The Independent Human Rights Act Review Round Table

with

UK Intelligence Agencies and relevant Government Departments

Date: 31st March 2021 – 14:30-16:30

Attendees:

IHRAR Panel & Officials	Government Departments
Sir Peter Gross	Jeremy Fleming
Baroness Nuala O'Loan	Sir Iain Macleod
Lisa Giovannetti	Paul McKell
Sir Stephen Laws	Isabel Letwin
John Sorabji	Shezhad Charania
Oliver Burrows	Christopher Leach
Millie Rae	Helen Thompstone
Iain Miller	Tony D
	Samantha Ede
	Douglas Wilson
	Ghizala M

Context

Given the specific expertise of those attending, it was agreed that the majority of the discussion would cover Theme 2 of the Independent Human Rights Act Review Terms of Reference (ToR), specifically question d.):

'In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?'

This was not restrictive. If attendees wanted to raise points on other sections of the ToR, then this was encouraged.

Introduction

Transparency amongst the UK Intelligence Agencies (the Agencies) is key. In the UK they are able to provide much more public detail than in many other jurisdictions. This has meant the Agencies have been able to willingly engage with this Roundtable session and the Independent Human Rights Act Review (IHRAR) generally.

The discussion was then opened to the floor where attendees contributed on a variety of topics. These have been grouped below with the key points for each topic listed.

General

- The European Convention on Human Rights (the Convention) substantive rights most relevant to the Agencies are Articles 2, 3, 5 and 8. Article 8 (the right to respect for private and family life, home and correspondence) is an ever-present consideration in their activities.

- Two of the key pieces of legislation relevant to the work of the national security community are the Human Rights Act 1998 (HRA) and the Investigatory Powers Act 2016 (IPA). In respect of the HRA, it reflected a central aspect of the legal and ethical framework within which they operate.

- When applying the Convention, the Agencies take a broad interpretation of the Convention rights. This helps to reduce the need to recalibrate their approach to exercising their powers where the European Court of Human Rights (ECtHR) expands the scope of such rights. There may be real practical difficulties in responding with immediate changes of practice (e.g. when computer software has to be reprogrammed). As a result, although the Agencies are not generally affected by the ECtHR expanding the scope of Convention rights, expansion in some particular areas, such as the scope of extra-territorial jurisdiction or the application of article 8 could have an impact on their operations.

- Applying the Convention can raise practical operational issues for the Agencies and relevant Government Departments. It can also pose practical issues where they seek to engage with external partners/agencies, i.e., from other jurisdictions that are not themselves subject to the Convention.

Impact of a broader extra-territorial application of the HRA

- The Agencies and the UK Government Departments present (the Departments) strictly operate within the rule of law. The key to ensuring this is having an effective legal framework that provides clarity.

- Certainty is the starting point and core need for the Departments. Fundamental issues surrounding a lack of certainty come from the Convention, not the HRA. Changes to the HRA therefore may not help deliver certainty. Lack of legal certainty in respect of the Convention arises in two ways:

- First, it is sometimes difficult to determine the correct interpretation of ECtHR judgments. They are not all drafted with the detail and clarity common to judgments of UK courts.

- Secondly, the ECtHR does not always develop a clear and consistent line of jurisprudence. It has not, for instance, developed such an approach to its jurisprudence on extra-territorial jurisdiction. It is thus both difficult to determine its scope and how it might develop in future.

- The ECtHR's case law on lethal force is a case in point. Decisions such as Hanan v Germany and Georgia v Russia (II) have not left the issue of the Convention's extra-territorial jurisdictional application clear. Uncertainty in this area does not provide an effective framework for the Agencies and Departments to operate within. It also requires them to follow the development of the case law carefully to try to determine the direction of travel of the Convention's extra-territorial jurisdiction.

- These issues that arise in respect of the development of extra-territorial jurisdiction under the Convention are issues that arise at the Convention level. They are not issues that are arising domestically under the HRA. It is difficult to see how amending the HRA could have any impact on the development of Convention jurisprudence in this area. Equally, it is difficult to see how

such amendments can cure the broader issue of a lack of clarity and certainty in ECtHR jurisprudence.

- There is a risk that attempts to create certainty (e.g. to set out how the UK courts are to approach the application of Convention rights or its extra-territorial scope) would in fact create further litigation and uncertainty. Consideration needs to be given to the extent to which amendments to the HRA that are not accompanied by amendments to the Convention would create a gap between the HRA and the Convention, which would result in more claims going before the ECtHR in a way that would be unhelpful.

- While questions of policy are not for attendees to advise on and are indeed outside their authority, it would be advisable for those proposing amendments to the HRA to consider the extent of potential new uncertainty which could arise through amending the HRA alone without matching amendments to the Convention. Any recommendation that the IHRAR were to make that could bring greater certainty to the issue of extra-territorial jurisdiction would be very much welcomed, albeit any solution lies, ultimately at the Strasbourg level.

Differential approaches to extra-territorial jurisdiction, the ECtHR and the HRA

- If the HRA were to be amended such that there was a difference in approach to extra-territorial jurisdiction between it and the ECtHR, this could pose problems.

- At the present time, where the two approaches are aligned, it means that the Agencies can utilise closed material proceedings (CMPs) before domestic courts and tribunals, such as the Investigatory Powers Tribunal (IPT) or SIAC. This means they are able to deploy national security material in domestic proceedings before domestic tribunals that the ECtHR has accepted are Convention-compliant e.g., the IPT. As a result, where the UK has to defend such proceedings where they end up before the ECtHR, they are able to rely upon findings of fact made by the domestic courts and tribunals based on national security material deployed in a CMP. A similar point can be made in respect of SIAC. In the Abu Qatada case, SIAC dealt with national security material. That meant that the ECtHR did not have to see national security material. It was, however, able to give weight to SIAC's findings of fact.

