IHRAR- Call for Evidence

The response of the Metropolitan Police Service and the National Police Chiefs' Council

This submission responds to the call for evidence by the Independent Human Rights Act Review, dated 13 January 2021. It focuses exclusively on theme one of the review, as set out below:

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

As noted in the Terms of Reference, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

We 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.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

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?

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?

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?

Introduction

1. The MPS and NPCC on behalf of policing in this country welcomes the opportunity to contribute to the Independent Human Rights Act Review. Human rights are welcomed and strongly supported by policing. A new recruit's career begins with a confirmation of this - the police oath requires officers to declare and affirm they will uphold human rights.

2. Parliament has passed a substantial amount of legislation concerning police powers over the past 20 years, much of which has involved a careful assessment of its compatibility with the Convention rights. This parliamentary process has enhanced the quality of operational policing through devising procedures which are aligned with the requirements of our working practices and the institutional structures which provide supervision and oversight. For example, the manner in which the Investigatory Powers Bill was drafted, in consultation with operational agencies and civil society, created a powerful framework to protect human rights, whilst also ensuring the public's interest in their protection from crime is maintained.

3. It is our overall view and core concern that the Human Rights Act 1998 ("the HRA") has developed in a manner which was not envisaged when passed. This has resulted in insufficient recognition being paid by our domestic courts when taking account of Strasbourg jurisprudence, as is required under s2 of the HRA, to the **necessary requirements of operational policing** and the delicate **balance of rights and duties** arrived at by statute and the common law.

4. When the HRA was passed there was an intention of judicial dialogue between the Strasbourg Court and our judiciary. As the White Paper for the HRA noted "*British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe."* However this has not materialised as it might have done. The panel is of course well aware of the jurisprudential approach taken by our courts to Strasbourg decisions, most authoritatively set out in *R (Ullah) v Special Adjudicator [2004] 2 AC 323*.

5. What this has meant in practice is that Strasbourg caselaw is effectively transposed into English and Welsh law, without appropriate consideration of domestic circumstances. Civil courts sometimes tend to ask simply what the ECtHR position is and then to apply it. The operation of s2 of the HRA is far removed from what Parliament intended when the HRA was passed. It requires:

   ' [a] court or tribunal determining a question which has arisen in connection with a convention right must ***take into account any [Strasbourg jurisprudence****, including in particular a 'judgment… of the European Court of Human Rights'], 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.'*

   Had the intention been for the courts to follow the current approach, one would expect s2 of the HRA to have had rather more directive and peremptory language.

6. As will be demonstrated, our domestic courts have adopted a different position in respect of civil law claims from that in criminal cases. It is our position that this approach should be adopted in the civil space as well.

Positive duties under the ECHR and their application to civil claims against the police

7. The three principal civil cases concerning the police which are of particular relevance to the panel are:

   i. *OOO v the Commissioner of Police of the Metropolis [2011] – This created an operational duty to investigate credible allegations which engaged Article 4 (ie allegations of human slavery). Significant failures of a systemic or operational nature will give rise to an award of damages.*
   ii. *DSD v the Commissioner of Police of the Metropolis [2018]– This created a duty to carry out an investigation into credible allegations of a breach of article 3. Significant failures of a systemic or operational nature will give rise to an award of damages.*
   iii. *Zenati v the Commissioner of Police of the Metropolis [2015]. This held that article 5 could be breached by a defendant's continued detention after the police became*

aware that there were no longer grounds for the charge but failed to communicate the same promptly to the prosecuting authorities or to the court.

8. These cases have substantially changed the position in respect of civil liability for police forces. In each the legal basis was effectively Strasbourg jurisprudence. A detailed consideration of the application of such principles in domestic circumstances did not take place. In effect the submissions made in the proceedings went to whether there was a particular reason why ECHR caselaw should not be applied rather than whether there was a reason to impose liability, bearing in mind domestic circumstances.

9. The first instance of a positive investigative duty being established by the court was OOO. In this matter the High Court noted that *"the circumstances would be rare in which the domestic court declined to follow the lead of the European Court when the principles in question had been clearly established in that court. In my judgment the principles relating to the scope of the investigative duty arising under Article 4 are settled in the European Court. There is* ***no reason, and certainly no sufficient reason, for me to define the scope of the investigative duty which arises under Article 4 in any way which is different from the definition of the scope of the duty provided by the European Court****."* The case is a good example of how little substantive questioning of the ECtHR rationale takes place in domestic courts. It was noted that circumstances are rare in which the domestic court declines to follow the lead of the ECtHR when the principles in question had been clearly established by the ECtHR. In effect if the ECtHR speaks clearly, our courts follow. In this way a new domestic right was created upon reliance of ECtHR authority.

