EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Summary of the meeting between members of the Independent Human Rights Act Review[1] and a delegation of Judges from the European Court of Human Rights[2] by videoconference on 20 May 2021

Sir Peter Gross, Chair, presented the nature and role of the Independent Human Rights Act Review ("IHRAR") and introduced the Panel members present for the meeting with the European Court of Human Rights ("the European Court"). The President of the European Court, Robert Spano, presented the delegation of Judges from the Court, Judge Síofra O'Leary, Judge elected in respect of Ireland and Judge Tim Eicke, Judge elected in respect of the United Kingdom ("the UK").

The Panel Members were particularly interested in hearing the Judges' views on three themes: the margin of appreciation, subsidiarity and shared responsibility; the quality and nature of judicial dialogue; and the perspective of another common law jurisdiction (Ireland) and its relationship with the Convention at the domestic level. The Panel members underlined the importance of the common law as a starting point for national Judges (in the UK) in resolving human rights complaints. Finally, the Panel members underlined their wish to maintain a channel of communication including before and after the publication of their report.

The answers given by the European Court Judges were structured around three main themes as set out below.

I. The notion of subsidiarity and shared responsibility under the European system of human rights protection

The Judges emphasised that the domestic authorities were the primary actors under the Convention system, as provided for under Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention" or "the Convention"). By virtue of Article 1, States Parties undertook to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. This Article laid the framework for the principles of subsidiarity and shared responsibility.

Those concepts had been reinforced over the last decade during a period of political reform of the Convention system called the "Interlaken reform process"[3] (so-called after the first Inter-Governmental conference held in Interlaken, Switzerland in 2010). The UK government had been very active during this reform period stressing the importance of those concepts and the margin of appreciation, which was reflected in the Brighton Declaration (2012)[4] adopted by the 47 States Parties

[1] Sir Peter Gross (Chair), Baroness Nuala O'Loan, Simon Davis (Panel Members) and Dr John Sorabji (Legal Adviser) and Kate Stevenson (Panel Secretariat), who were accompanied by Ambassador Neil Holland, United Kingdom Permanent Representative to the Council of Europe and Rob Linham OBE, United Kingdom Deputy Permanent Representative to the Council of Europe.

[2] President Robert Spano, Judge Síofra O'Leary, Judge elected in respect of Ireland and Judge Tim Eicke, Judge elected in respect of the United Kingdom, accompanied by Rachael Kondak (Registry member).

[3] https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=

[4] https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

to the European Convention on Human Rights ("the Convention") during the UK's Chairmanship of the Committee of Ministers of the Council of Europe. The Brighton Declaration specifically affirmed the strong commitment of the States Parties to implement the Convention at the national level. It was noted that Protocol No. 15 to the Convention, which was the product of the Brighton Conference and Brighton Declaration, would enter into force on 1 August this year thereby adding an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention.

By taking into account the case-law of the Court, the UK domestic courts were implementing the Convention at the national level, embedding it into the UK's legal system, strengthening the culture of human rights in the UK, and bringing the notion of shared responsibility to life.

It was noted by the Judges that the Human Rights Act's language was a useful and advantageous conduit through which UK domestic court decisions reach the European Court. UK judges would already, in their judgments, have translated their rights discourse into the language of the Convention via the Human Rights Act. Domestic judges from other States, by way of contrast, might employ more the language of their civil or common law systems or that of their respective constitutions. The latter might provide the same or more extensive protection but the framing and language was different. As such it might be easier for the Judge elected in respect of the UK to translate the UK's position in a judicial formation where no other common law judge would be present.

The Judges went on to stress that the European Convention provided a framework of "minimum standards". It was the role of the States Parties to identify and afford redress for possible infringements of human rights in each particular case. In so doing they enjoyed a margin of appreciation, subject to the supervisory jurisdiction of the Court.

In States in which the substantive embedding of the Convention had been largely successful, like the UK, the Court was in a position to take on a more "framework-oriented" role when reviewing domestic decision-making and to assess whether certain material elements allowed it to grant deference to national authorities. This was, by and large, limited to qualified rights and not to core or absolute rights. Of course, the Court reserved to itself the final say on Convention-compliance.

For example, in the case of *Ndidi v UK* (2017) the Court established the "strong reasons" principle with respect to Article 8 cases, "*in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so…".*

II. Judicial dialogue between national superior courts and the European Court of Human Right

The high quality of the dialogue between the UK superior courts and the Court was stressed by the Judges.

Formal judicial dialogue was characterised as a conversation through judgments, which usually resulted in the issue in question being resolved over time. This type of dialogue could be understood as a process which evolved and any one snapshot was not necessarily reflective of the quality or effectiveness of that dialogue. Examples were cited example, for example in the Horncastle litigation (*R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47 and *Al-Khawaja v UK 26766/05* [2011] ECHR 2127, (2012) 54 EHRR 23) and in the life sentences' litigation (*Vinter v United Kingdom* (66069/09) [2013] ECHR 645; (2016) 63 E.H.R.R. 1; *Attorney General's Reference (No.69 of 2013)* [2014] EWCA Crim 188; [2014] 1 W.L.R. 3964; *Hutchinson v The United Kingdom* - 57592/08 – Grand Chamber Judgment [2017] ECHR 65; 43 B.H.R.C. 667).

From the European Court's perspective, the UK courts engaged with the Convention critically and analytically which was seen as positive.

It was noted that the view expressed by Lord Rodger in *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2009] 3 WLR 74 (*Argentoratum locutum, iudicium finitum - Strasbourg has spoken, the case is closed*) may be explained by the very specific chronology and context and was, in any event, only one view expressed in that case. The other Law Lords engaged with the rights issues more critically.

