The Independent Human Rights Act Review Round Table

with

The Law Society of England and Wales (Roundtable 1)

Date: 23rd March 2021 – 15:30-17:30

Attendees

IHRAR Panel & Officials	**Law Society Members and Officials**
Sir Peter Gross	John Wadham
Alan Bates	Sean Humber
Simon Davis	Faith Salih
Professor Tom Mullen	Sue Willman
Gethin Thomas	Angela Jackman
Oliver Burrows	John Halford
Joseph Rice	Stephen Grosz QC
Millie Rae	Simon Creighton
	Alice Hardy
	Paul Wilson
	Ellie Cumbo
	Hazel Blake

This roundtable was facilitated and attended by the Law Society. However, the views expressed by attendees were their own and do not necessarily represent the views of the Law Society.

Civic Education

On the topic of public education, the following points were made by members of the Law Society:

- There is now scope for better education through virtual means. This dynamic should be used to better educate people on the protections and workings of the Human Rights Act (HRA).
- Non-Governmental Organisations now provide legal training to better share better information on the HRA to correct negative public perception. A good outcome of the review would be a wider understanding for the public of the workings of the HRA.
- There was no attraction in adding a reference to citizens' duties/responsibilities.

Common Law

On the topic of the common law, the following points were made by members of the Law Society:

- Common law protections often go further than the European Court of Human Rights (ECtHR).
- The starting point for most lawyers and counsel is the common law; the HRA is often used to add on to existing claims under the common law. There is therefore no need to entrench, through an amendment to the HRA, a duty to first pay due regard to the common law before looking at ECtHR jurisprudence.

- Courts are not bound by ECtHR jurisprudence; they have a duty to take it into account. Courts have been sensible when applying this duty.

Impact of the HRA

On the general impact of the HRA, the following points were made by members of the Law Society:

- The ToR making clear that the Government is not seeking to water down commitment to Convention rights is welcome, however there is concern that some of the implicit suggestions set out in the ToR could result in a backdoor watering down of rights.
- If changes were made to the HRA, there could be an adverse impact on the less publicised examples of the benefits of the HRA. For example, a human rights approach has been applied by public authorities, such that many potential breaches are dealt with before they reach trial.
- Court cases are therefore the tip of the iceberg. A major impact of the HRA is the influence it has on the decision-making processes and actions of public authorities. There is a culture of respect for human rights embedded into the actions of public authorities.
- It would be useful to put a number to the cases that are settled prior to any trial to understand the wider impact of the HRA, however, this is complicated as comprehensive data is not collected on settled cases.

Judicial Dialogue

On the topic of judicial dialogue, the following points were made by members of the Law Society:

- The UK judges and experts in the ECtHR take with them experience of UK common law. The importance that the ECtHR places on the UKs common law traditions should not be underestimated. The UKs contributions have been significant.
- There is some difficulty when understanding ECtHR jurisprudence, due to the need for a compromise to agree on a principal judgment.

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:

- Keeping section 2 of the HRA is necessary to avoid a greater number of applications to the ECtHR.
- There are many benefits from the HRA constituting a living instrument.
- The Coronavirus pandemic highlights the need for the HRA as a living instrument. It needs to be able to adapt quickly, without the need for Government enacting legislation on every aspect of life.
- Advances in technological and digital rights also provide examples of the need for the HRA to remain a living instrument. The cross-fertilisation of the common law and HRA enables protections against the misuse of private information.
- The HRA has had a significant impact on procedural matters, as well as on moral issues.. The debate is often side-tracked into these moral questions, when the procedural issues are perhaps the most significant.
- Domestic courts have been extremely careful when assessing the margin of appreciation provided to member states of the European Convention on Human Rights (Convention).

- If domestic remedies are diluted, it will increase the extent to which the ECtHR will be prepared to intervene. If there is an insufficient remedy, ECtHR will intervene.
- Members of the Law Society were open to the idea of the provision of guiding principles on the use of the margin of appreciation especially if declaratory of existing decisions - but warned that it could lead to further dispute or disagreement on the meaning of the guiding principles.

Theme Two of the Terms of Reference

On the topic of the second theme of the ToR, the following points were made by members of the Law Society:

- Sections 3 and 4 work well together. There is no need to amend or repeal section 3. It has been carefully applied and any changes to its nuanced approach would risk unbalancing the HRA.
- Domestic courts have been sensible in practice and have not gone against the intention of parliament when interpreting legislation compatibly with the ECHR. It is understood that there is an issue in this regard in theory, but it is not the case in practice. Courts are very restrained with respect to section 3.
- Section 4 should continue to be regarded as a last resort, and its relationship with section 3 should not be inverted.
- To prevent any misunderstandings on the intent of parliamentary legislation, a duty to provide a more detailed section 19 statement or explanatory memoranda could be useful.
- Section 3 as the primary lens of interpreting legislation allows for a more forensic approach on a case by case basis.
- Section 14 is useful as a symbol of the severity of a government seeking to derogate from its commitments to the ECHR. Removing section 14 would change the nature of the HRA and remove the significance of derogating from the ECHR.
- It is not necessary to change the process of dealing with provisions of subordinate legislation that do not comply with Convention rights. Even when courts do act, they are careful to restrict the scope of their remedies. It would be perverse to limit the Courts' powers in respect of subordinate legislation only in relation to the HRA. There was an overlap with IRAL which needed to be considered.
- Previous reviews and consultations on the extra-territorial scope of the HRA have always been framed from the Government's point of view, who have not been impartial. The HRA's territorial scope does not threaten the safety of armed forces, but rather protects them. The vast majority of cases have been with regard to equipment failure.
- The Government has sought to gain legal immunity in relation to combat, but they are not above the law and there is a need for judicial oversight. Removing the extra-territorial scope of the HRA would be novel and dangerous.
- Should any changes be made to restrict the extra-territorial scope of the HRA, the UK could be in breach of its obligations to provide domestic remedies and cases would go straight to the ECtHR.