The Independent Human Rights Act Review Round Table

with

The Bar Council

Date: 26th April 2021 – 17:00-19:00

Attendees:

IHRAR Panel & Officials	Bar Council
Sir Peter Gross	Derek Sweeting QC (Chair of the Bar)
Professor Maria Cahill	Schona Jolly QC
Simon Davis	Sam Fowles
Alan Bates	Maya Lester QC
Legal Support: John Sorabji	Joanne Kane
Secretariat Support: Millie Rae	Jessica Simor QC
Secretariat Support: Noah Thorold	Jamie Burton QC
	Dan Stillitz QC
	Tim Ward QC
	Support: Piran Dhillon-Starkings
	Support: Eleanore Hughes
	Support: Nikita Feifel

Introduction

The IHRAR Chair opened with brief remarks welcoming the Bar Council interaction with the IHRAR so far and thanking them for their response to the Call for Evidence (CfE). The Chair said that the review had no presumption of reform, was looking at the questions in the ToR in an open way and the Panel had no conclusions or interim conclusions. The Chair welcomed comments and discussion covering the whole Terms of Reference, and the Panel evinced their interest in the Bar Council's suggestion of taking other jurisdictions' judgments into account in the Call for Evidence response.

The Chair of the Bar welcomed the IHRAR Panel and said that a variety of experts from across the Bar were present, including both some involved in the drafting of the Bar Council's response, and others who were not involved.

The discussion was then opened to the floor where attendees contributed on a variety of topics.

The discussion has been grouped below by topic area, with the key points for each topic listed.

General

On this topic, the following points were made by participants from the Bar Council:

- Across the Bar there is generally little appetite for reform of the HRA, as demonstrated in the Bar Council's and many other responses to the Call for Evidence.
- One participant noted that when working in an area you can get used to the framework and rarely ask questions about whether it is right.

- There is a broad constitutional purpose of the HRA, which is that people's fundamental rights should not change depending on the colour of one's passport. Though this is achieved differently in different jurisdictions, in the UK the HRA is the primary domestic route and is critical allowing individuals to assert their rights.
- One participant mentioned the particular importance of the HRA in housing and homelessness cases, with Article 8 defences dealt with at first instance. Individuals are able to enforce their rights quickly, efficiently and cheaply by direct appeal to rights through the HRA.
- Many HRA-related cases are against the government. There is circumspection with the process of the IHRAR because of its political background, whatever the independence of the Panel.
- The HRA forms a straightforward constitutional protection of rights. There is nowhere else in domestic law where they are clearly written out in one place in a way that is simple and easy for the public to understand.
- No Bill of Rights alternative would be as elegant as the HRA.
- There can be a tendency in the UK to talk about Strasbourg as "them and us" – but in fact Strasbourg is us. The Convention was drafted by British lawyers and is built on UK jurisprudence.

Theme 1 - The relationship between domestic courts and the European Court of Human Rights

On this topic, the following points were made by participants from the Bar Council:

- Amending the wording in Section 2 would be cosmetic but may add a political impetus for courts to not follow Strasbourg in cases where they otherwise could. There are already cases where courts have not followed the Strasbourg reasoning and a tweak to Section 2 is not required for this.
- Courts already take into account a wide variety of jurisprudence, but Strasbourg is different because it is backed up by international law obligations stemming from the Convention.
- For all the merits of the Common Law, it did not adequately protect all the rights in the Convention – this is evidenced by the UK's frequent losses in Strasbourg pre-HRA.
- The lack of a written constitution in the UK means that the Common Law has less clarity and accessibility than constitutions in other countries, and it makes sense for it to be second order in a way that is different from other countries that have constitutions.
- Considering the Common Law and Strasbourg jurisprudence as totally different is wrong and they are now intertwined. There is however a question about the outlook of Common Lawyers in an adversarial system, where the outlook and way of operating is different from the dominant Civil Law strain of law in Strasbourg. However, UK judges can be trusted to use intuition to identify genuine points of inconsistency.
- Introducing the HRA has prompted a clearer articulation of common law rights than previously – for instance on apparent bias. The HRA has provided intellectual challenge to Common Law rights and is in this way complementary to it.
- The Common Law does not go as far as the Convention in certain articles – for instance on positive obligations around inquests in Article 2.
- The *Smith and Grady* case shows how the Common Law can be too cautious to provide adequate protection.
- If Section 2 was weakened, it would mean more people going to Strasbourg to enforce their rights and undermine public understanding of the HRA. Having Strasbourg battling with domestic courts would not be to the benefit of judicial dialogue.
- One participant argued that dialogue could be improved by means of ratification and use of Protocol 16.

- Domestic courts give too much deference to parliament on the Margin of Appreciation; more than envisaged by the Convention.
- The Convention should be a lowest common denominator rights protection, and the Common Law can go beyond it already. Putting a requirement to follow the Common Law on a statutory footing would be necessary only for political reasons, as courts can already do this.
- Where the Convention sets a higher standard, it would be difficult to look at foreign Common Law cases. These cases are already often raised, but formally elevating them, by way of amendment to the HRA so that it made provision for the courts to take account of such judgments, would be problematic and lead to confusion and a reduction in legal certainty.
- Through dialogue we are able to have an impact on the ECtHR; and this can be done without a need to amend the HRA. There is a collective wisdom in 47 views feeding into the ECtHR.

Theme 2 - The impact of the HRA on the relationship between the judiciary, the executive and the legislature

On this topic, the following points were made by participants from the Bar Council:

- A case was raised of the old prison health service employing a doctor who had been struck off. The NHS subsequently became responsible for prison healthcare out of a Convention obligation implemented through the HRA, which was not there in the Common Law.
- It should be assumed that parliament should always seek to act in line with international law. The HRA implemented the Convention appropriately in a dualist system, but without undermining parliament by giving judges the power to overturn primary legislation.
- The international obligation in the Convention is what justifies the stronger interpretive obligation in the HRA.
- Before the HRA, the Common Law did protect many rights, but in a less systematic and structured way: whilst an important source, it therefore was failing to do something that parliament deemed was required.
- Liberty's analysis of cases suggests Section 3 is rarely used in practice, so there is no problem to be solved through any amendment to it.
- The HRA provides judicial protection in what can be a tug-of-war with the Executive.