The Independent Human Rights Act Review Round Table

with

The Law Society of Northern Ireland
The Bar of Northern Ireland

Date: 25th March 2021 – 15:30-17:30

Attendees

IHRAR Panel & Officials	**Participants** (from the Law Society of Northern Ireland and Bar of Northern Ireland, academics and representatives of organisations with an interest in human rights)
Sir Peter Gross	Bernard Brady QC
Baroness Nuala O'Loan	David Mulholland
Simon Davis	Judith McGimpsey
Professor Tom Mullen	Rowan White
John Sorabji	Peter O'Brien
Gethin Thomas	Shania Kirk
Kate Stevenson	Les Allamby
Noah Thorold	Dr Evelyn Collins CBE
Millie Rae	Brice Dickson
Iain Miller	Brian Gormally
	John Larkin QC
	Kevin Hanratty
	Maria McCloskey
	Olivia O'Kane
	Patricia Coyle
	Monye Anyadike-Danes QC
	Barry MacDonald QC
	Paul McLaughlin QC
	Terence McCleave BL

Human Rights in NI

Participants set out the context of human rights and the Human Rights Act (HRA) with regards to Northern Ireland (NI). **A full note has been sent to the IHRAR Secretariat.** In summary the points raised were:

- There is an unease at the perceived intention of UK Government in commissioning a Review into the HRA.
- Human rights and equality were central to the 1998 Good Friday Agreement (GFA) with a section devoted to the issue reflecting its importance as part of securing a durable peace process. The GFA encompasses the machinery as well as the substantive rights of the Convention.
- The 1998 Agreement envisaged a 'Convention plus' approach. NI has no 'Bill of Rights' but an ad-hoc committee is currently considering one. The NI Act is the nearest thing NI has to a 'constitution'.
- The NI Protocol presents further complexities, given the commitment to non-diminution of rights, safeguards and equality of opportunity provisions. NI also has to maintain parity with the specific EU

directives on employment, self-employment, social security freedom from discrimination etc. This is the political reality for NI.

- a significant dilution of human rights protections will impact on the delicate ecology of the Agreement. There is a need to benchmark any proposals in the review alongside the GFA and the 'no diminution commitment'.
- The HRA is also valued amongst the police service of NI, who have done training work on the HRA.
- The Politics of NI mean that the HRA and the ability to enforce it effectively is an important practical and constitutional measure for the people of NI.

Further points on these were made by other attendees:

- There is a perception of a negative attitude in Government towards Human Rights and Human Rights Lawyers, both in the NI context and generally.
- NI is not mentioned in the ToR and the impact on the NI BoR committee (mentioned above) is not referenced either.

Theme One of the Terms of Reference

On the topic of the first theme in the Terms of Reference (ToR), the following points were made by participants:

- Examples of UK Courts moving away from Strasbourg jurisprudence (Al-Khawaja) show that Section 2 is not binding and the only way to further reduce its power is to not take into account Strasbourg jurisprudence at all. This would be nonsensical.
- On Margin of Appreciation, *Nicklinson* shows that the Convention sets a minimum standard where domestic courts have room to go further. Judicial dialogue works well here and shows flexibility and respect from ECtHR. If HRA was replaced with a British Bill of Rights, then this dialogue and a favourable outcome for the UK would not have happened.
- Participant responses in general therefore set out how an effective relationship exists between UK Courts and ECtHR, which is balanced, two-way, respectful and appropriate.

