

Human Rights in Action

Assessing the positive impact of the Human Rights Act 1998 in the UK

Submission to the Independent Human Rights Act Review
March 2021

Edited and introduced by

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With contributions from

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About Human Rights in Action

The Human Rights in Action project team comprises:

Kanstantsin Dzehtsiarou, Professor of Human Rights Law, University of Liverpool, editor-in-chief of the European Convention on Human Rights Law Review. Professor Dzehtsiarou is an author of three books, dozens of articles and hundreds of blog posts and other public engagements on the issue of interpretation of the European Convention on Human Rights, including relations between the European Court of Human Rights and domestic legal system. Professor Dzehtsiarou acts as an expert for the Council of Europe, the Organisation for the Security and Collaboration in Europe, the United Nations and other national and international organisations. Professor Dzehtsiarou's interests spread between interpretation of the European Convention of Human Rights, reform of the European Court of Human Rights, administration of international justice, comparative and constitutional law.

Silvia Falcetta, Research Associate in the Department of Sociology, University of York. Dr Falcetta holds a PhD in Sociology of Law from the State University of Milan and her current research agenda concerns human rights and sexual orientation equality, with a particular focus on the European Convention on Human Rights. With Professor Paul Johnson, Dr Falcetta has co-authored a number of journal articles that identify ways in which the Convention could be interpreted to enhance sexual orientation equality in the United Kingdom and other member states of the Council of Europe

Dimitrios Giannouloupoulos, Professor and Head of the Department of Law, Goldsmiths, University of London. As director of the Britain in Europe thinktank and Knowing Our Rights project, Professor Giannouloupoulos has undertaken significant public engagement activity in recent years, making substantial contributions to the debates on Brexit (particularly in relation to the rights of EU citizens in the UK), the potential repeal of the Human Rights Act (HRA) and withdrawal from the European Convention on Human Rights (ECHR). Professor Giannouloupoulos' public engagement contributions in these areas include: providing oral and written evidence to the Civil Liberties, Justice and Home Affairs Committee (LIBE) at the European Parliament; giving evidence to the House of Lords' EU Justice Sub-committee (October 2017); supporting through his research the work of MEPs and human rights NGOs; establishing dynamic networks that brought together academic scholars, legal professionals, NGO experts and policy makers; providing regular comment and analysis for the media; convening national and international colloquia (e.g. in October 2016, February 2017, November 2018 and May 2019) and public debates (e.g. in October and December 2016, in February 2019, at Goldsmiths and the Royal Society of Arts, and in March 2019 and December 2020); coordinating film screenings and public talks (e.g. at the BFI, Regent Street Cinema and

the Frontline club in June and November 2017). Professor Giannouloupoulos also oversees the delivery of human rights workshops to A level students in schools across London and the UK, in the context of which the Knowing Our Rights team has connected with more than 2,000 students, teaching them about the impact of the European Convention on Human Rights in the UK and the current debate on the potential repeal of the HRA and withdrawal from the ECHR.

Paul Johnson, Professor and Head of the Department of Sociology, University of York. Professor Johnson is an expert on the European Convention on Human Rights and sexual orientation equality. He has written the books *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*; *Homosexuality and the European Court of Human Rights*; and (with Robert M. Vanderbeck) *Law, Religion and Homosexuality*. Professor Johnson is the author of over forty peer-reviewed journal articles. Professor Johnson is the editor of the ECHR Sexual Orientation Blog, which is the world's leading resource for information about and analysis of human rights law and sexual orientation equality.

Contact us

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Human Rights in Action and the Knowing Our Rights research project

Some contributions to the Human Rights in Action project were first developed in the context of the Knowing Our Rights research project, and we have also drawn on other research and public engagement activities undertaken under Knowing Our Rights when providing answers to some of the questions of the Independent Human Rights Act Review.

Introduction

When the Independent Human Rights Act Review (IHRAR) was announced, the Human Rights in Action (HRiA) team were reassured, on the one hand, to see that its overriding mission would be to consider how the Human Rights Act (HRA) is working in practice and whether any change is needed.

But on the other hand, we were concerned, first by the fact that the IHRAR's "terms of reference frame[d] the review against a politically polarised backdrop - concerning how it allegedly allows the judiciary to usurp the power of the executive for instance" and, secondly, by the fact that the terms of reference "fail to ask the cardinal question of whether the HRA has effectively protected individual rights in the UK".

As academic human rights experts who have observed, analysed and, *in collaboration with others*, worked to promote – through our scholarship, teaching and public engagement activity – the indisputable positive influence of the HRA in protecting human rights in the UK, we were strongly motivated to join forces, with the ambition of providing comprehensive, evidence-based responses to the key questions being asked by the IHRAR. The HRiA project reflects, and is the mechanism that allows us to pursue, this ambition.

In the context of this project, the HRiA team invited some of the foremost human rights experts in their fields to answer the fundamental question of how the HRA has shaped UK law and UK courts over the last two decades, and to consider the questions that the IHRAR asked in its call for evidence.

The HRiA submission to the IHRAR comprises 20 contributions by 26 experts which provide answers to some of the IHRAR's central questions, while taking particular care to highlight the continuous positive impact of the HRA in human rights protection in the UK.

The individual expert contributions are reproduced in their entirety in this submission, and we are submitting them to the IHRAR with the hope that they will inform its work. We feel that, read together, they highlight the significant value of the HRA to the lives of everyone in the UK. Taking into account that this report is not a submission from a single author but a product created by a group of independent experts, we have exceeded the suggested maximum word count for a single submission.

We have made all of the contributions from the HRiA project available on our website, which we will continue to update with new contributions in the future. In addition to informing the IHRAR's work, we remain committed to engaging with the wider public to

show the positive impact of the HRA and alerting them to the risks inherent in the potential undermining of its key protections.

The political climate in which the IHRAR is taking place

The HRiA project team warmly welcomes the IHRAR's "commit[ment] to [the UK] remaining a signatory to the European Convention on Human Rights" (ECHR) and its intention to "procee[d] on the basis that the UK will remain a signatory to the Convention", as stated in its call for evidence. The IHRAR now has the opportunity, in the context of this timely review, to also confirm the UK's continued commitment to giving effect to the rights and freedoms enshrined in the ECHR *domestically*.

Why removing uncertainty over the future of the application of the ECHR in the UK, *through the HRA*, is urgently required must be analysed and understood against the backdrop of the anti-European human rights narrative that recent governments have willfully adopted, and the Eurosceptic attitudes that gave rise to Brexit and remain in action in the new post-Brexit environment.

On 3 October 2014, the Conservative Party published its policy document "Protecting Human Rights in the UK" which set out its proposal to repeal the HRA and replace it with a new "British Bill of Rights and Responsibilities". In addition, the policy document raised the prospect that the UK might withdraw from the ECHR. As Kanstantsin Dzehtsiarou (with Tobias Lock) noted in a policy paper at the time,

a withdrawal of the United Kingdom from the ECHR would deprive people in the UK from the possibility of taking their human rights complaints to the [European Court of Human Rights]. This would be accompanied by a substantial reduction of human rights protection, in particular for minority and vulnerable groups. Importantly, withdrawal would not relieve the UK of the duty to comply with judgments already handed down by the European Court of Human Rights, for instance on prisoner voting [...] Withdrawal would also affect the international standing and reputation of the UK. The UK would also be setting a negative example so that the protection of human rights within Europe as a whole might suffer.

But the government did not heed human rights experts' warnings about the risks inherent in its anti-ECHR narrative.

As Giannouloupoloulos wrote in the *European Human Rights Law Review*:

the Conservative policy on the HRA and ECHR has, in recent years, mutated from direct political aggression (with the pledge to repeal the Act in the 2015 manifesto)

to a strategy of creating ambiguity and chipping away at its democratic legitimacy. The 2017 manifesto contained a more nuanced commitment, to stay *temporarily* in the Convention *until Brexit was concluded*. The 2019 manifesto then promised to “update” the Act and reform judicial review at the same time, to ensure “it is not abused to conduct politics by another means or to create needless delays”, whilst also committing the Conservative government to “set[ting] up a Constitution, Democracy & Rights Commission that will [...] restore trust in our institutions and in how our democracy operates”. Human rights and the power of the judiciary to hold government to account – most notably through the HRA and judicial review – were conflated there into a common threat to the power of the executive and parliamentary sovereignty that is to all intents and purposes reduced to “the sovereignty of the executive”.¹

As Giannoulopoulos also wrote in *Prospect* magazine, the UK government

has aggressively been seeking, for many years now, to undermine the core system for the protection of human rights in the UK—the Human Rights Act, incorporating the European Convention.

In the process of doing so, the government

has offered no viable alternative, just vague promises about an elusive UK Bill of Rights, backed up by statements steeped in a type of legal chauvinism that one would think had become obsolete, such as the UK being the country that “invented charters of rights with Magna Carta and the Bill of Rights 1688”.

More recently, in the context of the negotiations with the EU on the future relationship, which eventually lead to the signing of the Trade and Security Agreement, the government took as its starting point, and maintained as its formal position until close to the conclusion of the negotiations, that it did “not want to formally commit to continuing to apply the ECHR” *as an essential element in the future partnership*. This was a “grave concern” for the EU, “immediately affecting” the ambition of the future relationship, specifically in relation to security and judicial cooperation. It was the EU that then took the important step of publishing a draft of the agreement on the future partnership, including in the document a “continued commitment to respect the European Convention on Human Rights” as a “basis for cooperation” and as one of the “essential elements” of the partnership established by the agreement.² As Giannoulopoulos notes, “it is unfathomable to realise that the UK [was] resisting so strongly subscribing to fundamental human rights that it should itself be seeking to put to the centre of the future relationship with the EU”.³ The UK Government accepted, in the end, the inclusion of the continued commitment to respect the ECHR as part of the Trade and Security Agreement.

Similarly, the Overseas Operations Bill, which was recently introduced in Parliament, to “protect” current and former members of the armed forces from “vexatious” human rights litigation, also gives cause for reflection, providing a practical example of the government’s ideology that aims to restrict the reach of the ECHR.

The government has, for years, intentionally sought to, or simply for political expediency taken the opportunity to, undermine, sometimes even demonize, the ECHR and HRA, not only when expressing itself as a collective organ – in pledging to repeal the HRA, continue to commit to it *for a limited amount of time only* (“until Brexit was concluded”), resisting committing to it as an essential element in the future partnership with the EU or promising to “update” it, without offering any empirical evidence on why such an update was required – but also through the individual actions and statements of some of its leading members, including former Prime Ministers David Cameron and Theresa May.

As Paul Johnson observed, “there has been a continuous stream of anti-ECHR rhetoric from senior Conservative Party officials [who] have repeatedly made it clear [...] that they want to fundamentally change the scope and influence of European human rights law in the UK”. Giannouloupoulos’ analysis⁴ offers a number of illustrations: we should be “writ[ing] our own British bill of rights and responsibilities, clearly and precisely into law, so we can have human rights with common sense”, David Cameron prescribed in 2006, while his aversion to aspects of the European Court of Human Rights’ (ECtHR) jurisprudence has been characteristically captured in his statement that he “felt ‘physically ill’ at the idea of giving the prisoners the vote”. Theresa May openly argued that the UK should actually leave the ECHR, not just repeal the HRA or replace it with a UK Bill of Rights. With less than two months to the EU Referendum, she launched a quite unprecedented attack on the ECHR, arguing that it was the ECHR, rather than the EU, that had caused all sorts of problems, and insisting that Britain should withdraw from the ECHR regardless of the EU referendum.

Similarly, the current Attorney General, Suella Braverman, wrote an article for the Conservative Home website in which she argued that: “Restoring sovereignty to Parliament after Brexit [was] one of the greatest prizes that await[ed] us. But not just from the EU. As we start this new chapter of our democratic story, our Parliament must retrieve power ceded to another place — the courts.” The Attorney General identified the HRA, and the “prolific human rights industry which it has spawned”, as the culprit for the judiciary’s “encroachment” of Parliament’s power, by means of which “the concept of ‘fundamental’ human rights has been stretched beyond recognition”. She concluded that she was “pleased that the Government ha[d] promised to update the Human Rights Act to restore the proper balance between the rights of individuals, national security and effective government and to set up a Constitution, Democracy and Rights Commission to ensure that the boundaries of judicial review are appropriately drawn”. Giannouloupoulos

comments that the Attorney General's "narrative moves at a dizzying speed, from the point about regaining sovereignty from the EU to that of reclaiming power from the courts, passing through a destructive exercise of dismantling protections central to the HRA".

Against this background, it is pleasing to see the Chair of the IHRAR, Sir Peter Goss, draw attention on how "[t]he UK's contribution to human rights law is immense", that "[i]t is founded in the common law tradition", and that it was "instrumental in the drafting and promotion of the European Convention on Human Rights". It is especially pertinent to the IHRAR's mission to observe that he also underlines how the UK's contribution to human rights law is now also "enshrined in the Human Rights Act 1998".

In seeking to review the operation of the HRA, we call upon the IHRAR to take into consideration the current political environment in the UK which, in itself, serves to undermine the HRA's operation.

This review offers a unique opportunity for the IHRAR to promote an evidence-based approach to analysing the impact of the HRA and the ECHR in the UK. This approach will serve to reliably demonstrate that, in taking into account ECHR jurisprudence, in line with section 2 of the HRA, and in maintaining a constructive dialogue with the ECtHR, including in the context of the "margin of appreciation" and principle of "subsidiarity", neither the ECtHR nor the UK judiciary encroaches upon the powers of the executive or Parliament. Rather, the domestic courts and the ECtHR fulfill their central mission of holding the power-holders to account, giving effect to our fundamental rights in the process.

Not only this, but the HRA has also enriched our law in many indirect ways, including in making "our judges [...] more aware of the ordinary, everyday concerns and problems of ordinary people" and "inject[ing] fresh thinking into our judiciary generally, into our law", as the former President of the Supreme Court, Lord Neuberger, explained during his recent appearance before the Joint Committee on Human Rights (JCHR) to give evidence on the IHRAR. To take another example of an indirect effect that strongly benefits the operation of an effective system for the protection of human rights, the HRA has also substantially reduced the number of cases that go to the ECtHR in the first place, allowing UK courts to deal with them at home. As the former Attorney General, Dominic Grieve QC, put it to the JCHR, "if we had not been adherent to the ECHR, the job of the Attorney [General] in dealing with the volume of cases that might have been trotting off to Strasbourg and making sure that we were represented, and everything that went with it, would have been very considerable".

In allowing evidence of this to come to the surface, the IHRAR can help dissipate the political attacks on our central human rights infrastructure, which undermine the protection of rights at home, in the UK, and cause irreparable damage to UK's reputation abroad; a nation that has, historically, played an important role in the development of

international law and international human rights has, in recent years, been perceived, with surprise, shock, even sadness, as launching a sustained political attack on European human rights. There is an opportunity for this deleterious environment to stop here, with the IHRAR.

Overview of contributions to the HRiA project and how they address the key themes of the IHRAR

The IHRAR has requested submissions which reflect on **the relationship between the domestic courts and the ECtHR**. Specifically, the IHRAR has stated that it would “welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change”. Many of the contributors to the HRiA project explicitly deal with this issue, pointing out both the strengths and weakness of the relationship which the HRA creates between the domestic courts and the ECtHR.

A specific concern of the IHRAR, and many of the contributors to the HRiA project, is how the duty created by the HRA for the domestic courts to “take into account” ECtHR jurisprudence is working in practice. Helen Fenwick and Roger Masterman comment on this as follows:

The initially prevailing approach to the interpretation of s2(1) Human Rights Act (HRA) 1998 demonstrated a strong collective presumption on the part of the judiciary that relevant Strasbourg authority should be applied. The development of this so-called “mirror principle” gave life to the suggestion that the Strasbourg authority “creat[ed] legal precedent for the UK (sic)” [...] But more recently the growing evidence of “exceptions” to the mirror principle reflects the pragmatic acceptance that the Strasbourg jurisprudence does not provide determinative authority for every arising human rights dispute, and that an uncritical stance towards the European Court of Human Rights’ case-law effectively inhibits dialogue initiated by national courts.

Interestingly, Fenwick and Masterman also argue that

[t]his acceptance appears to be symptomatic of a judicial response to the political disquiet surrounding the disempowerment of national institutions supposedly prompted by the enactment of the HRA.

Fenwick and Masterman further explain that

[t]he Supreme Court, admittedly, has been increasingly confronted with a socially conservative political climate in the UK, particularly from the viewpoint of right-wing

ideologues in the Conservative party, who have directly attacked the HRA/ECHR on a number of occasions.

Even if they somewhat qualify this statement by noting that the “judicial creation of a vibrant domestic human rights jurisprudence [in the UK] can readily be attributable to a range of other motivations”, the above is still a useful reminder of how the current political climate may be influencing the interpretation and application of human rights in practice, and of the fact that the socio-political conditions affecting the operation of the HRA provisions that are in question in the IHRAR require as much attention as the substantive content of the HRA provisions themselves. The IHRAR’s analysis should not view the latter in isolation from the socio-political context in which they operate.

To go back to the text of s.2(1) HRA, Conor Gearty notes, in the same line of thinking as Fenwick and Masterman, that

[i]t was arguably the case that in its first decade the section was interpreted in a way that was overly deferential to the Strasbourg court (*R (Ullah) v Special Adjudicator* [2004] UKHL 26). But since the important, early decision of the then newly formed Supreme Court in *R v Horncastle* [2009] UKSC 14, this has been no longer the case. The original intention of section 2, to stimulate a dialogue between the Strasbourg and the senior courts in the UK, has been achieved.

Gearty then concludes that “no change is required”.

The notion of “dialogue” between the domestic courts and the ECtHR is explored by several of the HRIA contributors, who see this as central to how the HRA operates in practice. Loveday Hodson, for example, states:

The HRA did not newly introduce [...] rights to the UK; the HRA “brings home”, and gives better effect to, rights contained in a treaty that has been in force for the UK since 1953. Neither does the HRA require the UK courts to unquestioningly follow the judgments of the [ECtHR]; its carefully balanced architecture does, however, require UK courts to take ECtHR case-law into account in their decision-making. In effect, the HRA’s important contribution is that it brings domestic courts into a dialogue with the ECtHR on shaping the scope of ECHR rights.

Conall Mallory and Stuart Wallace explain, in respect of a case in the UK Supreme Court concerning the Ministry of Defence’s failure to provide adequate equipment to armed forces personnel, how the dialogue between the domestic courts and the ECtHR works in practice:

The British judges who heard the case believed that the case law from the ECtHR had left them with “no alternative” but to recognise the application of the ECHR to the soldiers. Having followed the Strasbourg jurisprudence on the question of whether the ECHR applied, the UK Supreme Court was able to use its expertise in the domestic application of the rights to cultivate a unique test on how the right to life applied to soldiers so that it would not have a significant adverse impact on the conduct of military operations.

This is an example of what Helen Fenwick and Roger Masterman describe as a “dynamic approach to human rights which goes ‘beyond’ the Strasbourg stance in a range of instances and draws on a range of sources other than the Strasbourg case-law”. As Michael Abiodun Olatokun puts it, the ECtHR case law that the domestic courts must take into account is “no straitjacket or proscriptive constraint, but a creative and genuinely helpful network of decisions that provides guidance on how states might balance the competing aims of public safety against non-interference with citizens’ rights”.

The contributors to the HRiA project have shown, across a number of areas of law and in respect of a number of substantive issues, the positive relationship between the domestic courts and the ECtHR. For example, in the context of coronial law, Leslie Thomas has described the positive ways in which the HRA has facilitated changes in inquests, based on ECtHR jurisprudence, that are of benefit to families of deceased persons:

Before the HRA, the families of the deceased had few rights in an inquest. They had no automatic right to disclosure and no access to legal aid – while the institutions responsible for the death were often represented by a high-powered legal team. The jurisprudence of the ECtHR, and its implementation in the UK, has helped to put the bereaved families on a more level playing field. There is still much more to be done – in my view there should be automatic, non-means-tested legal aid for the family in Article 2 inquests. But the progress that has occurred would not have happened without the HRA.

Similarly, Philip Leach demonstrates the way in which the courts have applied the right to life and the significant impact on investigative and prosecutorial processes following deaths at the hands of the state or in respect of people who have been in the custody or care of the state. Julian Petley shows how the national courts have been aided by the HRA to better protect people's privacy and shield them from invasion by the press.

Anna Lawson, Maria Orchard, Beverley Clough, Luke Clements and Oliver Lewis state that the HRA has facilitated positive developments in the domestic courts for people with disabilities:

It is clear then that, by requiring UK courts to take account of ECHR developments, the HRA has proved an important and valuable tool in efforts to strengthen disability rights. Alongside examples of success, there are also of course examples of failure – of cases (not discussed here) where the HRA did not yield the result sought by the disabled claimant or their supporters. The HRA, and the linkage it creates to the ECHR, is a mechanism that we strongly urge should be retained, with attention being given to areas in which more work is needed to secure the rights of disabled people (as set out in the ECHR and the Convention on the Rights of Persons with Disabilities) firmly in domestic law.

Many of the contributors to the HRiA project show the requirement for the domestic courts to take ECtHR jurisprudence into account has led to positive protections for minority and marginalised individuals and groups. For example, Natasa Mavronicola, shows the significant ways in which Article 3 ECHR (prohibition of torture) has shaped the protection for certain individuals and groups in the domestic courts:

The right not to be subjected to torture or to inhuman or degrading treatment or punishment enshrined in Article 3 ECHR is not a panacea, nor has its interpretation been without flaws. But whatever the current shortcomings in the interpretation and application of Article 3 ECHR by Strasbourg or by domestic norm-appliers, it is strikingly clear that everyone, not least those who are demonised, stigmatised, marginalised, or otherwise “othered” in an ever-hostile environment, is better off with Article 3 than without it.

In light of the positive relationship created by the HRA between the domestic courts and the ECtHR Colm O’Cinneide, like many of the contributors to the HRiA project, urges caution in disturbing this now settled framework:

The Independent Human Rights Act Review has issued a call for evidence in relation to certain proposals for reforming the Act. Some of those proposals risk undermining the status of existing HRA precedent, and diluting the effectiveness of the Act.

The IHRAR also requested submissions which reflect on the **impact of the HRA on the relationship between the judiciary, the executive and the legislature**. Specifically, the IHRAR has asked for submissions that reflect on how the “roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy”. In this respect, a key issue is whether the HRA has led to “‘over-judicialising’ public administration” and drawn the domestic courts “unduly into questions of policy”.

Several contributors to the HRiA project focus on the issue of the relationship between the judiciary, the executive and the legislature. The current relationship created by the HRA is seen by them as essentially positive because, as Jonathan Cooper argues, an effective human rights framework is “essential to restrain executive overreach”:

At their most rudimentary, human rights are there to hold power to account. That power principally emanates from the state but also extends to the failure of the state to hold non-state actors who deny rights to account. Human rights are concerned with the human cost of violations. They recognise the individual price that is paid when rights are broken or flouted, and they find a remedy for that breach, which need not always be financial. When human rights are ignored, people are abused. Human rights also provide a template for democracy. Democratic societies work within the constraints of human rights. Without that framework to work within, democracies can turn in on themselves, ceasing to be democratic.

In this respect, Conor Gearty argues that, despite persistent claims to the contrary, the HRA “supports rather than undermines parliamentary sovereignty, and does so explicitly”. Stella Coyle concurs, and shows how the HRA “preserves Parliamentary sovereignty”.

A number of contributors to the HRiA project show how the HRA has not resulted in judicial “overreach” or “‘over-judicialising’ public administration”. They show, instead, how the HRA has created a dialogue between the domestic courts and the executive that is appropriately balanced. For example, Brice Dickson argues that the HRA

has been influential on how the Northern Ireland Assembly and Executive have gone about their business. The Northern Ireland Act 1998, which transposed the Belfast Agreement and later supplementary agreements into law, prohibits the Assembly and all government departments from passing laws or doing any act which violates the HRA. Likewise, all district councils in Northern Ireland must abide by the HRA, which helps negate any temptation there might be for discriminatory decision-making by such bodies. The result of all these obligations has been a more respectful and harmonious society.

Of course, as Frank Cranmer argues, it “can be all too easy for policymakers to prefer administrative convenience over wider human rights considerations”. For this reason, as many contributors to the HRiA project show, the HRA requires the executive and legislators to include a consideration of human rights in their decision-making and provides, what Reuven Ziegler describes as, “a measured system for scrutinising Executive policies and primary legislation”.

This does not mean, as Kanstantsin Dzehtsiarou demonstrates, that the HRA forces legislators to follow every judgment of the ECtHR by the letter. Rather, as Alan Greene shows in the context of terrorism and other emergency situations, governments always have “considerable latitude” to act:

Emergencies are often the precise conditions in which the most egregious human rights abuses occur. It is only right therefore that states are not given carte blanche to respond to a crisis in any way they see fit. However, as has been shown, the state has been granted considerable latitude by the judicial branches on the question of how best to balance questions of security and human rights. The claim therefore that the HRA or ECHR has unduly hampered the UK’s response to terrorism or emergencies is simply untenable.

Although the HRA, as Nataly Papadopoulou points out, keeps “the government accountable in justifying the interference with the important right of individuals”, it does so appropriately and in a balanced way. Dimitrios Kagiarios argues, in that respect, that watering down the HRA to lessen this accountability would probably have the opposite effect:

If the Independent Review is driven by scepticism towards the judiciary and its purported ‘power grab’ against the executive or Parliament, then limiting domestic courts’ powers to provide an effective remedy will mean that it will be the *international* judge who will be tasked with carrying out this function. In light of this, efforts should be made to strengthen rather than weaken the HRA.

How the HRA protects our rights

HRiA’s engagement with some of the leading human rights experts in the country had as its principal ambition to enable a dynamic representation of the HRA’s deeply positive impact across a number of areas; an illustration, in other words, of how the HRA has transformed rights protection in the UK.

We intentionally avoided prescribing for this project terms of reference that would mirror those of the IHRAR. We rather sought to direct our contributors’ attention to answering some of the IHRAR’s questions in the broader context, and with the wider objective, of demonstrating the HRA’s intrinsic value.

We believe it is impossible to isolate the HRA’s positive influence from the technical questions that relate to how judges use it. The fact that the HRA has revolutionized human rights protection in the UK speaks in itself about the appropriateness of the HRA framework (and the risks that would derive from changing the formula now; “if it ain’t broken, don’t fix it”). As the various submissions to HRiA clearly demonstrate, not only is

the HRA not broken, it has rather exceeded expectations, allowing us as a society to effect culture change, in an area where culture change was very difficult to achieve, and we have only just celebrated the twentieth anniversary since it has come into effect.

Dominic Grieve made the point to the JCHR, with force and finesse:

I think our eyes would pop out of our heads just reflecting on some of the things [that] were being done in a rather cavalier fashion right up to the 1990s. When you look at these things, that is when you start to realise that, rather than what I would call the high profile cases, people are in fact being enabled to assert rights.

