

## The Independent Human Rights Act Review Round Table

with

### Equalities Groups Organisations

**Date:** 29<sup>th</sup> April 2021 – 16:00-18:00

#### Attendees

IHRAR Panel & Officials	Human Rights Groups Attendees
Sir Peter Gross	Jennifer Twite - Just For Kids Law
Alan Bates	Harriet Wistrich - Centre for Women's Justice
Maria Cahill	Alice Livermore - Mind
Lisa Giovannetti	Ele Hicks - Diverse Cymru
John Sorabji	Nicole Treanor - Stonewall
Gethin Thomas	Naomi McAuliffe - Amnesty International Scotland
Oliver Burrows	Claire McCann - Equality NI
	Kahiye Alim - Chair of the London Refugee Communities Orgs Advocacy Forum

#### Operation of the Human Rights Act

On the topic of the operation of the Human Rights Act (HRA), the following points were made by attendees:

- The HRA is invaluable in providing a route to an immediate remedy when full scale reform is not possible. In the following case, s3 HRA was applied so that the Mental Health Act was interpreted in a way that meant the individual's same sex partner was recognised as their nearest relative: [SSG, R \(on the application of\) v Liverpool City Council & Anor \[2002\] EWHC 4000 \(Admin\) \(22 October 2002\) \(bailii.org\)](#).
- It has proved even more valuable during the pandemic. The HRA has been vital when securing the rights of individuals in mental health inpatient wards. In particular, there are lots of examples of advocates using the language of ECHR Articles 2,3, 5 to help patients detained under the Mental Health Act to secure respect for their rights on the wards. During the pandemic, there have been reports of examples of Article 8 in particular being used to informally challenge blanket policies not to allow visitors/advocates to inpatient psychiatric wards. The HRA has thus proven to be an important means by which, without recourse to litigation, rights could be given effect.
- Prior to the HRA, victims of crime or abuse could only rely on the common law. The advent of the HRA increased mechanisms for people to enforce their rights. For instance, it has increased avenues for access to justice of victims of crime and ensures the police are held accountable for breaching the rights of victims. The investigative obligations enforced by the HRA are a key example. Under the common law, police are not held accountable for negligence: see the House of Lords in *Hill*. The HRA increased accountability and enforcement and opened up avenues for justice that did not exist under the common law i.e., through *Osman* and latterly *DSD*. *DSD* created a framework through which the law on the prevention of crime can be implemented effectively. Specifically, it provided an avenue (where previously this had been barred in the common law of negligence) for challenging failures in the investigation (and prosecution) of serious crimes of violence including rape (meeting the Article 3 ECHR threshold).

- The HRA is being used as a model in Scotland for the further incorporation of international rights agreements. Any changes to how the HRA incorporates the European Convention on Human Rights (ECHR) could therefore have unforeseen consequences.
- The manner in which the ECHR is incorporated into domestic legislation through the HRA is not a perfect process that cannot be improved; however, it is the best the UK has as a result of its uncodified constitution. Enhanced protection for human rights could be achieved also by other means, including, for example, incorporation of other international human rights treaties such as the Convention on the Rights of the Child (UNCRC).
- The HRA is a powerful tool in holding parliamentarians and government to account when passing legislation. Non-Governmental Organisations and charities can point to it early in the legislative process when they perceive legislation may not be compatible or may be later be challenged.
- The Independent Human Rights Act Review (IHRAR) will need to consider carefully any reforms against the commitments made in the Northern Ireland Protocol committing the UK government to no diminution of rights protections.

### Civic Education

On the topic of civic education, the following points were made by attendees:

- Many people in the UK do not know their rights or how to go about claiming them. There are also examples where public bodies are not aware of their own duties and responsibilities. Greater education and communication of the UK's rights protections would be a useful outcome from IHRAR. There was a need to convey to the public that the rights in the HRA were their rights and not just the rights of those who were unpopular or vilified in the media.
- Constitutional rights are taught at schools in some other member states of the Council of Europe, such as Germany and Ireland; this should be replicated in the UK.
- Civic education was difficult, however, as members of the public could not be forced to be interested in rights education. It was also difficult to see how an adverse media narrative could be tackled.
- Wales is taking a more proactive approach to rights education, especially in schools. It has also sought to implement aspects of the UNCRC.
- If, however, there was to be greater rights education in schools there would be a need to de-politicise it.

