The Independent Human Rights Act Review Round Table

with

UK Police Services

Date: 13th April 2021 – 15:30-17:30

Attendees:

IHRAR Panel & Officials	Police Services
Sir Peter Gross	Dame Cressida Dick
Baroness Nuala O'Loan	Louisa Rolfe
Simon Davis	Martin Hewitt
Sir Stephen Laws	Steve Wilson
John Sorabji	Steven Bramley
Millie Rae	Michael Stamp
Iain Miller	Dame Lynne Owens
Kate Stevenson	Helen Thompstone
	Kenny MacDonald
	Duncan Campbell
	Mark Hamilton
	Richard Ross

Context

Given the specific interests of those attending, it was agreed that the majority of the discussion would cover Theme 1 of the Independent Human Rights Act Review (IHRAR) Terms of Reference (ToR):

'The relationship between domestic courts and the European Court of Human Rights (ECtHR)'

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

Introduction

The IHRAR Chair opened with brief remarks welcoming the Police Services interaction with the IHRAR so far, including the National Police Chiefs Council (NPCC) / Metropolitan Police Service (MPS) joint response to the Call for Evidence (CfE). The discussion was then opened to the floor where attendees contributed on a variety of topics.

The discussion has been grouped below by topic area, with the key points for each topic listed. ***Actions are listed in bold.***

General

- Policing in the UK follows a human rights based approach, where decisions and dilemmas in the Police Service are guided by reference to the Human Rights Act (HRA). The HRA has therefore changed policing for the better. While no chilling effect on policing has yet been

demonstrated, it has in some situations constrained the police's discretion in terms of decision-making.

- There is still work to be done in clarifying the provisions made under the HRA into something that is straightforward and translatable to officers on the front line.

The impact of Strasbourg jurisprudence on UK policing

- The concept of 'bringing rights home' has led to too much precedence being given to European Court of Human Rights (ECtHR) jurisprudence and not enough consideration of the domestic context. This jurisprudence is based on cases from a variety of contexts across the States signed up to the European Convention of Human Rights (the Convention). These contexts often do not align with that of the UK. The Strasbourg Court does not always take proper account of the domestic context by looking at domestic case law. Horncastle was a case where it did, but this is not always the case.
- The IHRAR would benefit from having the data to show how increased litigation resulting from ECtHR judgments has impacted the Police Service. **Attendees offered to provide further data on this.**
- There is a tendency in cases brought under the Human Rights Act that involve the MPS to cite and rely on a wide range of sometimes confusing precedents. Often, the question whether Convention case law should be followed in the instant case is not probed by the court, and the common law is left out of account even where it is applicable in the circumstances. Recognising the ability for UK Courts to take account of the common law, as per Lord Pannick's proposals to the IHRAR CfE, would mean s.2 HRA can deliver what it was originally designed to achieve, which is to 'take into account' Strasbourg jurisprudence but not rely upon it solely.
- In an international context, the difference between adversarial and inquisitorial legal systems further calls into question the application of ECtHR jurisprudence to the UK context. Strasbourg produces case law which derives from a range of legal systems. There is less read across from inquisitorial systems in other Convention States than from adversarial systems to law in the UK.
- It may be beneficial to introduce a new section into the HRA, analogous to section 12 in respect of the public interest in freedom of expression, making provision for the courts to take account of the public interest in the effective operation of the criminal justice system, when considering cases concerning policing.

DSD

- Lord Hughes' statement regarding *Commissioner of Police of the Metropolis v DSD and another* (DSD) sets out that the judgment is likely to increase the numbers of reinvestigations. DSD has had significant implications for the Police Service because of this, as the practicalities of resourcing lines of enquiry, weighing up evidence, and operating multiple competing claims at one time all require significant investment.
- This increased level of scrutiny has therefore affected the Police Service negatively. There is support for Lord Pannick's submission to the IHRAR CfE, which suggests reminding courts, through amending the HRA, that ECtHR jurisprudence is not binding, and UK Courts should have regard to Common Law decisions. If this was clearer at the time, cases such as DSD may have had a different outcome.

- Another consequence of DSD is that investigations have to be carried out in instances where the prosecution thresholds for offences are never likely to be met, but resources are still utilised to achieve the unachievable. **Attendees offered to provide a further note on the Article 3 implications of DSD.**
- The Police Service is often not able to reveal the impact that DSD, or other cases, have on it. The need to remain separate and impartial from party politics often prevents them directly raising these issues. More recently, police have had more of a voice in the development of policy. Any influence is always tempered with the understanding that Police Service should not overreach into policy development, and this is a good thing.

