CoPPA National.

Independent Human Rights Act Review

Response

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INTRODUCTION

COPPA is a multi-disciplinary organisation for professionals working under the Mental Capacity Act 2005 and in the Court of Protection. We have over 1000 members including Independent Mental Capacity Advocates, medical professionals, barristers, solicitors, Deputies and academics, amongst others.

The objectives of the Association are: -

- The development and strengthening of the practice of the Court of Protection, Mental Capacity and Mental Health Law in the jurisdiction of England and Wales.
- To provide a forum for discussion of matters of common interest.
- To ascertain and represent views of members in relation to their professional interests.
- To protect and promote the efficiency of Courts in England and Wales in dealing with matters relating to the Court of Protection.
- To further the understanding and development of the Court of Protection and Mental Capacity and Mental Health Law.
- To develop the facility in England and Wales for the conduct of cases in the Court of Protection.
- The advancement of education of the public and in particular but without limitation to work, to further and improve the knowledge and practice of all persons involved and interested in the law and practice relating to the Court of Protection and mental health and capacity issues.
- To consult and/or make representations, in so far as it may be desirable, with the legislature, executive and judiciary concerning matters pertaining to mental capacity law and policy, mental health law and policy and the Court of Protection and those who administer it.
- To promote best practice by means of high quality training, and the dissemination of information and know-how, to encourage bench marking; though the provision of seminars, conferences and meetings for the discussion of legal and practice issues issues affecting vulnerable adults and young persons, who may lack capacity to make decisions for themselves, their family and carers.

The Executive Committee members are-

Melanie Varey [Co-Chair]
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Overview

The Human Rights Act 1998 is an empowering piece of legislation for the individual, particularly those whose personal care, place residence and intimate relations are planned and managed by the State. The incapacitous adult's daily life disproportionately interfaces with State decision making: doctors, nurses, social workers, local authority employed Deputies and Clinical Commissioning care co-ordinators, care commissioners to name a few.

Under the Act an individual's Convention rights are readily accessible in domestic proceedings open to them, such as applications in the Court of Protection, and the mechanisms for raising proceedings are clear and uncomplicated. The Act is simply drafted and is clear in its terminology. Unlike may statutes the Act has withstood challenge and interpretation without complaint about its structure. Few statutes are successfully navigated, daily, without interpretation issues, as this one is. The Act is a complete and holistic scheme we caution strongly against changes to any one section which risks the undermining of the whole or creating barriers to the seamless navigation of the HRA 1998. We do not support amendments to the Act as foreshadowed by this consultation.

The nature of the public discourse from those proposing changes to the HRA appears to be one of national identity. The HRA is a domestic instrument which provides a portal to universal Convention rights that is no more than enabling citizens to protect themselves from unlawful State interference. The ability of a citizen to hold its government to account is central to the democratic values. Where the citizen is vulnerable and reliant on others for their care and support the processes around their lives and/or which inform decision making about that person must bear the inherent procedural protections of their fundamental Convention rights. Convention rights and the European Court of Human Rights dicta infuse the case law under the Mental Capacity Act but it is the accessibility of those rights created by the HRA 1998 that is the most effective tool in the protection of a vulnerable adult.

We were reminded by the Baroness Hale that "…human rights are for everyone, including the most disabled members of our community, and that those rights include

the same right to liberty as has everyone else"[1] which was a necessary redirection from protectionist tendencies. Any imperative to curb the citizen's right to hold the Government to account by changes to the HRA is misconceived. Any changes contemplated must be viewed from the perspective of exquisitely vulnerable individuals who live their lives under close management by the State and secure their rights to enforce inherent procedural protections, their freedoms and dignity. The HRA scheme does this successfully.

Theme One: Relationship between Domestic Courts and ECtHR

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

There is no need or justification for the amendment of section 2 Human Rights Act 1998.

This review is predicated on the UK remaining part of the Convention and that there will be changes to the Convention rights of UK citizens. The ECtHR interprets the Convention rights by reference to facts before them. Those cases act as helpful illustrations as to what the rights mean and their scope. If, as is contemplated, we will continue to have our Convention rights then their reach and scope must not become out of step with the definitions being applied about the same rights in each Country who is a signatory to the Convention. That risks there being multiple interpretations in different Domestic Courts about the meaning of the Convention words which otherwise have a consistency outside of our borders.

The section 2 duty to take account of the ECHR dicta **is applied** in practice in the Court of Protection and in the vulnerable adult jurisdiction of the High Court Family Division. It is an important part of the development of the ethos of the Court and its caselaw, in our view. It strikes a careful balance between not requiring the European jurisprudence to be precedent binding the UK court rather ensuring that there is a consistency of understanding as to the scope of the rights in the Convention.

[1] P v Cheshire West CC: P & Q v Surrey CC [2014] UKSC 19

By way of example in any case before the Court of Protection where Article 5 is engaged scrutiny as to the necessity of each facet of a highly restrictive care regime is an essential safeguard for the subject, ***Munjaz v United Kingdom [2012] ECHR 1704*** *"[80]…when a person's personal autonomy is already restricted, greater scrutiny must be given to measures which remove the little personal autonomy that is left".* This does no more than signal the direction of travel- autonomy and enabling focus rather than a protectionist one. We do not consider that removing, or limiting our access to, this wealth of assistive dicta can be in the interest of the individual. It may serve the Government but that rests the balance too far away from ensuing human rights for the citizens of the UK, particularly vulnerable adults.