Some of us in the HRiA, working from within the Knowing Our Rights project, did something similar, on the occasion of the 20th anniversary of the HRA. Along with a group of independent experts committed to the protection and enhancement of human rights – scholars, legal professionals, politicians and NGO experts – we collectively produced a short, but fairly comprehensive, list providing illustrations of the manifold ways in which the ECHR/HRA has improved individual rights protections in the UK. We stated there that:

The Act has enhanced the rights of LGBT+ people and reduced discrimination.

It has effected a huge change in the way that people with learning disabilities are treated.

It has protected British soldiers, by outlawing the deployment of equipment regarded as inadequate or outdated. It has brought justice to the families of military personnel who have lost loved ones through negligent action on the part of the Ministry of Defence.

It has been instrumental in supporting migrants' access to basic services like health and shelter.

It has meant that bereaved families of those who die in custody or detention are able to secure accountability. It has transformed how we investigate killings by state agents.

It has led to a rights-focused inquest system, helping bring justice for the Hillsborough 96. It creates hope that justice will be brought to the 72 innocent people who tragically perished at Grenfell Tower.

It has revolutionized criminal procedure, developing our existing common law traditions and entrenching constitutional rights.

It has reinforced the right to a fair trial, by giving effect to the right to legal assistance in pre-trial proceedings and preventing erroneous convictions.

It has strengthened our commitment to oppose the use of torture across the world, by preventing people from being sent overseas to face unfair trials tainted by torture.

The Act has had a major impact on the parole system, ensuring the fairness of parole proceedings.

It has created effective protections for our privacy, such as in relation to the interception of private communications, the indefinite retention of DNA profiles or, most recently, the use of live automated facial-recognition technology by the police that was not in accordance with the law.

It has put the right to freedom of expression on a statutory footing in the UK, and enhanced press freedom by providing protection against the disclosure of journalistic sources.

It has protected the rights of asylum seekers and refugees.

It has prohibited corporal punishment in schools, and led to greater clarity on the display of religious and charity symbols.

More broadly, the HRA has mandated our courts to apply human rights norms. Parliament has remained sovereign but the HRA has entrenched dignity, equality and humanity into our law.

As Giannouloupoulos observes, in an earlier volume of the *European Human Rights Law Review*,

The [ECtHR's] jurisprudence has led to a rights-focused inquest system, helping bring justice for the 96 innocent lives of Liverpool fans lost at Hillsborough. It has prohibited corporal punishment in schools; protected transsexuals from discrimination; found that there could be no blanket and indefinite retention of DNA profiles and fingerprints in cases where a defendant in criminal proceedings had been acquitted or discharged; led to changes to the law and regulations to restrict

the disclosure of CCTV images to third parties and to set clear restrictions on monitoring and recording conversations in public spaces; enhanced press freedom by providing protection against the disclosure of journalistic sources; led to greater clarity on the display of religious and charity symbols; extended the right to privacy to the workplace, meaning that employers could not monitor an employee's telephone calls, emails and personal email use at work, unless they had put in place a lawful policy of monitoring such activities and the employee had been made aware of its existence.⁵

A few examples only of how “[t]he list of European Court of Human Rights cases that have acted as a force for good and change in the UK is endless”,⁶ and of the point that Merris Amos has succinctly made to the Joint Committee on Human Rights: *substantively* the improvements the ECHR and HRA have brought are “so great as to be almost immeasurable”.⁷

The contributions that follow have been developed in the same spirit, of showcasing the HRA's invaluable contribution to human rights protection in the UK and sounding a warning about the government's intent - implicit in the IHRAR's terms of reference - to alter the existing balance of power.

The Human Rights Act: Delivering Rights and Enhancing Dignity

Jonathan Cooper OBE

Rights Work

Effective human rights are essential to restrain executive overreach. At their most rudimentary, human rights are there to hold power to account. That power principally emanates from the state but also extends to the failure of the state to hold non-state actors who deny rights to account. Human rights are concerned with the human cost of violations. They recognise the individual price that is paid when rights are broken or flouted, and they find a remedy for that breach, which need not always be financial. When human rights are ignored, people are abused.

Human rights also provide a template for democracy. Democratic societies work within the constraints of human rights. Without that framework to work within, democracies can turn in on themselves, ceasing to be democratic.

Human rights nurture peace. The pursuit and promotion of human rights enhance communities. Human rights compliant societies are more harmonious.

The UK System of Government Was Not Working

At the conclusion of the 20th century, it was clear that the UK system of government was not effective in the way that human rights were protected and promoted within the jurisdiction. Human rights could not be affirmed in any meaningful way. Decision makers, even when they violated human rights, were held to account in relation to minimum standards of responsibility. Decisions could only be challenged successfully if the decision was irrational. It was uncertain the extent to which human rights were to be considered. If they were, they were just one of multiple factors to be taken into account.

The common law provided hotchpotch protection. The rule of law worked efficiently in respect of issues such as legality, but the notion of the rule of law could not actually guarantee rights. Civil liberties were flimsy and stood no chance against the doctrine of Parliamentary Sovereignty. And it transpired that the majority of violations of the European Convention on Human Rights (ECHR) stemmed from primary or secondary legislation. The principal violator of human rights was not a decision maker, but the Westminster Parliament.

When measured against the ECHR, the UK system was found wanting. By the mid-90s, uniquely at the time across the Council of Europe, the UK had been found to violate all of the substantive ECHR rights except slavery, and a violation of that right was to follow.

The Human Rights Act (HRA) 1998 was a necessity. The UK was at a tipping point. The centralised state was no longer fit for purpose. Deference was dead. Decision-makers had to up their game. 21st-century Britain bore little resemblance to the country that had emerged in the decades immediately post war. It was expected that the state should be made more accountable. The failures of the state were well documented from the criminal justice system to the health service, education to housing. In the absence of effective accountability mechanisms, things were not changing.

Proportionality and the Rights Transformation

The single biggest change ushered in by the HRA, was enhanced and structured systems of accountability when human rights are engaged. The HRA did this by making proportionality the tool by which decisions were measured. UK courts had consistently declined to introduce the test of proportionality. Would it have been judicial overreach to do so? That dilemma which dominated the High Court in the 1980s and 1990s was settled by the HRA. Proportionality was adopted via that Act. And the quality of decision making was transformed and boosted overnight.

Human Rights Make Themselves at Home

The remarkable feature of the HRA was the degree of consensus there was for it amongst government circles, as well as cross-party support. The Bill's passage through Parliament was a genuine endeavour in ensuring the HRA could be as effective as possible. There were minor hiccups, but at the third reading in the House of Lords, the Shadow Lord Chancellor wished the Bill well.

There were passionate advocates for the HRA. The Tory Lord Alexander was no less in favour of it than Labour's Lord Williams or the Lib Dems' Baroness Williams.

The HRA's scheme was based on in-depth research and analysis by Francesca Klug, an academic (originally at King's, London and then the LSE) who had her roots in the NGO sector. Her work was then personally informed by the Lord Chancellor, Lord Irvine and the Home Secretary, Jack Straw, and of course, Lord Lester, who had campaigned for the incorporation of the ECHR into UK law for decades.

NGOs and civil society were actively involved in the process. In many respects the movement was led by NGOs. The Home Office and the then Lord Chancellor's Department (now the Ministry of Justice) carefully thought through the implications. Most civil servants welcomed the development. Enhancing the lives of all within the jurisdiction is a motive for the majority who join the civil service.

The HRA is universally acknowledged as a thing of legislative beauty. It was carefully crafted by Sir Edward Caldwell. He brought the scheme to life. And the way that the HRA fits within the UK system of government is truly accomplished. There was a seamless transition to enhanced accountability, as well as the recognition of rights.

The Scheme and Scope of Human Rights Protection

The HRA's genius is the way that it shares responsibility for human rights protection across all branches of government. No aspect of government is let off the hook. Courts are required to give effect to human rights unless primary legislation is so clear it is not possible to do so without butchering the clear meaning of the statute. Under those circumstances, assuming the law is declared incompatible with human rights, the burden shifts back to the executive and legislature to remedy the inconsistency. In exceptional circumstances the executive can act alone to address the harm caused.

All new Bills must be accredited as human rights compliant by the sponsoring Secretary of State, thus seeking to ensure that laws are not passed that violate the rights enshrined in the HRA. Parliament and its Joint Committee on Human Rights can engage with the Minister to ensure compliance. And, most important of all, everyone exercising a public function must give effect to, and respect, the rights contained in the HRA, unless statute law requires that they do not.

The HRA retains the basic building block of the UK's constitutional framework, Parliamentary Sovereignty, and develops it. It puts human rights at the heart of that doctrine without unsettling the core principle that UK democracy requires: Parliament must be allowed to do as it pleases. There is nothing in the HRA that prevents Parliament from legislating to violate human rights. And if that violation is clear, the courts can do no more than declare the law incompatible with human rights.

The rights in the HRA are drawn from the ECHR. Those core basic rights necessary to meet human needs. They are limited in their scope, but they are essential. As leading judge, Lord Bingham once mused, which of these basic rights would you remove? Which of them can we live without?

The HRA's scheme creates a conscious dialogue with the European Court of Human Rights (ECtHR). Case law from that Court must be considered, but no more than that. And, after all, that makes sense. The ECtHR has extensive and daily experience of dealing with these rights under a myriad of circumstances. Their observations can therefore only add value to UK courts' determination of the rights in the HRA.

Similarly, the ECtHR gets the opportunity to learn from the approach of UK courts and how they analyse ECHR rights and the Strasbourg case law. At the same time, by

referencing the case law of the ECtHR, that jurisprudence becomes part of the mainstream. Thus, encouraging the case law of international human rights courts and tribunals to be integrated within national legal systems. That case law should be celebrated as an opportunity and not a threat. The UK should relish this leadership role that they can play in domesticating the case law of the ECtHR.

Context, as with most aspects of law, is everything. UK judges can be trusted to understand the context of the legal issues before them.

And if we are to make an honest assessment of the cases decided under the HRA, which would we say were wrongly decided?

Strasbourg Stays

Beyond the HRA, the UK continues to be bound in international law by multiple human rights obligations. The most notable of which continues to be the right of individual petition before the ECtHR. That Court retains jurisdiction of breaches of the ECHR in the UK. It therefore remains the final arbiter of rights for the UK.

That is as it should be for the international legal order, but since the incorporation of the ECHR into UK law through the HRA, successful cases against the UK before the ECtHR are now the exception.

And to tweak the question above, which Strasbourg cases against the UK would we say were wrongly decided?

Celebrating All That Has Been Achieved to Date

The human rights framework enjoyed in the UK over the past 20 plus years has been carefully crafted. It was not a compromise. It was deliberately designed to ensure that the UK system of government was fit for purpose for the 21st century. As the 20th century drew to a close, the lack of effective rights protection was increasingly troubling the judiciary and the legal professions, but the other branches of government were also aware of their limits in delivering sound and effective administration.

Evidence of how much the HRA was needed is the speed with which it filled the vacuum from the moment it received Royal Assent. It became the golden thread linking all the different aspects of government together. From devolution to peace in Northern Ireland, the rejuvenation of policing to children's rights, the HRA was the common theme. And the interesting thing about the HRA's scheme is that it was neither radical nor revolutionary. It slotted rights that had been drafted fifty years earlier into the governing framework. The HRA is really that simple, which is why it needs neither reform nor renewal.

There are questions to be raised about the UK's human rights framework, but they are not the ones currently being considered by the Independent Review.

Dignity Matters

The central human rights question for the UK is does it adequately protect the right to human dignity? The answer to that quandary is that dignity is only just adequately recognised in law. The limited protection dignity is guaranteed in law in the UK comes from the ECHR via the HRA, which is why tinkering with the HRA should be avoided. An unexpected consequence might be that the nascent right to human dignity is stifled as a consequence.

Human dignity matters. It is a recognition of individual worth. Without an express right to human dignity, human rights law can remedy the consequences of violations of human rights but cannot always guarantee human dignity. Rights may be able to address violations that contribute to the encroachment on dignity but there are circumstances where human rights are insufficient to recognise the real harm caused, which is a denial of human dignity.

To over formalise the definition of human dignity, it prohibits instrumentalisation or objectification of human beings. What does this mean? People are not objects. Any dealings with people must recognise their inherent value. Dignity requires we always treat a person as an end in themselves, not as a means to an end.

Dignity will be engaged and likely violated when persons are denied their identities as individuals and are only characterised by being lumped within a group. Individualism becomes merged into a mound: a group which is defined by others. That denial of the person means that those who are defined as part of that group can be derided and demeaned.

Taken to its extreme, this denial of dignity leads to the horrors of genocide. The Jews, Bosnian Muslims and the Tutsi were all diminished as individuals. They were denied their equality, humanity and dignity. Their individualism was negated. They ceased to be persons and became defined by the group identity that they had been given to justify their persecution. Apartheid in South Africa is another example. Slavery is only possible when dignity is denied.

The UK witnesses the consequences of this denial of dignity for Black, Asian and minority ethnic people. The Windrush scandal is a textbook example of the consequences of sidestepping human dignity. Women have been similarly disregarded. The disabled become that. They cease to be people. Those who are poor can be similarly left without dignity.

The right to human dignity has been recognised as being particularly relevant to LGBT people. For millennia LGBT people have been tormented, criminalised and erased. The ability of LGBT people to form intimate, loving sexual relations has been ridiculed and rebuffed. The levels of violence LGBT people have been subjected to are unimaginable. LGBT people have lived the lives of outlaws, with no state protection. As recently as the 1950s a British Home Secretary had committed to “remove the scourge” of LGBT people from society. Such threats continue to be made by governments across the globe. It is not an over exaggeration to assert that if LGBT people could have been deliberately and systematically destroyed, they would have been. Except they keep being born.

The consequences of the stereotyping of LGBT people is a classic example of the denial of dignity. The human right to private life has helped, as has freedom of expression, as well as the prohibition on discrimination and increasingly the prohibition on inhuman treatment, but the right that encapsulates the harm done to LGBT people is the denial of dignity.

In the absence of an enforceable right to human dignity, the treatment of LGBT people was justified because they were labelled unequal. And this inequality was reinforced by rules and law. And whilst the law recognised that inequality, and reinforced it, there was no reason to believe LGBT people were worthy of dignity.

Building Dignity into Rights

For just over a decade a right to human dignity was recognised in the UK through the EU Charter of Fundamental Rights. Its first article proclaimed, “Human dignity is inviolable. It must be respected and protected.” The Charter was not retained post Brexit and therefore at the end of the transition period, from 1 January 2021, the right to human dignity ceased to be part of UK law. Government’s attempts to justify why this did not matter were half-hearted. They offered a brief Analysis, aiming to “set out how the Government considers that fundamental rights that are currently protected by EU law will be protected after exit from the EU”, but this was a flimsy document. The Equality and Human Rights Commission sought legal advice which was clear. Losing the right to human dignity matters.

The ECHR does not contain a right to human dignity (nor a reference to it), but the right to human dignity has been read into the Convention. The first case to do so was against the UK. It involved birching as a form of punishment in the Isle of Man. For the state to demean an individual in this way by beating him, stripped the young man of his dignity. As such, the treatment was degrading. Interestingly, the UK system (under which the Isle of Man falls as a Crown Dependency) was unable to remedy the predicament without the ECHR.

Is it a coincidence that the case which established “... the very essence of [the ECHR] is respect for human dignity”, was also a case against the UK? The ECtHR made clear the role of human dignity within the ECHR in the case which confirmed that marriage could not be a defence to rape and that consent could not be implied by the simple fact that a couple had been married.

Dignity in the UK

Does the UK system of Government guarantee human dignity? Outside of the HRA and the incorporation of the ECHR, it is difficult to assert with confidence that dignity can be guaranteed. There is no statutory framework providing for a right to human dignity. The common law has made occasional references to human dignity. These handful of cases have concerned welfare issues or circumstances where a person is on life support and who has no sensation or awareness. For example, in the Bland case, the treating clinicians made the case about human dignity and sought a declaration that they might, “lawfully discontinue and thereafter need not furnish medical treatment to [him] except for the sole purpose of enabling him to end his life and die peacefully with the greatest dignity and the least of pain suffering and distress.” The courts therefore engaged with dignity.

However hard we seek a right to human dignity as a principle of common law, the exceptions prove the rule that it does not exist in any meaningful way.

Therefore, unless someone wishes to put forward an argument that the UK does not need a right to human dignity, which is a very unattractive proposition, the only meaningful source of that right is the HRA/ECHR. Diluting that framework and/or the role of the ECtHR’s jurisprudence in the UK may have the consequence of constraining the right to human dignity. And, if that is the case, we will all lose out.

If the HRA’s scheme and scope is to be watered down, an option would be to establish a statutory right to human dignity. But it should not be either or. We need both the HRA and a Human Dignity Act which ensures all actions of public authorities comply with the right to human dignity, including the Crown.

Human Rights and the Rule of Law

Stella Coyle

The Human Rights Act 1998 (HRA) has faced criticism since the Conservatives took office in 2010. A persistent theme has been the HRA's supposed undermining of 'British [legal and democratic] values' and the consequent need for a British Bill of Rights to replace it. However, its detractors should acknowledge that the Act is firmly grounded in values and principles that are fundamental to our law and society, and it plays a vital role in upholding them. A fundamental principle, in any society that values justice and equality, is the rule of law. The precise meaning of the rule of law has long been debated, but for the purposes of this analysis, Lord Bingham's definition will be used.

Lord Bingham synthesised the substantive *conception* of the rule of law: a state's citizens and authorities should be bound by, and benefit from, laws publicly made and administered – and his view of the substantive *meaning* of the rule of law: a state which represses or persecutes its citizens cannot be said to adhere to the rule of law, even if the laws authorising the repression are properly enacted and implemented. This synthesis produced Bingham's *definition* of the rule of law, which was subsequently adopted by the *European Commission on Democracy Through Law (Venice Commission)* in 2011:

- (1) Law should be accessible (intelligible, clear and predictable);
- (2) Questions of legal right should be normally decided by law and not discretion;
- (3) There should be equality before the law;
- (4) Power must be exercised lawfully, fairly and reasonably;
- (5) Human rights must be protected;
- (6) Means must be provided to resolve disputes without undue cost or delay;
- (7) Trials must be fair, and
- (8) The state should comply with its obligations in national and international law.

The HRA incorporates rights contained in the European Convention on Human Rights (ECHR) into domestic law, so that they can be relied upon in domestic courts. Opponents of the HRA regularly cite examples – with varying degrees of accuracy – of cases where rights such as Article 8 (the right to privacy and family life) have been exploited by the 'undeserving'. It is important to challenge these inaccuracies with cases that show how human rights uphold the rule of law. The following two examples illustrate the importance of ECHR rights for (i) victims of anti-gay discrimination and (ii) victims of serious crime. The discussion also highlights how these rights are reflected in Lord Bingham's formulation of the rule of law - the cornerstone of a Britain that wishes to be a genuinely just society.

The HRA came into force in October 2000. The previous year, Navy personnel, who had been investigated and dismissed for being gay, had to go to the European Court of Human Rights (ECtHR) in Strasbourg to assert their ECHR rights. The ECtHR held that their dismissal on grounds of sexuality was a breach of Article 8 that could not be justified as being 'necessary in a democratic society'. The government had argued that its policy on gay military personnel was justified as being in the interests of national security and the prevention of disorder. However, the ECtHR considered that the attitudes displayed towards the gay personnel represented a 'predisposed bias on the part of a heterosexual majority against a homosexual minority' and did not provide 'sufficient justification for the interferences with the applicants' rights... any more than similar negative attitudes towards those of a different race, origin or colour'.

Article 8 is one of the 'qualified rights' under the ECHR, which means that the right to a private life can be subject to limitations, but only if the limitation is a proportionate means of achieving a legitimate aim. Furthermore, when government interference with such rights involves 'a most intimate part of an individual's private life', the ECtHR will require 'particularly serious reasons' before it can be justified. As well as being an illustration of the requirement that interference with ECHR rights must be proportionate, this case reflects several ingredients of the rule of law: equality before the law; power must be exercised fairly; human rights must be protected; and compliance with international law obligations. The HRA has enabled this principle of proportionality to enter UK law as a ground of judicial review in human rights cases. It may prove to be 'a more structured and transparent means of review' than the traditional ground of unreasonableness.

More recently, in the case of the 'black cab rapist' John Worboys, the UK Supreme Court found that police investigative failures were held to be a violation of the women's rights under Article 3 ECHR, which provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment. Worboys worked as a black cab driver in London and was convicted of sexual offences against 12 women, each of whom he had picked up as fares. He pretended he had won a lot of money and suggested that they share some champagne with him to celebrate; the champagne had been laced with sedatives. Worboys subsequently raped or sexually assaulted the women. Over six years, a total of 14 women had reported their experiences to the police, but despite the similarities the police failed to link the cases. At one stage, Worboys was arrested but was later released, having convinced police that his victim had been drunk and kissed him. The Independent Police Complaints Commission found that proper investigation could have prevented some of Worboys' attacks.

The Court confirmed that two of Worboys' victims were entitled to compensation for the serious defects in the police investigation of their claims and in prosecuting their attacker

– a delay which caused one of the victims serious psychiatric harm. The Court agreed that Article 3 obliges the state to undertake an effective investigation when it receives a credible report of serious harm. Lord Kerr highlighted the ‘clear and constant line of authority’ from case law of the ECtHR, showing that the state has a duty to conduct effective investigations into crimes of serious violence, whether or not it is ‘fair, just or reasonable’ to impose one. This decision underlines two of the key aspects of the rule of law: that means must be provided to resolve disputes without undue cost or delay; and that human rights must be protected. The importance of this decision cannot be understated, because when the police sought permission to bring their appeal to the Supreme Court, the then Home Secretary, Teresa May, intervened on their behalf in what was described as an ‘unprecedented and highly politicised move’. The HRA enabled these women to achieve justice in the face of state intransigence and police hostility towards their claims of sexual assault.

The HRA has faced criticism for its requirement that domestic courts take ECtHR decisions into account. However, this does not necessarily mean they must *follow* them; courts ‘should usually follow a clear and constant line of decisions... but we are not actually bound to do so’. Indeed, the developing body of HRA case law acknowledges circumstances where courts may depart from ECtHR jurisprudence. As Fenwick and Masterman illustrate, departure is already accepted where Strasbourg jurisprudence is not ‘clear’ or ‘constant’, or where it is ‘out-dated’; where relevant Strasbourg jurisprudence is clear and constant, but is inconsistent with a domestic binding precedent; where it has failed to understand a point of domestic law; or where it has failed to take account of factual matters or a principle of domestic law. Thus, as Fenwick and Masterman argue, many of the objections to HRA s 2 ‘are being, to an extent, neutered’. Moreover, the provisions of ss 3-4 mean that, although domestic legislation must, as far as possible, ‘be read and given effect in a way which is compatible with the Convention rights’, any declaration of incompatibility with the ECHR does not mean that the courts can strike down the legislation.

Therefore, it can be said with confidence that the Human Rights Act has a place in British society and in the constitution. Rather than elevating the ECHR and the ECtHR to a higher status than statute or the domestic courts, HRA jurisprudence preserves Parliamentary sovereignty and maintains the separation of powers. Moreover, the HRA buttresses the rule of law: every public body must comply with Convention rights, except when there is no available alternative because of the requirements of primary legislation. As Fenwick and Masterman conclude, replacing the HRA with a British Bill of Rights would be ‘a clearly retrograde step, opposing the notion on the international stage, that the UK’s human rights’ record is one that is overall to be respected.’

Human rights and religion in the UK

Frank Cranmer

Religion, the Human Rights Act 1998 and Article 9 ECHR

Largely as a result of the Human Rights Act (HRA) 1998 making the European Convention on Human Rights (ECHR) directly justiciable in the domestic courts, the past twenty years have seen a decisive shift from a freedom-based approach to what one may or may not do to a rights-based approach – not least because, as Sir Henry Brooke suggested in a speech in September 2000, ‘our freedom-based laws haven’t always proved very successful in protecting the rights of unpopular minorities’.

As to religion specifically, section 13(1) of the Human Rights Act obliges the court, when determining any question arising from the right under Article 9 ECHR to freedom of thought, conscience and religion, to ‘have particular regard to the importance of that right’. But there are three caveats:

- under Article 9(1), the right to *hold* beliefs (the *forum internum*) is absolute, but the right to *manifest* those beliefs (the *forum externum*) is qualified by Article 9(2);
- to be protected, a religious or philosophical belief must attain ‘a certain level of cogency, seriousness, cohesion and importance’ – see *Campbell and Cosans v United Kingdom* [1982] ECHR 1 [at para 36]; and, critically,
- the exercise of the right to manifest religion or belief may come into conflict with the rights of others.

That said, *issues of religion and human rights go far beyond the scope of Article 9*: the European Court of Human Rights (ECtHR) has decided cases with a strong religious element under Articles 6, 8, 10, 11 and 12, and Articles 1 and 2 to the First Protocol.

Even after the passing of the HRA, the treatment of ‘religion’ by public bodies does not appear to have been wholly consistent: the Charity Commission, for example, refused to register The Pagan Federation and The Temple of the Jedi Order as charities for the advancement of religion in England and Wales but agreed to register The Druid Network. Nevertheless, I would argue that the HRA has had a considerable – and positive – impact on the willingness of the courts to uphold the right to manifest religion in a way that takes due account of the rights of others.

Eweida

In *Eweida & Others v United Kingdom* [2013] ECHR 37, the ECtHR made it clear that domestic law on religious discrimination had to be compatible with Article 9 and that, provided a belief met the test of cogency, seriousness, cohesion and importance, the State's duty of neutrality and impartiality was 'incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed' [at para 81]. Further, though not every act in some way inspired, motivated or influenced a belief was a protected 'manifestation', an applicant was not obliged to establish that a disputed act was *mandated* by the religion or belief in question [at para 82]. Ms Eweida's insistence on wearing a visible cross at work was motivated by her desire to bear witness to her Christian faith and was therefore protected, *even though not mandated by her Church* [at para 89].

That said, however, *the right to manifest is not limitless*. In the case of Shirley Chaplin – the second applicant in *Eweida* – her managers at the hospital where she was a nurse had told her that, for health and safety reasons, she could no longer wear a visible crucifix on a neck-chain as an expression of her faith. In Ms Chaplin's case, the Court held that the protection of health and safety on a hospital ward was 'inherently of a greater magnitude than that which applied in respect of Ms Eweida' and it was a field in which the domestic authorities had to be allowed a wide margin of appreciation: 'The hospital managers were better placed to make decisions about clinical safety than a court, *particularly an international court which has heard no direct evidence*' [at para 99: emphasis added].

Hodkin

Possibly the most important domestic ruling on religious rights since 1998 has been *R (Hodkin & Anor) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

Some fifty years ago, in *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697, Lord Denning MR had characterised a 'place of meeting for religious worship' under section 2 of the Places of Worship Registration Act 1855 as a place where 'people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity' – though he did go on to make an exception for Buddhists. Further, in 1999, the Charity Commission had rejected an application from the Church of Scientology for registration as a charity.

