sedley might end up hearing it; for Mr Sedley not only achieved greatness by becoming a professor of law at Cardiff, he has also done not at all badly in London. In the face of such argument the least the justices will have to do, is rollup their sleeves and apply their minds to the question. It will not, however, be so simple in Wales.

#### 4 The Impact in Wales

The defence lawyer might, as soon as the prosecution is commenced, ask the Assembly to direct the LEA not to proceed. First of all he will need to decide if the Assembly has the power to issue such a direction. The power of the Secretary of State to secure proper performance of an LEA's functions (of whatever nature) is contained in section 497A of the Education Act 1996 (as amended by section 8 of the School Standards and Framework Act 1998).

He must next turn to The National Assembly for Wales (Transfer of Functions) Order 1999 to see if the powers under section 8 of the 1998 Act (and those under section 497A of the 1996 Act) have been transferred to the Assembly, and we see that they have.<sup>10</sup> He will also have to look to see if section 8 School Standards and Framework Act 1998 has come into force; (which it did on 1 October 1998<sup>11</sup>). After 1 July he will need a separate edition to see whether this is in fact the case in Wales, as the Assembly will have the power to determine the commencement dates in Wales for Public Acts.

The defence lawyer will appreciate how important it is that the Assembly be sensitised to the issue so that the ground is prepared when it receives the request to use its powers of "direction". The request will be sent either to the First Secretary or the Subject Committee Secretary (presumably the Education Committee) or more probably both. The defence lawyer will want the matter referred to the Committee for consideration rather than being dealt with by the Secretary using delegated powers (section 62). Before asking the Assembly to intervene therefore he might "prepare the surface" by getting a sympathetic Assembly member to ask a written or oral question concerning the compatibility of prosecutions under section 444 with the Convention. It is thought that each year there will be about 6,000 Assembly questions. These are dealt with under paras. 6.26 – 6.34 of the Standing Orders of the National Assembly for Wales.<sup>12</sup>

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8 *A v UK* [1998] E.H.R.L.R. 82.

9 *A.P and others v Switzerland* [1998] E.H.R.L.R. 88.

10 SI 1999, No. 672.

11 SI 1998, No. 2212.

12 Issued under section 50(3) of the Government of Wales Act 1998.

The issuing of a "direction" constitutes "relevant Welsh subordinate legislation" (under section 58(2) of the Act) but probably not "Assembly general subordinate legislation" (under section 58(6)) as it would not appear to be promulgated via a statutory instrument. Nevertheless the decision as to whether or not to issue such a direction would need to be considered by the subject committee and (presumably) one or other of the subordinate legislation procedures followed. Ideally the committee would decide to hold public meetings (to satisfy its obligation of openness under section 70), appoint expert advisers and call evidence etc.<sup>13</sup> All this would be a preliminary skirmish prior to the magistrate's hearing. Very likely during this period an opportunity for a judicial review will have arisen (no doubt to be heard in Wales as the Crown Office establishes its presence here). If the Assembly refused to issue a direction, then at the magistrates' hearing the lawyer would almost certainly invite the Justices to make a reference to the High Court of this "devolution issue"; there being a question as to "whether a failure to act by the Assembly is incompatible with any of the Convention rights".<sup>14</sup> He would also seek to have the Assembly joined as a party.

If the prosecution was in pursuance of subordinate legislation rather than a primary statute, then the issue of seeking a case stated to quash it as *ultra vires* would arise. However in the present example the course of action would be to have section declared incompatible with the Convention under section 4 of the Human Rights Act 1998 (if the Courts felt unable to construe it in a way which was not incompatible with the Convention).

What is so different about the post-June 1999 situation is the openness of the proceedings. The Welsh Office has seldom been judicially reviewed and this is hardly surprising. In cases such as this, it has generally been impossible to know why the Secretary of State has declined to issue a direction (as he invariably does) and equally impossible to say that "no reasonable Secretary of State" could have come to the same decision given the latitude he or she enjoys under the *Wednesbury* principles.

I have here considered a simple home grown example. The temptation to draw in the Assembly will be enormous. In the planning field, it is responsible not only for the guidance and circulars but also for the Planning Inspectorate, if not the actual development decision itself. In children's cases the main focus of attack will be on the post care involvement of parents.<sup>15</sup> The Assembly has power under section 7 of the Local Authority Social Services Act 1970 to issue directions and binding policy guidance (as Lord Justice Sedley so stated in *R v Islington LBC ex p. Rixon*<sup>16</sup>), I imagine it will be invited to do so. It will be likewise in the community care and mental health minefield of antiquated statutes, each with its own anti-Convention provision merrily ticking away. In education (I consider the above *Jarman* example to be primarily a criminal law issue) I foresee problems with further and higher education grant arrangements; and so on.

It is a long list; as long perhaps as The National Assembly for Wales (Transfer of Functions) Order 1999. We as public law lawyers and the Assembly may in time, for quite different

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13 Standing Orders, para. 8.14 et seq.

14 Schedule 8, para. 1(1)(d).

15 *Johansen v Norway* 23 E.H.R.R. 33.

16 *The Times* April 19 1996 and (1998) 1 Children's Cases Law Reports 119.

reasons, come to bless the 1 July and those 5,000 executive functions transferred, lock stock and barrel to the fledgling Assembly.