10. The case of DSD [2018] was also largely derived from ECtHR jurisprudence and effectively overturned the common law public policy position (established in *Hill v Ch Const West Yorks*, a case about the Yorkshire Ripper) that it was inappropriate for a police body to owe an operational duty to all members of the public to prevent certain crimes from taking place. The manner in which this issue was approached by the Supreme Court is instructive. 18 paragraphs of Lord Kerr's judgment considered the ECHR jurisprudence. A further eight paragraphs evaluated if there was a clear and consistent line of authority. Only one paragraph is spent by Lord Kerr considering the merits of such a duty being applied to this jurisdiction. He stressed that "*The police either have a protective duty under article 3 or they do not.* ***The presence of the duty cannot depend on one's conception of whether it is fair, just or reasonable for it to exist****."* The same approach largely is followed by the other members in the majority – see for example para 87 where Lord Neuberger and Lady Hale are effectively determining the case in reliance of their determination of what the Strasburg Court would do.

11. In a strong dissent from the narrow majority, Lord Hughes traced the successive glosses applied by the Strasbourg court to the right of the individual under article 3 of the Convention not to be subjected by the state to torture or to inhuman or degrading treatment or punishment. The first, in *Assenov v Bulgaria* [1998] was to extend this right to a duty on the state to investigate and punish state agents arguably responsible for such abuse. The second was to extend that principle into a positive duty to prevent such ill-treatment by third parties, ie non-state actors. This was initially decided in *Osman v UK* [1998], and has subsequently been extended from a preventive duty to a retrospective responsibility to investigate past violence by third parties in *MC v Bulgaria* [2005]. So a right not to be subjected to torture or

inhuman/degrading treatment by the state has developed into a duty on police to investigate reported past violence by third parties.

12. The issue in DSD as stated by Lord Hughes should not be 'a test of ex post facto assessment of whether the investigation was careless or made mistakes which ought not to have bene made…when the complaint is that an investigation could and should have been done better'. In para 132 , he went on to make these remarks, touching as he did so on the implications for counter terrorist investigations and the prevention of knife crime:

*'… **law enforcement and the investigation of alleged crime involve a complex series of judgments and discretionary decisions. They concern, amongst many other things, the choice of lines of inquiry, the weighing of evidence thus far assembled and the allocation of limited resources as between competing claims. To re-visit such matters step by step by way of litigation with a view to private compensation would inhibit the robust operation of police work**, and divert resources from current inquiries; it would be detrimental to, not a spur to, law enforcement. It is not carrying out the impugned investigation efficiently which is likely to lead to diversion of resources; on the contrary. It is the re-investigation of past investigations in response to litigation which is likely to do so. ….*

*In short, **the public duty would be inhibited by a private duty of such a kind**. A contemporary example can be seen in terrorist activity. It is well known that large numbers of possible activists are, to some extent or other, known to the police or security services. The most delicate and difficult decisions have to be made about whom to concentrate upon, whose movements to watch, who to make the subject of potentially intrusive surveillance and so on. It is in no sense in the public interest that, if a terrorist attack should unfortunately occur, litigation should become the forum for a review of the information held about different suspects and of the decisions made as to how they were to be dealt with. Nor is it difficult to see that it is by no means necessarily in the public interest that there should be pressure on the authorities, via the prospect of litigation, to ratchet up the surveillance of additional persons. The long-standing controversy over police use of powers of "stop and search", for instance in relation to the carrying of knives by youths, affords another example.'* [emphasis supplied]

13. The caselaw cited in *DSD* came from very different jurisdictions. The institutional structures in this country that exist to protect people from serious violations of their integrity are robust. This is not being sufficiently recognised when courts entirely accept the Strasbourg jurisprudence. To advance standards within policing there are regulators and inspectors (whether the IOPC or Her Majesty's Inspectorate of the Constabulary). In terms of compensation for victims of crime, Parliament created the criminal injuries compensation scheme. In the event that operational errors in the investigation of crime occur, appropriate redress can be obtain from these organisations, which were created by parliament for that purpose.

14. The post *DSD* developments have illustrated the difficulties in not entering into full dialogue with Strasbourg. In *DSD* it was noted that none of the ECHR cases the Supreme Court relied upon mean that "*a painstaking, minute examination of decisions taken by police*" was required. It is the NPCC experience that positive duty claims lead to precisely such examinations. Indeed, it is difficult to understand how civil litigation under the Civil Procedure Rules could lead to anything else. The wholesale importation of the positive duty

jurisprudence to create new obligations for investigative bodies, without consideration of the domestic framework, leads to real difficulties.

15. Another example of this jurisprudential approach expanding civil liability for law enforcement bodies and the CPS is *Zenati v Police of the Metropolis & Anor [2015]*. *Zenati* was a decision of the Court of Appeal which found that a cause of action could be brought under Article 5 of the ECHR in respect of the period of criminal detention, regulated by our domestic courts. As with *DSD*, this has resulted in a new species of civil claim which was unheard of before *Zenati*. It is the experience of the NPCC that this decision has effectively resulted in criminal investigations being painstakingly evaluated in minutiae which has operational consequences for the police.

16. The case was decided almost entirely relying upon ECtHR jurisprudence, allowing an appeal brought against the Met on the basis of the right to liberty under article 5, ECHR, while dismissing the appeal separately based on a breach of the common law tort of false imprisonment. There are approximately 20 mentions of the ECtHR position in a 65 paragraph judgment. The decision was largely made in reliance on a Strasburg decision known as *Clooth v Belgium* (1992) 14 EHRR 717. No substantial consideration was given as to whether this was an appropriate decision to be made on its own merits. In effect a significant change to the law was made by following the ECtHR.

