The Independent Human Rights Act Review Round Table

with

The Law Society of Scotland

Date: 29th March 2021 – 14:30-16:00

Attendees

IHRAR Panel & Officials	**Law Society Members (and other attendees)**
Sir Peter Gross	Amanda Millar
Sir Stephen Laws	Jennifer O'Neill
Simon Davis	Paul Cackette
Professor Tom Mullen	Adrian Ward
John Sorabji	Alison McNab
Kate Stevenson	Andrew Alexander
	Dr Ed Bates
	Charles Livingstone
	Charles Mullin
	Elaine Motion
	Fiona Larg
	Helen McGinty
	Jamie Dunne
	Jan Todd
	Jennifer Paton
	Jim McLean
	Jim Stephenson
	Katherine Nisbet
	Lisa Law
	Lynn Welsh
	Aileen McHarg
	Michael Clancy
	Rob Marrs
	Sheekha Saha
	Susan Carter
	Fiona Killen

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 members of the Law Society:

- Domestic courts should regard Strasbourg jurisprudence as setting a minimum floor of protection. This was important to secure legal certainty and to minimise the risk of successful challenges before the ECtHR. However, Strasbourg jurisprudence should be a 'floor not a ceiling', and domestic courts should be able to go beyond Strasbourg jurisprudence, for example in cases where there is a wide margin of appreciation, or no existing precedents. Domestic courts should be allowed to have a dialogic function, and there is need for flexibility in both respects. The decision in Ullah led to an approach that was too rigid. It treated Strasbourg jurisprudence as binding, as a floor and a ceiling.

- In last 10 years there has been a relaxation of the floor and ceiling approach to Section 2, and courts have greater confidence in departing, and are more willing to enter into dialogue. Some may argue that it has swung too far, but it will inevitably settle down in time.
- Potential options for reform include signing up to Protocol 15 of the Brighton Declaration (emphasising subsidiarity and the doctrine of margin of appreciation), or legislating so that the power to depart from Strasbourg jurisprudence could be confined to Supreme Court itself. The UK could also sign up to Protocol 16 (which allows domestic courts to seek advisory opinions from the ECtHR), however this would be undesirable as it could create more delays in cases.
- Nevertheless, changes introduce new areas of uncertainty at a point where we have familiarity.
- A schedule to the HRA could be added, requiring courts to list cases where Strasbourg jurisprudence is not to be followed.
- Across the board, the inclination is to look at domestic remedies and principles first, before looking at whether the Convention is engaged. Indeed, some judges already decide cases on Common Law grounds even when they have been argued on Convention jurisprudence - on which see Lord Reed's approach to look to domestic remedies first. Also see the approach of the High Court of Justiciary, which looks to common law fairness first and does so strongly in the criminal context.
- Domestic courts feel more comfortable departing from Strasbourg jurisprudence in areas of law that already have a strong foundation in the Common Law (e.g the right to fair trial and the right to property). There is a willingness to go beyond Strasbourg because there is a strong domestic tradition.
- In terms of devolution, there is a delicate interaction between the HRA and the Scotland Act 1998. The extent to which Devolution questions are engaged would depend on the amendments being proposed. Human Rights is a protected enactment and changes to the HRA's scope may affect Ministers' competence and what Scottish Parliament can do. In assessing potential amendments, the Panel would need to be very careful about whether amendments were 'hemming in' Scottish Ministers or allowing them more freedom. If allowing more freedom, devolution issues may not be engaged to the same extent. Amendment raises complicated devolution questions, particularly in terms of how to handle interactions between the reserved powers and devolved competences. The position raised (by Policy Exchange) in respect of devolution re Northern Ireland and the HRA was straightforwardly wrong.

<u>Theme Two of the Terms of Reference</u>

- The onus is on those proposing a change to make a case for change.
- Judges deciding between the use of sections 3 and 4 will be sensitive to the context of the cases being presided over. If they feel that a section 4 remedy will not provide justice to the individuals in a case, they will be more reluctant to use it. Use of section 4 alone could run the risk of injustice in particular cases.
- If section 4 was amended to provide a suspensive power, that could lead to more section 4 orders. This could cause problems, such as those seen in Salvesen v Riddell (reconciling rights on landlords and tenants). That was an extremely challenging case for the Supreme Court involving policy issues, and the court decided to suspend the effect of its decision for 12 months in order to give the Scottish Parliament an opportunity to remedy the human rights breach. The court recognised that balancing the two rights would have been fiendishly difficult.
- If there was a suggestion that s.4 would provide a suspensive power, such as is the case with section 102 of the Scotland Act, in respect of primary legislation that would be problematic. Section 102 (which applies to both primary and secondary legislation in Scotland) might, however, be a useful

tool to have even if not used. It provides that where a court concludes that Scottish legislation is outside its competence, it can make an order: (a) removing or limiting any retrospective effect of the decision, or (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.

- Section 102 extends to subordinate legislation and to executive decision making, as well as applying to Acts of the Scottish Parliament. It is supplemented by the rectifying power in section 107, which can be operated retrospectively by virtue of section 114(3).
- A v SoS was a case where the courts went too far. Ghaidan, however, shows how difficult it can be to reconcile the use of sections 3 and 4 HRA, not least because it was a split decision. Courts appear to be aware of where limits lie in determining rights and applying Section 3, so there is no strong case for change.
- Section 3 should not be amended retrospectively as this would create significant legal uncertainty.
- There might be a case for Ministers, rather than Parliament, to be notified a court is proposing to use section 3, in the same way as this operates in relation to the use of section 4. That would be problematic given the number of section 3 cases if the notification requirement applied to all courts. We currently have no data on how frequently section 3 is used. Nevertheless, there is no evidence that the current system is 'breaking down'.
- Courts already look at parliamentary materials to work out Parliament's intention. Contentious legislation is already thoroughly debated (particularly in the in House of Lords). It is therefore difficult to put additional formalities on Parliament.
- Explanatory memoranda for legislation already include statements about Human Rights compliance. Explanatory Memoranda had the benefit of provoking more in-depth thought and discussion in Parliament, and ensuring that Ministers were mindful of compliance for subordinate legislation. It might be possible to amend HRA section 6 to require a section 19 certificate for secondary legislation. If there was such a requirement, it would force Ministers to think again about ECHR compliance. That might be a reason for such a reform/development.
- Ministers could be required to make a pre-legislative statement – not just confirming that legislation doesn't infringe on rights, but also where legislation contributes to advancement of rights and promoting positive obligations.
- The process of making a section 19 statement is very important. Ensuring that legislation proposals are compliant ultimately means that they are of a higher quality
- Further points were made about the Scottish Human Rights Taskforce, which wants courts to play a more active role, to engage in a debate with the public sector through, for instance, the use of structural interdicts (injunctions).
- In respect of derogation orders, Dominic Grieve's view is correct on this. There is no real evidence that the approach to them does not work.
- The Scottish HR Taskforce considered that there ought to be a positive obligation for Ministers to specify how legislation advances human rights. This would make the HRA work more effectively.
- There is no case for changes to the remedial order process.