Other Cases

- *Zenati v Commissioner of Police of the Metropolis and another* (Zenati) provides another example of ECtHR jurisprudence having a negative impact on UK policing. The resulting judgment placed greater pressure on the MPS to investigate where the liberty of the subject is in issue, even though the ECtHR case law cited by the court arose from inquisitorial criminal justice systems and very different circumstances and contexts from the UK case.
- *Hannan v Germany* shows a slow advancement of positive Article 2 duties. Officers can be stationed overseas and engaged on casework involving offences committed by, and/or against, British nationals. Any extension to the territorial application of the HRA and, in particular, the positive duty to take reasonable steps to take steps to avert harm caused by criminals could have a significant impact, especially in dangerous locations. Even in a domestic context, the positive Article 2 'threat to life' responsibilities can have an operational impact. **Attendees agreed to a detailed note on Article 2 implications in this context.**
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Covid-19 Regulations

- Covid-19 regulations brought in this year, that the police were required to enforce, have created major practical difficulties and a crisis of legitimacy for Police Services across the UK. The regulations have brought about the most significant changes to the relationship between the public and the police since World War 2.
- The HRA was not drafted with the Covid-19 regulations in mind, and so the balance between enforcing the regulations and upholding substantive rights is an extremely difficult one to manage generally, specifically for front line police officers.
- Similarly, the HRA was not drafted with an anticipation that the police would be responsible for enforcing health regulations, which in normal circumstances are not regarded as 'criminal'.
- Commanders are well versed in balancing substantive rights, such as Article 10 and Article 11. However, the width of interpretation in the regulations means that those who might wish to wilfully misrepresent police behaviour have scope to do so. The result has been an atmosphere of distrust in policing amongst some areas of society. The is a sense of confusion amongst police officers as to how rights are balanced against regulations.
- Legislation on the Covid-19 regulations has been rapidly changing. This has created inconsistency, leading to criticisms of those left to do the enforcing, namely, the police. The 4 'E's' (engage, explain, encourage, enforce) were developed to assist police officers balancing rights and regulations and are believed to have been a very effective for officers in carrying out this balancing exercise. An ethics panel was also setup to specifically look at these dilemmas. The key question that needs clarifying is 'what is law, and what is guidance?'

- The polarisation of thought on such issues has placed the police in the middle of a much broader ideological debate. The protest environment illustrates the difficulty, given that the exercise of the right to protest has been illegal at various points during the pandemic.

Policing in Northern Ireland

- The Human Rights Act is a fundamental tenet of policing in Northern Ireland (NI) and is an enabler for the Police Service of Northern Ireland (PSNI), providing a structure for decision-making that was previously absent.
- There are numerous legacy cases in NI relating to 'The Troubles', largely dating to the 70s and 80s. PSNI explained that there would be a case before the UK Supreme Court (UKSC) in June this year in relation to the PSNI's rights and obligations in respect of Troubles Legacy Investigations. Clarity from the UKSC would be most welcome.
- Human rights law is continually changing and, given that human rights are so fundamental to policing and wider structures in NI, a more consistent approach that provides certainty would help policing. Any perception of breaching human rights is particularly sensitive in NI, so PSNI need clarity as to the parameters if they are to have the support of their community.
- *The IHRAR Chair clarified that 'temporal scope of the HRA' was not in scope of the IHRAR ToRs, but was still interested in the points raised to provide context.*

Policing in Scotland

- Policing in Scotland is devolved however, Police Scotland are a part of the NPCC. Human rights are central to their operations, demonstrated in the Oath of the Office of Constable, listed in the Police and Fire Reform (Scotland) Act 2012, s10.
- *Cadder v HM Advocate* [2010] UKSC 43, 2011 S.C. (Cadder) enabled reforms to be made via Scottish legislation to improve policing. This was in the context of the UKSC holding that the approach taken to questioning suspects in criminal proceedings was not compliant with art. 6 ECHR.
- The HRA is very much embedded into policing and the wider operation of Scottish law. The Scottish Government strongly support the HRA and the devolved powers of policing. The Scotland Act itself requires Ministers to act in a way that is compliant with the Convention.
- Police Scotland face less civil litigation than other Police Services across the UK, perhaps due to the different legal system of Scotland. *Starrs v Ruxton* was the first case where the Convention had an impact on a case in the Criminal Justice sphere in Scotland. It concerned the fact that temporary sheriffs, due to their appointment process, were not art. 6 compliant judges. The case law since then has developed and there is no desire to amend s.2 amongst those from Police Scotland - as the 'take account' provision was now tolerably clear.
- The Scottish government is clear in its support for the HRA and their responsibility for policing.