The criminal law

17. Whilst the civil courts substantially defer to Strasbourg in construing the Convention, our courts occasionally operate rather differently in the criminal field. A key decision in this area is *R v Horncastle and others [2009] UKSC 14*. In *Horncastle* the Supreme Court rejected a Strasbourg decision, albeit it was not a decision of the Grand Chamber. The result of this refusal to follow the Strasburg decision meant that the issue was considered fully by the Grand Chamber in *Al Kawaji v UK [2012].* This led Strasbourg to think again, enhancing the decision making process of the Court.

18. It could be said that *Horncastle* is a decision which demonstrates dialogue takes place between domestic courts and Strasbourg. This is correct, but does not reflect the entire picture. There are no other decisions where the Supreme Court has sought to directly challenge a Strasbourg decision. Other cases are largely questioning whether there is a consistent line of authority.

19. There is another notable decision - *Ismail Abdurahman v R [2019] EWCA Crim 2239*. This was a challenge made to a conviction relating to the 2005 terrorist attacks in London. Despite a Grand Chamber decision in favour of Mr Abdurahman, the Court of Appeal (Criminal) rejected an appeal against conviction. Indeed in Abdurahman the Court of Appeal expressly stated it preferred the minority in the Grand Chamber when rejecting the appeal. The difference in approach between the criminal appellate courts and civil appellate courts is striking.

20. In effect the criminal courts recognise the societal impact is balanced when making a human rights adjudication. If the rights of a defendant take precedence, this has implications for

other parties; ie victims or prospective victims. There may also be a recognition that the (largely) jury based and adversarial criminal justice system in England, Wales and Northern Ireland differs markedly from the continental European criminal systems shared by most member states of the Council of Europe to which the Convention applies. This is lacking by contrast when the civil courts fail to seek any dialogue with Strasbourg. It is suggested that just as there are implications for the community from an expansive construction of the Convention in a criminal space, the same applies within the civil sphere.

The consequences of the approach

21. The result of *DSD* and *Zenati* is that frequent claims are now made in reliance upon the positive obligations. Not only are many claims now brought, but they are expensive and resource heavy to deal with. They entail substantial review of correspondence, investigative steps and evidential inquiries. Letters of claim frequently exceed 20 pages of length, despite Lord Kerr's suggestion that they would not require *"a painstaking, minute examination of decisions taken by police".* This is precisely how such claims are conducted.

22. It is also our experience that damages, which of course are paid from police budgets, have been increasing upwards. HRA claims were not meant to be about compensation. This was noted by the Supreme Court in *Van Colle v Chief Constable of Herts Police [2009] AC 225*, where it was held that "*Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights. That is why time limits are markedly shorter".* However frequently arguments are advanced that tortious damages should be obtained (see the case of *Alseran v Ministry of Defence [2017] EWHC 3289*).

23. There is another issue that arises from the incorporation of Strasbourg principles without sufficient regard to the domestic position. English law requires causation before establishing liability in tort or contract. In HRA claims, there is no need to prove that breach of the Convention caused loss. Even if an investigative step would have made no difference, a failure to take it can give rise to a claim. Although causation goes to the quantum of compensation, it is our experience that courts do not make awards of nominal damages in HRA claims. In any event, even a claim for a declaration can lead to substantial costs being sought from law enforcement resources.

24. Widening the scope of civil liability inevitably leads to a lack of operational autonomy for police bodies. It also results in a position where monies which could be used to fund core police activities are redistributed to some classes of victims of crime, due to harm carried out by criminals.

25. The legal costs alone of a *DSD* or *Zenati* type claim, even if settled before a response is sent, can readily be £50,000. As such claims tend to be legally aided, no cost recovery can be made by police forces in the event of success. Substantial amounts of policing funds are paid on costs associated with such claims.

Closing Submission

26. It is suggested that the operation of s2 needs to be reconsidered by government and if necessary recast to reflect the original Parliamentary intention in 1998. The rule, introduced in the interests of judicial comity, coherence and perhaps tidiness, to 'follow any clear and constant jurisprudence of the ECtHR' in *Alconbury* [2003], and to 'keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less' per Lord Bingham in *Ullah* [2004], is arguably now out of control and in danger of creating bad law that is unfit for the protection and preservation of human rights in the UK. Caselaw has gone beyond the statutory requirement upon our courts to take account of Strasbourg jurisprudence only in so far as in their opinion is relevant to the proceedings in question. Amendment may now be needed explicitly to ensure that **in complying with s2 the courts are subject to an overarching duty to do justice as between the parties to the case**.

27. In any event, our courts should be encouraged to enter into a real dialogue with Strasbourg, even if faced with Grand Chamber decisions. British institutional structures should be considered by the judiciary and raised with Strasbourg. The precedent of *Horncastle* shows that this can work satisfactorily and that there is a two way street. This would ensure that not only are rights brought home, but that they work sensibly, practically and sensitively alongside both the careful protections developed in our statute and common law, and the regulatory and oversight bodies established by Parliament.