Inclusion London's Response to the Independent Human Rights Act Review

Inclusion London

Inclusion London is a London-wide user-led organisation which promotes equality for London's Deaf and Disabled people and provides capacity-building support for over 70 Deaf and Disabled People's Organisations (DDPOs) in London. Through these organisations, our reach extends to over 70,000 Disabled Londoners.

Key Comments

- Inclusion London believes that the Human Rights Act has been an essential tool for furthering the rights of Disabled people in the UK.
- Inclusion London believes that the UK courts are not compelled to mirror the decisions and judgements of the European Court of Human Rights, and that there is ample evidence of UK courts deciding not to follow the decisions of the ECtHR in cases where they considered it was not appropriate for them to do so.
- Inclusion London believes that there are certain "controversial" issues, such as assisted suicide, where the ECtHR has abstained on making a judgement, leaving it to the discretion of member states to legislate on the issue.
- Inclusion London believes that the Human Rights Act poses no threat to the UK constitution, and that Parliamentary sovereignty is respected both in the Human Rights Act and by the UK courts.
- Inclusion London believes that Declarations of Incompatibility are an effective measure in the Human Rights Act and do not threaten Parliamentary sovereignty.
- Inclusion London believes that there should be a mechanism by which remedial action has to be considered by the relevant member of the executive in a timely manner, and explanation given if remedial action is not taken.

The Human Rights Act and Disabled People

The Human Rights Act has had a very positive impact on the lives of many Disabled people in the UK. It has allowed Disabled people to challenge decisions and policies on fundamentally important issues, such as decisions which have a large effect on their day to day lives, such as Care and support[1], Deprivation of liberty[2], welfare benefits and mental capacity[3].

[1] http://ukscblog.com/case-comment-rabone-anor-v-pennine-care-nhs-trust-2012-uksc-2/
[2] https://www.bbc.co.uk/news/uk-england-norfolk-55636433
[3] https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2001/415.html

The impact of the Act has gone well beyond legal challenges as it has helped to promote new ways of thinking and change the practices of professionals supporting Disabled people.

The Human Rights Act has been demonstrably important to protect the rights of those discriminated against in our society, and many of the people that the government considers "vulnerable" have used the Human Rights Act to protect their rights – thus demonstrating a) the Human Rights Act's usefulness and b) that the vulnerability ascribed to certain groups and individuals is not innate and can be changed through approaches that aim to empower, support and eliminate discrimination.

Limitations of the European Court of Human Rights

Regarding Section 2 of the Human Rights Act, Inclusion London's view is that if the UK wants to continue to comply with the European Convention on Human Rights, UK domestic courts should follow the guidance of the European Court of Human Rights who interpret the Convention.

Despite this, it is important to note that the Human Rights Act places a soft, not absolute duty, on UK domestic courts to follow the rulings of the European Court of Human Rights:

"A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a)judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b)opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c)decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d)decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.[4]"

It is clear from the wording of Section 2 that whilst consideration must be given to the judgements and decisions of the European Court of Human Rights, British courts are not compelled to take said judgements and decisions as binding.

Despite many pointing to the Ullah principle to attempt to show a "mirror" effect between the European Court of Human Rights and UK courts[5], it can be seen that at least since 2009, the relationship between the ECtHR and the UK domestic courts has changed to one that can be most succinctly described as a "dialogue" principle.

[4] https://www.legislation.gov.uk/ukpga/1998/42/section/2

[5] https://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/

For example, the ruling in R vs. Horncastle (2009) contains the following:

"The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.[6]"

In R vs. Pinnock (2010) the ruling lays out when the UK Courts should follow the judgement of the European Court of Human Rights, and therefore, the circumstances when the UK should deviate from their judgement:

"Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.[7]"

There exists many other cases where the UK court declined to follow the judgement or decision given by the European Court of Human Rights, including but not limited to: R vs. Kaiyam (2014)[8], R vs. Hicks (2017)[9], R vs. Poshteh (2017)[10] and R vs. Hallam (2019)[11]. The reasons for departure from the judgement of the European Court of Human Rights included: poor or weak reasoning, the UK court following existing case law in the UK, negative impact on public finances or the practices of key public institutions, and a belief by the UK court that the European Court of Human Rights did not follow it's own case law. These cases clearly illustrate that the UK domestic courts have little issue in refusing to implement the judgement of the European Court of Human Rights in cases where they do not believe it would be appropriate to do so.