In *Hodkin*, however, the Supreme Court overturned the Court of Appeal's judgment in *Segerdal* – by which the lower courts had, however reluctantly, regarded themselves as

bound. The Supreme Court held that the Church of Scientology's London chapel satisfied the conditions of the 1855 Act and directed the Registrar General to register it for solemnizing marriages. In doing so, Lord Toulson observed, *obiter* [at para 32], that 'Religion and English law meet today at various points ... Individuals have a right to freedom of thought, conscience and religion under article 9 of the European Convention. They enjoy the right not to be discriminated against on grounds of religion or belief under EU Council Directive 2000/78/EC and under domestic equality legislation'.

In *Segerdal*, Lord Denning MR had said that he was sure that his conclusion 'would be the meaning attached by those who framed this legislation of 1855'. Which was no doubt true: however, he was ruling on the case in 1970 and, by then, both the religious makeup of society and our understanding of 'religion' had moved on. Furthermore, despite the fact that the UK had accepted the jurisdiction of the ECtHR and the right of individual petition in 1966, in *Segerdal* the Court had made no mention of Convention rights whatsoever.

In *Hodkin*, however, the Supreme Court changed that decisively, substituting a rights-based, inclusive view of 'religion' for one that had been essentially Judaeo-Christian. Lord Toulson offered a 'description' of 'religion' [at para 57] which would include Scientology, and which followed the Strasbourg judgment in *Eweida*. Perhaps surprisingly, he also concluded [at para 65] that it was 'unnecessary' to consider the appellants' arguments under the Equality Act 2010 and the ECHR. The reason for that conclusion, I would suggest, is this: by 2013, the Act had been in force for 13 years, Convention rights were a well-understood part of the domestic legal system – simply part of the furniture – and the domestic courts took them into account as a matter of course.

Lord Toulson's 'description' notwithstanding, however, the full effects of *Hodkin* have yet to be seen; and the problem remains that there has been no overall working definition of 'religion' applying universally and consistently across the board for such purposes as charitable status, the law of trusts, tax law and employment rights. So if, for example, the Church of Scientology were to reapply to the Charity Commission for registration, what would be the outcome? Answer: *we just do not know*. *Hodkin* decided that Scientology was a 'religion' – but would that satisfy the Commission for the purposes of demonstrating public benefit under section 4 of the Charities Act 2011?

Holding Parliament and Government to account

I am not sure that relations between the Legislature, the Executive and the Judiciary are a major issue in relation to religion, but if they *are* in fact an issue, I would argue that the Westminster Parliament and the UK Government are under the same duty as any other

public body to observe the terms of the HRA and Convention rights – *because they are the law*.

It can be all too easy for policymakers to prefer administrative convenience over wider human rights considerations. In *O'Donoghue & Ors v United Kingdom* [2008] ECHR 1574, for example, from 2005 onwards a Home Office Scheme aimed at preventing sham marriages had required immigrants without settled status to apply for a Certificate of Approval to marry – the only exceptions being EEA nationals and those who were to marry according to the rites of the Church of England. The Roman Catholic applicants before the ECtHR, one of whom was Nigerian, lived in Northern Ireland where, as the Court rather drily observed [at para 2], 'There is no Church of England'. The Scheme was held to breach Article 12 (right to marry) and Article 14 (discrimination) taken with Articles 12 and 9: the UK Government subsequently abolished it.

Conclusion: religion and the duty 'take into account' the jurisprudence of the European Court of Human Rights

While still President of the Supreme Court, Lady Hale suggested in an interview [posted in July 2017] that the HRA had enabled the courts to analyse issues differently from the way in which they had done so previously:

[T]he non-discrimination cases in Employment Tribunals were not analysed in terms of Article 9 as well as in terms of the non-discrimination laws. As a result, Christians felt that they were discriminated against because they weren't successful in court: rules that forbade them to wear crosses and other symbols of Christianity were upheld, whereas bans on Islamic headscarves and Sikh turbans and bangles were held to require justification. It was a very good thing when the HRA came along and particularly when those cases went to Strasbourg and Strasbourg said [in *Eweida*] 'yes, you have a right to manifest your religion, wearing a cross is a manifestation of your Christian religion, therefore, it can't be prohibited without a good reason' and so courts and tribunals had to look whether there was a good enough reason to prohibit it. The fact that it is not a core requirement of the religion did not matter.

In practice, the day-to-day impact of the HRA is not primarily on relations between citizens and Government but between citizens *and citizens* and, as Lady Hale observed, the area in which it has had most influence as regards religion is employment law. Without it, would an Employment Tribunal have held, as in *Holland v Angel Supermarket Ltd & Anor* [2013] UKET 3301005 2013, that a Wiccan sacked after her employers had made deeply insulting comments about her religion had been unfairly dismissed? Or would the Royal Navy have given one of its ratings permission to celebrate the rites of the Church of Satan

aboard ship, then four years later promoted him to chief petty officer? I don't think so. On the other hand, in *Mba v London Borough of Merton* [2012] UKEAT 0332 12 1312, when a devoutly-Christian care-worker in a children's home was told that she must work on Sundays in accordance with her contract of employment after some two years of avoiding doing so and claimed that the change would interfere with her attending church, an Employment Tribunal decided that her employer's aim of ensuring that all full-time staff worked on Sundays in rotation was legitimate and objectively justified.

Lady Hale's comments would appear to support the view that the obligation on the domestic courts to 'take into account' judgments of the ECtHR has not been a major contributory factor to the difficulties that have sometimes arisen. Her overall conclusion was that the HRA 'has improved the law, I think. So, yes, religion is a good example of improvement.'

I cannot disagree.

The Human Rights Act and the Conflict in Northern Ireland

Brice Dickson

By the time the Human Rights Act (HRA) came into force in Northern Ireland (in December 1999 for the Northern Ireland Assembly and Executive, in October 2000 for all other public authorities) the troubles were supposedly over. But, in reality, many issues remained to be resolved. These included how to reform the Royal Ulster Constabulary, what changes to make to the criminal justice system and how to service the needs of victims.

To help achieve that goal the Belfast (Good Friday) Agreement of 1998 was saturated with references to the protection and vindication of human rights. The British government promised to complete incorporation of the European Convention on Human Rights (ECHR) into Northern Ireland's law, 'with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency' (para 2 of the 'Rights, Safeguards and Equality of Opportunity' section in the Agreement). The Irish government also promised to examine the incorporation of the ECHR into Ireland's law (which it did by an Act of 2003). A Northern Ireland Human Rights Commission was established, one of the duties of which was to advise the British government on what rights should be added to the ECHR to form a Bill of Rights for Northern Ireland: that advice was proffered in 2008 but the British government has still not moved to create a Bill of Rights.

In the absence of a Bill of Rights, therefore, the HRA remains absolutely crucial to the peace process in Northern Ireland, which is still a very divided community. There are three main areas where the HRA has been particularly helpful in maintaining the peace process.

The first is the area of policing. Policing has been revolutionized in Northern Ireland since 1998. The Police Service of Northern Ireland (PSNI), created in 2001, is wholeheartedly committed to applying the HRA and each of the last three Chief Constables has reiterated many times that the main purpose of the PSNI is to protect the human rights of everyone living in Northern Ireland. The PSNI's performance regarding human rights is very closely monitored by the NI Policing Board, which has a clear framework against which it makes its assessments. Each year a detailed report is issued on the matter, mostly drafted by the Policing Board's Human Rights Advisor (the first person to hold that post, from 2002 to 2008, was Keir Starmer QC). The PSNI also applies a Code of Ethics which makes multiple references not just to the ECHR but to additional human rights standards agreed by the United Nations. A breach of the Code of Ethics is *ipso facto* a breach of disciplinary regulations. As a result of its completely new approach to policing, the PSNI now enjoys a very high level of support throughout Northern Ireland, even in republican areas.

The second area where the HRA has operated beneficially is that of dealing with the past. To an extent this is still a very controversial matter in Northern Ireland, but in so far as it has been dealt with to date it is largely because of the HRA. The Act has been crucial in ensuring that investigations into more than 1,000 killings have been reviewed in accordance with the requirements of Article 2 of the ECHR; reviews of about 2,000 further murder investigations remain to be completed. Dozens of inquests have been arranged, several of which have already brought a deal of comfort to loved ones of the deceased in terms of information disclosed, verdicts issued and admissions of responsibility declared. A few prosecutions for unlawful killings or attempted killings have ensued – of members of illegal paramilitary organisations as well as of members of the British security forces.

Thanks partly to the HRA many instances of wrongful past behaviour, including enforced disappearances and ‘punishments’ conducted by paramilitaries, ill-treatment of detainees meted out by police officers and soldiers, and failures of the court system to protect defendants against miscarriages of justice, have been brought to life in the last 20 years. The Act has helped to guarantee that, despite political wrangling in the Northern Ireland Executive and the UK Parliament, the rule of law has been upheld. By excluding the conduct of British soldiers taking place within the British Isles from the application of the Overseas Operations (Service Personnel and Veterans) Bill, currently before Parliament, the government has accepted that HRA standards must continue to apply to military activity in Northern Ireland. In 2020 the UK Supreme Court affirmed that, in relation to one of the most notorious murders of the troubles (that of Mr Patrick Finucane, a solicitor, in 1989) there still had not been an Article 2-compliant investigation into his death ([2019] UKSC 7).

The third area in which the HRA has had a profound effect in Northern Ireland is that of parading. What used to be an extremely contentious phenomenon, leading to many violent incidents during ‘the marching season’ between April and August of each year, is now well regulated by legislation (the Public Processions (NI) Act 1998) which ensures that the provisions of the HRA are taken into account by the police and the Parades Commission whenever decisions are taken concerning the holding of, or the routes to be taken by, parades and marches of all kinds.

Apart from those three main areas in which the effects of the HRA have been so marked, it is important to record that the Act has been influential on how the Northern Ireland Assembly and Executive have gone about their business. The Northern Ireland Act 1998, which transposed the Belfast Agreement and later supplementary agreements into law, prohibits the Assembly and all government departments from passing laws or doing any act which violates the HRA. Likewise, all district councils in Northern Ireland must abide

by the HRA, which helps negate any temptation there might be for discriminatory decision-making by such bodies. The result of all these obligations has been a more respectful and harmonious society – even if deep suspicion and indeed hatred still obtains in some quarters.

The fact that decisions by public authorities – such as the Public Prosecution Service, the Prison Service, the Northern Ireland Housing Executive, the Education Authority and the various Health Trusts – can be challenged on human rights grounds (whether or not legal proceedings are commenced) has created a culture which allows every individual to feel that their rights matter.

The post-2000 reforms to the criminal justice system, including the work of the Criminal Justice Inspectorate, are also constructed around the requirements of the HRA and have helped to boost confidence in the independence of the institutions involved. Changes made to anti-terrorism laws to bring them fully into line with the requirements of the HRA have also successfully subverted the assertions of dissident republicans that the legal system is still stacked against them. The same can be said of reforms to the prison system. Statutory guidance on the HRA issued to various institutions by the Attorney General for Northern Ireland has further raised performance and confidence levels.

The rights of women and children, moreover, which were given little attention during the years of conflict, have gained prominence through the HRA. The best example of this is the judgment by the UK Supreme Court in 2018 that the criminalisation of abortion in Northern Ireland was a breach of the HRA. This led within a few months to the enactment of a legislative provision which regularised the position.

Support for the HRA remains strong not just within society as a whole in Northern Ireland but within all political parties there. This is evidenced by the way in which representatives from the five parties which comprise the mandatory coalition government (two ‘unionist’ parties, two ‘nationalist’ parties and one ‘cross-community’ party) sit together on the NI Policing Board and insist upon the PSNI meeting in all respects the standards set by the HRA. The political representatives have learned that protecting human rights harms no-one, especially as the HRA itself allows other interests to be taken into account to the extent that it is fair and reasonable to do so in a democracy. An illustration of this is the UK Supreme Court’s decision to allow the photograph of a rioter in Derry/Londonderry to be published even though the picture was of someone likely to be under the age of 18: the need to prevent and detect crime outweighed whatever privacy rights the rioter was claiming (*In re JR38* [2015] UKSC 42).

In short, peace in Northern Ireland is highly dependent on the full applicability of the HRA as currently drafted. Amending it in any way could be very dangerous.

Prisoner Voting Drama or Much Ado about Nothing

Kanstantsin Dzehtsiarou

Introduction

There has been a lot of ‘bashing’ the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA) 1998 by the British authorities and media in relation to prisoner voting rights. This dramatic development started in 2005 when the European Court of Human Rights (ECtHR) delivered a judgment in the case of *Hirst (No 2) v the United Kingdom* in which it declared that the absolute ban on prisoner voting that existed in the UK breaches the ECHR. This blogpost argues that this issue received absolutely disproportionate attention in the UK. It also demonstrates that the UK authorities were effectively able to nullify the impact of this judgment on the law in the UK. This shows that the HRA does not undermine the sovereignty of the UK and there are avenues to negotiate the impact of the HRA if so required.

Prisoner Voting Drama

Is prisoner disenfranchisement the most pressing human rights issue in Europe? The Contracting Parties to the ECHR face some major structural human rights challenges - such as inadequate conditions of detention, excessive length of court proceedings, and violation of the human rights of illegal migrants - yet the prisoner voting challenge dominated for years the debates surrounding the ECtHR.

Many prisoners abstain from voting even if they have the right to do so. For example, after prisoners were enfranchised in Ireland the number of those who have used their right to vote has been very low. Of course, it is not possible to attach a definite value to a human right merely by measuring how often it is used, and the ECtHR should not only deal with brutal violations of the most basic rights. However, the relatively infrequent invocation of the right needs to be considered both by the ECtHR and by the national stakeholders when framing the debate around the issue.

Taking into account the minor impact of the issue of prisoner voting on the bigger picture of human rights protection in Europe, it is surprising that the issue has been largely shaping the narrative of the discussion of human rights in Europe, and especially in the UK. The prisoner voting debate is distracting the attention of stakeholders from violations of other ECHR rights and has the potential to undermine the very stability of the whole Strasbourg system.

It seems that three key conditions coincided in the prisoner voting debate that made it so problematic, and these have very little to do with the quality of the ECtHR's judgment or the role of the HRA in the infrastructure of the British legal system. Firstly, because voting rights are usually determined by legislation, national parliaments can block the execution of the ECtHR's judgment. Secondly, the ECtHR's judgment concerns unpopular minorities, easily vilified in the media and among the voting public. Thirdly, parliamentarians may perceive this to be a question in which the ECtHR should not get involved. In some countries, this may be because the question is perceived as 'political'. In others, it may be a microcosm of broader Euroscepticism.

The accumulation of these three conditions may explain why decisions as to prisoner voting cause standoff in some countries, but not in others. Thus, in Austria, the judgment in *Frodal v. Austria* was executed without any major issues, and in Ireland the national parliament initiated appropriate reforms without there having been any specific ECtHR judgment against them. Yet in Russia, Turkey, the UK—all states with growing levels of Euroscepticism—the prisoner voting issue is a major bone of contention.

Much Ado about Nothing

The Committee of Ministers of the Council of Europe supervises the execution of judgments of the ECtHR. It can close the supervision when it is satisfied with the execution. In 2018, the Committee did exactly that in relation to *Hirst No 2*. The government made changes to the policy and guidance to the prison service to make it clear that two categories of previously effectively disenfranchised convicted prisoners—those on temporary licence and on home detention curfew—are now able to vote. The Committee of Ministers accepted this arguably symbolic gesture of the UK government.

The Committee of Ministers, I would argue, effectively accepted the non-execution of *Hirst No 2* as execution. This is because, in reality, the changes made by the domestic authorities, mean that only a handful of people who previously could not vote are now able to vote. The impact of the ECtHR's judgment is therefore negligible. The prisoner voting case law is exceptional in this sense, however it proves that the ECtHR judgments can be used in order to initiate a discussion at the national level and in some cases, the ECtHR should not be perceived as an ultimate decision-maker of the last resort. The ECtHR is open to a dialogue and the HRA facilitates such a dialogue rather than undermines UK sovereignty. This does not mean that in other clearcut cases the Committee of Ministers would be satisfied with such minimal compliance with the ECtHR judgments. The prisoner voting case law shows that if the domestic authorities are dissatisfied with the solutions suggested by the ECtHR, the HRA is unable to force them to accept these solutions.

They cannot be forced because, according to the HRA, the Westminster Parliament possesses the ultimate power of decision-making and gives national courts an avenue to express their legal concerns about the alleged incompatibility of primary legislation with human rights norms. The HRA just provides the national courts with an instrument that would allow them to highlight problematic pieces of legislation by issuing declarations of incompatibility. This gives Parliament an opportunity to pre-empt violations of human rights and avoid possible Strasbourg judgments by addressing these issues domestically. This helps to harmonise national and international legal systems without unnecessary tensions.

The HRA has also empowered the national courts to take into account the case law of the ECtHR. Here, the HRA is not premised on imperative subordination between the ECtHR and national institutions; it allows the national courts to interpret national legislation in light of the case law of the ECtHR but does not oblige them to automatically follow ECtHR case law.

Conclusion

Some media outlets and politicians alike present the HRA and the ECtHR as institutions that can undermine British sovereignty and democracy. A lot of political discussion surrounding the HRA is based on the false premises that it can represent a threat to British democracy. The HRA did not create a particularly wide avenue for the ECtHR to impact the national legal order in the UK.

The HRA does not force the Westminster parliament or national courts to follow every judgment of the ECtHR by the letter. The prisoner voting case law and its implementation illustrate this argument perfectly.

The Relationship between domestic courts and the European Court of Human Rights⁸

Helen Fenwick and Roger Masterman

The initially prevailing approach to the interpretation of s2(1) Human Rights Act (HRA) 1998 demonstrated a strong collective presumption on the part of the judiciary that relevant Strasbourg authority should be applied. The development of this so-called 'mirror principle'⁹ gave life to the suggestion that the Strasbourg authority 'creat[ed] legal precedent for the UK (sic)';¹⁰ this stance is best delineated in *Ullah* by Lord Bingham: '... a national court subject to...s2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.....The duty of national courts is to keep pace with the Strasbourg jurisprudence.....no more, but certainly no less'.¹¹

But more recently the growing evidence of 'exceptions' to the mirror principle reflects the pragmatic acceptance that the Strasbourg jurisprudence does not provide determinative authority for every arising human rights dispute,¹² and that an uncritical stance towards the European Court of Human Rights' case-law effectively inhibits dialogue initiated by national courts.¹³ This acceptance appears to be symptomatic of a judicial response to the political disquiet surrounding the disempowerment of national institutions supposedly prompted by the enactment of the HRA.

In embracing an approach to the application of Strasbourg jurisprudence which is contextual, increasingly critical and eschews the precedential approach¹⁴ characterising the early HRA years, the domestic judiciary is moving towards a position in which the main objections to the impact of s.2 are being neutered.¹⁵ The stance that the courts are *now* taking therefore reflects more accurately the wording of the section and the original intention underlying it.¹⁶

Further, in the earlier cases, soon after the introduction of the HRA, the courts at times applied Strasbourg jurisprudence that had been influenced by the margin of appreciation doctrine, without recognising that that was the case.¹⁷ Therefore, in effect, in some instances they imported an international law doctrine into domestic law. However, in a number of the more recent cases, that approach has been rejected. Where a margin of appreciation would be likely to be afforded, or in a relevant decision has already clearly been accorded, to the member states, the domestic courts have recently shown greater confidence in finding that the question to be resolved is one for the domestic authorities to 'decide for themselves',¹⁸ and that trend is only likely to strengthen. If it is reasonably clear that the decision to be made *does* fall within the margin that the Court has decided to leave to the member states, the court need not be constrained in its decision by any

relevant jurisprudence, although it might seek some guidance – if any was available – from such jurisprudence.

The courts, having familiarised themselves with relevant Strasbourg jurisprudence, are currently gaining confidence and finding, especially where the decision falls within the margin of appreciation accorded to member states, that they can take a more activist approach to the European Convention on Human Rights (ECHR) guarantees, than the Strasbourg court itself would, since its approach is trammelled, not only by the influence of the margin of appreciation doctrine, influenced by consensus analysis,¹⁹ but also by concerns as to the reception a decision might have in the more socially conservative member states – the obvious example being Russia.²⁰ The UK Supreme Court (UKSC), unlike the Strasbourg court, need not concern itself with such a reception or with the number of member states that have provided protection for certain interests that potentially could fall within the scope of an ECHR right. The Supreme Court, admittedly, has been increasingly confronted with a socially conservative political climate in the UK, particularly from the viewpoint of right-wing ideologues in the Conservative party, who have directly attacked the HRA/ECHR on a number of occasions. As argued above, the recent growth in the range of ‘exceptions’ to the mirror principle, and in reliance on sources for the development of human rights law in the UK *other than* Strasbourg jurisprudence, appears to be attributable, in part, to a response to such attacks. Distancing that development from such jurisprudence tends to have the consequence of neutralising some of the socially conservative concerns that may underlie certain attacks. On the other hand, judicial creation of a vibrant domestic human rights jurisprudence can readily be attributable to a range of other motivations; moreover, the institutional position of the UKSC differs strongly from that of the Strasbourg Court, which is currently confronting a crisis of legitimacy fuelled by concerns that its judgments may be marginalised or disregarded in certain member states.²¹ In other words, even if the changed stance described here taken by domestic judges to s2 HRA is partly attributable to confronting *domestic* socially conservative forces, the outcomes in human rights disputes are less likely to display the caution shown at Strasbourg when confronted with cognate forces, emanating from certain member states.²²

Thus the development of human rights in the UK was initially shaped by absorbing Strasbourg jurisprudence into domestic law,²³ with the result that a remedy was potentially available domestically which previously would probably only have been available at Strasbourg, meaning, prior to the inception of the HRA, that vindication of human rights was severely delayed and available only to determined litigants.²⁴ But currently it is being shaped by a more dynamic approach to human rights which goes ‘beyond’ the Strasbourg stance in a range of instances²⁵ and draws on a range of sources other than the Strasbourg case-law.²⁶

Those developments also mean that the HRA has in a number of instances allowed the UK courts to hold the executive and legislative branches of government to account in the protection of human rights, initially by applying the Strasbourg jurisprudence less deferentially in ECHR-based disputes,²⁷ but somewhat more recently, in certain instances, by applying a more activist, rights-protective version of the ECHR in relation to such disputes.²⁸

The Human Rights Act and Parliament

Conor Gearty

The primacy of parliamentary sovereignty

A key but neglected fact about the Human Rights Act 1998 ('the HRA') is that it supports rather than undermines parliamentary sovereignty, and does so explicitly. True there is an interpretive capacity handed to the courts to strain language if *possible* to bring statutory provisions into line with human rights (section 3(1)) and all public authorities are also compelled to act consistently with the rights set out in the Act (section 6(1)). (Human rights in the HRA are defined by reference to the rights set out in the European Convention on Human Rights, a regional rights instrument overseen by the European Court of Human Rights in Strasbourg). But that is a power that takes second place to parliamentary sovereignty in two ways, one explicit and one the result of judicial interpretation.

First the explicit qualification. Section 3(2) ensures that the interpretive power cannot be allowed to 'affect the validity, continuing operation or enforcement of any incompatible primary legislation' (section 3(1)(b)). It is also clear that subordinate legislation – made under the authority of an Act of Parliament – is safe if 'primary legislation prevents removal of the incompatibility' (section 3(2)(c)). Just to make things doubly sure, section 6(2) allows public authorities to act in denial of human rights if an Act of Parliament leaves them no option but to act in this way (section 6(2)(a)) or if all it is doing is giving effect to an Act's human-rights-infringing provisions (section 6(2)(b)).

Second the implicit constraint. The assessment of what is 'possible' has been subjugated to parliamentary purpose as a matter of judicial interpretation. In the leading case of Ghaidain v Godin-Mendoza [2004] UKHL 30 the majority of their lordships were clear that only a reading of the provision under scrutiny that ran *with the grain of that statute's underlying purpose* could be warranted under section 3(1). Anything else would be, to quote Lord Bingham in an earlier case, 'judicial vandalism' (*R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at para 30). These dicta are well-known and routinely applied in the voluminous case-law on section 3 that has been generated since the HRA came into force. **It would be possible to amend the section to make the current judicial guidance more explicit, but it is not necessary: the section is well understood as it is.**

These sections and subsections of the HRA are fundamental to the architecture of the Act. The new Labour government that secured the Bill's enactment was aware of the deep mistrust of the judicial branch that was shared right across its benches, its wider

membership and its trade union supporters. There were good historical reasons for such suspicion, and these were not allayed by a few years of judicial liberalism. The politicisation of the US federal judiciary was an increasingly noisy warning about what could go wrong with judicial power. Parliament would have had no majority in 1998 for a human rights measure going further than the HRA, in the direction – American-style – of entrenching judicial oversight of legislation. This remains the case today.

The common law (judge-made law standing outside the legislative system and rooted in court rulings going back centuries) does not contain the same respect for parliament's sovereignty, albeit the courts have recognised its supremacy for centuries. What the courts respect at common law today they do not necessarily or inevitably respect tomorrow (*Jackson v Attorney General* [2005] UKHL 56). But what they cannot do, as long as sections 3 and 6 are in place, is refuse to recognise the legality of Acts of Parliament solely because of their infringement of Convention rights. So the HRA bolsters parliamentary sovereignty more than the contingent subservience that is offered by the common law. **Repeal of sections 3 and 6 might unlock common law constitutionalism in a way that would be seen as more controversial in democratic terms than the HRA has ever been.**

Accountability under the Human Rights Act

Part of the balanced deal between human rights and parliamentary sovereignty involved heightened accountability for compliance with human rights law as compared with the pre-HRA legal regime. In those days the victim of an alleged abuse of rights needed to take their case to Strasbourg, and a mild international law duty to implement the ruling was all that victory could produce. This system of judicial oversight remains and will no doubt return to prominence if the HRA were to be repealed or amended in substantial ways that denied access to the courts for alleged Convention breaches (and as long, of course, as the UK remained committed to the European Convention on Human Rights). The HRA adds new layers of accountability to this skeletal framework, in three ways in particular.

First, section 19 insists that the government reveal its hand so far as all its new legislation is concerned, saying whether or not it is in its view compatible with the rights set out in the HRA. No reasons need to be given but even as it stands the clause drives rights-analysis earlier into the drafting process than ever before. Such statements are however, and rightly, not determinative of any legal issue related to the relevant measure that might later emerge in court. **A possible addition to the HRA which would assist accountability would be to require brief reasons to accompany the section 19 statement.**

Second, the combination of the way the HRA is structured with the way that the Convention rights are interpreted, both in Strasbourg and in the UK, means that in practice the Government (or any public authority) will find itself frequently forced to defend itself in court by means of explaining why this or that of its actions are in fact consistent with human rights as understood in the HRA. This is because those rights are generally not absolute, but are permitted to be departed from in many ways, so long as such deviations are proportionate to their goal so far as the damage done to human rights is concerned. The great majority of cases under the HRA involve this sort of explanatory exercise from the authorities, one that was much less intrusive in the pre-HRA legal system than it is now.

