

COMMENT

You will see that the main difference is the inclusion of the words ‘So far as it is possible to do so’. This seems to be an acceptance of the possibility that, applying the usual rules of construction, the courts may be unable to give effect to an Act in a way which is consistent with the Convention. It is a ‘weak’ presumption of compliance with the Convention. Parliament is not attempting to bind its successors, but instead it is preserving the supremacy of future Parliaments.

3.3 The Human Rights Act 1998

In fact there are other provisions in the Human Rights Act which, together with s. 3, create a complex system which is designed both to protect Convention rights and to preserve the role of Parliament as the ultimate guardian of fundamental rights. You will be looking in more detail at this system in Unit 7, but the following provisions are the ones which are particularly relevant to the role of Parliament.

You will find the text of the Act in *Allen and Thompson*, pp. 427–435.

**3.3.1 Section 3: interpretation of legislation**

You have just considered the wording of s. 3 in **Activity 51**. The next activity enables you to examine the courts’ application of s. 3, as illustrated by two significant decisions of the House of Lords (in its then judicial capacity prior to the creation of the Supreme Court of the United Kingdom – see further Unit 5).

ACTIVITY 52**The approach of the domestic courts to s. 3 HRA** (allow 40 minutes)

Using LexisLibrary (or another database if you prefer), please locate and read the following extracts from two House of Lords cases:

- *R v. A (No. 2)* [2002] 1 AC 45 – the headnote and the speech of Lord Steyn
- *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 – the headnote and the speech of Lord Steyn.

For what reasons might it be argued that the House of Lords, when interpreting the relevant statutes in each case, went beyond what Parliament had intended them to do when using their interpretive powers under s. 3 of the Human Rights Act 1998?

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R v. A (No. 2)

Restrictions were imposed under s. 41 of the Youth Justice and Criminal Evidence Act 1999 on a defendant charged with rape from being permitted to adduce at his trial evidence of his alleged victim’s previous sexual history. The House of Lords considered that a strict reading of this section could contravene a defendant’s right to a fair trial under Article 6 of the ECHR, because there were circumstances when such evidence might be relevant to the issue of consent. The House of Lords therefore read this section to mean that evidence of a complainant’s previous sexual history could not be adduced, provided this did not infringe the defendant’s right to a fair trial.

The House of Lords effectively read extra words into the statute. Lord Steyn conceded that this had required the courts to adopt an interpretation which may appear linguistically strained, but also said that s. 3 imposed a duty on the courts to strive to find a possible interpretation compatible with Convention rights.

Ghaidan v. Godin-Mendoza

Under relevant housing legislation, the rights to a tenancy of residential premises could be inherited by the tenant's surviving spouse, or by someone living with the tenant at his or her death as the tenant's wife or husband. The issue on appeal was whether this extended to the survivor of a same-sex couple who had been living together, and how, therefore, the relevant provisions should be interpreted in the light of Article 8 of the ECHR (the right to respect for private and family life).

To avoid the less favourable treatment of surviving partners of homosexual partnerships compared with surviving partners of heterosexual partnerships, the House of Lords used its power under s 3 of the Human Rights Act 1998 to read the housing legislation as extending to same-sex partners. This took the provisions of the legislation further than their literal meaning. The leading speech was again given by Lord Steyn, who commented:

'Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under s. 3. Section 3 requires a broad approach concentrating in a purposive way on the importance of the fundamental right involved.'

3.3.2 Section 4: declaration of incompatibility

Under this section the High Court and higher courts have power to declare legislation to be incompatible with Convention rights. Such a declaration does not affect the validity, continuing operation or enforcement of the provision in question, and does not bind the parties to the proceedings.

In other words, if the courts cannot under s. 3 construe legislation consistently with Convention rights, they must apply the incompatible legislation. They may make a declaration of incompatibility, but the legislation remains in force until repealed or amended.

A particularly noteworthy example of the granting of a declaration of incompatibility occurred in the case of *A (FC) and others v. Secretary of State for the Home Department* [2005] 2 AC 68 (often referred to as the 'Belmarsh case', as it involved foreign terrorist suspects detained at the high security prison of that name) which you will examine in more detail later in the module.

In contrast, a declaration was sought unsuccessfully in *R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15. The claimants, a campaign organisation, had failed to obtain clearance for a television advertisement from the broadcasting authorities on the ground that its transmission would breach a statutory prohibition on political advertising. The claimants argued that that the statutory prohibition was incompatible with Article 10 of the ECHR as an unjustified restraint on the right to freedom of expression. The House of Lords decided that the statutory prohibition was a necessary restriction and thus compatible with Article 10.

3.3.3 Sections 10 and 11: remedial action and orders

These sections enable the government to make delegated legislation to remedy a breach of the Convention, identified by a declaration of incompatibility, or a finding of the European Court of Human Rights. They may make 'remedial orders' which repeal the offending legislation, with retrospective effect if necessary. As is usual with such delegated legislation, the Act provides that Parliament is to approve the orders.