## **Annex 1      The Human Rights Act 1998: Resume of the Key sections**

### **Interpretation of Convention rights**

*section 2:* A court or tribunal determining a question under the Act in connection with a Convention right must take into account any judgment, decision, opinion of the European Court / Commission of Human Rights or the Committee of Ministers

### **Interpretation of Legislation**

*section 3:* In so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

### **Declaration of incompatibility**

*section 4:* If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

### **Right of Crown to intervene**

*section 5:* Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

### **Acts of public authorities**

*section 6:* It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

### **Proceedings**

*section 7:* A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

- (a) bring proceedings against the authority, or
- (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

### **Judicial remedies**

*section 8(1):* In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

*section 8(2):* But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

*section 8(3):* No award of damages is to be made unless [*inter alia*] the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

*section 8(4):* In determining whether to award damages, or the amount of an award, the court must take into account the principles applied by the European Court.

### **Minister's Power to take remedial action**

*section 10:* Power of ministers to amend legislation the subject of a declaration of incompatibility.

### **Parliamentary Statements of compatibility**

*section 19:* The obligation on a Minister when proposing new legislation to make a statement to Parliament as to whether the Bill does comply with the convention.

## **Annex 2      The Government of Wales Act 1998: section 107 and Schedule 8**

### **Human rights**

#### *Section 107*

107(1) The Assembly has no power-

- (a) to make, confirm or approve any subordinate legislation, or
- (b) to do any other act,  
so far as the subordinate legislation or act is incompatible with any of the Convention rights.

(2) *Subsection (1)* does not enable a person-

- (a) to bring any proceedings in a court or tribunal, or
- (b) to rely on any of the Convention rights in any such proceedings,  
in respect of an act unless he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(3) *Subsection (2)* does not apply to the Attorney General, the Assembly, the Advocate General for Scotland or the Attorney General for Northern Ireland.

(4) *Subsection (1)*-

- (a) does not apply to an act which, by virtue of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section, and
- (b) does not enable a court or tribunal to award in respect of an act any damages which it could not award on finding the act unlawful under that subsection.

(5) In this Act "the Convention rights" has the same meaning as in the Human Rights Act 1998 and in subsection (2) "the Convention" has the same meaning as in that Act.

### **Schedule 8**

#### **DEVOLUTION ISSUES**

##### **PART I**

##### **PRELIMINARY**

1(1) In this Schedule "devolution issue" means-

- (a) a question whether a function is exercisable by the Assembly,
- (b) a question whether a purported or proposed exercise of a function by the Assembly is, or would be, within the powers of the Assembly (including a question whether a purported or proposed exercise of a function by the Assembly is, or would be, outside its powers by virtue of section 106(7) or 107(1)),
- (c) a question whether the Assembly has failed to comply with a duty imposed on it (including a question whether the Assembly has failed to comply with any obligation which is an obligation of the Assembly by virtue of section 106(1) or (6)), or
- (d) a question whether a failure to act by the Assembly is incompatible with any of the Convention rights.

(2) In this Schedule-

- (a) "the Judicial Committee" means the Judicial Committee of the Privy Council, and



(b) "civil proceedings" means any proceedings other than criminal proceedings.

2. A devolution issue shall not be taken to arise in any proceedings merely because of any contention of a party to the proceedings which appears to the court or tribunal before which the proceedings take place to be frivolous or vexatious.

## **PART II**

### **PROCEEDINGS IN ENGLAND AND WALES**

#### **Application of Part II**

3. This Part of this Schedule applies in relation to devolution issues in proceedings in England and Wales.

#### **Institution of proceedings**

4(1) Proceedings for the determination of a devolution issue may be instituted by the Attorney General.

(2) Sub-paragraph (1) does not limit any power to institute proceedings exercisable apart from that sub-paragraph by any person.

#### **Notice of devolution issue**

5(1) A court or tribunal shall order notice of any devolution issue which arises in any proceedings before it to be given to the Attorney General and the Assembly (unless a party to the proceedings).

(2) A person to whom notice is given in pursuance of sub-paragraph (1) may take part as a party in the proceedings, so far as they relate to a devolution issue.

#### **Reference of devolution issue to High Court or Court of Appeal**

6. A magistrates' court may refer any devolution issue which arises in civil proceedings before it to the High Court.

7.(1) A court may refer any devolution issue which arises in civil proceedings before it to the Court of Appeal.

(2) Sub-paragraph (1) does not apply-

(a) to a magistrates' court, the Court of Appeal or the House of Lords, or

(b) to the High Court if the devolution issue arises in proceedings on a reference under paragraph 6.

8. A tribunal from which there is no appeal shall refer any devolution issue which arises in proceedings before it to the Court of Appeal; and any other tribunal may make such a reference.

9. A court, other than the Court of Appeal or the House of Lords, may refer any devolution issue which arises in criminal proceedings before it to-

(a) the High Court if the proceedings are summary proceedings, or

(b) the Court of Appeal if the proceedings are proceedings on indictment.

#### **References from Court of Appeal to Judicial Committee**

10. The Court of Appeal may refer any devolution issue which arises in proceedings before it (otherwise than on a reference under paragraph 7, 8 or 9) to the Judicial Committee.

**Appeals from superior courts to Judicial Committee**

11. An appeal against a determination of a devolution issue by the High Court or the Court of Appeal on a reference under paragraph 6, 7, 8 or 9 shall lie to the Judicial Committee, but only-

- (a) with leave of the court concerned, or
- (b) failing such leave, with special leave of the Judicial Committee.