Third, where a declaration of incompatibility is made under section 4, the government needs to consider whether or not to bring the impugned law into line with the right or rights which it has now been found to have violated. It does not have to do anything but at very least it needs to explain itself. On the whole successive governments have acted to bring the law into line with such declarations, so much so that there is a slight sense that their quiescence here was not quite what the drafters of the HRA had in mind. **These provisions could be reworked to highlight the discretionary nature of the decision on whether or not to comply with declarations of incompatibility, but the wording is already arguably clear.**

Accountability could be further improved by giving statutory recognition in the HRA to the role of the Joint Committee on Human Rights – an important parliamentary forum for human rights that is however (as is the case generally with such committees) outside the framework of statute law (including the HRA).

The subsidiary role of the European Court of Human Rights

Section 2 of the HRA sets out the circumstances in which decisions of the Strasbourg court are to be taken into account in the UK courts.

The section might be thought unduly complicated and if there were the desire it could perhaps be simplified so as to eliminate from its remit the range of materials that are *required* to be taken into account that are presently set out at section 2(1) (b) – (d). The courts can be relied on to take these materials into account when relevant without being required to do so, and their presence in the section arguably detracts from understanding its primary effect and purpose: to ensure that decisions of the Strasbourg court are part of decision-making under the HRA but that they do not drive the outcomes of individual

cases (see *In re Finucane* [2019] UKSC 7 at para 29 – 31, 141 – 142 for a recent decision taking account of the Committee of Ministers' report in a Strasbourg case).

It was arguably the case that in its first decade the section was interpreted in a way that was overly deferential to the Strasbourg court (*R (Ullah) v Special Adjudicator* [2004] UKHL 26). But since the important, early decision of the then newly formed Supreme Court in *R v Horncastle* [2009] UKSC 14, this has been no longer the case. The original intention of section 2, to stimulate a dialogue between the Strasbourg and the senior courts in the UK, has been achieved. **No change is required.**

The Human Rights Act and Derogations

Alan Greene

The idea that human rights law somehow unduly constrains the UK government from confronting terrorism or other emergencies has not been borne out. Indeed, it is often the case that commentators critique human rights law for failing to constrain the UK's extensive counter-terrorist apparatus.²⁹

Derogations and the relation between UK courts and the European Court of Human Rights

Article 15 of the European Convention on Human Rights (ECHR) provides that states can derogate from the ECHR 'in time of war or other public emergency threatening the life of the nation' so far as these measures are 'strictly required by the exigencies of the situation.' Furthermore, no derogation is permissible from Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3 (torture and inhuman and degrading treatment or punishment), 4.1 (slavery) and 7 (retrospective criminal punishment).

Derogations under Article 15 are afforded a wide margin of appreciation by the European Court of Human Rights (ECtHR). This reflects the ECtHR's position as a supranational court, viewing Contracting Parties as best placed to assess whether a public emergency threatening the life of the nation exists.³⁰ Consequently, while UK courts 'must take into account' ECtHR jurisprudence in accordance with section 2 of the Human Rights Act (HRA) 1998, the wide margin of appreciation on this question means that ECtHR case law would be of minimal assistance.

This is reflected in the case law on section 2 HRA itself. Early cases under the HRA suggested that 'the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less';³¹ and that UK courts should 'follow any clear and constant jurisprudence of the European Court of Human Rights'. However, these cases also acknowledged that courts could depart from such jurisprudence in 'special circumstances'³² with one such example being where a wide margin of appreciation exists.³³

Helen Fenwick and Roger Masterman also note that what has been termed the 'mirror principle'—the aforementioned approach to section 2 HRA where domestic courts closely follow the jurisprudence of the ECtHR—has been departed from under a number of occasions. Even where a narrow margin of appreciation exists, UK courts have demonstrated a willingness to not follow pre-existing ECtHR case law.³⁴ In some cases,

UK courts have expressly disagreed with ECtHR jurisprudence. This was the case in *R v Horncastle*³⁵ where the UK Supreme Court refused to follow the prior ECtHR Chamber judgment in *Al-Khawaja v UK*³⁶ concerning the compatibility of a conviction based solely on hearsay evidence with the right to a fair trial under Article 6 ECHR. The Grand Chamber of the ECtHR subsequently agreed with the UK Supreme Court's approach, thus demonstrating that dialogue and comity between the ECtHR and domestic courts is a two-way street.³⁷

Finally, domestic courts have increasingly highlighted the role of the common law as a source of civil liberties in the UK, opening the path for a more synergistic relationship between the ECHR and the common law and the possibility for a 'particularly British view of the fundamental rights of citizens in a democratic society'. There is therefore scope under section 2 HRA for UK courts to take a unique approach to the protection of human rights in times of emergency.

Derogations before UK Courts

Even if UK courts were to follow ECtHR jurisprudence closely in the context of Article 15, this would result in UK courts effectively mirroring the highly deferential approach of the ECtHR on Article 15. To date, the ECtHR has never found that a public emergency threatening the life of the nation did not exist in a state.³⁸ The ECtHR has, however, been more robust on the question as to whether the measures taken by a state in lieu of such a derogation have been proportionate to the exigencies of the situation; nevertheless, significant deference is often present and the findings have not unduly restricted a state's response to terrorism.³⁹

Thus, in *A v Secretary of State for the Home Department*, the House of Lords, and later the ECtHR, found that the UK's detention without trial of non-UK citizens under section 23 of the Anti-Terrorism, Crime and Security Act (ATCSA) 2001 was incompatible with Article 5 ECHR.⁴⁰ Here, the HRA was fundamental in ensuring the capacity of UK courts to hold the executive and legislature to account in the protection of human rights in the context of counter-terrorism.

It should be noted, however, that the judgment found that the measures enacted were not proportionate to the exigencies of the situation. Neither the UK Supreme Court nor the ECtHR found that a public emergency threatening the life of the nation did not exist. This implicit endorsement of the existence of a public emergency in the UK following 11 September 2001 was used by the then government to justify the introduction of control orders.⁴¹ Moreover, the fact that many high-profile counter-terrorist attacks perpetrated in the UK since 11 September 2001 were carried out by British citizens and so would not

have been detainable under section 23 ATCSA demonstrate the irrationality of this provision.⁴²

The HRA therefore has not restricted the UK's approach to confronting terrorism. Indeed, many have been critical of the UK courts' deferential approach to questions of national security.⁴³ Such criticism is, however, not unique to the UK and so cannot be attributed to the ECHR or the HRA.

The HRA and Derogations for UK Armed Forces Overseas

There is considerable debate over whether the UK could presumptively derogate from the ECHR for the acts of its military forces overseas as proposed by the Overseas Operations (Service Personnel and Veterans) Bill. Any concerns regarding human rights unduly restricting the UK's armed forces are overstated, however. Firstly, in the context of Article 5 and the right to liberty, the utility of a derogation in the context of an international armed conflict is questionable as the ECtHR already interprets Article 5 in harmony with international humanitarian law.⁴⁴ Derogation would have minimal effect on the UK's ability to detain prisoners of war or other detainees in such circumstances. Furthermore, many cases regarding the application of human rights law in an armed conflict centre on claims made by soldiers or the families of deceased soldiers.⁴⁵ Framing this debate therefore as the government seeing to 'protect our Armed Forces' is deeply misleading.

The Human Rights Act and the COVID-19 emergency

No derogation is currently in existence meaning that the ordinary parameters of UK human rights law have not prevented Parliament or the government from enacting robust measures to confront the COVID-19 pandemic.

While case law to date on this issue is sparse, with there being considerable disagreement amongst academics on whether a derogation from Article 15 ECHR is necessary, it is clear that should the ECtHR find that states should have derogated from the ECHR, the pandemic would certainly have met the threshold for a public emergency threatening the life of the nation under Article 15 ECHR.⁴⁶

Moreover, there are strong human rights arguments *in favour* of the state taking measures to protect the lives of its citizens and to ensure that conditions in state run institutions do not constitute inhuman and degrading treatment or punishment. Consequently, the HRA and ECHR can empower rather than restrict the state's fight against COVID-19.⁴⁷

Conclusion

Emergencies are often the precise conditions in which the most egregious human rights abuses occur. It is only right therefore that states are not given carte blanche to respond to a crisis in any way they see fit. However, as has been shown, the state has been granted considerable latitude by the judicial branches on the question of how best to balance questions of security and human rights. The claim therefore that the HRA or ECHR has unduly hampered the UK's response to terrorism or emergencies is simply untenable.

The Human Rights Act and Sexual Orientation Rights

Loveday Hodson

Introduction

The legal rights of gay, lesbian and, to some extent, other queer sexual minorities within the UK have changed beyond recognition over recent decades. The Human Rights Act (HRA) 1998 has certainly played a noteworthy part in these developments, but its role in progressing sexual orientation rights in the UK should neither be exaggerated nor underestimated.

I therefore want to start this piece by setting out what the HRA *is* and what it *is not*. The HRA is not a ‘charter for gay rights’, mandating far-reaching reforms; it is a statute that protects certain fundamental rights set out in the European Convention on Human Rights (ECHR) and prohibits discrimination with respect to the enjoyment of those rights, protection that extends to discrimination on the grounds of sexual orientation.

The HRA did not newly introduce sexual orientation rights to the UK; the HRA ‘brings home’, and gives better effect to, rights contained in a treaty that has been in force for the UK since 1953. Neither does the HRA require the UK courts to unquestioningly follow the judgments of the European Court of Human Rights (ECtHR) in Strasbourg on sexual orientation rights; its carefully balanced architecture does, however, require UK courts to take ECtHR case-law into account in their decision-making.

In effect, the HRA’s important contribution is that it brings domestic courts into a dialogue with the ECtHR on shaping the scope of ECHR rights. Because, the ECtHR’s recognition of sexual orientation rights in Europe (and beyond) has developed pretty rapidly over the past forty years (developments impossible to even summarise here, but meticulously outlined in *Homosexuality and the European Court of Human Rights*), having an avenue for judicial dialogue over these developments that the UK courts can participate in is particularly significant.

The European Court of Human Rights’ Influence Prior to the Human Rights Act

Judgments from the ECtHR are binding upon the respondent State party. Therefore, even before the HRA, the ECtHR had a big impact on the scope of sexual orientation rights in the UK. While the ECtHR machinery might be criticised for being a bit slow to get off the ground, in its ground-breaking judgment of *Dudgeon v UK* (1981), the ECtHR held for the first time that legislation criminalising sexual relations between men in Northern Ireland violated the right to respect for private life. This case led the UK Government to extend

the partial decriminalisation of male same-sex sexual acts to Northern Ireland under the Homosexual Offences (Northern Ireland) Order 1982.

Some years later, the European Commission of Human Rights' decision in Sutherland v UK (1997) condemning another form of legislative discrimination ultimately led to the introduction of an equal age of consent for gay men (under the Sexual Offences (Amendment) Act of 2000). A later case that successfully challenged the prosecution of sexual activity between more than two consenting men in private under laws that did not apply to heterosexual acts, resulted in the introduction of neutral sexual offences law under the Sexual Offences Act 2003 (A.D.T v UK, 2000).

Asserting sexual orientation rights in the sphere of criminal law led the ECtHR to a more general and robust defence of the rights of sexual minorities. Smith and Grady v UK (1999), often referred to as the "gays in the military case", together with Lustig-Prean and Beckett v UK, compelled the UK government to overturn the prohibition of gay men and women from serving in the armed forces, a prohibition that led to devastating and humiliating ends to distinguished careers for many men and women. The ECtHR reiterated that distinctions based on sexual orientation require particularly serious reasons by way of justification. The rights of same-sex couples to relationship recognition and wider family rights have also been increasingly recognised by the ECtHR as fundamental to individuals' dignity and thus within the ECHR's remit.

Enter the Human Rights Act

Enacting the HRA meant that the UK courts could play a part in shaping this shifting terrain of sexual orientation rights, rather than remain relatively passive in the face of societal and legal developments.

The opportunity for the UK courts to enter the discussion came early on, in the form of Ghaidan v Godin-Mendoza (2004). In this case, the House of Lords – able now to assess the validity of legislative provisions measured against ECHR rights - was tasked with interpreting a statutory provision that, on the face of it, excluded a surviving partner from an unmarried same-sex relationship from enjoying protected tenancy rights on the same basis that they would have had they been in an opposite-sex partnership. The question for the House of Lords under Section 3 of the HRA was whether the relevant statutory provision could be read down in order to protect the respondent's Convention rights. In reaching the decision that it could be read down, the Law Lords referred to ECtHR discrimination case law, such as Fretté v France (2002), but their analysis articulates a rationale influenced by UK constitutional principles. Lord Nicholls argued:

Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced.

Thus, the *Ghaidan* case saw the domestic courts actively participating in the on-going process of shaping sexual orientation rights, at once enhancing the protection of rights for sexual minorities and enabling the UK judges to bring their unique experience and perspective to the task. Legislative developments such as the Civil Partnership Act 2004 – introducing civil partnerships, initially for same-sex couples - and the Equality Act 2010 – with its sweeping prohibition of discrimination on the grounds of sexual orientation, amongst others - were a logical outcome of this robust judicial dialogue on discrimination.

After the Human Rights Act: Dialogue

The judicial communication opened up by the HRA is a two-way dialogue: the UK courts are empowered by the HRA to become part of the human rights conversation, and the ECtHR is, in turn, able to engage with, and respond to, those views. This dialogic exchange is illustrated in recent cases where religious freedoms and the rights of sexual minorities appear to conflict.

For example, in *Ladele v UK* (2013), the applicant was a Christian working for a local authority as a registrar. She argued that being compelled to participate in the administrative and ceremonial aspects of civil partnerships violated her right to religious freedom. The Employment Tribunal and Employed Appeal Tribunal disagreed on the appropriate balance to be struck under the HRA. Drawing on ECtHR case law on religious freedom, the Court of Appeal reiterated the importance with which discrimination on the grounds of sexual orientation should be approached. Ultimately, however, the Court of Appeal based its decision on the will of Parliament, which “has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions”.

The *Ladele* case was taken to the ECtHR where the dialogue continued. The ECtHR referred to States’ margin of appreciation when determining whether an interference is necessary and the wide margin offered to States with respect to relationship recognition and in striking a balance between competing rights. Thus, the ECtHR left several key questions unaddressed. Disappointing though the ECtHR’s analysis was, it was perhaps the very fact that the UK courts had taken advantage of the opportunity to conduct a rights-based assessment and had asserted their view of the importance of sexual

orientation rights that meant the ECtHR felt disinclined to intervene further in this particular case.

Conclusion: an on-going dialogue

The conversation between the UK courts and the ECtHR is an on-going one. The progress of this conversation is certainly not linear, and a continuous judicial and legislative recognition of greater sexual orientation rights is far from guaranteed by it.

Lee v UK, for example, is a pending case that concerns the somewhat notorious refusal of a bakery in Northern Ireland, on religious grounds, to complete an order for a cake with a “Support Gay Marriage” message. The UK’s Supreme Court held that the bakery’s objection in this case was to the “message and not to any particular person or persons”, and therefore their refusal in this instance did not constitute either direct or associative discrimination on the grounds of sexual orientation. Further, existing anti-discrimination laws should not be read in a way that requires providers of goods, facilities and services to express a message that conflicts with their religious beliefs. The ECtHR will now have the opportunity to reject the Supreme Court’s analysis of Convention rights should it choose to do so.

The HRA has enabled the UK courts to play an active role in shaping sexual orientation rights under the ECHR. The development of rights in this area has been fast-paced and is still a work in progress. While neither the ECtHR nor UK courts have consistently championed sexual orientation rights, placing them in conversation has helped to shape a judicial dialogue and legal culture that has greater potential to result more often to rights in action than inaction.

The Human Rights Act 1998 and State Surveillance⁴⁸

Dimitrios Kagiros

One of the key rationales underpinning the adoption of the Human Rights Act (HRA) 1998 was the promise of 'bringing rights home'.⁴⁹ The drive to give domestic effect to the European Convention on Human Rights (ECHR) was premised on the idea that individuals should be able to challenge state action that violates their ECHR rights before UK courts and tribunals. The transformative impact of the HRA in this regard is evidenced by the frequency with which ECHR rights challenges have been brought before domestic courts in the past 20 years. Additionally, since the enactment of the HRA, there has been a steady decline in judgments from the European Court of Human Rights (ECtHR) finding the UK in violation of the ECHR.⁵⁰

This post traces the impact of the HRA in providing individuals with a domestic remedy for ECHR violations perpetrated by the Intelligence and Security services (henceforth, the Services). It focuses in particular on unlawful interception of communications and surveillance. While it would be wrong to suggest that the HRA has been an unmitigated success in keeping the services accountable in this regard, it has arguably become indispensable in providing individuals with the legal means to mount domestic challenges against arbitrary state interference with their fundamental rights. The post concludes that any weakening of the domestic protections afforded by the HRA will make the Services less accountable to the public, potentially deprive individuals of a domestic remedy for unlawful interferences with their rights, and invite further international supervision by the ECtHR. On this basis, the domestic framework for securing that the actions of the Services comply with the ECHR should be strengthened rather than weakened.

Legal accountability for state surveillance pre-HRA

Tasked with the duty of 'defending the realm', the Services have been granted extensive powers the exercise of which inevitably interferes with rights. For instance, the various forms of surveillance and interception of communications in which the services engage have been found to interfere with the right to private and family life (Article 8 ECHR) and, in certain instances, freedom of expression (Article 10 ECHR).⁵¹ Both these rights are qualified and subject to restrictions. For an interference to be lawful, it must satisfy the test set out in paragraph 2 of each of these provisions. Specifically, any interference with these rights must be prescribed by law, serve a legitimate aim, and be necessary in a democratic society.

The first part of this test in particular, put into question the compatibility with the ECHR of the Services' actions pre-HRA. The 'prescribed by law' test, requires the existence of an

accessible and foreseeable legal framework that sets out the conditions under which these restrictions to the right can be exercised. However, until the mid-1980s there was no statutory framework setting out the powers of the Services. As a result, there was little public accountability for their actions and a concomitant lack of meaningful remedies for those who without good reason had been subjected to surveillance. This was compounded by the fact that there was no right to privacy recognised in domestic law and the rights protected in the ECHR had not been given domestic effect. Potential victims of human rights violations were thus unable to rely on ECHR rights to challenge government action before UK courts. Consequently, before the HRA came into force, the sole available recourse for potential victims of rights violations due to unlawful state surveillance was to apply to the ECtHR. The landmark judgment in *Malone v. UK*⁵² was the first to find the UK in violation of Article 8 ECHR for its failure to provide an accessible and transparent legal basis for state surveillance and the interception of communications. In response to this judgment, legislation was enacted for the first time publicly setting out the powers of the Services.⁵³

The landscape post-HRA

In addition to legislation setting out the framework for surveillance, the enactment of the HRA created a further duty on all public authorities to act compatibly with ECHR rights.⁵⁴ It also equipped courts with the capacity to offer remedies where violations occur.⁵⁵ When it came to providing redress for ECHR rights violations perpetrated by the Services, it was considered important to establish a specialised Tribunal to handle such cases rather than to allow them to proceed through the ordinary court system. This was in recognition of the secretive nature of the Services' operation, and the need to protect national security. The Investigatory Powers Tribunal (IPT) was established under the Regulation of Investigatory Powers Act 2000 (s 65) for this purpose. The Rules regulating its procedures took effect on the same day as the HRA came into force.⁵⁶ These specialised procedures (for instance, the applicants have no right to an oral hearing, the IPT does not publish judgments in their entirety) raised credible concerns particularly as to their compliance with the right to a fair trial protected under Article 6 ECHR. When these procedures were challenged before the ECtHR, it found that IPT framework conformed to Article 6 ECHR, on the basis that the 'procedural restrictions were proportionate to the need to keep secret sensitive and confidential information and did not impair the very essence of the applicant's right to a fair trial'.⁵⁷

The contribution of the IPT has been significant. It has provided redress to individual applicants who have been subjected to surveillance unlawfully,⁵⁸ but also on occasion found that aspects of the general legislative framework on surveillance violate the ECHR. For instance, in separate cases in 2015 the IPT held that intelligence sharing between

the UK and the United States was in contravention of Articles 8 and 10 ECHR until December 2014,⁵⁹ that the interception of legally privileged information shared between the applicant and his legal representatives violated Article 8 ECHR,⁶⁰ and that there were insufficient safeguards in the law to prevent the police from intercepting the communications of journalists to identify their sources, thus breaching Article 10 ECHR.⁶¹ It is notable that in all three cases, the Government took steps to amend the framework and ensure it was ECHR-compliant following the IPT's judgment.

In light of this, after an initial refusal to accept that the IPT constitutes an effective remedy that applicants need to exhaust before applying in the ECtHR,⁶² in *Big Brother Watch and others v. UK*⁶³ the ECtHR accepted for the first time that

the IPT has shown itself to be an effective remedy which applicants complaining about the actions of the intelligence services and/or the general operation of surveillance regimes should first exhaust in order to satisfy the requirements of Article 35 § 1 of the Convention.⁶⁴

The *Big Brother Watch* judgment, among other issues, concerned the powers of the Secretary of State to issue warrants allowing for the indiscriminate, rather than targeted, interception of 'external communications' by the Services.⁶⁵ The meaning of external communications includes someone within the UK accessing a website whose server is located overseas, an individual in the UK posting something on their social media, as social media servers are also mostly located overseas, or someone in the UK using a cloud storage provider.⁶⁶ The impact of such warrants on the right to privacy of potentially millions both inside and outside the UK is obvious. The ECtHR held that the law authorising these warrants lacked the necessary safeguards and, as a consequence, the interference with Article 8 did not meet the 'prescribed by law' requirement. While this finding of an Article 8 violation is a welcome development, the ECtHR also determined in this judgment that establishing such a bulk interception regime fell within the state's margin of appreciation as long as it fulfilled the Article 8(2) criteria. It remains to be seen whether the ECtHR's Grand Chamber will reverse the Chamber's judgment in this regard.

How would a potential weakening of the domestic standards for the protection of ECHR rights impact the accountability of the Services?

Based on the outcome of *Big Brother Watch*, it is important not to paint too rosy a picture in relation to securing the legal accountability of the Services. Concerns remain in relation to the IPT's efficacy in protecting victims of human rights violations in general and state surveillance in particular.⁶⁷ However, one cannot deny the progress that has been made under the HRA by allowing domestic judges to provide domestic solutions for human

rights violations by the Services, even through the special procedures under which the IPT operates. Weakening the HRA framework is likely to reverse this progress for all courts and tribunals including the IPT.

The recently announced Independent Review of the HRA,⁶⁸ coincides with the adoption of the EU-UK Trade and Cooperation Agreement which requires the UK to remain a member of the ECHR.⁶⁹ This means that a watered down framework for the domestic protection of ECHR rights that lessens the capacity of domestic courts and tribunals to provide remedies, will lead purported victims of violations to turn to the ECtHR more often. Additionally, less robust domestic human rights standards increase the chance of the ECtHR finding the UK in violation of its international obligations. Therefore, any weakening of the domestic framework for protecting rights, not only risks making the Services less accountable, but also makes it more likely for the UK to be subject to increased international supervision and scrutiny by the ECtHR in sensitive areas such as national security.

Thus, if the impetus of the review is to lessen the domestic influence of the ECtHR, then watering down the HRA will have the opposite effect. If the Independent Review is driven by scepticism towards the judiciary and its purported 'power grab' against the executive or Parliament, then limiting domestic courts' powers to provide an effective remedy will mean that it will be the *international* judge who will be tasked with carrying out this function. In light of this, efforts should be made to strengthen rather than weaken the HRA in relation to actions of the Services.

The Human Rights Act 1998 and Disabled People

Anna Lawson, Maria Orchard, Beverley Clough, Luke Clements and Oliver Lewis

Introduction

In this short paper, we will draw attention to a number of examples of disability-related Human Rights Act (HRA) 1998 cases which illustrate the valuable role the HRA has played in the strengthening of disabled people's human rights in the UK.

Case law is not the only route through which the HRA has operated. Also significant is the work of the Joint Committee on Human Rights and the impact on campaigning and lobbying of the heightened profile which the HRA gives to human rights considerations. Detailed reflection on these issues, however, lies beyond the scope of this paper.

The focus, therefore, will be on examples of relevant cases – but it should be stressed that this will not be an exhaustive account of all disability-related HRA jurisprudence. The paper will be organised by reference to the different articles of the European Convention on Human Rights (ECHR) at issue.

Article 2

The right to life, set out in Article 2 ECHR, has been influential in driving up the responsibilities of hospitals and care home providers to take steps to protect the lives of disabled people. In *Rabone v Pennine Care NHS Trust*, for example, the UK Supreme Court held that Article 2 had been breached when a hospital allowed a patient, known to be at risk of suicide, to return home for a week – during which she killed herself. This was so despite the fact that the patient was in hospital on a voluntary basis, and not compulsorily detained under the Mental Health Act 1983. Given the fact that the hospital knew that there was a 'real and immediate' risk to life, it should have taken more care to protect the patient.

Article 2 has had a transformative effect on inquests concerning disabled people. Where a Coroner rules that Article 2 is engaged, the scope of the inquest is widened to exploration as to how the deceased came by their death, not simply how they died. Article 2 inquests trigger 'Exceptional Case Funding' by the Legal Aid Agency, which pays for legal representation for bereaved families, increasing their access to justice. Over the last few years, many deaths of people with learning disabilities, autism and/or mental health issues – particularly those who have died in institutional settings – have had Article 2

compliant inquest, which has revealed failures in healthcare and social care and led to policy changes at NHS Trusts, local authorities and private providers.

Article 3

Article 3 sets out a right to be free from inhuman and degrading treatment or punishment, and to be free from torture. A number of important cases decided by the European Court of Human Rights (ECtHR) have held that Article 3 has been breached because of the conditions in which a disabled person is held in prison or in police or psychiatric detention. These include cases against the UK, such as *Price v UK*, where a disabled woman was refused permission to take the battery charger for her wheelchair to prison with her; occupied a cell which was dangerously cold for her, with a bed she was unable to use; and had to rely on assistance from male staff in using the toilet. The ECtHR stressed that assessment of the minimum level of ill-treatment required to establish inhuman and degrading treatment depends on all the circumstances of the case, including any impairments of the victim and the physical and mental effects of the ill-treatment. Accordingly, although there was no deliberate intent to humiliate or debase Ms Price, there had been a breach of Article 3.

