OUTER HOUSE, COURT OF SESSION

P965/02

OPINION OF LORD BONOMY

in the cause

S.

Petitioner;

against

The Advocate General for Scotland

as representing the Secretary of State for the Home Department and the Criminal Injuries Compensation Appeal Panel

Respondent:

For Judicial Review of Paragraph 7(b) of the Criminal Injuries Compensation Scheme 1996 and of a decision to refuse a claim for compensation in reliance upon said Paragraph

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Petitioner: Sutherland; Drummond Miller, W.S.

Respondent: Lindsay; R. Henderson

5 December 2002

[1] The petitioner was sexually abused by her stepfather. He was convicted in respect of that abuse in 1997. The abuse occurred between 1967 and 1973 when the petitioner was between 7 and 13 years of age. The petitioner claimed criminal injuries compensation. The claim was submitted under the Criminal Injuries Compensation Scheme 1996. Paragraph 7(b) of that Scheme provided that no award of compensation was to be made where the criminal injuries were sustained before 1 October 1979 and the victim and assailant were living together as members of the same family. Her application for compensation was refused because of the terms of that paragraph. Her appeal against that decision to the Criminal Injuries Compensation Appeal Panel was refused on or about 12 January 1998 for the same reason.

[2] Following upon the decision of the Panel, the Human Rights Act 1998 was passed, and was then brought into force on 2 October 2000. With effect from that date it became unlawful for a public authority, which includes the Criminal Injuries Compensation Authority and the Criminal Injuries Compensation Appeal Panel, to act in a way which is incompatible with a Convention right (section 6(1)). Included among the Convention rights thus incorporated into the United Kingdom domestic law are the right to a fair hearing (Article 6 of the Convention) and the right not to be discriminated against in the exercise of other rights (Article 14). The petitioner seeks declarator that paragraph 7(b) of the Scheme is incompatible with these rights, and orders reducing paragraph 7(b) and the decision of the Panel made on 12 January 1998.

[3] On the face of it, the appropriate route to the petitioner's goal is a petition for judicial review of the decision of the Panel on the basis that the terms of paragraph 7(b) are incompatible with the Convention, and that the Panel acted unlawfully by giving effect to them. Such petition proceedings would ordinarily be in terms of Section 7(1) of the Human Rights Act 1998. The problem for the petitioner is that the challenge would relate to conduct which occurred prior to the Act coming into force. Section 22(4) of the Act provides that the Act does not have retrospective effect in relation to such challenges. Retrospective effect is confined to situations where proceedings are brought by or at the instigation of a public authority. That is clearly explained in *R* v *Rezvi* [2002] UKHL 1, [2002] 2 WLR 235, at paras. 24-26. The petitioner also recognised that it was not possible to challenge the decision to bring the Scheme into operation for the same reasons.

[4] Faced with that obstacle, Mr Sutherland, counsel for the petitioner, characterised her application as one seeking not a statutory remedy but a common law remedy. Where, as here, it was impossible to interpret subordinate legislation, such as paragraph 7(b) of the Scheme, in a way which was compatible with Convention rights, the Court could declare the paragraph incompatible with one or more Convention right, revoke the incompatible subordinate legislation and reduce the decision made thereunder which was unlawful. In following that course, the Court would simply be giving effect to section 8 of the Human Rights Act 1998 which provides that the Court may grant such relief or remedy, or make

such order, within its powers as it considers just and appropriate. Once the decks had been cleared in this way, the petitioner could make a fresh application. (A question arose over the fact that this Scheme has since been superseded, but no point turns upon that at this stage.) The petition was, therefore, not presented in terms of Section 7(1)(a) of the Act, but was a pure common law application.

[5] Mr Sutherland sought support for the proposition that a declaration of incompatibility is a free-standing remedy, which is available independently of proceedings under section 7(1), by reference to the way in which section 4 of the Act has been applied. Section 4 is confined to declarations of incompatibility of primary legislation, or secondary legislation in respect of which primary legislation prevents removal of the incompatibility. It has thus no direct application to this case. By reference to a variety of recent cases, counsel sought to persuade me by analogy that it was competent at common law, in appropriate cases, to seek a declarator of incompatibility of subordinate legislation as a prelude to revocation or reduction of the legislation and reduction of any decision thereunder. Since the primary obligation of the Court was to interpret all legislation, both pre- and post- the Human Rights Act and indeed the Human Rights Act itself, in a manner consistent with the Convention, the Court was bound to consider the terms of paragraph 7(b) of the Scheme and, if it found them to be incompatible with a Convention right, to make a declaration to that effect and any necessary consequential orders to give effect to the declarator.

