The Independent Human Rights Act Review Round Table

with

The Lord President and Judicial Working Group

Date: 22nd April 2021 – 16:00-18:00

Attendees

IHRAR Panel & Officials	**Judicial Members**
Sir Peter Gross	The Lord President
Sir Stephen Laws	The Lord Justice Clerk
Professor Maria Cahill	Lady Carmichael
Professor Tom Mullen	Lady Poole
John Sorabji	Sinead Campbell (official)
Kate Stevenson	

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 Scottish Judicial Working Group:

- The Convention had caused a 'bumpy ride' in the criminal system when introduced, caused partly by the way that the Scotland Act was drafted. Fair trial arguments were being converted into devolution issues, meaning that procedural issues were being 'promoted' to devolution / rights issues. The Scotland Act 2012, s.36(4) which amended the Scotland Act 1998, schedule 6, part 1, provided that the Lord Advocate was not a public authority for the purposes of the office's prosecutorial functions. This vastly reduced the number of Convention rights cases in criminal proceedings. The aforementioned challenges are now issues of the past, with parties once more arguing cases based on common law fairness when challenging decisions taken in criminal prosecutions.
- The UKSC decision in in *R (Osborn) v Parole Board* [2013] UKSC 61 also changed the courts' approach to Strasbourg jurisprudence. Lord Reed emphasised that common law and domestic statutes should be the first 'port of call'.
- Cases are still argued on Convention rights grounds, when there are good common law grounds. Nevertheless, considering cases on Convention rights grounds has had the benefit of making people examine issues from a new perspective. The HRA has been beneficial for judges as it has prompted them to look at the jurisprudence to see if it needs to be developed. There is a greater willingness now to consider whether change is required where a matter might otherwise be viewed as sanctified by usage.
- In *Starrs v Ruxton [2000] JC 208* there was a successful challenge to the use of temporary sheriffs. As a general rule, Scotland does not have a fee-paid judiciary in the court system (except for emergency situations). This follows a trend across Europe.
- In *Cadder v HM Advocate [2011] (UKSC) 13*, judges in London had tried to anticipate Strasbourg jurisprudence, although they never got a decision. Furthermore, the Crown could not take the case to Strasbourg because they were not victims. This was a case where, perhaps, the UKSC did not appreciate the impact it would have in practice.
- Another significant UKSC decision (*The Christian Institute v The Lord Advocate (Scotland)* [2016] UKSC 51) concerned whether the "Named Person" legislation (the Children and Young People

(Scotland) Act 2014) was compliant with the Convention. Following this decision, it appears the Scottish Government has abandoned the proposed legislation.

- The Human Rights Act (HRA) has been a force for good. It has also been a source of disruption and prompted challenges. For better or worse, the HRA is now part of our legal framework.
- In Scotland there is a good relationship between the Courts and the Scottish Parliament.
- The margin of appreciation feels stable at the moment, particularly with regards to cases involving social and political rights. The courts have been more cautious about the development of socio-economic rights.
- Generally, judges and practitioners feel more comfortable in dealing with the margin of appreciation. Judges do not feel like sands are 'shifting underneath them' and are not experiencing difficulties. The Scottish government is planning to incorporate into Scottish law a number of International Conventions, including the United Nations Convention on the Rights of the Child. That will make a difference to the approach that the Scottish judiciary will need to take to such issues.

Theme Two of the Terms of Reference

On the topic of the second theme in the Terms of Reference (ToR), the following points were made by members of the Judicial Working Group:

- Scottish Courts have not strained the interpretation of legislation. No Scottish Court has ever struck down a whole Act of the Scottish Parliament (although in principle they do have the power to do so), although particular provisions have been found not to be law.
- With regard to section 19(1) HRA statements of ECHR compatibility, a similar approach is taken under Section 31 of the Scotland Act 1998. The latter provision, however, allows for such statements to be made during the passage of a Bill through the Scottish Parliament, first by the Minister introducing it, and secondly by the Presiding Officer. These do not cover future amendments. The Policy Memorandum accompanying Scottish Bills usually contains a section covering compatibility with Convention rights. An extra statement of compliance is not likely to be helpful. Furthermore, lawmakers cannot envisage all future scenarios, therefore a note cannot cover all potential issues.
- In well-founded challenges, the Scottish government has at times issued amending legislation which has resulted in resolution of the case without the need for judicial determination.
- Both rules of standing and the discretion as to remedies are limits on public law challenges (including human rights). In appropriate cases the court may exercise its discretion to refuse remedies even where a challenge has been successful. The discretion to withhold remedies is exercised on equitable principles and will take into account all of the circumstances, which may include the subject matter, grounds of challenge, consequences of any order, and the nature of the petitioner's interest.
- Section 102 of the Scotland Act 1998 is useful. It enables a court to remove or limit the retrospective effect or suspend the effect of its decision when it finds that an Act of the Scottish Parliament is outside its competence or acts of the executive are ultra vires. The more options available to a court in terms of remedies, the better. An example where the UK Supreme Court used that power to suspend Scottish legislation in order to enable the Scottish Parliament sufficient time to correct the defect in legislation, and to do so in a way that was compatible with ECHR rights is *Salvesen and Riddell v The Lord Advocate (Scotland)* [2013] UKSC 22. Use of the s.102 provided the Scottish Parliament with the time to remedy the issue in the case.


IHRAR
INDEPENDENT HUMAN RIGHTS ACT REVIEW