The Independent Human Rights Act Review

Response of Bhatt Murphy Solicitors

1. Introduction

1.1. Bhatt Murphy is a team of legal aid lawyers who work together to make a contribution to the protection of human rights, civil liberties and access to justice. We offer specialist representation to often vulnerable members of the public who seek accountability from public authorities. Our focus includes immigration authorities, mental health providers, social services and criminal justice agencies. A core element of our work is assisting clients to combat discrimination in all its forms. We are motivated by the needs of our clients and use the law as a tool to assist in the realisation of their objectives. We aim to deliver a high quality legal service irrespective of our client's ability to pay. We seek to contribute to the progressive development of the law and to the protection of human rights and civil liberties outside the courts.

1.2. Our clients come from all sections of society. Recent Human Rights Act ('HRA') challenges in which we have acted range from the Supreme Court's decision that aspects of the law on abortion in Northern Ireland were in breach of Article 8 ECHR[1] to the grant of a lifelong worldwide injunction preserving the anonymity of two prisoners who committed murder as children pursuant to Articles 2 and 8.[2]

1.3. The overarching experience of our client group is that the HRA is working well in providing essential protection and redress to the most vulnerable members of society. Without the HRA, those citizens, including victims of crime, those who die in custody, detainees, protestors, prisoners, and privacy campaigners would be left without any domestic remedy for human rights violations in this jurisdiction. The HRA operates as an important tool of accountability and as a reminder to all public authorities to respect the human rights of the communities they serve. Over the past twenty years, the HRA has acted as a vital check on the abuse of state power and as a means of redressing inequity. It is important that it continues to perform that function.

1.4. As specialists in HRA litigation before courts at every level, we have generally been encouraged by the skill and agility employed by the judiciary in using the HRA to bring human rights home. It is not our view that the HRA requires any fundamental

[1] Northern Ireland Human Rights Commission v Attorney General of Northern Ireland & Anor [2018] UKSC 27

[2] D&F v Persons Unknown [2021] EWHC 157 (QB)

change and we are not aware of any call for change from those who act for the victims of human rights violations.

1.5. We have had the benefit of considering the response to this consultation by the Police Action Lawyers Group ('PALG'), with which we agree.

2. Theme One: The relationship between domestic courts and the European Court of Human Rights

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

2.1. In our experience, the duty on domestic courts to take into account Strasbourg jurisprudence generally works well in practice, with section 2 providing a helpful aid to interpretation and compliance with the Convention.

2.2. By way of example, in *O v The Commissioner of the Police for the Metropolis* [2011] EWHC 1246 (QB), a domestic court found for the first time in this jurisdiction a breach by a public authority of Article 4 ECHR: the prohibition on human trafficking and forced labour. The case concerned a police failure to investigate credible allegations of human trafficking made by four Nigerian children.

2.3. In the absence of any domestic authority, the police argued that the delineation of the investigative duty under Article 4 should be informed by analogous Strasbourg case law and domestic common law. The High Court accepted that aspects of Strasbourg jurisprudence in relation to the Article 4 operational duty were relevant to the scope of the investigative duty, including regarding police resources; however, then Williams J. rejected the argument that the investigative duty ought to be defined by reference to the common law of England and Wales on the basis that:

> *"158. An actionable duty to investigate alleged breaches of arts 2, 3 and 4 arises only by virtue of the Convention. For all practical purposes no actionable duty to investigate crimes, even crimes amounting to breaches of those Articles, exists in the common law of England and Wales. That state of affairs is dictated, essentially, by policy reasons. I simply do not see why policy reasons...can be used to justify the emasculation of the investigate duty which arises under arts 2, 3 and 4 of ECHR".*

2.4. Importantly, in arriving at this decision Williams J. recognised that:

> *"160...my duty is to take account of the jurisprudence of the European Court. I am not obliged by the Human Rights Act 1998 to adhere to it come what may..."*

2.5. This judgment illustrates the utility of the HRA both, in providing protection for victims of child trafficking without any recourse to redress under the common law, and by ensuring the observance of fundamental human rights over matters of domestic policy. It provides a clear example of why the HRA is needed in this jurisdiction, and of how section 2 operates to protect Convention rights from inappropriate policy considerations. Any dilution of the section 2 duty risks eroding the intrinsic purpose of the HRA.