ECtHR dicta are used to extract and apply the principles to be derived from the case and not its factual matrix. We do not see Domestic Courts misinterpreting section 2 and applying European cases as a precedent. Amendment to section 2 is not required.

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?

No change is required.

When addressing whether there has been an infringement of a qualified right we note that the margin of appreciation appears to act affectively as a weight tipping a narrow balance in favour of the State, when Human Rights claims are litigated in the COP. That is not specific to the European caselaw rather to the application of the Convention principles and determining whether there has been an infringement. That said the European jurisprudence setting out the doctrine of the margin of appreciation is considered by the court when faced with this issue, in our experience. The principle of proportionality and necessity are applied in almost every case that comes before the COP and that can, at times involve, consideration as to whether a measure goes beyond what is necessary to meet a specific objective. In those instances, this appears to be another facet of the application of the margin of appreciation principle.

We find that the Court of Protection jealously guards the line between the State's decision making as to allocation of resources to a person and their ability to effect changes to a care plan or placement that the State is willing to commission for them. Lord Brown in R (McDonald) v Royal Borough of Kensington and Chelsea [2011]

UKSC 33, paragraph 16 stated "*the clear and consistent jurisprudence of the Strasbourg Court establishes 'the wide margin of appreciation enjoyed by states' in striking 'the fair balance … between the competing interests of the individual and of the community as a whole' and 'in determining the steps to be taken to ensure compliance with the Convention', and indeed that 'this margin of appreciation is even wider when … the issues involve an assessment of the priorities in the context of the allocation of limited state resources'*". This has become embedded in the principles applied by the COP judges when determining disputes which turn on the available options.

The Supreme Court in N v A CCG [2017] UKSC 22 emphasised that the Court of Protection has no more power to create an option (care package/place of residence/support for contact) than the individual himself "*35. So how is the court's duty to decide what is in the best interests of P to be reconciled with the fact that the court only has power to take a decision that P himself could have taken? It has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the "available options". In this respect, the Court of Protection's powers do resemble the family court's powers in relation to children*."

Obiter, Baroness Hale went further preserving the State's entitlement to take public law decisions accounting interest outside of the individual and the Court should not lightly interfere with that *"37. Other service-providing powers and duties also have their own principles and criteria, which do not depend upon what is best for the service user, although that will no doubt be a relevant consideration. The Care Act 2014, which is not relevant in this particular case but will be relevant in many which come before the Court of Protection, creates a scheme of individual entitlement to care and support for people in need of social care. But it has its own scheme for assessing those needs (section 9) and its own scheme for determining eligibility (section 13) and then deciding how Page 15 those eligible needs should be met (section 24). The Act even provides for the possibility of introducing appeals to a tribunal (section 72), although this has not yet been done. The National Health Service also has its own processes for assessing need and eligibility, albeit not in a legislative context which recognises individual legal entitlement. Decisions can, of course, be challenged on the usual*

judicial review principles. Decisions on health or social care services may also engage the right to respect for private (or family) life under article 8 of the European Convention on Human Rights, but decisions about the allocation of limited resources may well be justified as necessary in the interests of the economic wellbeing of the country (see McDonald v United Kingdom [2015] 60 EHRR 1). Here again, therefore, the legal considerations, both for the public authority and for the court, are different from those under the 2005 Act."

This is the doctrine of the margin of appreciation in action in domestic courts and it is applied without complexity nor hesitation, in our experience.

Theme Two

The second theme considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature. The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy. We would welcome any general views 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. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

We refer back to the last answer. The jurisprudence from the Court of Protection, judicial reviews under the scheme of community care legislation and the vulnerable adult jurisdiction of the High Court treads a fairly careful line of respecting the public functions of the State and the rights of the individual. Where an application to the COP is being utilised as device to bring about changes to local government resource decision making the Court is reluctant to entertain the continuation of the case, Baroness Hale in N v A CCG stated "*44. This was not a case in which the court did not have jurisdiction to continue with the planned hearing. It was a case in which the court did not have power to order the G to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those circumstances, the court was entitled to conclude that, in the*

exercise of its case management powers, no useful purpose would be served by continuing the hearing."

In a jurisdiction predicated upon welfare principles the temptation to adopt the most protective course for the subject of the application is discouraged and adherence to procedural and legal principles is encouraged, the former Vice President of the COP, Charles **J** observed in *B v A (Wasted Costs Order) [2012] EWHC 3127 (Fam), [2013] 2 FLR 958* , at paragraph 11), *"… there is a natural temptation for applicants to seek, and for courts to grant, relief to protect the vulnerable …. But this temptation, and the strong public interest in granting such relief, does not provide an excuse for failures to apply the correct approach in law to such applications. Indeed, if anything, the strong public interest in providing such relief and its impact on the subjects of the relief and their families mean that the correct approach in law should be followed and so the sound reasons for it, based on fairness, should be observed."*

These canons provide a framework within which Court of Protection applications and the Mental Capacity Act decision making framework is navigated on a daily basis without intruding on policy considerations, for the most part. Though there have been attempts to use of HRA claims as a device to sidestep this framework has not been successful in our members experience the Court does not allow the MCA functions to become conflated with public law issues.

