The Independent Human Rights Act Review Round Table

with

JUSTICE

Date: 19th April 2021 – 17:00-19:00

Attendees

IHRAR Panel & Officials	Non-IHRAR Attendees
Sir Peter Gross	Stephanie Needleman – Lawyer, JUSTICE
Sir Stephen Laws	Catherine O'Regan – Director, Bonavero Institute
Simon Davis	Claire Hall – Lawyer, Child Poverty Action Group
Lisa Giovanetti QC	Jo Hickman – Director, Public Law Project
John Sorabji	George Peretz QC – Monckton Chambers
Kate Stevenson	Catherine Callaghan QC – Blackstone Chambers
	Dame Sara Thornton – Independent Anti-Slavery Commissioner
	Jonathan Moffett QC – 11 King's Bench Walk

The following points were made by attendees:

- The starting point for the Review is that the substantive content of convention rights and/or withdrawal from Strasbourg are out of scope. However, the Panel needs to be conscious of attempts to undermine the HRA /relationship with Strasbourg 'by the back door'.
- There is little evidence that things are not working satisfactorily. The courts are now looking at the common law first, at least following the UKSC decision in Osborn.
- S3 doesn't just apply to courts but to everybody. In considering the HRA's operational impact it is important to bear in mind that it was intended to create a HR culture, where public authorities paid attention to human rights in borderline cases.
- On the question of predictability, it was noted that ossifying laws might draw attention to factors that are not relevant in individual cases. The current regime allows for departure from Strasbourg.
- With regards to section 19 – if there is a way to increase parliamentary scrutiny then that is a good thing. However, explanatory memoranda are already produced and there is a risk of potential conflation of the intentions of parliament and of ministers.
- The Terms of Reference place much emphasis on sections 3 and 4. It may be noted that Government is generally reluctant to argue for Declarations of Incompatibility (DOIs), and has not been asking the court for more DOIs.
- Section 3 is often relevant to problems or scenarios that were not thought of when the legislation was enacted (e.g *Ghaidan v Godin-Mendoza [2004] UKHL 30*).
- Courts may prefer the s3 route rather than s4 because s3 offers a remedy to the parties in the individual case, and judges want to be able to grant a remedy.
- Increased use of s4 would mean that more cases would be taken to Strasbourg, and it is far from clear that this is something government would welcome.
- In tribunals, it is not just lawyers using the Act but individual claimants. It is immensely important for claimants to be able to get direct remedies through s3 which would not necessarily be available otherwise.

- Tribunals do not have DOIs available. There are cases where an individual does not get justice because the tribunal recognises a violation of rights but cannot do anything about it. Tribunals can however disapply secondary legislation.
- Public authorities need to have as much information as possible to help them make HRA compliant decisions.
- It is difficult to know if Parliament disagrees with a court interpretation of legislation when the courts use the s.3 HRA interpretative power if it does not consider such interpretations. It is an important obligation, placed on the government, to take steps to correct decisions made by courts under s.3 HRA where it does not agree with them e.g., through corrective legislation.
  It should not simply be assumed that s.3 HRA has a 'chilling' effect on how public authorities conduct themselves.
- There should be an emphasis on training with a view to influencing decision-making in public policy. The way in which decisions are made can have significant impacts for policy, strategy and operations as well as the individual decisions in question.
- A piece of research has found that since 2013 there have only been 24 cases[1] in which section 3 was used to interpret legislation that would otherwise have been incompatible with Convention rights.
- Although there are relatively few section 3 cases, the impact for individuals is significant because their effect is very different from that of a s4 decision. There are many examples of cases with a big impact on the public.
- Derogation orders should not be treated differently from other subordinate legislation. There is a constitutional distinction between subordinate and primary legislation. The two should not be conflated.
- The lack of Parliamentary scrutiny of subordinate legislation encourages government decision-making to be channelled through it. Around 80% of SIs are passed under negative process.
- Remedial orders should not be able to amend the Human Rights Act. Henry VIII powers should be narrowly construed, and should not be used to affect the carefully balanced position of the HRA.
- There have only been 14 successful challenges to subordinate legislation.
- There is a broad definition of subordinate legislation in section 21. There is a need to be specific about the meaning.
- The courts have set an extremely high threshold for quashing subordinate legislation because it is in principle incompatible with the HRA, and are showing self-restraint (for example in *MM (Lebanon) v Secretary of State for the Home Department)*.

<u>Extra Extraterritorial Jurisdiction</u>

- The courts have recognised practical difficulties that could arise on the battlefield (seen in *Smith v Ministry of Defence*.) The judgment was cautious, recognising the difficulty of decision making on the battlefield and the dynamic conditions there.
- There is a risk of international criminal court investigations if amendments are made to the territorial scope of the HRA.

[1] Further research has identified another case, bringing this number to 25.