- If there was a discrepancy between the Convention and the HRA's approach to extra-territoriality, and an individual did not have any other effective remedy before the UK courts, it could result in the UK having to consider deploying factual material before the ECtHR. This would be problematic as national security material could not be deployed in a CMP before the ECtHR. It is also difficult to see how a process could be established for national security material to be made available to the ECtHR i.e., to restrict it to UK officials at the court or to bring it within the scope of the Official Secrets Act. This would arguably result in the UK not being able to deploy that material and thus would undermine its ability properly to defend proceedings before the ECtHR.

- Amending the HRA in any way that reduced the UK domestic courts' ability to hear proceedings that raised Convention rights issues or questions concerning extra-territoriality would also potentially raise a broader concern. At the present time, the ECtHR can consider the reasoning and analysis in a domestic judgment in proceedings that ultimately result in action being taken before it. The ECtHR thus has the benefit of that domestic judgment. The Wang-Yam case demonstrates the benefits of domestic consideration for national security,

and the difficulty of sensitive material being presented to the ECtHR. It would be useful for the IHRAR to review the decision.

Giving effect to Article 2 & 3 extra-territoriality

- It is inherently difficult to carry out Article 2 compliant investigations in an armed conflict. The practical realities of war are often overlooked, and Article 2 does not seem to have been developed with a military application in mind.

- It is not clear whether an amendment to the HRA (or new statute), which provided guidance on how to ensure that an investigation was Article 2-compliant, could be of any benefit.

- In the context of whether new powers are needed to provide for Article 2 investigations, it is suggested that the existing frameworks are sufficiently flexible.

Bulk powers, international cooperation and managing risk

- There is a difficulty in aligning bulk powers concerning data with the precise terms of Article 8 of the Convention, mainly relating to the proportionality of intrusion into privacy at the point of collection. This creates a difficulty in explaining to the Council of Europe, especially where other countries do not have the power and capability to operate in 'bulk'. The perception that bulk powers apply to entire populations is incorrect.

- International cooperation has real benefits for all and is built on deep trust (i.e. Five Eyes partnership). These relationships include conversations on how legal frameworks intersect, something that is inherently difficult to disentangle.

- Risk is complex. The Agencies and Departments put forward carefully analysed reasoning of the risks involved in certain operations (including proportionality issues), which Ministers review. However, with ECtHR case law continually changing, it is difficult to anticipate where the boundaries of this risk will be case by case.

- The margin of appreciation could therefore be utilised to enhance the 'UK context' of decision making, where the ECtHR is seen more as a 'safety net'. This goes to the substance of the Convention generally, with implications beyond the issue of extra-territorial jurisdiction.

UK Courts and ECtHR Jurisprudence – Judicial Dialogue

- It is difficult to see how changes to the HRA could significantly allay concerns as to a lack of clarity in respect of the Convention.

- There could be more scope for dialogue to further explain UK thinking on extra territoriality. The ECtHR has already stated that there are circumstances where extra-territorial jurisdiction does not apply.

- There is a case for a more united international dialogue with the ECtHR where the legal implications and frameworks are actively discussed between states with similar issues – could this commonality of position be better conveyed to the ECtHR?

- The Brighton Declaration shows States' commitment to the Convention and, when analysing jurisprudence since the declaration in 2012, a shift towards a clearer direction for Convention application.

- What Hanan shows is that states are looking at the issues, engaging in dialogue, and intervening as 3rd parties (which is positive).

Margin of Appreciation, Protocols and amendments to the Convention

- It is not clear how altering the current approach to the margin of appreciation under the HRA could deal effectively with any of the issues concerning the development of extra-territorial jurisdiction by the ECtHR. The issues that affect the Departments arising from the development of extra-territorial jurisdiction can only ultimately be resolved at the Strasbourg level.

- In some cases the government has been expected to act on Convention jurisprudence that is not yet binding because, for instance, there is 3 months to refer a case to the Grand Chamber, or where the judgment is not final or is subject to the control of the Committee of Ministers.

- Protocol 15 (principle of subsidiarity and the doctrine of the margin of appreciation) has not yet been ratified by Italy, but this has not stopped the ECtHR approaching cases with the protocol in mind[1]. The issue here would be to secure Italy's ratification. Again, this is not, however, an issue for the HRA itself.

Boundary between Convention jurisprudence and International Humanitarian Law

- International Humanitarian Law (IHL) is the '*lex specialis*' for armed conflicts. The Convention comes into conflict with this principle, particularly in respect of the application of Article 5 (right to liberty). The court's judgments do not provide clear guidance on what States are permitted to do in a military context.

- The most problematic area on a practical level in respect of military operations is the interaction between IHL and the Convention. Some Convention jurisprudence (for example *Al-Jedda v UK*) is not readily reconcilable with military operations in armed conflicts. The Convention was not designed with armed conflicts in mind. See, for instance, Lord Sumption in the *Mohammed case* when, for example, he indicated that Article 5 does not take account of detention in the course of an armed conflict.

[1] Since the meeting, it has been confirmed that Italy will, on Wednesday, 21 April 2021, ratify Protocol 15 to the ECHR and consequently, Protocol 15 will enter into force on 1 August 2021.