It is also important to remember that the European Court applies the concept of "margin of appreciation" very carefully. In the case of "controversial" issues such as assisted dying, the European Court of Human Rights leaves the decision to the discretion of each of its member states, as noted in Pretty vs. the UK (2002)[12]. The same goes for cases about the level of support for Disabled people which would have significant resource implications[13].

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[6] https://www.supremecourt.uk/cases/docs/uksc-2009-0073-judgment.pdf
[7] https://www.supremecourt.uk/cases/docs/uksc-2009-0180-judgment.pdf
[8] https://www.supremecourt.uk/cases/docs/uksc-2014-0036-judgment.pdf
[9] https://www.supremecourt.uk/cases/docs/uksc-2015-0017-judgment.pdf
[10] https://www.supremecourt.uk/cases/docs/uksc-2015-0219-judgment.pdf
[11] https://www.supremecourt.uk/cases/docs/uksc-2016-0227-judgment.pdf
[12] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60448%22]}
[13] *MCDONALD V. THE UNITED KINGDOM – 4241/12 – CHAMBER JUDGMENT [2014] ECHR 492 (20 MAY 2014)*

For example, in one of assisted dying cases the court notes:

"the Court finds, in agreement with the House of Lords and the majority of the Canadian Supreme Court in the Rodriguez case [Rodriguez v Attorney General of Canada [1994] 2 LRC 136], that States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals. The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue in this case, section 2 of the 1961 Act, was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to taken informed decisions against acts intended to end life or to assist in ending life. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question. It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures.[14]"

This case, and others, demonstrate that the European Court of Human Rights is very much aware of the member states sovereignty and is very careful not to overstep the mark.

Constitutional Considerations

Inclusion London does not believe the Human Rights Act, nor the current use of the Human Rights Act by UK domestic courts, poses a threat to the constitutional balance or the sovereignty of Parliament.

Although the UK has an uncodified, and often unclear, constitution, the two fundamental principles in relation to the role of the judiciary within the constitution were defined in the 2005 Constitutional Reform Act – they should uphold the rule of law, and the judiciary should be independent[15].

In regard to the rule of law, one important aspect of it is the principle of legality. This ensures that public bodies and devolved legislatures can be held to account if they exceed their legal powers. It further ensures that the executive cannot make decisions without being able to justify them using the legislation that the legislature has passed[15]. Clearly here, Parliamentary sovereignty is being respected, as the judiciary are holding the executive accountable to their own decisions, and those of the wider legislature.

Secondly, the rule of law "imposes a set of formal requirements as to the general characteristics of law and the legal system. These requirements are premised on the need for respect for human autonomy and dignity, which in turn demand that the law be publicly accessible, intelligible and applied in a predictable and principled manner by independent courts.[16]" This requires the judiciary to interpret laws, as again laid out in section 3 of the Human Rights Act, but additionally the Human

[14] https://www.judiciary.uk/wp-content/uploads/2017/10/r-conway-v-ssj-art-8-right-to-die-20171006.pdf [15] https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-accind/justice-sys-and-constitution/

[15] https://publiclawforeveryone.com/2015/10/16/1000-words-the-rule-of-law/

[16] https://publiclawforeveryone.com/2015/10/16/1000-words-the-rule-of-law/

Rights Act adds a requirement for them to be interpreted with their compatibility with the European Convention on Human Rights:

"(1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2)This section—

(a)applies to primary legislation and subordinate legislation whenever enacted;

(b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.[17]"

It should be noted that even prior to the introduction of the Human Rights Act, it was acknowledged by Lord Steyn in the judgement on Regina v. Secretary of State for the Home Department, Ex Parte Pierson that:

"Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption.[18]"

If anything, the introduction of the Human Rights Act and the specification that it is the European Convention on Human Rights that UK courts should be using to interpret laws reduces the assumptions about the principles and values upon which European liberal democracies are based.