The ECtHR case law has proved extremely influential over UK law. An example of an English HRA case in which there was held to be a breach of Article 3 is *ZH v Commissioner of the Police for the Metropolis*. Here, the police failed to consult the carer of an autistic child (who was transfixed by a swimming pool) with the result that they followed their standard procedures for interacting with people causing a nuisance. The alarmed child then jumped into the pool from which he was forcibly removed, handcuffed and restrained in a police van. Concerns about the inconsistency of many restraint practices with Article 3 and other ECHR rights led the Equality and Human Rights Commission to publish guidance on the topic in 2019. In the same year, the Commission supported judicial review proceedings on behalf of Bethany, a 17-year-old girl with autism who had been kept in a seclusion room in St Andrew's Hospital, Northamptonshire, for two years. It was argued on her behalf that her rights under, inter alia, Article 3 ECHR had been breached. The case settled by way of damages and a public apology by the healthcare provider and public bodies.

Article 5

Article 5 protects rights to liberty and security of the person and is concerned primarily with the right to be free from arbitrary detention. In the disability context, it was relied on by the UK Supreme Court in the leading case of *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*. In this case it was decided that three

people with learning disabilities had been deprived of their liberty (within the meaning of Article 5) by virtue of living arrangements that placed them under continuous supervision and control and meant they were not free to leave should they attempt to do so. This case overturned previous practice, which did not treat these circumstances as deprivations of liberty. Its implications are far reaching, given that very many people with learning disabilities are in similar circumstances and that any deprivation of liberty attracts the protections of the Deprivation of Liberty Safeguards set out in the Mental Capacity Act 2005. These Safeguards provide a rigorous process by which health services have to prove that compulsory detention is the best solution for the individual concerned.

Article 6

Article 6 ECHR concerns the right to a fair trial. There are many examples of disability-related HRA cases in which this right has been relied on. An early example is *R v Isleworth Crown Court (ex parte King)*, in which it was held that, when questioning a litigant in person whose concentration and memory had been affected by a stroke, Article 6 required the judge to make adjustments including allowing additional time and not express impatience. Another example is *AH v West London Mental Health Trust*, in which Article 6 was relied on to support a ruling that a person detained under the Mental Health Act 1983 was entitled to have his case reviewed in a public hearing, rather than in private.

Article 8

Article 8 ECHR sets out the rights to privacy, home and family life. An example of a disability-related HRA case in which it was held to have been breached is *Bernard v Enfield LBC*. Because the Council neglected to provide Mrs Bernard and her family with accessible accommodation for 20 months, she was denied the means of caring for her six children and required to endure repeated indignities associated with not being able to access the bathroom independently.

Another early example is the case of *R v East Sussex CC (ex parte A and B)*, in which Article 8 was used to overturn a council's blanket ban on the manual lifting of disabled people. A and B were two sisters with physical impairments. Without manual lifting it would have been impossible for them to take part in their valued leisure activities outside the home.

In the COVID-19 pandemic, several disabled people initiated judicial review proceedings arguing breaches of Article 8 ECHR. These included a challenge to NHS England whose guidance in the first wave was that hospitals could ban visitors. Pre-action

correspondence raised Article 8 points and resulted in policy changes at national and Trust levels.

Article 14

The Article 14 right to be free from discrimination in the enjoyment of other ECHR rights has provided the basis of a number of disability-related HRA cases in which government regulations have been successfully challenged.

The majority of these cases concern regulations on eligibility to disability-related benefits. In *Mathieson v Secretary of State for Work and Pensions*, for example, the Supreme Court held that Article 14 (in combination with Article 1 of Protocol 1, on peaceful enjoyment of possessions) had been breached by various provisions of the Social Security (Disability Living Allowance) Regulations 1991 which permitted the Secretary of State to withdraw Disability Living Allowance from children who had been in hospital for more than 84 days. Because of this case, the regulations were changed.

Regulations relating to Personal Independence Payments (PIP) (the successor to Disability Living Allowance) were challenged in *RF v Secretary of State for Department of Work and Pensions*. These prevented an award of the enhanced PIP mobility rate for a person who, 'for reasons other than psychological distress', was unable to follow the route of a familiar journey without assistance. The exclusion of people affected by psychological distress was quashed for breaching Article 14 (in combination with Article 1 of Protocol 1), because it was 'blatantly discriminatory against those with mental health impairments' and not capable of objective justification.

Regulations imposing a cap on housing benefits for an additional bedroom were challenged for their discriminatory impact on disabled people needing extra space (e.g. for carers or equipment) in *Burnip v Birmingham City Council* and *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions*. In both cases the HRA was used and it was held that the regulations contravened Article 14 ECHR, in connection with Article 1 of Protocol 1. The cap was therefore lifted in cases where an additional bedroom is needed for disability-related reasons.

The HRA has also been successfully used to challenge regulations under the Equality Act 2010 on the basis that they discriminate against certain disabled people (contrary to Article 14, in combination with the right to education under Article 2 of Protocol 1). In *C & C v The Governing Body of a School*, the issue was whether a regulation issued under the Equality Act 2010 contravened Article 14 ECHR. This regulation excluded people with a 'tendency to physical abuse' from establishing that they have a disability under the

Equality Act 2010, thus preventing them from bringing claims for disability discrimination. It was held that the regulation did contravene Article 14 (in combination with Article 2 of Protocol 1) insofar as it prevented young autistic children – with a tendency to lash out at teachers or other children – from bringing cases against their school for disability discrimination. Because of this case, the regulation no longer has this effect in educational settings.

The provisions of Article 14 (in combination with other articles) have proved particularly valuable in addressing forms of oppressive discrimination which fall outside the more rigid provisions of the Equality Act 2010. In *Hurley v Secretary of State for Work and Pensions*, for example, an unpaid family carer was adversely impacted by benefit restrictions for which the court was unable to identify any legitimate justification. Carers are not a protected category under the Equality Act 2010, but there can be no public policy benefits for rendering immune from challenge laws that oppress such carers. In similar terms, in *R (SH) v Norfolk CC*, the High Court held unlawful local authority charging policies that had a disproportionate impact on the independent living opportunities of those with the most severe impairments.

Of particular importance in the field of social welfare law is the principle first articulated in the case of *Thlimmenos v Greece*: that unlawful discrimination can arise where, without objective and reasonable justification, states fail to ‘treat differently persons whose situations are significantly different’. Research at the University of Leeds, for example, identified as unlawful local authority policies that discriminate against disabled children with autism compared to children with other conditions (the ‘Autism Plus research’). Such policies have no rational justification in public policy terms and cause immense distress and humiliation to families. The *Thlimmenos* mechanism captures the illegality at the heart of offensive public policies of this kind. The ‘Autism Plus research’ also provides an example of the impact of human rights legislation that does not rely on court action. Subsequent to the research, individual local authorities were contacted and, in many cases, agreed to review their policies. An approach of this kind mirrors work undertaken by the Equality and Human Rights Commission in 2017 concerning policies adopted by Clinical Commissioning Groups placing a budgetary limit on support packages for severely disabled people – an approach that proved to be effective without the need for court involvement.

Conclusion

It is clear then that, by requiring UK courts to take account of ECHR developments, the HRA has proved an important and valuable tool in efforts to strengthen disability rights. Alongside examples of success, there are also of course examples of failure – of cases

(not discussed here) where the HRA did not yield the result sought by the disabled claimant or their supporters.

The HRA, and the linkage it creates to the ECHR, is a mechanism that we strongly urge should be retained, with attention being given to areas in which more work is needed to secure the rights of disabled people (as set out in the ECHR and the Convention on the Rights of Persons with Disabilities) firmly in domestic law.

The right to life – operational policing and the investigation of fatal incidents

Philip Leach⁷⁰

Introduction

You might imagine that, of all the panoply of human rights, the right to life has had little relevance for us in the UK. After all, it is not a country where it is common for people to die because of human rights violations. If that is your perception, then I hope that this brief foray into the field will prove to be of interest, as the opposite is the case: in fact, the right to life (the subject of Article 2 of the European Convention on Human Rights) has had a significant impact on our laws and practices.

Its remarkable influence is, I would suggest, a consequence of both its breadth and depth. The right to life applies not only to situations, as you might expect, where the British army, security services or police decide they need to resort to use their weapons in response to a dangerous threat, but also to vulnerable prisoners, and the victims of trafficking, domestic violence and environmental disasters.

There is surprising depth, too. In a law enforcement situation, the right to life will not only have a bearing on police officers' decisions, for example, to fire a weapon, but also on the way in which the particular operation was planned and managed by the police, and how the incident was subsequently investigated. Failings at any of these stages could mean that the victim's right to life was violated.

But you would never have been able to glean all of this from the wording of Article 2 itself – we have only learnt this because of the way the courts (and other public bodies) in the UK, and the European Court of Human Rights (ECtHR), have considered and applied it in many different situations, from individual shootings to large-scale inquiries and mass fatal tragedies, such as Hillsborough and Grenfell.

There is far too much to say in this short post, and so I will limit myself to just two subjects: firstly, the duties arising when the authorities plan and conduct operations using force, involving the police and the security forces, and, secondly, the various obligations which arise in investigating fatal incidents.⁷¹

Policing the police - operational obligations⁷²

At its most elemental, the right to life sets out the circumstances where it may be lawful for state agents to use lethal force – subject always to the fundamental rule that they may

use no more force than is *absolutely necessary*. If you think about it, that is a very high standard – and rightly so. The right obviously applies to a police officer's decision to deploy a weapon – but it also has much broader application, to the whole context, to take in the way that such an operation was planned and conducted. This means that the *right* imposes a range of *duties* on the state.

Within the UK, the right to life has proved to be of particular importance in Northern Ireland, as a result of the conflict there from the late 1960s to the mid-1990s, which caused more than 3,600 deaths. One landmark case which arose in that context was McCann v UK, which for the first time laid down standards for the planning and control of policing operations. The case concerned the fatal shooting in Gibraltar of three members of the Irish Republican Army (IRA) by British Special Air Service (SAS) officers, as they were believed to be about to detonate a bomb with the aim of killing British soldiers. However, they were not in fact in possession or control of a bomb at the time, but were on a reconnaissance mission for the planting of a bomb.

The relatives of the IRA members took a case to the ECtHR where they argued that the killings breached the right to life. The ECtHR found that the SAS officers had honestly and reasonably (albeit mistakenly) believed that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing loss of life. However, by a narrow margin of ten judges to nine, the ECtHR held that the right to life had still been violated, as a result of the failures in the conduct and planning of the operation. The ECtHR was critical of the authorities' decision not to prevent the suspects from travelling into Gibraltar – in other words, the security forces could have intercepted them earlier which would have obviated the need to use lethal force. The ECtHR also found that the authorities had not made sufficient allowances for the possibility that their intelligence assessments might, at least in part, have been wrong.

The judgment was intensely controversial at the time. The then Deputy Prime Minister, Michael Heseltine, said that the Government would 'ignore it and do nothing about it'. However, over time, the standards established by the judgment on the control and planning of operations have become accepted, and are now enshrined in guidance for police on the management, command and deployment of armed forces.⁷³

What is required when investigating a fatality?

When someone dies in circumstances suggesting that the state may have been at fault in some way, it will be essential to try to find out exactly how and why they died. The main rationale for this is not to point the finger of blame (although in some situations a death may lead to someone being prosecuted), but is preventative - to establish the cause of death, so that similar occurrences can be avoided in the future. The way in which the

courts have applied the right to life has had a significant impact on investigative and prosecutorial processes following deaths at the hands of the state or in respect of people who have been in the custody or care of the state.⁷⁴

One of the leading cases in this area, *Hugh Jordan v UK*, is again from Northern Ireland. It concerned the fatal shooting in Belfast of an unarmed man, Pearse Jordan, by officers of the Royal Ulster Constabulary (RUC). The RUC then carried out an investigation into the death, on the basis of which the Director of Public Prosecutions decided that there would be no prosecutions. However, the ECtHR later found that there was a breach of the duty to carry out an effective investigation into the death of Pearse Jordan, because of a series of shortcomings. Most fundamentally problematic was the lack of independence of the investigating police officers from the officers involved in the events – they were all from the RUC. The ECtHR was also critical of a series of procedural failings, including the inadequacy of the information provided to the victim's family about the reasons for the decision not to prosecute anyone. In addition, the procedures at the inquest were found to be deficient as the officers who shot Mr Jordan could not be required to attend the inquest to give evidence as witnesses, witness statements were not provided to the Jordan family in advance, and the inquest itself was too protracted. In a similar vein, the Supreme Court decided in 2019 that an inquiry into the murder in 1989 of Belfast solicitor Patrick Finucane had not met the requisite right to life standards, because witnesses could not be required to give evidence, those who did were not sufficiently probed or challenged and one potentially crucial witness was excused attendance.

In cases like these, arising in the particular context of Northern Ireland, the right to life has provided a legal framework within which to assess the competing claims - between families wanting to find out what happened and why (in particular where there were allegations of state collusion in killings), and the state authorities which were reluctant to reveal their sources of intelligence, including the use of informers, whose lives might be at risk if their identities were disclosed.

What is more, cases like *Jordan* pointed collectively to broader systemic failings in the investigative and prosecutorial processes, and in the years which followed, the UK Government responded to the cases with a series of changes to law, policy and practice, some of which were specific to Northern Ireland,⁷⁵ and others UK-wide. For example, in 2000, the office of the Police Ombudsman for Northern Ireland was created to conduct independent investigations of complaints against the police, and in 2003 the Serious Crime Review Team was established to review unsolved major crimes in Northern Ireland (which became the Historical Enquiries Team in 2005). In 2006, a new Coroners Service was launched in Northern Ireland, with the aim of speeding up the inquest process.

Beyond the specific legacy in Northern Ireland, the right to life case-law established the essential requirements that must be met in carrying out an investigation into cases in which Article 2 may have been breached. These are: effectiveness; independence; promptness; accessibility to the family, and sufficient public scrutiny to ensure accountability. These principles have been held by both the ECtHR and domestic courts to apply to circumstances beyond those involving deliberate killing by state agents.⁷⁶ For example, they were applied in cases involving: the killing of Zahid Mubarek in a young offenders' institution by a cell mate with a known history of violence and racism; the death after an asthma attack of Paul Wright, who had a known history of asthma and received deficient medical treatment while in prison;⁷⁷ and the deaths by suicide while in custody of Mark Keenan and Colin Middleton. Indeed, the Middleton case led the House of Lords to broaden the very remit of inquests in the UK so as to comply with the state's obligation to carry out an effective investigation.⁷⁸

Of course, in assessing human rights standards, the courts will take full account of the particular pressures on police officers in operational situations. This is illustrated by the case of Armani Da Silva v UK which concerned the fatal shooting by police officers of Jean Charles de Menezes in July 2005, following the London underground suicide bomb attacks, apparently due to mistaken identity. Citing Article 2, the victim's family complained about the decision not to prosecute any officers following the shooting, but the ECtHR found there had been no violation of the right to life. Be that as it may, the various factors which the ECtHR took into account demonstrate the positive influence of the right to life case law on post-death practices by this time: there had been public acknowledgment of an error by the police and a personal apology given to the family; compensation had been paid, as well as an offer made to fund legal fees; both the institutional responsibility of the police and the individual responsibility of the officers involved had been considered in depth by the Independent Police Complaints Commission (IPCC),⁷⁹ the Crown Prosecution Service, the criminal court and during the inquest; and institutional and operational failings were identified and detailed recommendations issued to ensure that the mistakes made were not repeated.

Domestic violence

It is clear, however, that there is still much to be done in applying these standards to the effective investigation of domestic violence in the UK. The UN Special Rapporteur on Violence against Women has recorded, as regards police responses to domestic violence, 'a pattern of continued scepticism, indifference and a lack of empathy towards women, particularly women from black and minority ethnic communities'. It is well established legally that where domestic authorities, such as the police, fail to appreciate

the seriousness and extent of the problem of domestic violence, this will not just be treated as an isolated failure in dealing with violence against women, but also as a repetition of acts reflecting a discriminatory attitude towards victims on account of their sex (e.g., *Volodina v Russia*).

In addition to the obligation to investigate, the right to life also imposes a duty of prevention on the authorities. However, the Femicide Census reported in 2020 that 1,425 women had been killed in the UK in the period from 2009-2018, which prompted the Observer to report that

A history of abuse was evident in at least 611 cases (59%), including coercive control, stalking, harassment and physical, financial and emotional mistreatment. A third of the women had reported their abuse to the police. They still died.

The human rights of vulnerable prisoners

As will be evident from some of the cases mentioned in the previous section, the right to life has been interpreted as requiring the authorities to take particular steps to protect vulnerable people in state custody or care – especially prisoners. The case of *Paul and Audrey Edwards v UK* concerned the killing of a young man, Christopher Edwards, during his detention on remand, by another detainee who was considered dangerous and with whom he was sharing a cell. In human rights terms, at the heart of the case was the failure of the agencies involved (the medical profession, police, prosecution and courts) to pass on information about the second detainee to the prison authorities and the inadequate nature of the screening process on his arrival at the prison. Furthermore, the inquiry into Edwards' death was considered defective, because it had not been possible to oblige prison staff to give evidence and also because Edwards' parents were not sufficiently involved in the procedure. This case, and others like it, have led to significant changes within the prison service aimed at ensuring prisoners' safety.⁸⁰

The right to life and public inquiries – Hillsborough and Grenfell

Beyond the policing realm, the principles established by the right to life will have application to fatal tragedies involving wider scale loss of life.

In April 1989, 96 football supporters were crushed to death at a match between Liverpool and Nottingham Forest played at the Hillsborough stadium in Sheffield. After years of uncertainty and bitter division over the causes of their deaths, it was in the late 2000s when critical additional documentation finally came to light and the Hillsborough Independent Panel was appointed by the Home Secretary in 2010 (reflecting human

rights considerations) to oversee and manage the process of public disclosure of documents, to consult with the families to enable their views to be taken into account, and to publish its findings.

After reviewing over 450,000 pages of documentation, the panel published its report in 2012, concluding that the risks of overcrowding and crushing at the Hillsborough stadium had been known to the authorities, that the crush was not caused by fans arriving late and there was no evidence of fans' excessive levels of alcohol consumption. The panel also expressed concerns about the response of the emergency services, which had never previously been fully examined because of the limited remit of the original inquests, and concluded that significant numbers of those who died could have survived had there been a better emergency response. As a result, the original inquests were quashed and new inquests ordered, and in 2012 a new criminal inquiry into the Hillsborough tragedy was announced and a fresh investigation was established by the IPCC into claims of police misconduct in the aftermath of the disaster.

Analysing these developments, Dr Peris Jones has lamented the original 'cover up', the demonisation of working class football fans and the authorities' initial success in absolving themselves of any responsibility. According to Jones, justice was achieved because of the 'sea change' in the 2000s through the enactment of the Human Rights Act 1998 and the Freedom of Information Act in 2005 which 'provided important hooks for accountability' which were used by the families, campaigners, and local MPs:

The influence of Article 2 and its requirement of an "effective and proper official investigation" led to: better engagement to uphold the families' rights; enabled the jury to express their opinion; and helped in establishing the circumstances in which the deaths had occurred.

The right to life principles discussed in this piece are also fundamental to the Grenfell Tower Inquiry, which was established to examine the circumstances of the fire at Grenfell Tower in London on 14 June 2017, which led to the deaths of 72 people.⁸¹ The extent of public participation has been a notable element of the Inquiry, with 'core participants' (who include survivors, bereaved families and affected local residents) being provided with relevant evidence prior to hearings, being given the opportunity to make opening or closing statements and to suggest lines of questioning that should be pursued and pose questions to witnesses (through their lawyers).⁸²

A crucial question for the Inquiry to resolve is how wide it should go in assessing the causes of the fire. The Equality and Human Rights Commission (EHRC) rightly urged that, in investigating potential violations of the right to life, the inquiry should consider

broader systemic issues, such as the adequacy of building regulations and the system of monitoring and supervising their compliance. In March 2019 the EHRC argued that there was an ‘ongoing breach of the positive obligation to ensure that the right to life is protected’. It argued that the evidence showed that the authorities knew, or should have known, there was a real and immediate risk to life from combustible cladding on Grenfell Tower. The Commission also concluded that in accordance with its right to life obligations, the authorities should provide adequate training for firefighters on combatting cladding fires and ensure that residents are provided with sufficient fire safety advice. The EHRC further submitted that the authorities had failed, and continued to fail, to take appropriate protective measures to cater for the needs of particularly vulnerable groups, such as children, pregnant women, older people, disabled people (notably those with mobility impairments, visual impairments and dementia), and people not fluent in English. It called on the Inquiry to issue urgent findings and recommendations, rather than wait for its final report – a call which was not heeded.

Conclusion

Murray Hunt, the former legal adviser to the Joint Committee on Human Rights, has emphasised that the right to life case law has impacted upon the ‘minutiae of how states conduct important functions like investigations...’. Many challenges still remain in responding appropriately to fatalities with swift, effective and independent investigations. By applying the principles inherent in the right to life to many different situations, we now have an established human rights framework in the UK on which we can draw for guidance, even in the most difficult situations where competing rights and obligations may clash.

Military Operations and Occupations

Conall Mallory and Stuart Wallace

The application of the Human Rights Act (HRA) 1998 during the UK's overseas military operations has been a point of contention for some time. Despite the controversy, the HRA has become a critical tool in protecting the rights of both soldiers and victims of British overseas operations.

Application Overseas

The application of the HRA to the actions of armed forces outside the UK is a combination of Parliament's exercise of its sovereignty and judicial interpretation. The HRA was clearly intended to apply to the armed forces. During the House of Lords debates on the Act, when facing amendments which would limit its application to soldiers, the Lord Chancellor stated that "the Government's view, is that the Armed Forces fall squarely within the category of an obvious public authority".

It is less clear whether the HRA was intended to apply to the armed forces while deployed overseas. This point was neither determined in the White Paper 'Rights Brought Home', or in either House of Parliament, leaving the question of the HRA's extraterritorial application to be resolved by the courts. At the time the HRA was adopted though, a number of European Court of Human Rights' (ECtHR) judgments had already applied the European Convention on Human Rights (ECHR) to the actions of states outside their territory, including their military forces.

The House of Lords conclusively addressed this issue in the UK context in the case of *Al-Skeini v Secretary of State for Defence*, where it held that, because the purpose of the HRA was to 'bring rights home', and thus give domestic effect to ECHR rights, the HRA was to have the same scope of application as the ECHR.

Unlawful killings and Ill-treatment

The extraterritorial application of the HRA to overseas military operations has been instrumental in allowing individuals who have suffered human rights violations at the hands of British troops to obtain a degree of justice. Articles 2 and 3 ECHR obligate the state to conduct an effective and independent investigation where there are accusations of unlawful death and ill-treatment by its agents.

These obligations have been critical to the creation of two public inquiries into the behaviour of British forces in Iraq, along with investigations conducted by coroners and

the service police. Indeed, without the HRA, it is questionable whether any investigation would have been launched into the numerous accusations of misconduct by British forces abroad. The Iraq Inquiry found that the government had little appetite to investigate Iraqi deaths, with its principal concern being to “rebut accusations” so as “to sustain domestic support for operations”.

The application of human rights law led directly to the public inquiry into the death of Baha Mousa, an Iraqi hotel receptionist who was captured by UK service personnel in September 2003. As a result of severe ill treatment, Mousa died in British custody. The public inquiry into his death concluded that

During his detention, Baha Mousa was subjected to violent and cowardly abuse and assaults by British servicemen whose job it was to guard him and treat him humanely” [...] A subsequent post-mortem examination of his body found that he had sustained 93 external injuries.

If it were not for sustained pressure on the Government from litigation using the HRA, the truth about this shameful incident is unlikely to have ever been uncovered.

There are several other similar examples, such as the case of *Alseran v Ministry of Defence* where the High Court determined that British soldiers had mistreated detainees held in internment camps in Iraq in 2003. The service personnel were found to have run along the backs of several men, while another detainee was found to have been “systematically beaten”. In *Al-Saadoon v Secretary of State for Defence* the Court of Appeal discussed a number of instances of men being killed during raids on their homes, as well as the case of a man shot in the stomach, pulled from his car and beaten repeatedly by soldiers at a petrol station.

A frequent criticism of the application of the HRA to overseas military operations is that it has led to soldiers facing repeated investigations into their past conduct during military operations. Indeed, this criticism prompted the introduction of the Overseas Operations (Service Personnel and Veterans) Bill, currently before the UK Parliament. This Bill establishes a legislative presumption against prosecuting after 5 years, for members of the armed forces who have committed offences abroad. It will also require prosecutors to take consideration of the conditions faced by armed forces personnel deployed overseas, and requires the consent of the attorney general before any prosecution is brought. Framed as an attempt to provide certainty to soldiers and veterans that they will not face repeated investigation for their conduct abroad, the Bill has been roundly criticized by both domestic and international commentators, as well as members of the armed forces’ community.

It is important to place these “repeated investigations” in the correct context. Despite the investigative obligations under the HRA being clear to the Ministry of Defence (MOD) in 2003, the government’s position was that the HRA did not apply to its overseas military operations. As a result, accusations of unlawful killing and ill-treatment committed by British soldiers were not investigated adequately in their immediate aftermath.

The Joint Committee on Human Rights recently heard that many of the investigations into events in Iraq and Afghanistan “were not sufficiently resourced, independent, timely or expert”. Once the deficiencies were uncovered, the UK was ordered by the courts to carry out proper investigations into a number of the events. The Al-Sweady Inquiry concluded that some of the allegations made against service personnel were exaggerated, while others have been found to be credible. Indeed, the same inquiry found that there had been ill-treatment of detainees. The MOD has paid out millions of pounds in compensation to abuse victims in Iraq. A 2019 investigation by the Times and BBC Panorama reported that British detectives had found credible evidence of war crimes in Iraq and Afghanistan, but that investigations had been covered up by the Government and armed forces. Most recently, the Office of the Prosecutor of the International Criminal Court concluded that there “is a reasonable basis to believe that members of the British armed forces committed the war crimes of wilful killing, torture, inhuman/cruel treatment, outrages upon personal dignity, and rape and/or other forms of sexual violence”.

The solution to this problem seems obvious: it is not to shut down investigations, but to ensure that they are carried out properly in the first place. In the absence of effective and independent investigations at the time of these incidents, the truth may never emerge, and the British military will continue to operate with the stain of these accusations upon its soldiers. The fault here lies not with the application of the HRA, but with the initial decision not to apply the HRA to the overseas deployments and the institutional failure to properly investigate at the time.

The right to life and soldiers

While much has been made of application of the human rights law to people in other countries, such as Iraq and Afghanistan, little has been made of the beneficial impact of the HRA on soldiers themselves.

The protection of the right to life in the ECHR and HRA, in particular, has repeatedly helped bereaved families to hold the MOD to account for failing to properly protect soldiers when deployed overseas.

The first soldier killed in Iraq, Sgt. Steven Roberts, died in a friendly fire incident due to delays in providing his unit with appropriate body armour. Article 2 ECHR required the state to undertake a comprehensive investigation into his death. The coroner at his inquest concluded "Sgt Roberts's death was as a result of delay and serious failures in the acquisition [...] of enhanced combat body armour, none being available for him to wear." Following the investigation, the MOD changed its policy and now provides enhanced body armour to all service personnel before deployment overseas.