### Public Narrative

On the topic of the public narrative on human rights, the following points were made by attendees:

- In public discourse, including from politicians, the HRA is often misrepresented, and the narrative is often one-sided or inaccurate. Many high-profile figures in the media and political sphere contribute to these misconceptions.
- Positive outcomes as a result of the HRA are often ignored or under-reported; its importance in cases such as the bedroom tax or universal credit are overlooked. Cases that result in positive and popular decisions are not framed as a success of the HRA.
- The HRA often acts as a shortcut for protections already enshrined in existing legislation or the common law. This needs to be more effectively communicated as there are many cases where the HRA is blamed for unpopular decisions that would have been made anyway.

- As it stands the HRA often acts as a magnet for unjust criticism. There have been ‘decades of criticism’ of the HRA.
- Responses to the IHRAR’s call for evidence were often defensive in nature due to the context of the last 10 years. There has been a consistent line of attack on the HRA which include threats to amend, repeal or replace it. Other factors include the governments approach to exiting the European Union; the Overseas Operations Bill; the Covert Human Intelligence Sources Bill; the Police, Crime, Sentencing and Courts Bill; and the Internal Markets Bill, all of which have contributed to a defensive mindset when suggestions are made that domestic rights protections need amending.

### Ownership of Rights

On the topic of ownership of rights, the following points were made by attendees:

- The HRA functions in conjunction with the Scotland Act 1998. Courts are given greater powers to strike down rights incompatible legislation under the latter Act, and yet the tensions regarding legislative sovereignty do not exist to the same extent as they do in England.
- The perception of the HRA in Scotland is experienced alongside devolution, providing for a more positive narrative amongst the Scottish public. There is a greater acknowledgement that rights are for everyone.
- The HRA and individual rights “need to be seen as ours”, as the constitutions and rights protections often are in other nations.
- The HRA and rights protections are far more politicised in England than elsewhere in the UK. If greater ownership and education could be provided, it may help to change the public’s perceptions on how it operates as a safeguard for everyone in the UK, not just people for whom it is an immediate concern.
- Northern Ireland is seeking to implement a Bill of Rights building on the rights associated with the ECHR. The Northern Ireland process is distinct as it is based on the Belfast (Good Friday) Agreement. The ongoing process in relation to a Bill of Rights for Northern Ireland is based on the commitment in the Belfast (Good Friday) Agreement that any Bill of Rights would supplement the rights in the ECHR. It is currently being progressed pursuant to commitments in New Decade, New Approach, which was the foundation for the restoration of devolution in Northern Ireland in January 2020 – a process that was led by the Secretary of State for NI and the Irish Tánaiste and Minister for Foreign Affairs and agreed across all parties.

### Theme Two of the Terms of Reference

On the topic of theme one of the IHRAR’s terms of reference, the following points were made by attendees:

- Section 3 is vital as it is not a good use of parliamentary time to enact change when there is a simple interpretation that can be made by the courts that ensures compatibility with the Convention.
- It is sometimes a difficult exercise to understand what the intent of parliament was when enacting legislation for specific groups, therefore providing the courts with an interpretive tool is imperative.
- The value of Section 3 can be seen in *Ghaidan v Godin-Mendoza*. The Court’s section 3 interpretation provided justice and marked a progressive approach to the rights of same sex couples.
- *Smith and Grady v United Kingdom* is another useful example of Section 3’s value, one that marked further progress for LGBT rights in the UK.

- Section 4 is valuable but can still be a lengthy process. In *R(P,G and W) v SSHD* [2019] UKSC 3 (<https://www.supremecourt.uk/cases/uksc-2017-0121.html>), the Supreme Court made a declaration of incompatibility, and it was only in November 2020 that the relevant changes to the law actually came into force. Just for Kids Law first took on the case in early 2015. was brought in January 2015 and only received a remedy in January 2020. It was a case with which the individual was dealing for 3 years before it was brought, therefore taking nearly a decade in total to produce an outcome.
- The following case is an example of the HRA being used as a tool to enforce children's rights under the UNCRC. It is an example of a case settling early and with agreement from the government department, but only once proceedings had been issued: <https://justforkidslaw.org/news/just-kids-law-welcomes-government-u-turn-exempt-children-extended-custody-time-limits>.
- *Commissioner of Police of the Metropolis v DSD* was another case that relied on ECHR jurisprudence.