Analysis of Strasbourg case-law by UK superior courts showed an in-depth understanding of and engagement with the Court's case-law.

Indeed, the sophisticated analysis by the UK domestic courts of the Strasbourg case-law was relied upon in its judgments against other States. The most recent example was the Grand Chamber case of *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, 22 October 2018. Sometimes the reasoning in UK domestic judgments, like that of other superior courts, is discussed in depth by the judicial formation even if that is not expressly reflected or recorded in the final judgment.

Apart from the Judges, the Court's Registry and Registry lawyers were also familiar with those decisions. Many may have done their postgraduate education in the UK. Some were UK-trained lawyers. Additionally, UK judgments, which were followed closely, were circulated by many European Court Judges amongst themselves, not least because of the analytical and persuasive way in which the UK judiciary discussed and dealt with questions of rights.

The fact that there were now so few violations found against the UK pointed to the UK courts successfully applying the Convention at the domestic level. In considering the operation of the Human Rights Act, it was worth considering that any future divergence between that Act and the Convention might result in more cases being brought before the Court from the UK. Moreover, any potential "decoupling" between the Human Rights Act and the European Convention might also have the effect of reducing the quality of the judicial dialogue between the UK superior courts and the European Court and the benefits that have flowed therefrom. There was a very good equilibrium between the European Court and the UK courts at the present time, although that did not mean that the two were always in agreement.

Another form of judicial dialogue outlined was the possibility to intervene in proceedings as a third party. The UK intervened relatively frequently in cases before the Court and this practice was further encouraged recently in the Copenhagen Declaration (2018). Such interventions were particularly seen in Grand Chamber cases, where the Court was dealing with major issues of principle. One example of this was the UK's intervention in *M.N. and Others v Belgium* (2020), which concerned the Convention's extra-territorial jurisdiction. The Court welcomed this practice. Third party interventions were also possible under Protocol No. 16 to the Convention where a member State requested a non-binding advisory opinion. It was notable that in the first advisory opinion sought by the French Court of Cassation under Protocol No. 16 both the UK and Ireland intervened despite not having ratified the Protocol.

In addition to formal dialogue between judges through their judgments, there was a very well-developed informal dialogue which took place through various means. Firstly, there were regular bilateral meetings between small groups of UK judges (from the three domestic UK jurisdictions and the Supreme Court) and judges from the Court. These were held every 18 months or so alternately in Strasbourg or in the UK. The last visit took place in Strasbourg in February 2020 and a visit of family law judges was tentatively planned for November 2021. Secondly, Judge Eicke, frequently visited the UK and engaged in informal dialogue with the judiciary in England and Wales as well as in Scotland and Northern Ireland. Another forum for informal dialogue was the Superior Courts Network ("SCN") of which four UK superior courts were members, namely the UK Supreme Court, the Supreme Courts of Scotland, the Court of Appeal of England and Wales and the Court of Appeal of Northern Ireland.

III. A comparative view of the Convention system from the perspective of another common law jurisdiction

The UK and Ireland were both similar in that they were common law jurisdictions which had incorporated the Convention via legislation drafted also in a similar manner. However, one fundamental difference was the fact that Ireland was a common law jurisdiction providing constitutional protection for fundamental rights. Irish judges and the Irish Parliament were quite familiar and comfortable with invalidating unconstitutional legislation or seeing it invalidated in a system in which the separation of powers is nevertheless respectfully observed. The Convention was incorporated even later in Ireland than it had been in the UK, with the adoption in 2003 of the European Convention on Human Rights Act. Its purpose was to comply with and accommodate the Good Friday Agreement and ensure an equivalent protection of fundamental rights throughout the island of Ireland. The IHRAR call for evidence submission from Queen's University Belfast provided a very good overview of this background and its consequences.

Given the constitutional protection of fundamental rights in Ireland, even before the incorporation of the Convention, for several decades rights had been invoked in areas where there was considerable, on occasion long-lasting, public disagreement over the correct course of action for the State to take. Prior to the 2003 Act, and indeed prior to the Convention, the Constitution already provided the courts with the power and indeed the duty to vindicate rights where appropriate. Where individuals considered that the level of protection afforded by the Constitution and the Irish courts fell short they brought their cases to Strasbourg.

Cases from Ireland to the European Court had at times involved consideration of fundamental and controversial issues. There had, in general and over time, been little backlash in relation to those cases as long as the Court was considered to have respected the requirement of exhaustion and engaged as carefully and sensitively as possible with them. In *A, B and C v Ireland* - 25579/05 [2010] ECHR 2032, for example, which concerned the constitutional ban on abortion and the absence of a regulatory framework to accommodate the exceptions to this ban developed by the Irish courts, the European Court engaged carefully with both the margin of appreciation and subsidiarity, despite Ireland being, at the relevant time an "outlier" amongst Convention States such that the European consensus might not have assisted it. The European Court's judgments in such cases could feed into public dialogue in Ireland, which had in recent years been supplemented by the organisation of citizens' assemblies.

Looking at how the Irish courts approached rights, they might consider depending on a given case: common law rights; constitutional rights; EU law and EU fundamental rights; and Convention rights. In many cases the courts would first consider the common law, then constitutional rights, and only then Convention rights. There was no sense in Ireland of the Convention having replaced either the common law or the Constitution. The Irish courts engaged in depth and detail, and when necessary critically, with the Strasbourg Court's case-law.