Submission to the Independent Human Rights Act Review

Theme One

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

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

1. I believe that the s.2 duty to "take into account" needs a complete overhaul, as the interpretation and implementation of this section by the courts is unsatisfactory.

2. In *Alconbury,* Lord Slynn held that whilst HRA does not provide that a national court is bound by the ECtHR's decisions "*it is obliged to take account of them so far as they are relevant*" and "*in the absence of some special circumstances...the court should follow any clear and constant jurisprudence*" of the ECtHR.[1]

3. In *Ullah,* Lord Bingham held that the domestic courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the ECtHR, because "*the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court*" and "*the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*".[2]

4. In *Kay,* Lord Bingham held that the duty imposed on domestic courts by s2 HRA to take into account any judgment of the ECtHR, together with the fact that s6 HRA prohibits the domestic courts from acting in a way which is incompatible with the Convention rights, means that whilst HRA provides scope for isolated occasions when a domestic court may challenge the application by the ECtHR of the principles that it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of the national authorities:

   "*it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights specified in section 1(1) of the 1998 Act. That court is the highest judicial authority on the interpretation of those rights and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down*."[3]

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[1] *R* (*Alconbury Ltd) v Environment Secretary* [2001] UKHL 23 at [26]

[2] *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [20]

[3] *Kay v Lambeth* [2006] UKHL 10 at [28]

5. In *RJM*, Lord Neuberger held that "*it would require the most exceptional circumstances*" before any national court should refuse to apply a Grand Chamber decision "*in which the relevant authorities and principles were fully canvassed*" and where it "*came to a clear conclusion which was expressly intended to be generally applied by national courts*".[4]

6. In *AF (No 3)*, Lord Hoffmann held that the decision in *A v UK* had to be followed, despite his concerns that it was wrong and "*may well destroy the system of control orders which is a significant part of this country's defences against terrorism*" because, whatever the limits of s2 HRA, the UK is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation.[5]

7. In *Horncastle*, Lord Phillips held that the requirement to "take into account" will normally result in the domestic court applying principles that are clearly established by the ECtHR.[6]

8. In *Pinnock*, Lord Neuberger held that the Supreme Court isn't bound to follow every decision of the ECtHR but where "*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]

9. In *Chester*, Lord Mance held that:[8]

   "*In relation to authority consisting of one or more simple Chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as R v Horncastle, to refuse to follow Strasbourg case-law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg. But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. <u>It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level</u>.*" (emphasis added)

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[4] R (*RJM) v Work and Pensions Secretary* [2008] UKHL 63 at [31]

[5] *Home Secretary v AF (No 3)* [2009] UKHL 28 at [70]

[6] *R v Horncastle* [2009] UKSC 14 at [11]

[7] *Manchester City Corporation v Pinnock* [2010] UKSC 45 at [48]

[8] *R (Chester) v Justice Secretary* [2013] UKSC 63 at [27]

10. In *Chester*, Lord Sumption held that:[9]

> in the UK treaties "*are not a source of rights or obligations in domestic law unless effect is given to them by statute*";
>
> the drafting of the HRA "*was a compromise designed to make the incorporation of the Convention into English law compatible with the sovereignty of Parliament*";
>
> "*Under section 10 of and Schedule 2 to the Act, the Crown has a power but not a duty to amend legislation by order so as to conform with the Convention where there are "compelling reasons" for doing so, but this is subject to prior parliamentary approval under the positive resolution procedure";*
>
> *"the interpretation of the Convention by the Strasbourg Court takes effect in English law only by decision of the English courts";*
>
> the UK courts cannot interpret the s.2 HRA duty to "take into account" as meaning "*no more than to consider it, which is consistent with rejecting it as wrong*", save in altogether exceptional cases;
>
> "*The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, so far as they are free to do so*" and "*Parliament must be taken to have been aware that effect would be given to the Act in accordance with this long-standing principle.";*
>
> A decision of the ECtHR *"is an adjudication by the tribunal which the United Kingdom has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention which the Convention intends them to be, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which may, when properly explained, lead to the decision being reviewed by the Strasbourg Court."*

11. In *A v SSHD*, Lord Bingham referred to the appellants' submissions which relied on "*the well-established principle that the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it*". He then discussed the obligations and duties of the courts under s.2, s.3 and s.6 HRA and the principle that "*If, and to the extent that, development of the common law is called for, such development should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them"* and said *"I do not understand these principles to be contentious*".[10]

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[9] *R (Chester) v Justice Secretary* [2013] UKSC 63 at [119-121]

[10] *A v Home Secretary* [2005] UKHL 71 at [27]

12. In *MN*, the Court held that the effect of s.6 HRA is that the government and the courts are obliged to act compatibly with the Convention rights, and the effect of s.2 is that in interpreting the Articles the courts are obliged to take into account the Strasbourg case-law and therefore the positive obligations or duties imposed by the Articles, as elucidated in the Strasbourg jurisprudence, are for practical purposes binding as a matter of domestic law.[11]

13. So there is a consistent body of binding domestic authority which says that the ECtHR is the highest judicial authority on the interpretation of the Convention rights; that the domestic courts are obliged to take account of its decisions and that, absent some special or exceptional circumstances, they should follow any clear and constant jurisprudence of the ECtHR, especially Grand Chamber decisions.