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

No, we do not support changes to sections 3 and/or 4 of the HRA 1998.

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)?

If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

Section 3 should not be amended or repealed.

Pursuant to section 19(1) of the HRA all statutes enacted after the HRA came into force carry a certificate of compatibility with Convention Rights. Thus the exercise of auditing compatibility is the domain of the legislator in the first instance then Parliament by enactment. Interpretation of a statute by the court only requires the judiciary and others to read the section compatibly which is the objective of both the legislator (by their certificate) and Parliament (in enacting and ensuring certification before doing so). Section 3 places no greater emphasis on compatibility with Convention Rights than the executive and parliament ought to. The Supreme Court has set clear limits on the use of the section to prevent judicial 'amendment' to legislation. We note that a case relating to a challenge under the Care Standards Act 2000 about the blacklisting [PVA list] of carers who were deemed unsuitable to work with vulnerable adults provided Baroness Hale with fertile ground to set out where the red lines are. In R (On the application of Wright and others) (Appellants) v Secretary of State for Health and another (Respondents) [2009] UKHL 3 Baroness Hale concluded that the procedure adopted failed to meet the protections required by Article 6 "*No other solution could properly be adopted by way of the interpretative obligation in section 3(1) of the Human Rights Act 1998*". *I would therefore return to the solution adopted by Stanley Burnton J and make a declaration that section 82(4)(b) of the Care Standards Act 2000 is incompatible with the Convention rights*. *However, I would not make any attempt to suggest ways in which the scheme could be made compatible. There are two reasons for this. First, the incompatibility arises from the interaction between the three elements of the scheme - the procedure, the criterion and the consequences. It is not for us to attempt to rewrite the legislation. There is, as I have already said, a delicate balance to be struck between protecting the rights of the care workers and protecting the welfare, as well as the rights, of the vulnerable people with whom they work. It is right that that balance be struck in the first instance by the legislature*."

We submit that the development of the law provides protection against the encroachment of the judiciary into legislative drafting.

Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

No.

Section 4 protects Parliamentary sovereignty. At all times Parliament remain in control of the legislation and whether it will be amended, repealed or changed in any way. The declaration cannot act retrospectively thus exposing the State to liability. The enactment is extant and valid, applicable law whilst the declaration is considered by the Executive.

What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

Derogation under the HRA and the ECHR are distinct from each other. Derogations under the HRA are an exercise of a statutory power. The State is the only party who can give notice of a derogation. Derogations can be challenged on normal judicial review grounds. We see no deficit requiring a change here.

Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

No change is required. The remedies exist.

Where an incompatibility cannot be remedied because of a provision of primary legislation it is only then that a declaration can be made.

Outside of that instance the domestic courts have powers to grant quashing orders or disapply the incompatible secondary legislation, to name a few remedies available. This is the situation for all legislation. This is not unique to the HRA.

The power to quash secondary legislation is an established remedy in administrative law. There can be limited justification for a change to that remedy. As long as it remains the courts are able to quash subordinate legislation in a suitable case.

Conclusion

The accessibility of the Convention to vulnerable adults and their families is a vital tool to ensure that no one person is prevented from distinguishing themselves from the community and seeking to have their individuality, liberty and bodily physical and psychological integrity promoted and protected. The dilemma for the vulnerable adults in State care is best illustrated by the current Vice President of the Court of Protection when addressing an application[2] under the Mental Capacity Act 2005 by a man seeking to be with his wife whom he had been separated from in excess of 15 months due to visiting restrictions in her care home(s) "*For those in care homes, perhaps more than any other, deprivation of contact with loved ones has the potential to corrode quality of life to such a degree that, it may become difficult to evaluate where the balance of harm lies, as between a risk of exposure to an insidious and life threatening virus and compromising the most basic quality of life. Into this equation of competing interests must be factored the moral imperative to protect a group as well as an individual. These countervailing interests each require consideration. This cannot be regarded as an either-or situation. The fact that the interests of an individual and those of the wider group are difficult to reconcile, perhaps frequently irreconcilable, does not absolve the care home, or the state more generally, from engaging in the effort to do so. The strength of the obligation to protect the rights of the individual, particularly the vulnerable and mentally incapacitated, i*s not in any way diminished by the pandemic health crisis; it is, if anything, enhanced."

Human Rights legislation allows the individual to raise challenge where the balance has been struck disproportionately against their rights. In our members' experience the Convention rights imperative are so infused throughout the dicta of the Court of Protection it is neither necessary, nor possible, to determine where domestic and European principles begin and end. As the aforesaid dicta make clear these are basic principles which enhance the protections available to the most vulnerable in society.

3 March 2021

[2] Michelle Davies v Wigan CC & NHS Wigan CCG [2020] EWCOP 60