

The Human Rights Act and the Scotland Act 1998: A harmonious inter-relationship?

Alison Presly reviews the recent decision of the Inner House of the Court of Session in the case of *Somerville v Scottish Ministers* which adopts a novel approach to the inter-relationship between the Scotland Act 1998 and the Human Rights Act 1998

The Human Rights Act 1998 (“HRA”) which came in force in October 2000, gave domestic recognition to certain rights enshrined in the European Convention on Human Rights. It enabled individuals to enforce their Convention rights before the UK courts. The Scotland Act 1998 (“SA”), which came into force 15 months prior to the HRA, was part of the devolution settlement to Scotland, Wales and Northern Ireland. The human rights restrictions on the actions of the Scottish Executive appear as limitations on their legislative competence. Respect for human rights by the devolved authorities was therefore seen as a fundamental part of the new constitutional settlement for Scotland.

It is accepted by one senior member of the judiciary, Lord Rodger of Earlsferry, that the relationship between the HRA and the SA is “a relationship which Parliament has not spelled out clearly.” There is no statutory inter-linkage between the two Acts despite a proposed amendment to that effect during the legislative passage of the Human Rights Bill. As a result, the inter-relationship has been left open to judicial interpretation in the varying contexts of human rights litigation.

In *Somerville v Scottish Ministers*, the petitioners were prisoners who questioned the lawfulness of Directions made under the Prison Rules authorising their segregation whilst in custody. It was undisputed that the making of the Directions were acts of the Scottish Ministers for the purposes of the SA. The petition for judicial review was taken on the basis that the Scottish Ministers had acted *ultra vires* in terms of section 57(2) of the SA (a “devolution issue”) and, as a “public authority”, had acted unlawfully in terms of section 6 of the HRA.

Amongst numerous arguments in this case, the issue of particular significance in *Somerville* for constitutional observers is the Inner House’s ruling on the correct basis for a claim for damages in circumstances where it is alleged that the Scottish Ministers have acted in a manner incompatible with Convention rights. The petitioners sought to advance their claim for damages under the SA which contains no express time bar within which an action raising a Convention rights challenge as a devolution issue must be brought. In contrast, the Scottish Ministers claimed the proper basis for raising a claim was the HRA which included a 12 month time bar.

In finding the petitioners’ claims time-barred under the HRA, the First Division interpreted the two statutes as one constitutional code where the procedural deficiencies in one could be cured by reading across to the provisions of the other:

“The fundamental flaw in the petitioners’ approach is that they insist that proceedings in respect of an act which is incompatible with Convention rights must be made either under the Human Rights Act (to the exclusion of the Scotland Act) or under the Scotland Act (to the exclusion of the Human Rights Act). The true position is that the Human Rights Act and the Scotland Act are both on the statute book, and a decision must be made, not as to which of them is applicable to a given claim, but rather as to whether there are

provisions made by one or other or both of them which are applicable to a particular claim.”

The Inner House conclude that since a claimant is entitled to rely on provisions from either or both of the HRA and the SA, and there is an “explicit procedural and remedial” scheme for damages claims under the HRA, “*there is no need to look for a basis for a claim for damages in the Scotland Act.*”

The significance of the decision on legal basis is that if the claim alleging a breach of Convention rights is raised more than 12 months since the act or omission complained of, the complainant is effectively denied a remedy as a result of the HRA time bar.

In terms of remedies for breaches of Convention rights by the Scottish Ministers, under the SA the power of the court to grant relief or to provide a remedy is left to common law principles. Section 100(3) SA implies a power to award damages as it prevents the court from awarding damages which it could not award under sections 8(3) and (4) of the HRA. The HRA authorises the court, which has determined that a public authority has acted unlawfully, the discretion to make such orders as it considers “just and appropriate”.

Of particular interest in *Somerville*, is the decision to reject dicta from the Privy Council case of *R v HMA* to the effect that the SA “was to be read as a constitutional statute which provided, within its four corners, a complete system of rights, obligations and remedies as regards the devolved governance of Scotland.” By effectively stripping the SA of this independent constitutional status, the decision in *Somerville* has been described by Counsel for the petitioners as “a recipe for constitutional confusion”.

The case is currently on appeal to the House of Lords.

Weblinks:

- [Somerville v Scottish Ministers \[2006\] CSIH 52](#)
- [Scotland Act 1998](#)
- [Human Rights Act 1998](#)