14. Article 46 of the Convention obliges the UK, as a matter of international law, to "abide by" decisions of the ECtHR to which it was a party. However, Lord Sumption's observations in *Chester* identify that s.2 HRA was a compromise, which provides for the UK to violate international law and its treaty obligations under Article 46 and only comply with those obligations if the government and Parliament decides there are "compelling reasons" to do so.

15. Thus s.2 HRA would appear to bind the courts and prevent them from applying the established principle, referred to in many of the judgments discussed above, which says that they must assume that the government intends to abide by its treaty obligations.

16. I find it quite odd that there has not been much, if any, complaint about the fact that the HRA, which has been in force for over 20 years now, allows the UK to violate its treaty obligations under the Convention (which it has done on several occasions), especially in light of the robust criticism the government faced in 2020 when it proposed to enact legislation, in the form of the Internal Market Bill, which would have allowed it to breach the terms of another treaty, the Withdrawal Agreement.

17. In 2009 in *AF (No 3),* at [64] Lord Phillips recognised that it was a matter for Parliament and government to resolve the conflict between the right to a fair trial and national security but then held that the ECtHR had already resolved the issues, by making its decision in *A v UK* and thus the previous reading down of the Prevention of Terrorism Act 2005 by the House should be allowed to stand. At [70] Lord Hoffman appears to have decided that he was obliged to prefer Article 46 over s.2 HRA and to follow the decision in *A v UK*, even though the government and Parliament had not found compelling reasons to comply with that decision, because if the House rejected the decision "*it would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention.*"

18. In 2013 in *Chester,* the Court rejected the Attorney General's invitation to disregard the Grand Chamber's decisions re. prisoner voting rights in *Hirst v United Kingdom* (No 2) (2005) and *Scoppola v Italy* (No 3) (2012) (even though Article 46 didn't apply to the latter),

[11] *MN v Home Secretary* [2020] EWCA Civ 1746 at [49]

but it accepted that it couldn't give effect to those decisions because there was primary legislation, in the form of the Representation of the People Act 1983, which prevented it from doing so and at [39-42] it declined to make a declaration of incompatibility, on the grounds that a declaration had already been made in another case; the issue was already under active consideration by Parliament and there was no possibility of it extending the vote to life prisoners, which the appellant was and thus he did not stand to benefit from any amendments that Parliament might make to the Act to give effect to the Grand Chamber's decision.

19. Then in 2020 in *MN*, the Court of Appeal decided that decisions of the ECtHR which elucidate positive obligations are effectively binding on the courts.

20. So the courts have at times decided that, whether because of Article 46, or s.2 HRA read together with s.6 HRA, they are obliged to follow the ECtHR's decisions, regardless of whether the government or Parliament has felt compelled to give effect to them in legislation, whilst at other times they've decided that they cannot give effect to the ECtHR's decisions, even Grand Chamber decisions against the UK, if there is conflicting legislation.

21. To further complicate the picture, the consistent body of authority discussed above, which says that the domestic courts should ordinarily follow the ECtHR's decisions, has been contradicted by the House of Lords (in *Kay*) and the Supreme Court (in *RJM*) finding that where there is a conflict between domestic authority and decisions of the ECtHR, the domestic courts must ignore the latter and follow the former, regardless of whether the ECtHR's decision post-dates the domestic authority.

22. Inevitably ECtHR decisions against the UK will be pre-dated by conflicting domestic authority, as applicants have to exhaust domestic remedies before applying to the ECtHR. So, if the domestic courts are obliged to follow the domestic authority until such time as a decision is appealed up to whichever court made it (which will ordinarily be the Supreme Court or the Court of Appeal), it could be many years before the domestic courts can take any notice of the ECtHR's decision. That is not consistent with them "ordinarily" following such decisions, rather it creates a situation where they can only follow decisions that didn't involve the UK (and even then, there may be conflicting domestic authority that prevents them doing so). With decisions against the UK, the lower courts have to ignore them until such time as the relevant senior court affirms them, after which the lower courts will just be following domestic authority, as they'd have to do even if s.2 HRA didn't exist.