The families of soldiers who had been killed by roadside bombs in Iraq were also able to rely on the right to life to challenge the MOD's failure to provide adequate equipment. In *Smith v Ministry of Defence*, the UK Supreme Court held that the MOD's failure to provide sufficient armoured vehicles with effective countermeasures against roadside bombs for patrols could be examined by courts under the HRA's right to life protections. The government eventually reached a settlement with the families involved in these cases and issued them an apology.

This episode in particular sheds light on the value of the HRA from a number of angles. Because of the HRA, the families of deceased service personnel did not have to experience the lengthy and oftentimes expensive process of bringing their case directly to the ECtHR. The British judges who heard the case believed that the case law from the ECtHR had left them with "no alternative" but to recognise the application of the ECHR to the soldiers. Having followed the Strasbourg jurisprudence on the question of whether the ECHR applied, the UK Supreme Court was able to use its expertise in the domestic application of the rights to cultivate a unique test on how the right to life applied to soldiers so that it would not have a significant adverse impact on the conduct of military operations.

The application of the HRA to the UK's overseas military operations has not been without difficulty. In part, this is due to the evolving global understanding of how human rights laws apply to armed conflicts. It is undoubtedly also due to the sheer scale and frequency of military expeditions launched by the UK in the last two decades. Despite these challenges, however, the HRA has played a vital role in seeking truth and accountability, and upholding the value of human life for both victims of conflict and British soldiers alike.

The unpopular (and) Article 3 ECHR

Natasa Mavronicola

Torture, inhumanity, degradation and the UK

In 1971, UK government agents subjected a number of people they suspected of involvement in the activities of the Irish Republican Army to the so-called 'five techniques' of interrogation, which included painful stress positions, hooding, noise, deprivation of sleep and deprivation of food and drink. The survivors of these 'techniques' came to be known as the Hooded Men. The European Commission of Human Rights found the 'techniques' to constitute torture, while the European Court of Human Rights (ECtHR) considered that they amounted to inhuman and degrading treatment.

Either finding meant that the UK was conclusively in violation of Article 3 of the European Convention on Human Rights (ECHR), which provides 'in absolute terms' (as the ECtHR has repeatedly put it) that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Many years later, an inquiry into the death in 2003 of Baha Mousa, a hotel receptionist in Iraq, found that he had been subjected to the same, by now supposedly banned, 'techniques' as well as other forms of inhuman treatment. Over the course of the last years, it has been confirmed that the five 'techniques' have in fact mutated and migrated, being used across the world against many people, particularly people suspected of terrorism, sometimes with the complicity of UK forces.

In the 1980s, the UK proposed to transfer Jens Soering to the authorities in Virginia in the United States, where Soering faced prosecution for murdering his girlfriend's parents and, if convicted, the death penalty. In the 1989 case of Soering v UK, the ECtHR found that extraditing Jens Soering to the United States would violate Article 3 of the ECHR, because the experience of being on death row would cause so much anguish and suffering as to be inhuman. His extradition had, on the other hand, received the green light by domestic authorities and courts.

In the 1990s, the UK proposed to deport Mr and Mrs Chahal to India because they felt Mr Chahal posed a threat to national security. In its 1996 judgment in Chahal v UK, the ECtHR confirmed that Article 3 prohibits removing someone to another State where substantial grounds have been shown for believing that the person in question would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. The ECtHR underlined that the prohibition provided in Article 3 is absolute, and the activities of the individual in question, however undesirable or dangerous, cannot displace the protection of Article 3. In this way, the ECtHR affirmed that Article 3 provides protection beyond the scope of refugee law, which allows for some

persons to be excluded from protection on account of their conduct. Mr Chahal was considered to be a Sikh separatist and the ECtHR found that he faced a real risk of ill-treatment at the hands of Indian security forces. It therefore put a stop to his deportation. Today, hundreds of people facing the sharpest edge of the UK's hostile environment can assert their rights under Article 3 ECHR, on the basis of the Human Rights Act (HRA) 1998, to avoid the prospect of being removed to a place where they are likely to face torture or inhuman or degrading treatment or punishment.

Article 3's significance for persons in 'irregular migration' contexts goes beyond its operation as a bar to removal. In its 2005 judgment in R (Limbuela) v Secretary of State for the Home Department, the House of Lords held that reducing certain asylum-seekers to destitution by denying them access to State support and banning them from taking up paid employment violated Article 3 ECHR. *Limbuela* is widely considered to be a landmark judgment in establishing that rights found in the ECHR may require a minimum level of social provision. Recently, Article 3 ECHR has also been applied to the UK government's 'no recourse to public funds' (NRPF) policy, a condition applied to persons 'subject to immigration control' that deems them ineligible for almost all public benefits, including benefits oriented at ensuring the basic welfare of children dependent on the person subject to this condition. In R (W, a child) v Secretary of State for the Home Department the High Court ruled that the NRPF regime failed to guarantee that the imposition of the NRPF would not result in inhuman or degrading treatment, contrary to Article 3 ECHR and section 6 of the HRA, as it did not sufficiently protect persons at *imminent* risk of destitution. The case is yet another example of the importance of Article 3 in protecting people whose irregular migration status would otherwise operate as a basis on which to deny them fundamental socioeconomic protections.

In 1993, Mark Keenan, a young man who was serving a four-month prison sentence for assault and who evinced depressive and suicidal tendencies and other mental ill-health, was placed in segregation, a harsh form of imprisonment which involves isolation and is known to have debilitating consequences for persons' mental health. He committed suicide the next day. In 2001, the ECtHR found that he had been subjected to inhuman and degrading treatment and punishment contrary to Article 3 ECHR. Today, Article 3's extensive application in the prison context operates to reclaim the humanity of people who are all too often at best disregarded and stigmatised and at worst treated as 'human waste' (as Judge Costa has put it). The ECtHR's case law on criminal punishment makes clear that Article 3 requires that everyone, even the most egregious wrongdoers, be given a chance at rehabilitation and a real hope of release if such rehabilitation is achieved.

Article 3's absolute character

Article 3 of the ECHR is a pithy provision of just 15 words, providing that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', but it is one which encapsulates the spirit of the ECHR and human rights more broadly. It proscribes, and demands protection from, treatment which is antithetical to human dignity. Conduct contrary to Article 3 ECHR is conclusively unlawful, irrespective of concerns relating to national security or the unpopularity of such findings or, in many of these cases, the unpopularity of their beneficiaries. Both the ECtHR and UK courts have repeatedly underlined that the right enshrined in Article 3 is absolute. This means that it cannot be displaced by extraneous considerations – it does not allow for lawful interference like the rights to privacy or freedom of expression do, for example, nor can it be derogated from in times of war or other public emergency threatening the life of the nation.

So we can see that Article 3 can bar policies and practices that may appeal to the government of the day, and Article 3 can make forceful demands that, without it, might otherwise merely attract indifference or disregard, or be accorded low priority by public bodies. It thereby offers significant protection to those who may routinely or sporadically fall through the cracks of majoritarian processes and reasoning, as well as through the gaps in UK law, which simply does not replicate Article 3's protections. I have specifically concentrated here on cases and contexts that concern persons who have been on the margins of society's regard, those who are unpopular, disenfranchised or otherwise politically and/or materially disempowered, and whose abuse might otherwise have faced few barriers and attracted little meaningful redress or condemnation by powerful political forces within this jurisdiction. In other words, Article 3 has been vital for those whom Conor Gearty describes as 'people whose tenuous connection with the mainstream has left them vulnerable to being passed over by conventional legal frameworks of support'.

This is nothing new. In ancient times across many polities, torture was inflicted regularly and almost exclusively on non-citizens, notably slaves, 'barbarians' and foreigners. In the past as well as today, as Darius Rejali has observed, torture and ill-treatment have served as markers of someone's lesser citizenship. Torture and ill-treatment operate, Rejali has said, to '[remind] lesser citizens who they are and where they belong'. On the flip side of this, Patricia Williams has astutely observed that those who are prepared to justify torture in 'exceptional' circumstances 'overlap substantially with the class of those who have never been the persistent object of suspect profiling, never been harassed, never been stigmatized just for the way they look'.

Threats to the right to be free from torture and related ill-treatment

Article 3 of the ECHR therefore remains vital particularly for persons who find themselves to be the 'losers' of the UK's political constitution. Article 3 has been and remains a barrier against, or at least a means of redressing, the abuses and excesses of counter-terrorist policy and practice. It has served as an obstacle to inhuman deportation and extradition practices, requiring that 'even' (suspected) criminals must not be sent to places where they face a real risk of torture or inhuman or degrading treatment or punishment. It has been a valuable rampart against the pull of penal populism, requiring authorities to treat those in prison with respect for their personhood and their physical, psychological and social needs, irrespective of their crime.

Unsurprisingly, it is especially in the contexts where Article 3 ECHR is most crucial a bulwark against tendencies to dehumanise the 'Other' that Article 3 is most contested. In 2006, Tony Blair indicated that he would like to change human rights protections in the UK specifically to alleviate the ban on expelling undesirable people from the UK to places where they face a real risk of torture or other ill-treatment. His aim was, purportedly, to 'ensure the law-abiding majority can live without fear again'. The Conservatives' more recent attacks on the Human Rights Act have included the argument that the ban on whole life sentences of imprisonment, that is, on treating persons as human waste, is too expansive an interpretation of Article 3 ECHR, and they have repeatedly sought to dilute the duty not to send people to places where they face a real risk of torture or ill-treatment. Indeed, the Conservative party's attempt to 'define' degrading treatment with a view to stemming judicial activism demonstrates a readiness to arbitrarily *narrow* the substantive scope of Article 3 ECHR and fundamentally contradict its letter and spirit. It is precisely where it has attracted consternation or backlash that Article 3's vital importance in vindicating the egalitarian character of human rights and the unconditional protection of human dignity is most evident.

That the protections afforded by Article 3 ECHR are in peril is also illustrated by the Government's widely contested Overseas Operations Bill. The severe restrictions placed by the Bill on the investigation and prosecution of wrongdoing in overseas military operations are at odds with a staggering body of international legal norms on accountability and redress for torture, and stand thereby to deny fundamental protections to individuals victimised by UK military forces, as well as (or including) – the generally much less maligned – military personnel themselves.

It may be tempting to assume that, if we let it, the common law and its values can help counter such trends and/or ultimately replicate Article 3's protections and shield against the sort of dehumanisation that Article 3 shields against. This would amount to

unwarranted optimism. Proclamations of the UK legal system's aversion to torture, for example in *A and others v Secretary of State for the Home Department*, are in many ways worryingly ahistorical accounts that wrongly cast torture, cruelty, and inhumanity as fundamentally un-British, when history – including recent history, as the abuse of the Hooded Men and Baha Mousa attests – tells us otherwise. Such notions are also hollow in substance when we compare the currently ill-defined common law constitutional guarantees of bodily and mental integrity to the elaborate specification of Article 3's concrete demands over a vast body of case law by UK courts and the ECtHR.

Conclusion

The right not to be subjected to torture or to inhuman or degrading treatment or punishment enshrined in Article 3 ECHR is not a panacea, nor has its interpretation been without flaws. But whatever the current shortcomings in the interpretation and application of Article 3 ECHR by Strasbourg or by domestic norm-appliers, it is strikingly clear that everyone, not least those who are demonised, stigmatised, marginalised, or otherwise 'othered' in an ever-hostile environment, is better off with Article 3 than without it.

How the HRA has Functioned as a Vehicle for Protecting Equality and Non-discrimination Rights – and the Rights of Vulnerable Groups More Generally

Colm O’Cinneide⁸³

Introduction – the Historic Impact of the ECHR

The European Convention on Human Rights (ECHR) has had a considerable impact on UK law over the years, especially when it comes to the rights of vulnerable minorities and equality issues more generally. European Court of Human Rights (ECtHR) judgments such as Dudgeon v UK,⁸⁴ Smith and Grady v UK,⁸⁵ Goodwin v UK⁸⁶ and Abdulaziz v UK⁸⁷ have generated significant legal changes – such as the repeal of the ban on gay and lesbian people serving in the armed forces (*Smith and Grady*), recognition of the right of trans persons to have their gender identity recognised (*Goodwin*), or the ending of overt sex discrimination in the application of immigration control measures (*Abdulaziz*).

When they were handed down, these judgments inevitably attracted controversy. The ECtHR was accused of crossing the line into politics and/or undermining the prerogatives of nation states. However, over time, these judgments have come to be acknowledged as important steps on the road to greater equality – and absorbed into a wider, comforting narrative of how the UK has progressively extended full equality to an assortment of formerly marginalised groups.

Furthermore, the legal principles developed in this ECtHR case-law have gradually become infused into various aspects of UK domestic law. For decades now, in part because of the link between ECHR and EU jurisprudence, courts have taken these principles into account in interpreting relevant legislation. This is particularly true of the Equality Act 2010: English courts have placed significant reliance on ECtHR jurisprudence in determining complex discrimination law cases such as Lee v Ashers Bakery.⁸⁸ The ECtHR case-law has also influenced the development of common law standards related to equality and non-discrimination. These standards remain radically underdeveloped.⁸⁹ However, insofar as they have any meaningful content, they have been interpreted by the courts as paralleling the key elements of ECtHR equality jurisprudence.⁹⁰

The Impact of the HRA

And then, of course, there is the Human Rights Act (HRA) 1998. When the HRA originally became law, it was widely anticipated that it would have relatively little impact on equality

rights – especially given the comparatively well-developed state of UK anti-discrimination legislation. However, in actuality, the HRA's equality dimension has influenced the development of UK law in a wide variety of fields, from national security to the protection of disability rights.

Some of the HRA judgments impacting on equality rights (broadly defined) are well known. The 'Belmarsh' judgment, *A v Secretary of State for the Home Department*,⁹¹ saw the House of Lords conclude that the detention without trial of certain categories of non-nationals constituted a breach of the non-discrimination requirements of Article 14 ECHR. In the landmark gay rights judgment of *Ghaidan v Godin-Mendoza*,⁹² the House of Lords interpreted landlord and tenancy legislation by reference to section 3 HRA and Articles 8 and 14 ECHR so as to allow a same-sex life partner to inherit a statutory tenancy as a spouse of the deceased tenant.⁹³ In the case of *In re P*,⁹⁴ the exclusion of unmarried parents from being considered for adoption in Northern Ireland was held to breach Article 8 ECHR, with the relevant legislation re-interpreted accordingly in line with section 3 HRA. Similarly, in the *McLaughlin* case,⁹⁵ the Supreme Court issued a declaration of incompatibility in respect of the exclusion of unmarried partners from entitlement to widows' allowance.⁹⁶ In the case of *Mathieson*,⁹⁷ the Supreme Court concluded that the suspension of a disabled child's living allowance for the duration of an extended stay in hospital breached Article 14 ECHR, as the difference in treatment between the boy and other vulnerable children in need was not objectively justifiable.

All of these cases addressed significant issues of discrimination, fairness and structural inequality. In general, they demonstrate how the HRA has made the UK legal system better able to provide a remedy to claimants subject to arbitrary or unfair treatment by the state. It is also striking how many of these cases involved challenges to highly rigid or outmoded primary or secondary legislation - much of which had not been subject to any meaningful form of parliamentary scrutiny, or political debate. The same is true for recent judicial determinations finding delegated legislation schemes to be in breach of Article 14 ECHR – including the Supreme Court decision in *R (Tigere) v Secretary of State for Business, Innovation and Skills*⁹⁸ that concluded that the exclusion of students with temporary leave to remain status from the student loan scheme was unjustified.

The impact of the HRA on equality issues is not just restricted to these high-profile apex court decisions. Lower court judgments have also engaged with very important issues of discrimination, social exclusion and structural inequality. These cases have often involved persons with disabilities, carers and other vulnerable and marginalised groups within society. Indeed, they represent some of the most significant and valuable HRA jurisprudence, in terms of its direct impact on individual lives – even if they are often ignored in debates about the Act.

For example, in the important judgment in *Hurley v Secretary of State for Work and Pensions*,⁹⁹ a failure to exempt carers from effect of the 'bedroom tax' was held to breach Article 14 ECHR, with the relevant legislative framework being interpreted by reference to section 3 HRA to provide the claimants with a remedy.¹⁰⁰ (This decision is particularly significant for how it recognises carers to be a vulnerable group, and applies stricter scrutiny to measures having a negative impact upon them.) In the *East Sussex* case,¹⁰¹ the High Court provided local authorities with detailed guidance as to what forms of physical handling of severely disabled persons would be compatible with Articles 3 and 8 HRA. In *C and C v Governing Body of a School*,¹⁰² the Upper Tribunal concluded that the automatic exclusion of autistic children from school based on their physical behaviour would constitute unlawful discrimination contrary to Article 14 ECHR.

Taking these judgments together with the way in which ECHR rights are regularly invoked in a variety of other cases involving vulnerable groups,¹⁰³ it is clear that the HRA is providing a legal vocabulary for courts and tribunals to address issues of social exclusion, and a mechanism for historically marginalised groups to challenge discriminatory treatment. In other words, the HRA has come to play a key role in ensuing justice for minority groups and others facing structural disadvantage – and HRA precedents are now integral to many areas of law impacting upon equality and discrimination issues.

Conclusion

Given all this, there are good reasons to be concerned by any attempt to tinker with the internal mechanisms of the HRA.

The Independent Human Rights Act Review has issued a call for evidence in relation to certain proposals for reforming the Act.¹⁰⁴ Some of those proposals risk undermining the status of existing HRA precedent, and diluting the effectiveness of the Act.

For example, the Review is looking for views on whether the section 2 HRA requirement to 'take into account' Strasbourg jurisprudence should be diluted or eliminated. This could call into question the status of existing HRA precedent in many areas, which gives particular (but not necessarily determinative) weight to ECtHR judgments. Might important precedents such as *Hurley* be open to challenge and revision if section 2 HRA is amended, and if so what costs might this generate in terms of legal uncertainty?

Similar concerns arise in respect of proposals seeking to tilt the balance in the HRA system of remedies away from section 3 interpretation towards section 4 declarations of incompatibility. To what extent would this limit the ability of courts to give concrete remedies to claimants in cases like *Hurley* and *C&C*? Would it dilute the precedential

value of this and similar cases? Would it encourage a turn towards the much vaguer and inchoate common law equality jurisprudence, to the detriment of legal clarity?

More generally, is it justified to dilute the impact of the HRA, given its effective track record over the last two decades in providing remedies to vulnerable and disadvantaged groups? Furthermore, are the critics of the HRA correct to claim that it has resulted in excessive judicial interference in political issues, when the bulk of the HRA equality jurisprudence has concerned issues that have usually not been the subject of any sustained political debate – but which often have a very negative impact on social groups lacking political capital, such as persons with disabilities?

Careful thinking is needed in this regard.

Balancing Your Right to Privacy against the Prevention of Serious Crime through Advanced Surveillance Techniques

Michael Abiodun Olatokun

Policing in the United Kingdom is at a problematic juncture; it has been suggested that distrust in law enforcement agencies is at an all-time low.¹⁰⁵ A recent report of the Joint Committee on Human Rights found that 85% of black people in the UK believe that they are not treated with parity by the police, and 77% that their human rights are not as adequately protected as those of Caucasian Britons.¹⁰⁶ As a result, 2020 saw the growth of campaigns to 'Defund the police' and further protests in light of the disproportionate use of stop and search powers against minority ethnic communities.¹⁰⁷

The public outcry for police accountability is exerting a strategic influence over the police to tackle wider societal injustices.¹⁰⁸ Their second most significant influence is technological innovation. Police leaders such as Cressida Dick have expressed a desire to incorporate novel tools into police operations to keep the public safe.¹⁰⁹ This has ushered in the use of devices such as facial recognition cameras, but these tools have the potential to further decrease public antipathy towards the police.

In addition to facial recognition cameras, some countries have begun to use algorithmic tools in policing such as predictive analysis to determine which neighbourhoods should be subject to patrols, and some American courts are using formulae to determine sentences for those convicted of crimes.

The inexorable tide of technological tools in justice exerts a palpable effect on the rights of citizens, and this paper argues that recourse to the European Court of Human Rights' (ECtHR) external perspective is helpful, and will remain so in the UK for years to come. The paper also argues that European Convention on Human Rights (ECHR) jurisprudence has provided assistance on how public authorities might balance obedience to public law duties on the one hand and the need to keep public trust on the other.

ECtHR case law helps police forces to understand where their use of novel technologies engages fundamental rights

Section 2(1) of the Human Rights Act (HRA) 1998 contains a provision (the duty) that courts must take into account the jurisprudence of the ECtHR in determining any question which has arisen in connection with an ECHR right. This is a key provision often relevant to judicial review litigation involving police forces.

The duty was applied in the recent case of *Bridges v South Wales Police*.¹¹⁰ This litigation

constituted the first challenge to the lawfulness of facial recognition cameras in the world. The specific technology involved would first compile biometric databases of wanted persons, it would be deployed in open spaces, it would scan the faces of members of the public, then collect biometric information and compare the captured information against the database.

Amongst other grounds, the claimant argued that the use of the facial recognition cameras was in breach of Article 8 ECHR on the basis that the use of facial recognition was not sufficient to be 'in accordance with law' for the purposes of Article 8(2) ECHR. The Court of Appeal ultimately ruled that the regime did not meet these requirements and that South Wales Police acted unlawfully in that regard.

The case is important because it illustrates the significance of ECtHR jurisprudence in ensuring the common law keeps pace with developments in modern technology.

A line of ECtHR case law clarifies how the collection of data by police forces can engage the right to privacy. Rotaru v Romania (2000) showed that "public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities," and PG v United Kingdom (2001) illustrated that covertly recording suspects' voices for the purposes of future voice recognition may also constitute a violation of citizens' rights. The same is true of the collection of fingerprints; S v United Kingdom (2008).

The knowledge that their activities may constitute an interference with Article 8 ECHR enables forces to 'get ahead of the game' by conducting public information campaigns that make citizens aware of the covert surveillance technologies that they will deploy, increasing goodwill and ensuring great accountability for their actions. This foresight also allows forces to design their operations in such a manner as to avoid disproportionate interference with citizens' rights when deploying these new technologies.

ECtHR case law helps police forces to understand how their use of novel technologies can comply with rule of law requirements

The jurisprudence developed under the influence of Article 8 ECHR also helps UK courts to preserve core tenets of the UK constitution. *S v UK (above)* established the standard required of legal frameworks in order to satisfy the Article 8(2) 'in accordance with law' provision. The UK Supreme Court in R (Catt) v Commissioner of Police of the Metropolis and the Court of Appeal in *Bridges* relied heavily on the Grand Chamber's ruling in *S v UK* in the most important police law cases of recent years, and it is vital to the preservation of the rule of law that the test remains good law. The test had 6 hallmarks that, where present, would point to a legal framework that was sufficient to be 'in accordance with law':

- a. A basis in domestic law so as to be compatible with the rule of law;
- b. The legal basis should be accessible;
- c. The law must afford adequate protection against arbitrariness;
- d. A discretionary power must be balanced by safeguards;
- e. There should be a framework akin to a framework of law governing enforcement;
- f. There should be reasonable predictability.

This echoes the enunciation of the rule of law by Lord Bingham, who stated that a legal system endowed with the rule of law must firstly have law that is accessible, intelligible, clear and predictable; secondly that the law should determine rights and not discretion; thirdly that power should be exercised in good faith.¹¹¹

Conclusion: ECtHR case law is flexible and facilitates proportionate law enforcement activities

One of the arguments frequently raised against the section 2 HRA duty is that it ties the hands of police in being able to use covert surveillance technologies in order to track the activities of terrorists. The reality is much more nuanced than this, and a wide margin of appreciation has been afforded to states by the ECtHR in tracking those that might harm the public.

ECtHR jurisprudence is littered with cases in which the Court found an interference with citizens' rights to be lawful due to its justification with regard to Article 8(2). From Uzun v Germany where the claimant's car was tracked via GPS, to İrfan Güzel v Turkey where telephones were bugged, to indefinite retention of terrorists' photographs in Murray v United Kingdom.

The ECtHR case law is no straitjacket or proscriptive constraint, but a creative and genuinely helpful network of decisions that provides guidance on how states might balance the competing aims of public safety against non-interference with citizens' rights, particularly the right to privacy. This was reinforced in the Big Brother Watch v UK litigation in which the UK Government Communications Headquarters (GCHQ) system of comprehensive surveillance was ruled to be unlawful because it lacked sufficient oversight for its accountability framework to have the 'quality of law'. The ECtHR case law will help decision makers to cure deficits in the future to define the standards their data use will be held to with transparency and accountability that is absent at present.

How the Human Rights Act 1998 has helped the law on assisted suicide in England and Wales develop, and why we still need it

Nataly Papadopoulou

Background

Although suicide is no longer a crime in England and Wales, section 2(1) of the Suicide Act 1961 established that to assist or encourage another to commit suicide is a criminal offence ('the prohibition on assisted suicide'). It is unsurprising that this is the subject of intense debate and controversy.

Horrible diseases cause suffering, indignity, loss of autonomy and prompt some individuals to seek to control how and when they die. The impact the prohibition on assisted suicide has on these individuals and their loved ones, but also on healthcare professionals, the criminal justice system, and society in general is profound.

Police investigations continue for people like Geoffrey Whaley, who was assisted by his wife, Ann, to travel to Switzerland to end his life. Dignitas, a Swiss clinic, reported that Britons hold second place for 'accompanied suicides' between 1998-2019. Individuals who travel abroad to die choose an expensive 'option', one that involves a number of hurdles, and of course the risk of prosecution.

The option of committing suicide, although not a crime, is rightly not a desirable or acceptable option. Others stop taking food ('self-starvation'), a prolonged and distressing exercise, one taken by high-profile campaigners Tony Nicklinson and Debbie Purdy. There are media reports of 'euthanasia kits' or illegal drugs or gas used without medical supervision or the protection of the law for individuals to take control of their deaths. Meanwhile, the situation in other jurisdictions is different. Legislation is expected in New Zealand, while debates are currently taking place in Ireland, Portugal, Spain, and in the US.

Against this backdrop, the important role the Human Rights Act (HRA) has had on the development of the law on assisted suicide in England and Wales, as well as why we still need it is noted below.

The HRA and assisted suicide

There is no doubt that a regulated framework involving legal and medical safeguards, reviewing and monitoring mechanisms is preferable than the current domestic situation described above. Yet the prohibition on assisted suicide remains in place, with several Private Members' Bills failing to convince Parliament on the need for reform.

A shaft of light for those impacted by the law and its practice is the HRA. The HRA has been the most influential piece of legislation for assisted suicide in England and Wales. The HRA has contributed towards mitigating the harshness of the prohibition on assisted suicide by recognising that it interferes with Article 8 of the European Convention on Human Rights (ECHR). The HRA has prompted the Director of Public Prosecutions (DPP) to create an offence-specific guidance for assisted suicide. The HRA gives the opportunity to claimants and courts to voice their views for Parliament to consider.