Further points were added by attendees:

- The Convention cannot be incorporated into law just as text, it has to be a living instrument that moves with the times and this is reflected by taking into account jurisprudence.
- If loosening any relationship with regards to Section 2 (i.e doing less than 'take into account', which means not taking into account) then this would breach the Good Friday Agreement which pledges to incorporate the Convention into Northern Irish Law.
- A Review process would be needed to make any changes to the HRA under the Good Friday Agreement. This is para 7 of Good Friday Agreement **(a short note on this has been circulated)**.
- Although the Convention is not part of the IHRAR remit, the Panel can say something about how genuine judicial dialogue could be fostered by 'advisory opinions'.
- 'Outlier cases' do not present a problem for Section 2, where only the 'fixed stream' of cases are 'taken into account' but outliers (ie Russia spectacles case) are ignored.
- Courts in NI have found no difficulties when interpreting S2.
- Judges sitting domestically on Human Rights issues should ask the 'most appropriate' solution, and must consider other courts' opinions (including ECtHR). Parliament cannot prevent Judges doing this without falling foul of the rule of law.
- There should be more trust in the Judiciary to be able to identify and rationally deal with 'outlier cases' as explained above. This is true of the Judiciary in many areas, they are not irrational actors.

- The material that courts can look at is endless, and the extent to which Parliamentary debate assists in construing a statute should come with a health warning.

Theme Two of the Terms of Reference

On the topic of the second theme in the ToR, the following points were made by participants:

- In NI, this question is set within the context of the 2017-2020 Stormont lockdown, a period where questions were asked over how far senior Civil Servants and the Judiciary should / could make decisions whilst there was no legislature.
- In reality, Sections 3 and 4 are working well in NI. Section 3 is being used consistently and in conjunction with Parliament, while Section 4 allows the necessary scrutiny of legislation, whilst not undermining the democratic position of Parliament.
- Similarly, the processes of judicial review and of quashing derogations do not need amending, and represent a balance of power that allows legal challenge to parliamentary decisions. Furthermore, there are no changes needed to Secondary Legislation processes.

Further points were added by attendees:

- The HRA is intended to entrench a set of rights within the UK's constitution. This is deliberately different to most other jurisdictions (as there is no written constitution or Bill of Rights).
- The HRA is now embedded into all jurisprudence in NI and to alter it would be a backward step.
- The HRA does not subordinate our constitution to the Convention, but 'brings rights home'. This was legislation passed by our parliament so even though it utilises the same Convention text, the legislation is the UK's and therefore poses no risk of a perceived 'loss of sovereignty'.
- The main criticism of Section 3 is that it attaches itself to the Convention, which is not static. This undermines the idea of consistent law/legislation.
- There is a constitutional balance to be struck, where judicial interpretation of policy does not overreach. The UK courts get this right as the ECtHR can often be expansive on interpretation of rights (ie spare room subsidy, two child policy) but UK courts still work well in dialogue with them – there is no tension in this regard.
- The balance of power between the three arms of the constitution will always be politically contentious, but currently the system is working well.
- Any desire to diverge from ECtHR in UK Law must be considered with the consequence that more cases go to Strasbourg. If HRA 'brought rights home', then changes could easily 'send rights away' again.
- Expansive obligations under Section 3 are not just designed to protect individuals, but can have benefits for the state too. By allowing Courts to interpret legislation compatibly with the Convention, there is a reduced risk that a remedy will need to be sought in the long run.

Extra-Territorial Jurisdiction (ETJ) and Temporal Scope

On the topic of ETJ (in theme 2 of the ToR), the following points were made by members of the Participants:

- The general principle of law is often seen that once it is declared it 'twas ever thus' however, there has been criticism of this approach. NI legacy in this context is complex and potentially divisive. The key question being, is it right to apply the HRA to deaths that occurred in NI before the HRA was passed?

- In its simplest form, it would seem strange to apply lower standards to the past than to things happening now.
- On ETJ, the basic principles of Human Rights are signed up to by states in all circumstances in respect of acts under their control, so there is no just reason to restrict warzones from this.
- Retrospective HRA application is a necessity if NI wanted to be a 'progressive society'. There is no perceived 'line in the sand' as crimes committed in the past cannot be ringfenced in peoples' minds.
- The above view was (perhaps surprisingly) reflected amongst some senior military figures too, who saw the benefits in terms of military discipline.