23. It is hard to understand how the senior courts have decided that the common law principle of *stare decisis* can take priority over the statutory provisions in the HRA or the UK's treaty obligations under the Convention. The only instance I'm aware of when a judge has questioned this state of affairs was in a First-tier Tribunal Freedom of Information case, *Gibbs v ICO and FCO* (EA/2017/0258). In his judgment at [111], FTTJ Thomas said "*At first sight, the proposition that the Tribunal should decline to do what section 2(1) HRA says clearly it must do – to take into account Magyar – is a startling one, and the proposition becomes more startling, not less, when the explanation is that this is what the House of Lords (in Kay) and the Supreme Court (in RJM) says it must do*".

24. He continued at [112] "*the common law proceeds on the basis of precedent, itself reflective of a strict judicial hierarchy. If a higher judicial body says that the law is x, the Tribunal cannot say that it is y; if a higher judicial body says that a particular approach must be taken, the Tribunal cannot plough its own furrow. In the present context, in Kay Lord Bingham said that judicial bodies complied with their section 2(1) duty in the scenario under discussion by giving leave to appeal, including where appropriate by leapfrog to the Supreme Court. With Tribunal decisions, leave would need successively to be given from the Tribunal, the Upper Tribunal and the Court of Appeal for a case to reach the Supreme Court, all of which would take some considerable time*."

25. It seems quite remarkable that the senior courts have decided that a court or tribunal complies with its s.2 duty to "take into account" the ECtHR's jurisprudence by completely ignoring it when deciding the case before them and making a judgment which they know is wrong in law according to that jurisprudence but then considering it when deciding whether to grant permission to appeal the erroneous decision they've just knowingly made.

26. It would appear that the senior courts are so unwilling to surrender some of their own authority to the ECtHR, despite treating the decisions of that Court as effectively binding on the government and public authorities when it suits them, that they came up with this convoluted way to justify requiring the lower courts to prefer their decisions over the ECtHR's, despite having repeatedly held that ordinarily the domestic courts are obliged to follow the ECtHR's decisions.

27. It is inappropriate for the senior courts to effectively rewrite an Act of Parliament, especially one as important as the HRA, because they don't like the idea of the lower courts following the ECtHR's decisions rather than their own. The government and Parliament need to decide what they want the effect of s.2 to be and then amend the Act if necessary to make that clear. If they agree with the court's interpretation, then it could be amended to say:

    "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account [the ECtHR jurisprudence], 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, **unless there is conflicting binding domestic authority, in which case they must ignore [the ECtHR jurisprudence] and follow the domestic authority when determining the question and only take [the ECtHR jurisprudence] into account when deciding whether to grant permission to appeal**"

28. Alternatively it could be amended to say:

    "The Supreme Court, when determining a question which has arisen in connection with a Convention right, must take into account [the ECtHR jurisprudence] and any other court or tribunal must only take it into account when deciding whether to grant permission to appeal"

29. The court's present interpretation of s.2 HRA also raises questions about what public authorities are required to follow when complying with the twin duties under s.3 HRA to i) read and ii) give effect to legislation in a way which is compatible with the Convention rights and their duty under s.6 HRA to act in a way which is compatible with the Convention rights.

30. What are they supposed to refer to when complying with these duties? Any relevant decision of the ECtHR? Only those decisions where the UK was a party and thus Article 46 applies? Or only those decisions where there is no conflicting domestic authority?

31. If it is anything other than the last of these three options, that would mean that public authorities are expected to follow decisions which most domestic courts and tribunals are expected to ignore, which seems unworkable and unjust.

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

32. From the cases I'm aware of, it seems that the domestic courts and tribunals are generally very keen to find a reason *not* to follow the ECtHR's decisions if that would involve departing from the domestic legislation, even in circumstances where the senior courts have held that the HRA empowers them to do so by reading down the legislation[12]. There have been a few occasions where the courts have read down legislation, including primary legislation but generally they seem to dislike doing so and will prefer to make a declaration of incompatibility.

