



Law Society
of Scotland

The Law Society of Scotland's Response

Joint Committee on Human Rights - The
Government's Independent Human Rights Act
Review

March 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the Joint Committee Inquiry on Human Rights the Government's Independent Human Rights Act Review. The sub-committee has the following comments to put forward for consideration.

General Introductory Comments

Human rights litigation is dealt with slightly differently in Scotland from in other parts of the UK.

The Independent Inquiry is into the Human Rights Act 1998 (HRA) but it is important to point out at the outset that questions as to whether Acts of the Scottish Parliament ("ASP") or subordinate legislation or other executive acts by Scottish Ministers are incompatible with Convention rights, are usually not dealt with under the HRA (although they could be) but under the Scotland Act 1998 (SA).

Under section 29(1) and (2) (d) of the SA, a provision in an ASP is "not law" if it is incompatible with any of the Convention rights. Accordingly, any challenge to a provision in an ASP on the grounds that it is incompatible with a Convention right is a "devolution issue" and, as such, requires to be brought under the SA. This is so even although an ASP also is included in the definition of "subordinate legislation" in section 21 of the HRA and so could also be regarded as unlawful under section 6(1) of HRA.

Similarly, under section 57(2) of the SA, a member of the Scottish Government has "no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights." Accordingly, any challenge to such an act on that ground can be brought under the SA even although that act is also unlawful under section 6(1) of the HRA.

It was originally held by the Privy Council that the challenge to executive acts by a member of the Scottish Government had to be brought under the SA (see *R v HMA 2002 UKPC D3 Lord Rodger at para 128*) but it was later held by the House of Lords that it could be brought under either Act but, if it was brought under the Scotland Act, it was not subject to the procedural restrictions in the HRA, such as the time bar for claiming damages in section 7(5) of the HRA (*Somerville v Scottish Ministers 2007 UKHL 44*). The relevance of this decision has been reduced by amendment of the SA which has harmonised the time bar provisions between the two acts. The key point is that under the SA the Scottish Ministers have no defence to a breach of Convention Rights under the SA as they do under section 6(2) of the HRA.

There have been five cases to date in which Scottish Parliament legislation has been held to be 'not law'. These cases all relate to specific provisions within the statutory scheme rather than to the statute itself or the overall policy objectives. Christopher McCorkingdale, Aileen McHarg and Paul Scott in *The Courts, Devolution and Constitutional Review* 36 *U. Queensland L.J.* 289 (2017) identify that this is so because "the Supreme Court has so far adopted something of a 'dialogic' remedial approach as opposed to a rigid and final strike down.

18 ASPs have been subject to judicial review. 12 on the basis that incompatibility with Convention rights was the dominant ground of challenge. Five cases succeeded on Convention rights grounds: *Cameron v Cottam* 2013 JC 12; *Salvesen v Riddell* 2013 SC (UKSC) 236; *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29; *P v Scottish Ministers* 2017 SLT 271; *AB v HMA* 2017 SLT 401.

In two of the three successful civil challenges, *Salvesen* and *Christian Institute*, the Supreme Court exercised its discretion under section 102(2)(b) of the Scotland Act 1998 to suspend the effect of its decisions (that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 and the information sharing provisions of Part 4 of the Children and Young People (Scotland) Act 2004 respectively) were incompatible with Convention rights. This allowed an opportunity for the Scottish Parliament and the Scottish Ministers to take measures in order to remedy the incompatibilities.

McCorkingdale, McHarg and Scott argue that this dialogue between the Court and the devolved institutions is clear in the *Christian Institute* case in which the Court felt it 'inappropriate to propose particular legislative solutions', but warned the executive and legislature that minimal amendments that failed to address the breach would run the risk of further judicial sanction.

In the criminal cases *Cameron* and *AB*, each of which raised 'compatibility issues' relating to criminal procedure – the decisions that section 58 of the Criminal Justice and Licensing (Scotland) Act 2010 and section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 respectively were 'not law' were returned to the High Court of Justiciary (Scotland's supreme criminal court) for it to determine whether or not to suspend or to vary the effects of the resulting invalidity.

1. Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?

