

## UK Court of Appeal considers Presumption of Innocence and Principle that Legislation be Interpreted Consistently with Human Rights

*Keogh v R* [2007] EWCA Crim 528

The UK Court of Appeal has recently held that the requirement under the *Human Rights Act 1998* (UK) that, so far as it is possible to do so, legislation be interpreted and applied compatibly with human rights required that legislation which, on its natural meaning imposed a burden on defendants to establish their innocence, be read in such a way as to impose this substantive obligation on the prosecution.

### Background

The appellant, a Crown servant, acquired possession of a highly confidential record of a meeting between the British Prime Minister and the President of the United States in relation to UK and US policy in Iraq. The discussions concerned current political, diplomatic and defence issues of a highly sensitive nature. The document subsequently found its way into the possession of a Labour Member of Parliament.

The appellant was charged with breaches of ss 2 and 3 of the *Official Secrets Act 1989* (UK), which make it an offence to make a damaging disclosure of information, documents or articles relating to defence or international relations without lawful authority. The Act provides that it is a defence to prove that, at the time of the alleged offence, the person did not know, or had no reasonable cause to believe, that disclosure of the information would be damaging.

### The Issue

Article 6 of the *European Convention on Human Rights* provides, relevantly, that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The issues for the Court of Appeal to consider were:

1. whether ss 2 and 3 of the Act, on their natural meaning, reversed the legal burden of proof in respect of the mental element of the offence in a way that was incompatible with art 6; and
2. if so, whether pursuant to s 3(1) of the *Human Rights Act 1998* (UK), the sections could be read and given effect to in a way which was compatible with art 6.

### Trial Judge Decision

The Trial Judge concluded that ss 2 and 3 created offences of strict liability, to which any defence would be closely linked with the defendant's state of mind. His Honour held that such an infringement on the presumption of innocence was justifiable. His Honour reasoned that it would be too onerous a task for the prosecutor to disprove, beyond reasonable doubt, that the accused did know or believe that the disclosure of the document would be damaging and that it was reasonable to require the accused to prove his own state of mind.

## Right to Presumption of Innocence

The Court of Appeal noted that to require a defendant to prove anything, positive or negative, in order to establish that he is not guilty prima facies conflicts with the presumption of innocence required by art 6. However, their Honours also noted that to interpret art 6 in this way would potentially conflict in some areas with the requirements of an effective criminal law. Their Honours considered three cases on this issue:

- In *R v Lambert* [2002] 2 AC 545, the House of Lords looked at whether it would be compatible with art 6 to interpret provisions of the *Misuse of Drugs Act 1971* (UK) as imposing on the defendant the burden of proving that he was unaware that the contents of a bag in his possession were prohibited drugs. The House of Lords held that the burden was incompatible with art 6, but expressed the view that the right to be presumed innocent is not absolute and that a departure from the presumption may be justifiable in certain circumstances having regard to the aim and proportionality of the limitation.
- In *R v Johnstone* [2003] 1 WLR 1736, the House of Lords held that a reverse burden of proof imposed by the *Trade Marks Act 1994* (UK) was compatible with art 6. The House of Lords noted that any derogation from the right to be presumed innocent required justification and that the more serious the punishment which may flow from conviction, the more compelling the reasons must be.
- In *Sheldrake v DPP* [2004] UKHL 43, Lord Bingham noted that the 'task of the Court is never to decide whether the reverse burden should be placed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence'.

## Court of Appeal Decision

In overturning the Trial Judge's decision, the Court of Appeal determined that the critical ingredient of an offence under ss 2 and 3 of the Act is the appellant's state of mind at the time of intentional disclosure. Their Honours observed that if the onus of proof were placed on the appellant, he would be required to disprove a substantial ingredient of the offence and this would constitute a disproportionate and unjustifiable infringement on the presumption of innocence.

Their Honours concluded that the reverse burden of proof is not a necessary element in the effective operation of ss 2 and 3 and that, therefore, placing such a burden on the appellant cannot be justified. The Court of Appeal therefore held that, pursuant to s 3(1) of the *Human Rights Act 1998*, the provisions should be 'read down' and interpreted and applied to the effect that, 'if the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not'. The Court of Appeal noted support for this approach from the House of Lords which, in *R v Director of Public Prosecutions (ex parte Kebilene)* [2000] 2 AC 326, was required to consider a similar reverse onus provision in the *Terrorism Act 2000* (UK).

## What Might this Mean for the Victorian Charter?

Section 32(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that the judgments of foreign courts may be considered when interpreting statutory provisions.

It is likely that the Court of Appeal's reasoning in *Keogh* will therefore be considered by Victorian courts and tribunals when interpreting s 25(1) of the Charter, which provides for rights in respect of criminal proceedings, in determining in what circumstances it may be justifiable to derogate from the right to be presumed innocent until proved guilty according to law.

It is also notable that the decision in *Keogh* supports a robust approach to the interpretative principle enshrined in s 32(1) of the Charter which requires that, 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. The approach in *Keogh*, which follows the approach of the House of Lords in cases such as *Ghaidan v Godin-Mendoza* [2004] AC 557, supports an approach that, subject to not unduly 'straining' the meaning and purpose of legislation, s 32 may involve the 'reading down' of express provisions and also the implication (or 'reading in') of provisions to ensure human rights compatibility.

The full text decision is available at <http://www.bailii.org/ew/cases/EWCA/Crim/2007/528.html>.

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