

## PUBLIC LAW EXAM NOTES

### **Delegated legislation**

Parliament delegates the power to make laws to another institution, usually the executive.

#### *Ahmed v HM Treasury*

Two orders in council made by the HM Treasury to implement counter-terrorism measures enacted by the UN Security Council under their chapter 7 powers.

Resolution 1267 – imposed sanctions on certain entities. There was a consolidated list of the entities affected.

Al Qaida Order enacted in response.

Resolution 1373 – all UN member states must take certain anti-terrorism measures.

Terrorism Order enacted in response.

United Nations Act 1946 s1 – gave the government power to make orders in council that are necessary to give effect to security council resolutions.

The appellants had their assets frozen as a result of the Treasury making a direction against them under article 4 of the Terrorism United Nations Terrorism Order 2006 on the basis that there were reasonable grounds to suspect that the appellants were terrorists. The effect of the orders was complete deprivation of any economic resources.

Issue: are the two orders within the scope of the authority conferred under s1 of the United Nations Act 1946?

Principle of legality = important rights cannot be overridden by general or ambiguous statutory language.

Court:

S1 does not confer authority for rights being abrogated any further than is absolutely necessary to implement the security council resolutions.

Terrorism order (UNSCR 1373) – freezing of assets of people merely suspected of terrorism is going beyond what is necessary to implement 1373 because 1373 only refers to persons who commit or attempt to commit terrorist acts.

Al Qaida order (UNSCR 1267) – this was a faithful translation of 1267. But it blocked access to the Courts, and since the language taking away this right was not clear enough, it was invalid.

Outcome:

Government enacted some new primary legislation that did the same thing.

#### Henry 8<sup>th</sup> clauses

Delegated legislation that is made superior to statutes. E.g. Parliament delegates the power to amend, suspend, or override other statutory provisions, i.e. Canterbury Earthquake Recovery Act 2011.

#### Regulations Review Committee

Can examine regulations of its own accord, or if someone brings a complaint. There are specific grounds that the committee can investigate on the basis of.

#### Judicial review

When someone brings a legal challenge to a piece of delegated legislation, the issue before the Court is always whether the delegated legislation falls within the scope of the power that is delegated within the statute which confers authority to legislate.

Statutory authority argument – statute authorising search and seizure requires that a constable is present during the search. The statute does not mention that the SoS is an official possessing the power to authorise search and seizure warrants.

Customary argument – Court looked for recognition of this practice at common law. There was no precedent for these actions.

Outcome: warrant issued by SoS was not valid, and thus the search and seizure was illegal.

### **Prerogative powers**

“the remaining portion of the Crown’s original authority, and it is therefore...the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or his Ministers.” – Dicey.

Three fundamental elements:

- Residual powers from the Crown
- Not written in statute but can be overridden by statute
- Distinct from third source

e.g. Governor General can appoint or dismiss the Prime Minister; summon, prorogue, or dissolve Parliament; and gives royal assent to legislation.

Cabinet can declare war; destroy or seize property during wartime; and make international treaties.

#### *Attorney General v De Keyser’s Royal Hotel*

Governor claimed the hotel to house air force officers and staff. Government claimed that they were exercising a prerogative power and had no obligations to compensate.

Defence Act 1842 – provided for seizure of property during wartime but required compensation.

Prerogative power claimed – power to seize property during wartime without paying compensation; exercise by the Governor.

Court:

Power did exist as a Crown power. But in this case, the 1842 statute overrides the prerogative power and compensation must be paid.

#### *Northumbria case*

Riots in South London and Brixton due to tension between Police and black community. SoS wanted to provide plastic bullets and gas canisters directly to the Police without the approval of the Police Authority (normal process).

Police Act 1964 s41 – codified prerogative power of keeping the peace.

Issue: does the statute include supply of plastic bullets and gas canisters?

Court:

Nothing to suggest that the consent of the Police Authority is necessary. SoS has the authority to do this.

#### *GCHQ Spy case*

Government issued order in council banning intelligence officers from joining the GCHQ, a union for spies, citing national security concerns. The union seeks judicial review saying that it is unfair to ban employees from joining a union.

Court:

Prerogative powers are subject to judicial review. The prerogative power here, defence of the realm, overrides the right of the spies to join a union because it is so important.

4. Declaration
5. Injunction

### **Treaty of Waitangi**

No single text of the Treaty – two versions.

Under international law both versions are equally important.

Waitangi Tribunal reports:

#### Manukau report

Per the *contra preferentum* rule of law, the Treaty should be construed in a way that goes against the party who drafted the document. This means the Maori version should be preferred.

Discussion of what was ceded by Maori – kawanatanga (governorship) rather than tino rangatiratanga (absolute authority).

Maori cannot claim undisturbed possession of the seas because it was implicit in the nature of the Treaty that settlers would arrive by sea and Maori would have contemplated this.

Residual authority in the oceans was probably what was contemplated by Maori.

The Treaty requires not just recognition of Maori rights but also active protection by the Crown.

#### Muri Whenua report

The principles of the Treaty are the standard against which the government's actions should be measured.

4 principles: protection; honourable conduct; fair process; recognition.

Protection – Maori interests should be protected. Clear from both the text and the context (royal instructions to Hobson that working with Maori was important). Fiduciary obligations imposed on the Crown because of the marked power differential between the parties.

Honourable conduct – relationship presented would have contemplated strict standards of fair conduct.

Fair process – Maori complaint should be enquired into by an independent agency.

Recognition – respect for each other's authority.

Principles enlarge the terms of the Treaty (from the text) and give more complete meaning.

Any ambiguity should be resolved in favour of Maori.

Conduct is helpful as evidence – how people acted gives an indication of what they thought their obligations were.

#### Tika Whenua Rivers report

Rivers – in Te Ao Maori they are whole entities; in western law they are part of the land.

Transferring ownership of rivers to the Crown where they border land is a breach of tino rangatiratanga under the Treaty.

Fisheries – taonga under the Treaty. Tino rangatiratanga over fisheries was never ceded by Maori.

Right to development – Maori have a right to develop their interests even if they did not previously make use of these rights. Crown conferring the right to generate electricity to other entities was a breach of the Treaty.

#### Ko Aotearoa Tenei report

The Treaty gave each party authority over their own culture. However, pakeha worldview dominates and this is a breach of the Treaty.