2.6. By way of a further example, in *ZH v Commissioner of Police* [2013] 1 W.L.R 3021 (2013), a domestic court found for the first time in this jurisdiction a breach by the police of the Article 3 ECHR negative duty: the prohibition on inhuman or degrading treatment. The Court also found the police in breach of Articles 5 and 8. The facts concerned the police restraint of a disabled child in a swimming baths during a school trip.

2.7. The police appealed to the Court of Appeal essentially on the basis that the judgment unreasonably interfered with the operational discretion of the police and made practical policing impossible. Following a detailed review of domestic and Strasbourg authority, Lord Dyson MR (as he then was) held as follows:

> "*90. I accept that operational discretion is important to the police. This was recognised by the judge. It has been recognised by the European Court...But operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything...*"

2.8. In employing the HRA to check this abuse of police powers, the Court of Appeal's analysis of the case law focused, not on whether a judgment was domestic or European in origin, but on the emerging "statements of principle" across both sets of jurisprudence [75]. This is indicative of the sensible approach adopted by the vast majority of judges to the increasingly porous borders between domestic and European human rights law. There is no need for an amendment of section 2 HRA.

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

2.9. It has been our experience that the domestic courts have been very rigorous in relation to the margin of appreciation that is afforded to the United Kingdom. The famous comment of Lord Rodger in *Home Secretary v AF* [2009] UKHL 28 that: "*Argentoratum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed" [98] was made in the context of an explicit disagreement between the ECtHR and the domestic courts on the same case. This is a rare situation and it is clear that the domestic courts in fact guard the considerable margin of appreciation that is afforded to mature and developed legal systems of member states jealously.

2.10. The current position is helpfully summarised in the recent decision in R *(Stott) v Secretary of State for Justice* [2018] UKSC 59 where it was stated that:

"The starting point for a determination of these questions is that the ECtHR would allow a Contracting State a margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify different treatment, and would allow a wide margin when it comes to questions of prisoner and penal policy, although closely scrutinising the situation where the complaint is in the ambit of article 5. <u>This court must equally respect the policy choices of parliament</u> in relation to sentencing." (emphasis added) [153]

2.11. This issue was also illustrated by the long running prisoner voting cases. Despite the popular characterisation of the judgment in *Hirst v UK (No 2)* (2006) 42 EHRR 41 as requiring prisoners to be given the vote, the decision in fact simply required the domestic legislature to consider and affirm the rationale for removing voting rights from convicted prisoners. This was eventually resolved in a far more restrictive manner than virtually every other member state without any difficulty.

2.12. It is arguable that this expansive interpretation of the margin of appreciation, afforded to the domestic courts runs the risk of creating a two tier system in relation to the enforceability of ECtHR judgments (discussed below). However, it is clear that the approach of Lord Rodger in *AF* is not the current position of the Supreme Court. In *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, although Lord Reed adopted a similar position, he was in the minority with the majority view rejecting this approach. Lord Wilson commented that he *"cannot subscribe to the ECtHR analysis in this area, despite the high professional regard in which he holds its judges, the desirability of a uniform interpretation of article 6(2) throughout the states of the Council of Europe"* [94].

(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?

2.13. In the *Adams* case (above), Lord Wilson expressed his concern that there is little room for further constructive dialogue between the domestic courts and the ECtHR. This is a pessimistic view, unrepresentative of the ongoing dialogue that does exist.

2.14. For example, following the Grand Chamber decision in *Vinter v UK* (2013) 63 EHRR 1, which expressly disagreed with domestic judicial findings on whole life sentences, the matter was revisited by the Court of Appeal in *R v McLoughlin* [2014] EWCA Crim 118. The Court of Appeal criticised the lack of understanding of the domestic law and affirmed that domestic law did in fact protect the Article 3 rights in question. This decision was subsequently affirmed by the ECtHR in *Hutchinson v UK* (App No 65792/08, 17 January 2017).