Although progress has been slow, the HRA has helped the law on assisted suicide develop, and has given hope to those who fight for reform. Below, I provide a summary of the domestic case law to highlight the positive impact the HRA has had, and argue that English judges should make greater use of their power under section 4(2) HRA and issue a declaration of incompatibility if they find that the law is incompatible with human rights. This may prompt Parliament to actively engage with the matter of legalising and regulating, giving choice to those who want it to control the manner and timing of their deaths while creating a robust legal and procedural framework.

The Pretty case

The first to challenge the compatibility of the prohibition on assisted suicide with the HRA was Mrs Diane Pretty who suffered from motor neurone disease. Unable to end her own life, she asked for prosecutorial immunity for her husband who was willing to assist her. The DPP refused as he had no power to 'grant an advance pardon' for a criminal offence.¹¹² The judicial review of the decision failed, and the House of Lords found no violation of the ECHR.¹¹³

The most significant facet of her case stems from the decision of the European Court of Human Rights (ECtHR) which considered her application in April 2002. The ECtHR disagreed with the House of Lords and found, for the first time, that Article 8 was engaged by the prohibition of assisted suicide. It found that Mrs Pretty was prevented 'from exercising her choice to avoid what she considers will be an undignified and distressing end to her life'.¹¹⁴ The ECtHR, however, found that this interference was justified by the need to protect the weak and vulnerable, and that the UK enjoyed a wide margin of

appreciation in regulating assisted suicide.¹¹⁵ The decision is nonetheless important as it ensured that, from that point onwards, the prohibition of assisted suicide prima facie interfered with Article 8 and the right of individuals to control the manner and timing of their deaths. Significantly, it ensured that the UK and other Member States have legitimate, proportionate, and necessary reasons for interfering with such intimate right.¹¹⁶

The Purdy case

In July 2009, the House of Lords accepted for the first time that the prohibition on assisted suicide in S.2(1) interferes with Article 8, confirming what the ECtHR held already. Ms Purdy suffered from progressive multiple sclerosis, and unlike Mrs Pretty, did not seek immunity from the prohibition of assisted suicide. Rather, she sought clarification on the likelihood of prosecution of her husband if he were to assist her to die. It was this rather more specific claim that led the House of Lords to find that section 2(4) of the Suicide Act 1961 (consent required for the prosecution by the DPP) did not satisfy the 'legality requirement' in Article 8(2), and specifically that it did not allow Ms Purdy to make a decision affecting her private life, failing the test of accessibility and foreseeability.¹¹⁷

On this basis, the House of Lords ordered the DPP to create an offence-specific policy on which prosecutors will rely to decide whether a case should be brought for a reported assisted suicide.¹¹⁸ This is, in practical terms, the most significant development for the law on assisted suicide, one that was made possible by the HRA. Though the policy does not decriminalise assisted suicide, and indeed creates no right to assisted suicide, it does recognise the harshness of the prohibition, providing prosecutors with the means to mitigate an absolute rule, and recognising the key role of compassion when suicides are assisted.¹¹⁹

In October 2014, the DPP revised the policy following the decision of the UK Supreme Court (UKSC) in *Nicklinson*.¹²⁰ The change seems to indicate that a healthcare professional providing assistance is more likely to be prosecuted if the patient was 'in his care' at the time.

The Nicklinson case – changing judicial views, and the declaration of incompatibility

In June 2014, in a highly publicised decision on assisted suicide, the UKSC decided against making a declaration of incompatibility of section 2(1). The case, however, highlights changing judicial attitudes towards assisted suicide,¹²¹ but sadly also a misconceived idea of the power judges have under section 4(2) of the HRA. There were six different judgments relating to the case, the issues complicated and involving

applicants joining at different stages and with different claims. Key to the discussion here is the UKSC's judgment which had to deal with two questions: whether the DPP's policy was lawful,¹²² and whether section 2(1) breached Article 8. The UKSC found that the policy was lawful, and that section 2(1) did not breach Article 8.

However, the judgment is important for several reasons. Perhaps the most obvious one is the two dissenting judgments by Lady Hale and Lord Kerr, who found section 2(1) incompatible with Article 8 for the first time in the history of these legal challenges. But beyond this, at least three of the other Justices (Lords Neuberger, Mance, and Wilson) were openly critical towards the law and practice¹²³ and offered proposals for how the law could be reformed.¹²⁴ This left many to wonder why a declaration was not made on a 5:4 basis, considering the clear dissatisfaction of the three Justices with regards to the prohibition on assisted suicide.

As many others have argued, this is likely down to a misconceived idea of the power and role of section 4(2) of the HRA. Contrary to what most Justices have said about the need to give Parliament the opportunity to review the law first or leave the matter entirely to Parliament, section 4(2) does exactly that: creates a dialogue between the domestic courts and Parliament through a power vested on the courts by Parliament itself. This power on senior courts is anyway limited, and unlike other jurisdictions, it has no impact on the validity of a particular provision. This very fact does not explain the reluctance of, at least, Lords Neuberger, Mance, and Wilson to join the dissenters and issue a declaration in response to the serious concerns expressed in their judgments on the functionality and rationale of the prohibition on assisted suicide.¹²⁵

Many describe the case as one that sends a clear message to Parliament to review the law. Although Parliament has indeed since reviewed a couple of Private Members' Bills, none have been given proper scrutiny or been referred to an independent committee as in 2005. An important point is also that none of the Bills that Parliament has so far 'reviewed' will have covered the applicants in *Nicklinson*. Overall, the judgment recognises the 'flawed nature of the current universal prohibition of assisted suicide', and raises difficult human rights questions especially in relation to the role of domestic courts under the HRA.¹²⁶ The fact remains, nonetheless, that none of this would have been possible without the HRA.

The Conway case

In 2018, the UKSC refused to allow an appeal by Mr Noel Conway on the grounds that his case had low chances of success. Previously, the High Court,¹²⁷ with which the Court of Appeal agreed,¹²⁸ found that the interference of section 2(1) with the claimant's Article

8 was justified, this time also citing two additional reasons: the sanctity of life, and the need to promote trust between doctors and patients. This is a worrying expansion of the justifications put forward by the government. Since, three more applicants have seen their cases dismissed by courts, perhaps indicating that focus must now turn to Parliament.

Concluding remarks

Although the prohibition on assisted suicide remains in place, the HRA has allowed the law to develop.

In recognising that the prohibition of assisted suicide interferes with Article 8, the HRA is keeping the government accountable in justifying the interference with the important right of individuals to control the manner and timing of their deaths.

This leaves the door open for claimants to challenge the justifications put forward by the government, which although, as seen in *Conway*, seem to expand, they remain open for challenge of their compatibility with the HRA.

Further, the HRA has mitigated the harshness of the prohibition by allowing prosecutors to exercise their discretion for assisted suicides cases. The offence-specific policy allows for a balancing exercise to take place to recognise that a majority of assistances take place on compassionate grounds.

Whether prosecutorial discretion is the best way forward is doubtful, with the ball now back to Parliament to consider whether, and if so, how to change the law. Interested parties, including claimants and their families, campaign groups, 18 Police and Crime Commissioners, certain prominent MPs, and some recent parliamentary debates,¹²⁹ are calling for a governmental inquiry into assisted suicide, a call that must not be ignored.

Overall, the HRA is there to remind everyone the importance of recognising the rights and needs of those who choose death over life, keep courts and Parliament under scrutiny, but also give hope to those directly impacted by the prohibition that a change may be possible in the near future.

Privacy

Julian Petley

Before the Human Rights Act 1998

During the second half of the twentieth century, the increasingly prurient nature of much of what passes for journalism in sections of the national press in the UK gave rise to repeated calls from concerned MPs and judges for some form of privacy legislation.

These were given added impetus when, in 1990, a journalist and a photographer from the *Sunday Sport* gained access to the hospital room of the seriously injured actor Gordon Kaye, and photographed and 'interviewed' him without his informed consent. This provoked widespread public revulsion, but, in the absence of any form of privacy legislation, the only legal option available to Kaye was an action for malicious falsehood. As Lord Justice Glidewell said in his judgment '[t]he facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals', whilst Lord Justice Bingham noted that the case 'highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens'.

No legislation was forthcoming, however, nor did the government take up the recommendation by Sir David Calcutt in his 1993 *Review of Press Self-Regulation* that it give further consideration to introducing a tort of infringement of privacy. In 2003, the Department of Culture, Media and Sport select committee report, *Privacy and Media Intrusion*, recommended that the government

bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone – not the press alone – into their private lives. This is necessary fully to satisfy the obligations upon the UK under the European Convention of Human Rights.

However, this recommendation was firmly rejected by the government, which expressed the view that 'the weighing of competing rights in individual cases is the quintessential task of the courts, not of Government or Parliament'.

Article 8

Largely as a result of the Kaye case, the courts had already been fashioning a tort of privacy, mainly out of legislation relating to breach of confidence. However, the

incorporation of the European Convention on Human Rights (ECHR) into UK law via the Human Rights Act (HRA) 1998 gave this process a considerable boost. The strong suspicion that successive governments had refused to countenance any form of privacy legislation for fear of incurring the wrath of the press was amply confirmed by newspapers' relentless hostility not simply to those judges developing a right to privacy but to the ECHR and the HRA that made this possible.

Article 8 ECHR states that 'everyone has the right to respect for his private and family life, his home and correspondence'. And while this right can be directly asserted only against public authorities, Strasbourg jurisprudence provides that public bodies have a positive obligation to take steps to secure privacy rights. Consequently, the courts have developed the law of confidence in such a way as to protect Article 8 rights in cases between two private parties – for example, between an individual and a media organisation that stands accused of infringing those rights. This inevitably has brought the media within its scope, particularly those newspapers which make a habit of prying into people's private lives. However, *contra* the impression habitually given by such newspapers, this does not create an absolute right to privacy, but a right which must be balanced with other rights on a case by case basis. Particularly important in this respect is the right to freedom of expression enshrined in Article 10. However, this too is a qualified, not an absolute, right and may be restricted 'for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence', which clearly bring privacy and breach of confidence, as well as defamation, within its scope.

A balancing act

The need to balance competing rights is a crucial aspect of the HRA, and in cases involving privacy and freedom of expression this could not have been carried out before the passing of the Act as in the UK there was no statutory right to such freedom. The importance of carrying out this balancing act in cases involving privacy was made clear by Lord Steyn in an early judgment in 2004, *In re S (FC) (a child) (Appellant)*, which involved an attempt to prevent newspapers publishing information which might lead to the identification of a child whose mother was accused of murdering her other child. In his judgment Lord Steyn made it clear that neither Article 8 nor 10 'has *as such* precedence over the other', and thus 'an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary'. Lord Steyn also explained that the justifications for interfering with or restricting each right must be taken into account, and a proportionality test must be applied to each. Undertaking such an 'intense focus' is now standard practice in cases involving Article 8, and indeed all rights which are not absolute.

‘A debate of general interest’

The case of *Von Hannover v Germany* (2004) has also had considerable impact on subsequent privacy judgments. This concerned pictures of Princess Caroline of Hannover and her family published in various German magazines, which the German courts had refused to block. She thus appealed to the European Court of Human Rights (ECtHR), which upheld her case, arguing that:

A fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of ‘watchdog’ in a democracy by contributing to imparting information and ideas on matters of public interest ... it does not do so in the latter case.

It concluded that ‘the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published [work] make[s] to a debate of general interest’ – a notion that looms large in many subsequent privacy judgments.

One of these was delivered by Mr Justice Eady in *Max Mosley v News Group Newspapers* (2008), which resulted from the paper printing intimate details of a private party that Mosley had attended. This was important for two reasons. Firstly because as a result of the *News of the World* attempting repeatedly to run spurious ‘public interest’ defences of its actions, Eady produced a particularly clear distinction, based soundly on Strasbourg jurisprudence, of the distinct difference between material which is in the public interest and material which may simply interest sections of the public. Thus he stated:

In matters relating to striking a balance between protecting private life and the freedom of expression that the Court had had to rule upon, it has always emphasised ... the requirement that the publication of information, documents or photographs in the press should serve the public interest and make a contribution to the debate of general interest ... Whilst the right for the public to be informed, a fundamental right in a democratic society that under particular circumstances may even relate to aspects of the private life of public persons, particularly where political personalities are involved ... publications whose sole aim is to satisfy the curiosity of a certain public as to the details of the private life of a person, whatever their fame, should not be regarded as contributing to any debate of general interest to society.

Sexual activity, privacy and Article 8

Second, he clearly established what has now become the dominant approach in most cases relating to sexual activity, namely that such activity is private. This contrasts very strongly with the pre-ECHR approach. To illustrate this one can do no better than cite Lord Denning in *Woodward v Hutchins* (1977), which concerns the attempts by a rock group (of whom Denning clearly disapproved) to suppress revelations by their press agent. In this they were unsuccessful because, in Denning's view:

If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if [their servant or agent] afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected.

Thus referring back to Lord Steyn's judgment quoted above, Eady described the 'intense focus' on the individual facts of the specific case required by the ECHR as a 'new methodology which is

obviously incompatible with making broad generalisations of the kind which the media often resorted to in the past, such as, for example, 'Public figures must expect to have less privacy' or 'People in positions of responsibility must be seen as 'role models and set us all an example of how to live upstanding lives'. Sometimes factors of this kind may have a legitimate role to play when the 'ultimate balancing exercise' comes to be carried out, but generalisations can never be determinative. In every case 'it all depends' (i.e. upon what is revealed by the intense focus on the individual circumstances).

He also made it abundantly clear that in prying into Mosley's sexual behaviour the *News of the World* had breached his right to privacy. As he put it:

There is now a considerable body of jurisprudence in Strasbourg and elsewhere which recognises that sexual activity engages the rights protected by Article 8 ... People's sex lives are to be regarded as essentially their own business – provided at least that the participants are genuinely consenting adults and there is no question of exploiting the young or vulnerable.

Given that this was indeed the case, he continued:

It is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade. It is not for journalists to

undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval.

Few statements made by judges could underline more strongly the contribution which the ECHR has made to protecting personal privacy. Entirely predictably, however, judgements such as these earned him the label of 'Britain's Muzzler-in-Chief' in a *Times* editorial on 21 April 2011.

Misuse of private information

The ECtHR has also greatly aided the efforts of the national courts to protect people's privacy by having recourse to the notion of breach of confidence. This development was usefully summed up by Lord Woolf in the case of *A v B & C*, 2002, which concerned the footballer Garry Flitcroft's attempt to injunct the *People* from revealing the details of two extra-marital affairs, when he explained that:

In the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection.

He also made it clear that:

A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected ... [In most cases] its existence will have to be inferred from the facts.

This key aspect of the right to privacy was also developed in the case arising from Naomi Campbell suing the *Mirror* in 2001 for publishing a story about her drug addiction, which included a photograph of her attending a Narcotics Anonymous meeting. The case eventually went to appeal in the House of Lords in 2004, with the majority agreeing that her attendance at the clinic was analogous to other forms of medical treatment whose privacy the law should be particularly ready to protect, and that Campbell's right to privacy in this matter outweighed the newspaper's right to report it. Regarding the matter of breach of confidence, Lord Nicholls argued in a key passage not simply that the law had 'firmly shaken off the limiting constraint of the need for an initial confidential relationship' but that:

The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an

individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

Conclusion

That, thanks in large part to the ECHR and HRA, there now exists a right to privacy was made abundantly clear when, on 11 February 2021, Mr Justice Warby granted Summary Judgment in Meghan Markle's case against the *Mail on Sunday* for publishing a highly personal letter that she had written to her father. In his view, there was no need for a trial to establish the relevant facts, because:

Taken as a whole the disclosures were manifestly excessive and hence unlawful. There is no prospect that a different judgment would be reached after a trial. The interference with freedom of expression which those conclusions represent is a necessary and proportionate means of pursuing the legitimate aim of protecting the claimant's privacy.

Although, utterly predictably, many newspapers raged against what they represented as yet another extension of privacy law, nothing could be further from the truth, as Warby's judgment drew meticulously on key judgments in previous privacy cases, some of which are discussed above, making it a particularly valuable summary of the present legal situation regarding privacy. It was certainly a damning judgment (which may explain why the extent of press reporting of it was extremely limited), but hardly surprising, given the numerous legal precedents on which it drew. In fact, the only surprising aspect of the case is that the *Mail on Sunday*, which has considerable legal expertise at its disposal, should ever have thought for a moment that it stood the slightest chance of defending itself successfully.

What this demonstrates is that whilst the ECHR and HRA have played a key role in helping the courts to protect people's privacy, the kinds of newspapers which have made such protection a necessity are still constantly probing the limits of the legally possible. In this, they are greatly emboldened by the fact that the vast majority of their victims of privacy invasion are simply not rich enough to be able to take them to court. Nonetheless their relentless demands for the UK to leave the ECHR and abolish the HRA continue apace, and they are clearly hoping that these will have the same success as their 30-year campaign for the UK to leave the EU.

The importance of the Human Rights Act 1998 in coronial law

Leslie Thomas QC

Inquests are an important method of sudden and unexpected death investigations in England and Wales. We expect accountability for the people in power whose decisions created the environment in which needless deaths occur.

If deaths are not properly investigated, then the authorities cannot be held to account. It is submitted that it should be obvious why the investigation of deaths is central to a democratic and free political system. We expect the following:

- First, we expect that the state will carry out a timely investigation. So that evidence is not lost, or memories fade. Families can have answers without having to wait for years.
- Second, we expect that any investigation carried out is full and proper.
- Third, we expect equality of arms. This means that the parties should be starting on a level playing field. The bereaved family should have the same opportunity to participate in the proceedings, put forward evidence and arguments, and question witnesses as is given to the agents of the state involved in the death.
- Fourth, we expect the state to provide adequate disclosure of the evidence in its possession.

Until the passing of the Human Rights Act (HRA) 1998, many of the above expectations were not met by inquests.

There was no right to legal aid, there was a lack of fairness, there was no right to disclosure, and there was no equality of arms between different interested persons in an inquest. Further, the scope of the inquest was narrow. In *R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1, the Court of Appeal took a narrow view of the task of an inquest. They were to decide “by what means” the deceased came by their death, but not “in what circumstances”. So the inquest’s purpose was not really to hold the state to account.

The situation was changed by the European Convention on Human Rights (ECHR) once directly incorporated into English Law by the HRA.

For example, Article 2 is not simply a right not to be killed. It also imposes positive obligations on the state. There are three main positive obligations:

- The “systems duty”, the duty to have an adequate system to protect life.

- The “operational duty”. In some circumstances, where the state knows or ought to know that there is a “real and immediate risk” to someone’s life, it may have a duty to take reasonable measures to protect them.
- The “investigative duty”. This applies where a person dies at the hands of the state, or in other circumstances that engage the state’s responsibility.

Undoubtedly the biggest driver of change in the past 20 years has been the European Court of Human Rights’ (ECtHR) case law following the implementation of the HRA.

In 1995 in McCann v United Kingdom (1996) 21 EHRR 97 the ECtHR crystallised the idea that Article 2, the right to life, is not just about whether the state kills you. It is also about what it does after you have been killed. Article 2 requires “that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.”

In Jordan v United Kingdom (2003) 37 EHRR 2, the ECtHR elaborated on the standards that had to be met by an Article 2 investigation. It held that the persons carrying out the investigation must be independent from those implicated in the events. It held that the investigation must be ‘effective’, in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. It held that the authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy. And, very significantly, it held that an effective investigation required that the “next of kin” of the victim “must be involved in the procedure to the extent necessary to safeguard [their] legitimate interests.”

In R (Middleton) v HM Coroner for Western Somerset [2004] 2 AC 182, the House of Lords accepted that in order to comply with Article 2, the role of coroners where a person had died at the hands of the state needed to change. They said that compliance with the investigative obligation:

must rank among the highest priorities of a modern democratic state governed by the rule of law.

The Article 2 investigative duty can also apply more widely to deaths for which the state bears responsibility in a broader sense. The ECtHR in Oneryildiz v Turkey (2005) 41 EHRR 20 found a breach in respect of a disaster caused by a poorly maintained municipal rubbish dump, and in Budayeva v Russia (2014) 59 EHRR 2 in respect of failure to protect

people from a natural disaster. So, too, in the Grenfell Tower inquiry it has been accepted that Article 2 is engaged in respect of a tragic fire.

Equality of arms

Equality of arms means procedural fairness. In short, that the parties to a legal proceeding should be starting on a level playing field. At the hearing, they should each have the opportunity to call witnesses, and question the other's witnesses. In short, neither should be put at a procedural disadvantage.

In *Jordan*, the ECtHR was very critical of the inquest process in Northern Ireland. It said, about the non-disclosure of witness statements:

The previous inability of the applicant to have access to witness statements before the appearance of the witness must also be regarded as having placed him at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the [Royal Ulster Constabulary] who had the resources to provide for legal representation and full access to relevant documents. The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events.

This was a step forward, as a recognition that families were at a major disadvantage in the traditional inquest process.

Bereaved families in inquests have now been given a right to disclosure of key documents under rule 13 of the Coroners (Inquests) Rules 2013.

Legal Aid

Another way in which the HRA has brought greater equality of arms in inquests is with the provision of legal aid for inquests. Prior to October 2000 there was no legal aid for inquests.

When a bereaved family has no legal aid this can be devastating for that family at such a sensitive time. A bereaved family member quoted in the charity INQUEST's February 2019 briefing on legal aid said:

We had to do everything ourselves. We had no lawyer at the inquest. Those three weeks were the most terrifying thing I've ever done in my life. I had to cross examine witnesses, it was absolutely terrifying, and they had lawyers. There needs to be a level playing field; a family member should never be put through that.

This needs to be contrasted with the funding that the state has access to. State institutions are usually concerned to protect themselves from reputational damage and civil liability. So, in virtually every case, the institution implicated in the death will be represented at the inquest. But the bereaved family of the deceased are often not legally represented at all.

From November 2001 the Lord Chancellor under the Access to Justice Act 1999, began to fund legal representation at inquests. This measure was to bring inquests in line with the UK's obligations under the ECHR.

The position was improved by the Court of Appeal case of *R (Khan) v Secretary of State for the Home Department* [2004] 1 WLR 971 in which the Court of Appeal held, exceptionally, that the lack of legal aid for the bereaved family of a child who died in hospital had breached the State's obligations under Article 2. It said:

...the inquest will not be an effective one unless Naazish's family can play an effective part in it. The evidence shows... that they are in no fit state to play that part themselves.

From 1 December 2003, the new regulations gave the Lord Chancellor power to waive the means test. So from then on, families could, exceptionally, get legal representation at an Article 2 inquest. Accordingly the system improved. It is still far from perfect, and arguably the provision of legal aid could go further, but there was a definite improvement compared to the pre-HRA 1998 position. Today, an "Article 2 inquest" is more expansive and fairer than a normal (domestic) inquest, and is the primary means by which the state carries out its investigative obligation. None of this would have been possible without the HRA.

Conclusion

Before the HRA, the families of the deceased had few rights in an inquest. They had no automatic right to disclosure and no access to legal aid – while the institutions responsible for the death were often represented by a high-powered legal team. The jurisprudence of the ECtHR, and its implementation in the UK, has helped to put the bereaved families on a more level playing field. There is still much more to be done – in my view there should

be automatic, non-means-tested legal aid for the family in Article 2 inquests. But the progress that has occurred would not have happened without the HRA.

The Human Rights Act and jurisprudence pertaining to Seekers of International Protection

Reuven (Ruvi) Ziegler

UK courts are required, pursuant to section 2 of the Human Rights Act (HRA) 1998, to ‘take into account’ the case-law of the European Court of Human Rights (ECtHR) and to interpret legislation ‘in so far as it is possible to do so’ in a manner compatible with the European Convention on Human Rights (ECHR) (section 3 HRA). Per section 6(3) HRA, as a ‘public authority’, it is unlawful for courts to act in a way which is incompatible with a ECHR right, and they can hold the Executive to account for failed to meet its obligations under section 6(1) thereof. Given this context, my contribution considers key effects of the HRA on Seekers of International Protection (SIPs), arguing that the application of ECHR provisions to SIPs has significantly impacted their immigration status and associated rights in the UK.

Seekers of International Protection

SIPs include recognised ‘refugees’ per the 1951 Convention relating to the Status of Refugees (the 1951 Convention) as well as ‘asylum-seekers’, namely persons whose applications for recognition as refugees are pending. The UK Parliament has reported that, in 2019, 35,737 persons applied for asylum in the UK.

Whereas the UK ratified the 1951 Convention on 11 March 1954, ‘the Convention as a whole has never been formally incorporated or given effect in domestic law’ (Asfaw [29]). Nevertheless, pursuant to section 2 of the Asylum and Immigration Appeals Act 1993 ‘the immigration rules’ (within the meaning of the immigration Act 1971) ‘shall not lay down any practice which would be contrary to the [1951] Convention’.

The HRA has significantly affected the protection of rights of recognised refugees and asylum-seekers. Yet, whereas the 1951 Convention only applies to those who meet its ‘refugee’ definition (namely those who fall within the remit of Article 1A(2) and are not excluded from its application pursuant to Articles 1D, 1E, or 1F), ECHR protections – and by implication those of the HRA – extend to ‘everyone’ within the UK’s jurisdiction (per Article 1 ECHR).

Consequently, other SIPs who *do not* meet the 1951 Convention definition such as ineligible asylum-seekers or those seeking protection in the UK pursuant to other grounds also enjoy such protections. In litigation, SIPs have primarily relied on Article 3 ECHR (prohibition of subjection to torture or to inhuman or degrading treatment or punishment) and Article 8 (respect for private and family life), alone or in combination with Article 14

(prohibition on discrimination). Occasionally, they have invoked Article 5 (right to liberty and security) and Article 6 (right to a fair trial). In the next section, I highlight key ECtHR and UK cases in which Articles 3, 8, and 14 have affected SIPs' immigration status and associated rights.

(1) Article 3

Deportations/removals: whereas the *nonrefoulement* obligation in the 1951 Convention applies only to those who meet its 'refugee' definition and is *not absolute* (Article 33(2) stipulates that its benefits cannot be claimed by a 'refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'), the ECHR Article 3 prohibition on deportations entailing real risk of exposing a deportee to torture, inhuman, or degrading treatment or punishment is couched 'in absolute terms' and 'makes no provision for exceptions' or derogations (*Ireland v UK* [163]). Consequently, some prima facie deportable refugees pursuant to the 1951 Convention will be protected by ECHR Article 3.

Prior to the coming into force of the HRA, in *Soering v UK*, the ECtHR held that deportations are subject to Article 3 considerations: namely, ECHR signatories are not only prevented from carrying out prohibited practices in their own territories, but also from deporting persons to other countries where they face real risk of being subjected to such practices. As per *TI v UK* Article 3 applies also in cases of 'indirect removal[s]...to an intermediary country' which 'do not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3'. In *SH v UK*, the ECtHR found substantial grounds for believing that there is a real risk that the applicant, a failed asylum-seeker of Nepalese origin, would be subjected to ill-treatment if returned to Bhutan.