Furthermore, Parliamentary sovereignty is not threatened by the use of the European Convention on Human Rights to interpret UK law, as it was the legislature who passed the Human Rights Act which gave duties to the UK judiciary to interpret laws according to the Convention. Even with the duty to interpret laws in a way that is compatible with Convention rights, the judiciary still do not have the power to change the operation or enforcement of existing laws – that power still lies exclusively with the legislature, ensuring that Parliamentary sovereignty is safeguarded and preserved.

Disabled people have used the Human Rights Act to challenge policies through judicial reviews. However, this has only concerned secondary legislation which was not properly scrutinised by Parliament. This mechanism should be seen more as an opportunity for the government to improve its decision-making processes. Surely, when the government is committed to upholding the rights of Disabled people, this kind of scrutiny must be welcomed. In our experience, cases that are won with the use of the Human Rights Act are the cases where something was wrong with decisionmaking process[19].

[17] https://www.legislation.gov.uk/ukpga/1998/42/section/3

[18] https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970724/piers04.htm

[19] For example in the case of RF v Secretary of State for Work And Pensions [2017] EWHC 3375 (Admin) (21 December 2017) the judge was very critical about the evidence that was used to make decision about limiting

Declarations of Incompatibility

Inclusion London believes that Declarations of Incompatibility are an effective measure in the Human Rights Act, and strikes the right balance between Parliamentary sovereignty and the ability of individuals and the UK courts to bring light to an issue that may be in breach of the European Convention on Human Rights. It is important to note that in the over 20 years of the Human Rights Act in operation in the UK, there have been only 43 Declarations of Incompatibility issued by UK courts (some of which were later repealed), so any claim that the judiciary is overreaching into Parliamentary sovereignty is extremely exaggerated.

Section 4 of the Human Rights Act reads as follows:

"(6)A declaration under this section ("a declaration of incompatibility")—

(a)does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b)is not binding on the parties to the proceedings in which it is made.[20]"

As stated in the legislation, a Declaration of Incompatibility does not place any binding duty on the executive or legislature to change a piece of primary or secondary legislation, rather, it grants the power to the relevant member of the executive to consider and propose changes to the legislation in question. Ultimately, the power over policy decisions and whether and how to change legislation still rests in the hands of the legislature and executive.

Considering the lack of scrutiny available to much of the secondary legislation in the UK, Declarations of Incompatibility should be viewed by the executive as a welcome form of scrutiny and an opportunity to correct legislation which is found to be in breach of human rights.

Furthermore, the power to consider and take remedial action lies exclusively with the executive, subject to the approval of the legislature. Section 10 of the Human Rights Act includes:

"(2)If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3)If, in the case of subordinate legislation, a Minister of the Crown considers—

entitlement to Personal Independence Payment for people with mental health support needs. See para 44 onwards of the judgment.

[20] https://www.legislation.gov.uk/ukpga/1998/42/section/4

(a)that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b)that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.[21]*"*

In light that 32 of the 43 Declarations of Incompatibility are still in operation, this shows that the power to take remedial action by a member of the executive is rarely ever utilised. Inclusion London would therefore recommend a change to the Human Rights Act to ensure that there is a mechanism by which remedial action is at the very least considered in a timely manner, and reasons given by the relevant member of the executive if the remedial action is not taken.

For Further Information

Please contact Rachel O'Brien, Inclusion London's Policy and Public Affairs Officer at [redacted]

[21] https://www.legislation.gov.uk/ukpga/1998/42/section/10