2.15. One of the key difficulties in promoting and enhancing that dialogue is that where there is apparent disagreement between domestic and ECtHR judgments, the issue can only be resolved by new cases being brought which requires particular facts to be established and the issue to be litigated exhaustively causing considerable expense. It is suggested that there should be consideration to the Supreme Court

having the power to issue advisory opinions, similar to the ECJ, in cases where there is a clear departure between domestic and Strasbourg decisions.

3. Theme Two: The impact on the HRA on the relationship between the judiciary, the executive and legislature?

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

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

3.1. It has been our experience that the courts have demonstrated the utmost caution to ensure that Parliamentary intention is not undermined by their interpretative powers and that no changes are required. We can illustrate this with three examples from cases that we have taken or been closely involved with all involving the same issue: the question of which body or person has the power to make determinations concerning the sentencing and early release of prisoners.

3.2. In circumstances where the challenge has been made to a legislative power that is fundamental to the decision making process, the courts have been very clear that the only remedy available is a declaration of incompatibility so as to ensure that the intentions of Parliament are respected. For example, in *Anderson* [2002] UKHL 46, following a finding of a breach of Article 6, the House of Lords were requested to read and give effect to a legislative provision through the interpretative power of s 3(1). In the lead judgment, Lord Bingham noted that even though Parliament had not sought to prescribe the relevant procedures to be followed, the power in question had been vested in the Home Secretary and that: *"It cannot be doubted that Parliament intended this result when enacting section 29 and its predecessor sections"* [30]. In consequence, the only appropriate remedy was a section 4 declaration.

3.3. A similar conclusion was reached by the Court of Appeal in the case of *Black* [2008] EWCA Civ 359[3]. This again was a challenge to a legislative provision that required the Home Secretary to perform a particular function relating to the release of prisoners. Again, the appropriate remedy identified by the court was a declaration of incompatibility pursuant to section 4

3.4. By contrast, in cases where the finding of a violation of Convention rights relates to a procedural issue but did not disturb the intention of Parliament in relation to the identity of the decision maker, a remedy under section 3 was considered appropriate. In *Hammond* [2004] EWHC 2753 (Admin), legislation required the High Court to re-set the sentences imposed on prisoners serving life sentences. The

[3] NB the decision on the substantive issue was subsequently over turned by the House of Lords: [2009] UKHL 1

legislative provision that this process would be undertaken as a paper exercise with no oral hearing was challenged. Having found that the provision in question infringed the requirements of Article 6, the Divisional Court concluded that the provision should be read to allow discretion for an oral hearing as: "it is compatibility under s 3(1) of the 1998 Act the court must, if possible, achieve and not a subsequent remedy for that incompatibility" [33].

3.5. The decision was upheld on appeal. The House of Lords suggested that this was a "bold exercise in 'interpretation'" but noted that the Home Secretary had not sought to challenge the remedy granted ([2005] UKHL 69 @ 29). This case is perhaps illustrative of the limits of what the courts have found to be permissible under section 3 and the House of Lords made it fairly clear that had the Divisional Court's finding on the limits of this power been challenged, it would have bene likely to side with the Secretary of State. However, given that the amendment was purely to the procedural steps to a decision, it is clear that the Secretary of State found it more convenient for there to be a judicial remediation of the problem hence the decision not to appeal.

ii) 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?

3.6. N/a

iii) Should declarations on compatibility (under section 4 HRA) 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 can be addressed?

3.7. We adopt the submissions made by PALG in response to this question.

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

3.8. We adopt the detailed submissions made by PALG in response to this question.

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

3.9. We do not consider that this is an issue that causes any difficulty, legally or constitutionally. The domestic courts have always had the power to review the legality of subordinate legislation (see eg: *R (Howard League) v Lord Chancellor* [2017] EWCA Civ 244).

(d) In what circumstances does the HRA apply to act of public authorities taking place outside the territory of the UK? What are the implications of the current positon? Is there any place for change?

3.10. We adopt the detailed submissions made by PALG in response to this question.

(e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

3.11. We adopt the detailed submissions made by PALG in response to this question.

BHATT MURPHY

REF: SC/TM

3 MARCH 2021