The HRA renders it more likely that cases like *Soering*, *TI*, and *SH* will be adjudicated in UK courts, taking into account ECHR jurisprudence, rather than forcing applicants to seek redress in Strasbourg, resulting in a violation finding of with consequent remedies as well as preventable waste of temporal and monetary resources. *Y and Z (Sri Lanka)* offers a sound example: the Court of Appeal held that returning ineligible asylum claimants to Sri Lanka, where they had previously suffered torture, would expose them to risk of self-harm which cannot be controlled given lack of access to care and treatment, thus violating Article 3.

Destitution: the HRA has enabled UK courts to scrutinise social assistance policies affecting SIPs not just on 'ordinary' JR grounds but also through the lens of ECHR rights. In its seminal *Limbuela* judgment, the House of Lords enjoined the then Home Secretary

from relying on Section 55 of the Nationality Immigration and Asylum Act 2002 to deny 'late' asylum-seekers subsistence support, a practice deemed likely to render them destitute given the concurrent prohibition on gainful employment. The House of Lords found that the duty to act, pursuant to section 6 HRA, arises not only when someone *is* enduring treatment contrary to Article 3 (at which point the Home Office was willing to offer them support), but also when there is an 'imminent prospect' of that occurring. Lord Bingham held [6] that 'the [Article 3] threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life'. Lord Hope reiterated [55] that 'the obligation to refrain from...[Article 3 incompatible] conduct is absolute'. By logical extension of the *Limbuela* rationale, the High Court in *MK and AH* found that delaying welfare support to two failed asylum-seekers who became homeless and destitute while awaiting a decision on their fresh asylum claims involves a significant risk that their Article 3 rights would be breached.

(2) Article 8

Respect for the right to private and family life may affect SIPs' immigration status in the UK. Whereas Article 8 rights are subject to limitations (viz. Article 3), such limitations must be pursued for an (enumerated list of) legitimate aims and be 'necessary in a democratic society'. Generally, it is harder to justify deportation of SIPs with strong, established ties to the UK, especially when this would have particularly detrimental consequences for dependent children.

The House of Lords in *Ullah* noted that, according to ECtHR jurisprudence [47] extradition and expulsion may in cases of a 'real risk of a flagrant violation of the guarantee of family or private life engage Article 8', offering as an example 'the expulsion of an alien homosexual to a country where, short of persecution, he might be subjected to a flagrant violation of his article 8 rights'. *Ullah* is also where it was famously held that [20] pursuant to section 2 HRA '[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.

In *Huang* the House of Lords found that, where the family life of an applicant is prejudiced 'in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8', refusal of leave to enter or remain would be unlawful.' In *Ex Parte Razgar*, it held that, despite finding no *Article 3* violation, removal to Germany was nevertheless prevented given the serious psychological trauma suffered by the applicants, as mental stability was considered fundamental for enjoyment of private life as per Article 8.

Precarious immigration status: another positive effect of the HRA has been the streamlining of ECHR considerations in primary legislation. When Parliament seeks to restrict recourse to grounds for challenging immigration decisions (to refuse leave to enter or remain), it does so by reference to ECHR considerations. For instance, in Section 117B(4) of the Nationality, Immigration and Asylum Act 2002 (brought into effect by Section 19 of the Immigration Act 2014), Parliament stipulated that, in Article 8 cases, a person's private life or relationship formed with a qualifying partner [British citizen or someone settled in the UK] established while unlawfully in the UK should be given 'little weight' by a tribunal as part of its 'public interest considerations'. Section 117B(5) similarly stipulates that little weight 'should be given to a private life established by a person at a time when the person's immigration status is precarious'. By legislating to restrict recourse to Article 8 in such cases, Parliament recognised that, in other immigration cases, recourse is not (and should not be) similarly restricted.

Brexit: The UK's departure from the EU *may* have the effect of bringing ECHR considerations to the foreground in cases pertaining to returns or deportations to EU member states, especially given that the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 disapplied the Dublin Regulation (the EU system of allocation of responsibility for assessing asylum claims). In NA (Iran) the Court of Appeal was not satisfied that conditions in Latvia (which had initial responsibility for processing the asylum applications of NA and her husband under Dublin) would fall short of its obligations under the Reception Directive, a benchmark for determining that there is a high risk that an individual's Convention rights (protected through the HRA) would be violated. In ZAT (concerning war-torn Syrian children previously staying in the Calais 'Jungle' who sought asylum in the UK without applying through the designated route in the Dublin regulation), the Upper Tribunal held that, only in 'exceptional circumstances' would an Article 8 ECHR claim succeed absent a Dublin application. On this occasion, however, the Home Secretary's refusal to admit the applicants disproportionately interfered with their Article 8 right to family life, given the physical violence they had experienced in the 'Jungle' and that their medical needs were unmet there. Given the disaplication of Dublin, prospective returns to EU member states such as Latvia and France *may* no longer enjoy a rebuttable presumption (compare: MSS v Belgium) that standards there are convention-compatible, potentially necessitating greater resort to ECHR analysis.

Notably, EU asylum law was partly retained, including the Refugee or Persons in Need of International Protection (Qualification) Regulation 2006 which implements the Qualification Directive. Article 15 of this Directive defines 'beneficiaries of international protection' to include, in addition to 1951 Convention refugees, those entitled to subsidiary protection based on 'real risk' of 'serious harm'. Given the textual similarity between Article 3 ECHR and Article 15(b) of the Qualification Directive, greater resort to ECHR

jurisprudence in deportation cases may depend on the extent to which UK courts *choose* to consider Luxembourg judgments in interpreting retained EU law. According to section 6(2) of the European Union (Withdrawal) Act 2018, UK courts ‘may have regard’ to such judgments, but they are not bound by principles or decisions made after the implementation period’s ‘completion date’ (31 December 2020)(European Union (withdrawal agreement) Act 2020).

(3) Article 14

Unlike the Equality Act 2010, the prohibition of discrimination based on one of the listed statuses or ‘other status’ under Article 14 of the ECHR is not free-standing: it must be discrimination that falls ‘within the ambit’ of other ECHR rights. However, Article 14 can be used to challenge adverse effects on Article 8 rights and any other right in the ECHR if differential treatment cannot be objectively justified, even if the practice in and of itself does not violate Article 8 or other rights.

In *Hode and Abdi v UK*, the ECtHR held that a Somali refugee’s spouse would be able to join them in the UK despite the refugee having been granted five-year Temporary Leave to Remain (TLR) (and hence not a person ‘present and settled in the UK’) and the marriage having taken place post-flight (in Djibouti). The court found that spouses of students and workers, also TLR status-holders who were able to sponsor their spouses’ applications were in an analogous position to refugees; hence, the differential treatment could not be justified. That Article 14 can be relied on in UK courts to challenge practices that have adverse effects for SIPs is significant.

Conclusion

Through its careful structure, the HRA creates a measured system for scrutinising Executive policies and primary legislation that affects SIPs’ immigration status and rights. it enables UK courts to pre-empt adverse Strasbourg finding, and streamlines ECHR rights-based considerations in decision-making. The implications of ‘modifying’ applicable ECHR rights through e.g. altering the non-absolute nature of Article 3, raising the threshold for its application, revising Article 8 criteria, or indeed of no longer mandating UK courts to ‘take into account’ ECtHR case-law would be profound: at best, it would force SIPs to seek remedies for rights violations in Strasbourg, given the jurisprudential divergence that will inevitably ensue; at worst, they may end up destitute or deported in breach of their convention rights.

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- ¹ D. Giannouloupoulos, "The Eurosceptic Right and (Our) Human Rights: the Threat to the Human Rights Act and the European Convention on Human Rights is Alive and Well" [2020] *European Human Rights Law Review* 225, 236.
- ² D. Giannouloupoulos, "The Eurosceptic Right and (Our) Human Rights: the Threat to the Human Rights Act and the European Convention on Human Rights is Alive and Well" [2020] *European Human Rights Law Review* 225, 236.
- ³ D. Giannouloupoulos, "The Eurosceptic Right and (Our) Human Rights: the Threat to the Human Rights Act and the European Convention on Human Rights is Alive and Well" [2020] *European Human Rights Law Review* 225, 239.
- ⁴ D. Giannouloupoulos, "The Eurosceptic Right and (Our) Human Rights: the Threat to the Human Rights Act and the European Convention on Human Rights is Alive and Well" [2020] *European Human Rights Law Review* 225, 229-235.
- ⁵ D. Giannouloupoulos, "What has the ECHR ever done for the UK?" [2019] *European Human Rights Law Review* 1-10.
- ⁶ D. Giannouloupoulos, "What has the ECHR ever done for the UK?" [2019] *European Human Rights Law Review* 1-10.
- ⁷ M. Amos, "Written evidence from Professor Merris Amos", Twenty Years of the Human Rights Act Inquiry, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/20-years-of-the-human-rights-act/written/89739.html>
- ⁸ This partly draws on: Fenwick and Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80 *Modern Law Review* 1111; R. Masterman, *Supreme, Submissive or Symbiotic? UK Courts and the ECtHR* (London: Constitution Unit, 2015).
- ⁹ J. Lewis, 'The European Ceiling on Rights' [2007] PL 720.
- ¹⁰ *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.5.
- ¹¹ *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323, [20].
- ¹² *Ambrose v Harris* [2011] UKSC 3; [2011] 1 WLR 2435, [129]. In *Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2017] UKSC 36 the Supreme Court found '[the relevant Strasbourg decision] is one which should not readily be adopted without full consideration of its practical implications for the working of the domestic regime [36]. This is a case in which the....Court should not regard the Chamber's decision as a sufficient reason to depart from its own [previous] fully considered and unanimous conclusion' [37].
- ¹³ *Manchester City Council v Pinnock* [2011] 2 AC 104, [48].
- ¹⁴ See: *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [90]; *P v Surrey CC* [2014] AC 896.
- ¹⁵ *R (on the application of Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, [43]; *R v Horncastle* [2010] 2 AC 373 [11] (Lord Phillips).
- ¹⁶ *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, at [48].
- ¹⁷ Thus, *R v Perrin* [2002] EWCA Crim 747 applied *Handyside v UK* (1976) 1 EHRR 737, a decision heavily influenced by the margin conceded to the UK.
- ¹⁸ See *In Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, [31]. In *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38 it was found: '[in the instant case, where the Court had already found that the matter was within the member states' margin of appreciation] the national courts therefore must decide the issue for themselves, with relatively unconstraining guidance from the Strasbourg court...' [70]. See also *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin). The approach of the Strasbourg Court to the margin of appreciation need not be replicated domestically: see *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32: '...the approach of the ECtHR to the question of what margin of appreciation member states should be accorded is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified' ([28]).
- ¹⁹ See H Fenwick 'Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the Court's authority via consensus analysis?' (2016) 3 EHRLR 249-272.
- ²⁰ See H Fenwick 'Finding 'East'/'West' divisions in Council of Europe states on treatment of sexual minorities: the response of the Strasbourg Court and the role of consensus analysis' (2019) 3 EHRLR, 247-273 (with D Fenwick).

²¹ In particular, an amendment to the law on the Constitutional Court of the Russian Federation came into force on 14 December 2015 to accord the Constitutional Court the power to declare it ‘impossible to implement’ judgements of a human rights body (including, obviously, the Strasbourg Court) on the ground that its interpretation of the international treaty provisions underpinning the judgement would be inconsistent with the Constitution of the Russian Federation.

²² See *Oliari v Italy* App nos. 18766/11 and 36030/11, judgment of 21st Oct 2015. The Court sought to confine the findings to the local situation in Italy, arguably due to concerns as to the reception that would have been accorded to more universally applicable findings in member states that have introduced no registered partnership scheme for same-sex couples.

²³ See eg *McKennitt v Ash* [2007] 3 WLR 194.

²⁴ The ‘living instrument’ approach at Strasbourg nevertheless still enabled development.

²⁵ See *R (on the application of Jalloh v Secretary of State for the Home Department* [2020] UKSC 4, finding that counsel for the Secretary of State was attempting ‘to restrict the classic understanding of imprisonment at common law to the very different....concept of deprivation of liberty under the ECHR. The Strasbourg court has adopted this approach [needing to] draw a distinction between the deprivation and restriction of physical liberty....the common law [need not] draw such a distinction and [there is] every reason for [it] to continue to protect those whom it has protected for centuries against unlawful imprisonment, whether by the State or private persons’ [33]. See also: *R (TT) v The Registrar General for England and Wales* [2019] EWHC 2384 (Fam); *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

²⁶ See *Osborn v The Parole Board; Booth v The Parole Board* [2013] UKSC 61: ‘the protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system’, [55]. See also: *Rabone v Pennine Care Foundation NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, [113]; *Kennedy v Charity Commission* [2015] AC 435 [133].

²⁷ See in particular: *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56; *Secretary of State for the Home Department (Appellant) v. JJ and others* [2007] UKHL 45.

²⁸ See the examples in n21 and n17.

²⁹ For an overview of this see A Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018) Ch 4.

³⁰ See O Gross and F Ní Aoláin, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights’ [2001] 3 HRQ 623.

³¹ [R\(Ullah\) v Special Adjudicator](#) [2004] UKHL 26.

³² [R \(Alconbury Developments Ltd\) v Secretary of State for the Environment](#) [2001] 2 WLR 1389.

³³ [Re P](#) [2008] UKHL 57.

³⁴ See [R \(Animal Defenders International\) v Secretary of State for Culture, Media and Sport](#) [2008] UKHL 15.

³⁵ [2009] UKSC 14.

³⁶ (2009) EHRR 1.

³⁷ *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127.

³⁸ The now defunct European Commission on Human Rights did make such a finding against the Greek Military Junta in 1969. This case never made it before the ECtHR as the anti-democratic Greek Government withdrew from the Convention before the case could be heard. See *The Greek Case* (1969) YB 1.

³⁹ See A Greene ‘Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights’ (2011) 12(10) *German Law Journal* 1764.

⁴⁰ [2005] 2 WLR 87; *A v UK* app no 3455/05 (19 February 2009).

⁴¹ Prevention of Terrorism Act 2005.

⁴² E.g. the London bombings of 7 July 2005 and the Manchester arena bombing of 2017.

⁴³ Greene (n 29); H Fenwick and G Phillipson, ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and beyond’ (2011) 46 *McGill LJ* 863.

⁴⁴See A Greene, The UK Government's Proposed 'Presumption to Derogate' from the ECHR: Submission to the Joint Committee on Human Rights (March 28, 2017). Available at SSRN: <https://ssrn.com/abstract=2942210>.

⁴⁵See *Smith and Others v The Ministry of Defence* [2013] UKSC 41.

⁴⁶For competing perspectives see A Greene, 'Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When' [2020] EHRLR 263; K Dzehtsiarou, 'Article 15 Derogations: Are they really necessary during the COVID-19 Pandemic?' [2020] EHRLR 359.

⁴⁷See A Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press, 2020).

⁴⁸An earlier version of this paper was presented at the Goldsmiths Law/Knowing Our Rights symposium on 'What has the ECHR ever done for the UK', at the British Academy, on October 27, 2018.

⁴⁹Home Office, Rights Brought Home: The Human Rights Bill (1997), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

⁵⁰Twenty years of the Human Rights Act: Extracts from the evidence available at <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1434/1434.pdf> pg 3.

⁵¹*Big Brother Watch and others v. United Kingdom* (App. Nos. 58170/13, 62322/14, 24960/15, 13 September 2018) at [500].

⁵²(App. No. 8691/79, 02 August 1984).

⁵³Among others, the Interception of Communications Act 1985, the Security Services Act 1989, the Intelligence Services Act 1994, and the Regulation of Investigatory Powers Act 2000.

⁵⁴Human Rights Act 1998 s6.

⁵⁵On whether declarations under s4 constitute an effective remedy for the purposes of Article 35(1) of the Convention see *Burden v. United Kingdom* (App. No. 13378/05, 29 April 2008) at [43].

⁵⁶Helen Fenwick, *Civil Liberties and Human Rights* (5th edn, Routledge, 2017) 817.

⁵⁷*Kennedy v. United Kingdom* (App. No. 26839/05, 18 May 2010) at [190].

⁵⁸See for instance *Liberty and Others v GCHQ and Others* [2015] UKIPTrib 13_77-H, 22 June 2015.

⁵⁹*Liberty and Others v GCHQ and Others* [2015] UKIPTrib 13_77-H, 6 February 2015.

⁶⁰*Belhadj & Others v the Security Service & Others* [2015] UKIPT 13_132-9-H, 29 April 2015.

⁶¹*News Group Newspapers Ltd and Others v Commissioner of Police of The Metropolis* [2015] UKIPTrib 14 – 176-H, 17 December 2015.

⁶²*Kennedy* (n.57) at [108]-[112].

⁶³*supra* (n.51). This applied only in instances where the applicants challenged the compatibility with the Convention of the legislative framework for surveillance. See *Kennedy supra* (n. 57).

⁶⁴*ibid* at [268].

⁶⁵Under the Regulation of Investigatory Powers Act s8(4). These powers are now regulated under Part 2 of the Investigatory Powers Act 2016.

⁶⁶*supra* (n. 51) at [69]-[71].

⁶⁷See indicatively, Natasha Simonsen, 'The Investigatory Powers Tribunal and the rule of law' available at <https://ukhumanrightsblog.com/2015/02/16/the-investigatory-powers-tribunal-and-the-rule-of-law-natasha-simonsen/>, Kathryn Wilson, 'The European Convention on Human Rights and the Investigatory Powers Tribunal: Rationalising a Law unto Itself?' (2020) 23 Trinity CL Rev 129-54.

⁶⁸Ministry of Justice, Guidance - Independent Human Rights Act Review' available at <https://www.gov.uk/guidance/independent-human-rights-act-review>

⁶⁹On whether the agreement successfully 'locks in' the UK to the ECHR see Steve Peers, 'Analysis 3 of the Brexit deal: Human Rights and EU/UK Trade and Cooperation Agreement' available at <http://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>

⁷⁰Professor of Human Rights Law at Middlesex University and Director of the [European Human Rights Advocacy Centre](https://www.ehrac.org/) (EHRAC). As a former Legal Director of Liberty, he represented the applicants in the cases of *Edwards* and *Wright*, which are referred to in this article. He wishes to express his grateful thanks to his colleague Dr. Alice Donald for her perceptive comments on a draft of this piece.

⁷¹This article should be read in conjunction with the piece by Professor Merris Amos, in the Goldsmiths Law/Knowing Our Rights symposium, *What has the ECHR ever done for the UK?*, British Academy, 27 November 2018, which covers other aspects of the right to life.

⁷²See further the discussion on the right to life in Alice Donald, Jane Gordon and Philip Leach, '[The UK and the European Court of Human Rights](#)', [Equality and Human Rights Commission](#), section 5.3.

⁷³ See further: Jim Murdoch and Ralph Roche, '[The European Convention on Human Rights and Policing – a handbook for police officers and other law enforcement officials](#)'.

⁷⁴ The obligations will apply to patients in state care, including voluntarily detained mental health patients. See: [Rabone and another v Pennine Care NHS Foundation Trust](#).

⁷⁵ As extensively documented in: Brice Dickson, 'The European Convention on Human Rights and the Conflict in Northern Ireland', Oxford University Press, 2010, chapter 9.

⁷⁶ They have also been applied to the British army acting overseas, as shown by the case of [Al-Skeini v UK](#) which concerned the lack of an independent and effective investigation into the deaths of the applicants' relatives (Iraqi nationals), during operations conducted by the UK armed forces in Iraq.

⁷⁷ *R (Wright) v Secretary of State for the Home Department* [2001] 1 Lloyd's Rep Med 478.

⁷⁸ The House of Lords stipulated that the aim of an inquest - to establish 'how' a person died - should not be construed too narrowly, and that it should ascertain 'by what means and in what circumstances' the death occurred.

⁷⁹ The IPCC was replaced in January 2018 by the [Independent Office for Police Conduct](#).

⁸⁰ These include having procedures aimed at flagging up potential cases of self-harm, and a reception screening process for prisoners, to ensure the better detection and recording of health problems, both physical and mental.

⁸¹ At the time of writing, the Inquiry was in its second phase. It is expected to be completed in 2022.

⁸² Citing Article 2 ECHR, the [Inquiry has underlined](#) the steps it has taken with the aim of involving concerned individuals, including starting the Inquiry by holding commemoration hearings for those who lost their lives. However, [complaints have been made](#) about the ability of people in practice to participate in the inquiry and question witnesses.

⁸³ Professor of Constitutional and Human Rights Law, UCL.

⁸⁴ (1981) 4 EHRR 149.

⁸⁵ (1999) 29 EHRR 493.

⁸⁶ (1996) 22 EHRR 123.

⁸⁷ *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

⁸⁸ [2018] UKSC 49.

⁸⁹ See C. O'Cinneide, 'Equality: A Core Common Law Principle – Or "Mere Rationality"', in M. Elliott and K. Hughes (eds.), *Common Law Constitutional Rights* (Hart, 2020), 167–192.

⁹⁰ See the comments of Ouseley J in *R (Gurung) v Secretary of State for Defence* [2008] EWHC 1496 (Admin), [54], [60].

⁹¹ [2004] UKHL 56.

⁹² [2004] UKHL 30

⁹³ See also *Bellinger v Bellinger* (Lord Chancellor intervening) [2003] 2 AC 467.

⁹⁴ [2008] UKHL 38.

⁹⁵ *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 4.

⁹⁶ See similarly *R (Hooper) v. Secretary of State for Work and Pensions* [2005] UKHL 29.

⁹⁷ *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

⁹⁸ [2015] UKSC 57.

⁹⁹ [2015] EWHC 3382.

¹⁰⁰ See also *Burnip v Birmingham City Council* [2012] EWCA Civ 629 (15 May 2012).

¹⁰¹ *R (A, B, X and Y) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin).

¹⁰² [2018] UKUT 269 (AAC).

¹⁰³ The extensive HRA jurisprudence on prisoners' rights and immigration issues could also be cited here, as could the jurisprudence on abortion access in Northern Ireland.

¹⁰⁴ See <https://www.gov.uk/guidance/independent-human-rights-act-review>.

¹⁰⁵ Greater London Assembly, 'Action Plan - Transparency, Accountability and Trust in Policing' (2020).

¹⁰⁶ Joint Committee on Human Rights, 'Black people, racism and human rights', Eleventh Report of Session 2019–21 (2020).

¹⁰⁷ [The Home Office National Statistics](#) for April 2019- March 2020 showed that for every 1000 black people, there were 54 searches, with 6 searches for every 1000 white people.

¹⁰⁸ Independent, 'Merseyside Police apologises after using advertising van to tell residents being offensive is an offence',

<https://www.independent.co.uk/news/uk/home-news/merseyside-police-being-offensive-offence-van-b1805560.html> (2021).

¹⁰⁹ Cressida Dick, 'RUSI Annual Security Lecture' (2020).

¹¹⁰ [2020] EWCA Civ 1058.

¹¹¹ Tom Bingham, 'The Rule of Law'.

¹¹² *R (on the application of Pretty) v DPP* [2001] EWHC Admin 788 [2], [8]-[9], [33].

¹¹³ *R (on the application of Pretty) v DPP* [2001] UKHL 61.

¹¹⁴ *Pretty v the UK* (2002) 35 EHRR 1 [62]-[65], [67].

¹¹⁵ *ibid.* [74].

¹¹⁶ See further: Dan Morris, 'Assisted Suicide under the European Convention on Human Rights: A Critique' (2003) 1 European Human Rights Law Review 65; Michael Freeman, 'Denying Death its Dominion: Thoughts on the Dianne Pretty Case' (2002) 10(3) Medical Law Review 245; Antje Pedain, 'The Human Rights Dimension of the Diane Pretty Case' (2003) 62(1) Cambridge Law Journal 181; Andrew Ashworth, 'Dying, Human Rights and Quality of Life' (2002) 5 Archbold News 4; and John Keown, 'No Right to Assisted Suicide' (2002) 61(1) Cambridge Law Journal 8.

¹¹⁷ *R (on the application of Purdy) v DPP* [2009] UKHL 45 [40], [42], [53].

¹¹⁸ *ibid.* [56], [69], [83]-[86], [88], [101]-[102].

¹¹⁹ See further: Nick Cartwright, '48 Years on: Is the Suicide Act Fit for Purpose?' (2009) 17(3) Medical Law Review 467; Roger Daw and Alex Solomon, 'Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute' (2010) 10 Criminal Law Review 737; Kate Greasley, '*R(Purdy) v DPP* and the Case for Wilful Blindness' (2010) 30 Oxford Journal of Legal Studies 301; Penney Lewis, 'Informal Legal Change on Assisted Suicide: The Policy for Prosecutors' (2011) 31 Legal Studies 119; Ben Livings, 'A Right to Assist? Assisted Dying and the Interim Policy' (2010) 74 The Journal of Criminal Law 31; Alexandra Mullock, 'Overlooking the Criminally Compassionate: What are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?' (2010) 18 Medical Law Review 442; Jonathan Rogers, 'Prosecutorial Policies, Prosecutorial Systems, and the Purdy Litigation' (2010) 7 Criminal Law Review, 543; and Hazel Biggs, 'Legitimate Compassion or Compassionate Legitimation? Reflections on the Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (2011) 19 Feminist Legal Studies 83.

¹²⁰ *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [141], [143]-[145].

¹²¹ Nataly Papadopoulou, 'From *Pretty* to *Nicklinson*: Changing Judicial Attitudes to Assisted Dying' (2017) 3 European Human Rights Law Review 298.

¹²² I will not deal with this issue here. In summary, the DPP's policy was deemed lawful, but the UKSC said that if there was any lack of clarity, the DPP should make amends. I note the change to the policy earlier in the discussion.

¹²³ *R (on the application of Nicklinson and another) v Ministry of Justice; R (on the application of AM) (AP) v DPP* [2014] UKSC 38 [96], [111], [186].

¹²⁴ *ibid.* [107]-[108], [186], [205], [314]-[316], [355].

¹²⁵ See further: Jonathan Rogers, 'Assisted Suicide Saga - The *Nicklinson* Episode' (2014) 7 Archbold Review 7; and Alexandra Mullock, 'The Supreme Court Decision in *Nicklinson*: Human Rights, Criminal Wrongs and the Dilemma of Death' (2015) 31(1) Professional Negligence 18; and Elizabeth Wicks, 'The Supreme Court Judgment in *Nicklinson*: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2015) 23(1) Medical Law Review, 144.

¹²⁶ Elizabeth Wicks, 'The Supreme Court Judgment in *Nicklinson*: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2015) 23(1) Medical Law Review, 144.

¹²⁷ *R (on the application of Conway) v The Secretary of State for Justice* [2017] EWHC 2447 (Admin).

¹²⁸ *R (on the application of Conway) v The Secretary of State for Justice* [2018] EWCA Civ 1431.

¹²⁹ HC Deb, 23 Jan 2020, vol.670, cols186-210; HC Deb, 4 July 2019, vol662, cols1412-1451; HC Deb, 8 Oct 2019, vol664, cols1622-1623.