

Practice questions for Chapter 4 – Europe and the English legal system

Essay question

To what extent has the principle of Parliamentary sovereignty and the role of the judiciary been affected by the UK's entry into the EU?

Introduction

- Your introduction should be used in order to deal with the background information that the reader will need to know, including:
 1. Explain what the principle of Parliamentary sovereignty states, namely that Parliament is free to pass any law that it wishes (except laws that bind future Parliaments).
 2. Briefly discuss the UK's entry into the EC, namely that we entered the EC via the passing of the European Communities Act 1972, which came into force in 1973.

The supremacy of EU law

- Point out that the Treaty of Rome does not state that EU law is to take precedence over domestic law. However, the ECJ in the case of *Costa v ENEL*¹ stated that member States are bound to follow EU law.
- This is reflected in the European Communities Act 1972, s 2(1) which provides that rights, powers and obligations under the Treaties are without further enactment to be given legal effect in member States. Accordingly, directly applicable and directly effective EU law would take precedence over domestic law and if domestic law conflicted with EU law, domestic law would need to be changed. A good example of this can be found in the case of *R v Secretary of State for Employment, ex p Equal Opportunities Commission*² (discussed in *Card & James'* at pp 105-06).
- However, how should a court act if faced with a piece of legislation that appears to be inconsistent with EU law? Such a court would be placed in a difficult position. On the one hand, the court would feel obliged to follow domestic legislation, but on the other hand, EU law takes precedence over domestic law.
- The answer to this problem was established in the landmark case of *R v Secretary of State for Transport, ex p Factortame (No 2)*.³ You may want to briefly set out the facts of the case. Note that normally, it is the *ratio* of a case that is important and so the facts will usually not be needed. However, where an essay strongly focuses on one case, or one case is crucial to the essay topic, then briefly providing the facts may be of aid. Note, however, that a detailed explanation of the facts should be avoided.
- You should note the remarkable result of *Factortame*, namely the House issuing an injunction suspending the operation of an Act of Parliament that conflicted with EU law. Judges can refuse to follow legislation that conflicts with EU law.
- As a result of *Factortame*, it is clear that EU law is supreme. Various judges have expressed concern over this – see Lord Denning's comments referred to in *Card & James* on p 106. It would appear to be the case that *Factortame* has severely affected the principle of Parliamentary sovereignty. The House of Lords did not accept this however. Lord Bridge stated that Parliament had

¹ C 14-64, [1964] ECR 585.

² [1995] 1 AC 1 (HL).

³ [1991] AC 603 (HL).

chosen to be bound by EU law via the 'entirely voluntary' passing of the European Communities Act 1972 and that, if Parliament chose to do so, it could unbind itself from EU law by repealing the 1972 Act. This could become a reality if the upcoming EU referendum decides that the UK should leave the EU.

Statutory interpretation

- The supremacy of EU law also affects the judiciary's role in interpreting legislation. European courts (and the courts of most civil law systems) interpret legislation using what is known as the teleological approach, under which the courts will try to give effect to the 'spirit' of the legislation.
- UK courts, when interpreting EU law should also adopt such an approach. The case of *Litster v Forth Dry Dock and Engineering Co Ltd*⁴ (discussed in *Card & James'* on p 107) provides a good example of the House of Lords using such an approach.

Conclusion

- Your conclusion should reflect what was discussed in the essay. However, the likely conclusion you will reach is that the principle of Parliamentary sovereignty has been weakened by the UK's entry into the EU.

Essay question

'The Human Rights Act 1998 has significantly affected the role of the judiciary in relation to the interpretation of legislation. As a result, judges have to walk a very thin line between statutory interpretation and statutory alteration. On several occasions, the judiciary have stepped over this line.'

Discuss.

Introductory issues

- Begin by briefly discussing the principal purpose of the 1998 Act, namely to allow the relevant Convention rights to be enforced in a domestic court. Note that it is common for students (and some textbook writers) to believe that the 1998 Act incorporated in the Convention into our domestic law – this is not the case. You may want to briefly discuss the problems of enforcement that existed before the Act was passed, namely that taking a case to the European Court of Human Rights was an expensive and time consuming affair (especially given that all domestic avenues of appeal had to be exhausted first).
- You may decide to include some background information on the Act or the Convention. The commencement date of the 1998 Act (October 2000) should be mentioned at some point.

Human Rights Act 1998, S 3

- You should quickly get onto the main topic of the essay, namely the interpretive duty placed upon the courts via s 3 of the Act. Students should discuss the ambit of s 3, namely:
 1. It is retrospective (that is, it applies to legislation passed before October 2000)
 2. It overrules prior precedent (that is, if a lower court feels that a higher court's interpretation is inconsistent with a Convention right, the higher court's decision need not be followed)

⁴ [1990] 1 AC 546 (HL).

3. The court need only interpret legislation in line with the Convention in so far as it is possible to do so. The Act envisages that, at times, legislation will be incompatible (e.g. via a derogation).
- You should discuss the fine line that s 3 requires judges to walk, namely between providing an interpretation that respects Convention rights and also Parliamentary sovereignty, and between ascribing an intention that Parliament clearly could not have had in order to avoid breaching Convention rights. You should provide case law examples of situations where the judges have carefully and harmoniously interpreted legislation in line with the Convention, in a manner that does not disrespect Parliamentary sovereignty (e.g. *Ghaiden v Godin-Mendoza*).⁵
 - Students should also discuss those cases where the courts have clearly overstepped the boundaries envisaged by s 3 (e.g. *Re A (No 2)*).⁶ In such cases, rather than override Parliamentary intention, the court should have made a declaration of incompatibility.

Declarations of incompatibility

- The words 'so far as it is possible to do so' in s 3 indicate that there will be times when a court may not be able to interpret legislation in a manner that is compatible with a Convention right. In such cases, rather than interpret the provision in a way that is infeasible, or usurps Parliament's legislative function, the court should instead issue a declaration of incompatibility.
- You should discuss when declarations of incompatibility should be used by the court and discuss key cases where such a declaration was made, the notable example being *A v Secretary of State for the Home Department*.⁷
- You should discuss the effect of a declaration of incompatibility (that is, it has no effect per se, other than to notify Parliament that the court is of the opinion that a provision contravenes a Convention right). However, in practice, if a declaration is made, Parliament will usually revisit the statute. Provide examples of legislation that has been passed or amended due to a declaration (e.g. the Gender Recognition Act 2004).
- You should also note that, in relation to subordinate legislation, the courts do not need to make a declaration of incompatibility and can instead quash any subordinate legislation that is incompatible with a Convention right (as occurred in *A v Secretary of State for the Home Department*). Clearly, this gives the courts a significant amount of power and further increases their role in relation to the interpretation of legislation.

Conclusion

- Based on the arguments you have presented, you should form a suitable conclusion. The available evidence would result in most people concluding that the quote in the question is true. The line between statutory interpretation and statutory alteration can indeed be a fine one and whilst, generally, the judiciary have remained within the boundaries envisaged by s 3, there have been occasions when they have, in an effort to fulfil their duty under s 3, interpreted a provision in a way that Parliament clearly would not have intended.
- You might also wish to mention the current government's plans to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights. However, this proposal has met with a considerable amount of criticism and whether it will be implemented remains to be seen.

⁵ [2004] UKHL 30, [2004] 2 AC 557.

⁶ [2001] UKHL 25.

⁷ [2004] UKHL 56.