[6] None of the authorities relied upon by counsel for the petitioner supported his proposition. In *International Transport Roth GmbH* v *Home Secretary* [2002] EWCA Civ 158, [2002] 3 WLR 34 the issue was the incompatibility of primary legislation, passed before the Human Rights Act came into force, which established a scheme of fixed penalties which continued to be imposed on owners, hirers and drivers of vehicles in which illegal immigrants were found concealed after the Human Rights Act was in force. In *R (H)* v *London North and East Region Mental Health Review Tribunal (Secretary of State for Health Intervening)* [2001] EWCA Civ 415, [2001] 3 WLR 512 the Court of Appeal made a declaration under section 4 of the Human Rights Act that two sections of the Mental Health Act 1983 were incompatible with Article 5(1)(4) of the Convention because they placed an inappropriate burden upon the patient to prove the illegality of his detention. The point appears to have been dealt with as an isolated issue. The determination of the applicant's previous application for discharge predated the coming into force of the Human Rights Act. However, the Court dealt with the matter because the applicant was about to make a further application to challenge his detention, and the true interpretation of the Mental Health Act might impact upon that application. The nature and competence of the application before the Court were not the subject of debate. In *Aston Cantlow PCC* v *Wallbank* [2001] EWCA Civ 713, [2001] 3 WLR 1323 the owners of former rectorial land sought to resist the claim by the parochial church council for the cost of repairs to the church, by contending that the rules of the common law infringed Articles 6 and 14 of the Convention. The demand for payment was made before the Human Rights Act came into force. Their resistance was successful. The Court of Appeal gave retrospective effect to the Act, since the owners were resisting a claim rather than making one and Section 22(4) did not, therefore, exclude reliance on Convention rights.

The position of Section 4 of the Human Rights Act in the scheme of things was not discussed. The Court simply applied section 6(1) of the Human Rights Act and found for the defendants because the council were acting unlawfully in making the claim. In *R* (on the application of Hooper &c) v *Secretary of State for Work and Pensions* [2002] EWHC 191 (Admin), [2002] UK HRR 785 various pensioners sought judicial review of applications refusing certain payments to them. The Court refused to entertain challenge of any decision about payment made prior to the coming into force of the Act. Counsel suggested that at paragraph 167 the Court seemed to envisage both section 8 and section 4 of the Act as providing discrete, free-standing remedies. The contrary is the case. The paragraph simply reflects the argument that, because the decisions made were lawful in terms of primary legislation, the Court's powers were limited. The matter was put this way:

> "[167] The defendant argued that s. 6(1) of the HRA 1998 does not apply because of the refusal to pay benefits, be they statutory or extra-statutory, was not unlawful. Accordingly the Court has no power to grant any relief or remedy under s.4 of the HRA 1998. The Court is thus limited to its power to make a declaration of incompatibility under s.4 of the HRA 1998."

None of these cases is authority for the proposition that free-standing proceedings under section 4 of the Human Rights Act may be instituted independently of any proceedings raised in terms of section 7(1) of the Act.

[7] As Mr Lindsay, counsel for the respondents, pointed out, the scheme of the Act is clear. The basic obligation to interpret the law in accordance with the Convention is set out in section 3. Where that cannot be done in relation to primary legislation, section 4 applies. All that can be done is to seek a declarator that the primary legislation is incompatible with a Convention right. That has no direct consequences. Section 5 provides for the Crown to be notified of any impending declarator of incompatibility. Where the incompatibility relates to any other aspect of law, such as subordinate legislation, or a matter of common law, then section 6 states the substantive position. It is unlawful for a public authority to act in a way which is incompatible with the Convention right. The citizen faced with such an act may resist, asserting the incompatibility as a defence. In addition, the citizen may positively take action to assert the unlawfulness. Section 7 provides for both forms. It is in this way that the petitioner might in the ordinary course challenge the decision to refuse her appeal and coincidentally challenge the incompatibility of the Scheme and have it reduced. She would do so as a victim. Section 7 defines "a victim". It is in terms of that section that a person becomes a party to litigation in which issues under the Act are raised. The issues involved may include interpretation in accordance with section 3 and a declarator of incompatibility in accordance with section 4. Section 8 states the power of Courts to grant just and appropriate remedies, and deals in particular with damages. Section 9 prescribes how challenges of judicial acts should be made under Section 7.

[8] In view of the provisions of section 22(4) the petitioner cannot take positive action in terms of section 7(1). If that were not so, and if it were possible at common law or under section 4 of the Act to seek declarator in relation to every conceivable form of incompatibility between domestic law and the Convention, then it would be open to anyone aggrieved by a decision made prior to the Act coming into force to challenge that decision by seeking such a declarator, with a view to the decision made being reduced and the application made re-considered. It follows that the first and third pleas-in-law for the respondent should be sustained and the petition dismissed.