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

33. I haven't seen much evidence of this 'judicial dialogue'. In regards to the Grand Chamber's decision in *Hirst v United Kingdom (No 2)* (2004), which held that the UK's 'general, automatic and indiscriminate' ban on prisoners' voting was in breach of Article 3 of Protocol 1 (as was reaffirmed in subsequent decisions), the government and Parliament simply refused to abide by the decision, despite the best efforts of the Attorney General, Dominic Grieve, to persuade them to comply with the UK's international law obligations, and they continued to do so for 14 years, until the Committee of Ministers capitulated and signed off on a compromise deal in 2018, whereby the UK agreed to amend prison guidance (rather than the offending legislation) to make it clear that prisoners released on Home Detention Curfew can vote, thus extending the vote to about 100 people who aren't actually in prison and thus aren't really prisoners at all.

https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/

[12] *Ghaidan v Godin Mendoza* [2004] UKHL 30 at [25-33]

34. I also note that in *Gibbs v ICO and FCO* (EA/2017/0258) FTTJ Thomas held that the Tribunal was obliged by common law to prefer the Supreme Court's obiter findings in *Kennedy* over the Grand Chamber's decision in *Magyar*, even though the government had told the ECtHR in *Times Newspapers and Kennedy v. The UK* (2018) that the High Court and the Court of Appeal were free to take account of *Magyar* despite *Kennedy* and *Sugar (No. 2)*, and in doing, it had persuaded the ECtHR that the applicant had failed to exhaust domestic remedies. The government's submissions in *Times Newspapers* are summarised in the judgment at [83-88] and the Court's reliance on those submissions is at [107-108].

35. In *D v Information Commissioner* [2020], the Court of Appeal ignored almost every authority cited by the appellant, including 6 Court of Appeal decisions, 17 House of Lords or Supreme Court decisions and 18 decisions by the ECtHR, including 4 where the UK was a party and thus Article 46 applies and obliges the UK to abide by them (2 of which were Grand Chamber decisions) and 3 Grand Chamber decisions where the UK wasn't a party. There is an account of this case here: https://rightsvswrongs.wordpress.com/

36. One of the ECtHR decisions which the Court of Appeal ignored was *Mackay and BBC Scotland v. the United Kingdom* (2010) (Application no.10734/05), which held at [20-22] (reaffirming previous decisions) that the right to report matters stated in open court cannot be described as a right which is "civil" in nature for purposes of Article 6. In disregard of this, the Court of Appeal held that the press and the public have rights under Article 6 to be provided with information placed before a court or tribunal.

37. Despite the government being obliged by Article 46 to abide by *MacKay*, it has done nothing to give effect to it in legislation and the courts have just ignored it, despite there being no legislation which would prevent them following it, in accordance with the UK's international law obligations. It would appear that the domestic courts aren't keen on the ECtHR's decisions when they might affect their own inherent powers to manage proceedings in terms of granting anonymity and restricting access to information, which rather seems to undermine their authority to judge public authorities for breaching the Convention rights, as defined by the Strasbourg jurisprudence.

38. Despite the Court of Appeal having ignored numerous domestic and ECtHR authorities and refusing to consider the grounds which the Upper Tribunal had granted permission for, the Supreme Court refused the appellant permission to appeal, finding that the application did not raise an "*arguable point of law of general public importance*". and the ECtHR subsequently declared the appellant's application inadmissible, finding that it did not "*disclose any appearance of a violation of the rights and freedoms set out in the Convention*".

39. So despite what some people might believe about the HRA protecting the rights of everyone equally, the evidence shows that when they want to the courts will just ignore the law and breach those rights and there's nothing the victim can do about it.

Theme Two

The impact of the HRA on the relationship between the judiciary, the executive and the legislature.

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

40. S.3 applies to all public bodies, not just courts and tribunals, although judicial bodies are of course better equipped to consider difficult questions of interpretation. Nonetheless, all public bodies must comply with the two complementary but distinct duties under s.3 to a) read and b) give effect to legislation in a way which is compatible with the Convention rights, when carrying out their functions.[13]

41. One example of the courts interpreting legislation in a manner inconsistent with the intention of the UK Parliament is how the senior courts have interpreted the s.2 HRA duty to "take into account" to mean "take into account, unless there's conflicting domestic authority, in which case you must follow that and ignore the ECtHR's decision". That may be how the current Government would have chosen to enact HRA but that is not the s.2 that Parliament enacted and if it is to be applied in that way, the Government and Parliament should take responsibility for it and amend it to say that.

42. Another is the case of *D v Information Commissioner,* where the Court of Appeal failed to comply with its duties under s.3 by just ignoring all the ECtHR jurisprudence that was cited in the appellant's submissions.

43. That decision was handed down on 15 May 2020, finding that the appellant had no right to privacy in respect of information about his disabilities, which he had shared with the First-tier Tribunal in order to request reasonable adjustments to enable him to access the Tribunal.

44. On the same day, the Court of Appeal handed down its decision in *ZXC v Bloomberg* [2020] EWCA Civ 611, which held that, prior to being charged, a criminal suspect has a right to privacy under Article 8 in respect of the fact they are subject to a police investigation and the details of that investigation and this outweighs the rights of the press to freedom of expression under Article 10, because publishing such information may damage the suspect's reputation.

[13] *Ghaidan v Godin Mendoza* [2004] UKHL 30 at [106-107]