Under section 7 HRA, a person who claims that a public authority has acted in a way which is made unlawful by section 6 may bring proceedings only if the person is or would be a victim of the unlawful act. The necessity for individuals to prove that they are victims maybe more restrictive compared with the normal rule in judicial review. Unfortunately, we have no research upon which to base a more detailed response.

2. How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?

We think that the HRA has made a considerable difference in practice for public authorities. because the risk of contravening section 6(1) has meant that they must take account of the Convention rights in

everything they do. Previously, it was only the UK Government which was held responsible by the ECtHR for any contravention of the Convention rights by public authorities. We consider that this is a considerable benefit in the observance and enforcement of the Convention rights in the UK and has had the clear advantage of reducing the number of cases which the UK Government has had to defend in Strasbourg.

3. What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?

Section 3 of the HRA provides:

3. Interpretation of legislation.

(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.

Section 3 is not simply about the interpretation of legislation it encapsulates aspects of the separation of powers and Parliamentary sovereignty. Making changes to section 3 would raise the prospect of further constitutional change to the distribution of powers between the legislature, the executive, and the judiciary.

Section 3 requires the courts, so far as it is possible to do so to read and give effect to primary and subordinate legislation “in a way which is compatible with Convention Rights”.

Some cases appear to envisage a stronger role for s3 than others. *Regina v A [2001] UKHL 25* is the example usually cited as having gone too far. The approach of the majority in *Ghaidan v Godin-Mendoza [2004] UKHL 30* seems more representative. The choice between using section 3 or section 4 turns not only on a question of what is linguistically possible, but rather involves a contextually sensitive assessment of the limits of judicial law-making in the context of each case. Similarly exercise of judicial deference involves a contextually sensitive analysis of the court’s institutional competence to make judgments about whether particular rights have been breached. This mirrors the contextually sensitive nature of the margin of appreciation doctrine itself.

We take the view therefore that on the whole the courts are aware of where the limits lie when determining rights and applying section 3 acknowledging the broad context, the role of Government and the concept of Parliamentary sovereignty.

Accordingly, the courts acknowledge that section 3 will not allow them to interpret Convention Rights in such a broad or expensive way so as to touch on matters of policy. In such circumstances, they will leave Parliament to legislate on such rights in law.

We agree with Lord Neuberger who recently said to the Joint Committee, “As for the reading down point, Section 3 of the Act, as Dominic Grieve has said, enshrines a principle that is applied generally, but it ensures that judges are able to do their utmost to enable a statute to comply with the Human Rights Act. There is, of course, the protection of Section 4, the declaration of incompatibility, if it does not”. (Joint Committee on Human Rights Oral evidence: The Government’s Independent Human Rights Act Review, HC 1161 Wednesday 27 January 2021Q5 page 11)

4. Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?

Under section 2 of the HRA “a court or tribunal determining a question which has arisen in connection with a Convention right must take into account judgements of the European Court of Human Rights (ECtHR)”. Such judgements are not binding as *Blackstone’s Human Rights Digest (2.8) K. Starmer 2001 (with Iain Byrne)* states “the HRA is intended to provide a floor for Convention rights but not a ceiling”.

Controversy over the relationship between the UK courts and the Court of Human Rights in Strasbourg has been a significant feature of academic and public discourse since the HRA was brought into effect.

The Equalities and Human Rights Commission Research Report 83 *The UK and the European Court of Human Rights* by Alice Donald, Jane Gordon, and Philip Leach (2012) contains a comprehensive overview of the debate up to that time.

The research paper makes it clear that while the Human Rights Bill was passing through Parliament in 1997/98 the relationship between the UK courts and the European Court of Human Rights was examined closely. During the Committee stage of the Bill in the House of Lords, Lord Kingsland, the then Shadow Lord Chancellor promoted an amendment to provide that the courts “shall be bound by any judgment, decision, declaration or advisory opinion of the European Court of Human Rights...” Hansard House of Lords on 18 November 1997 col 511.

The amendment was not pressed to a vote, but many peers expressed the view that the amendment would be unacceptable. The then Lord Chancellor, Lord Irvine of Lairg, stated at col 514:

“We believe that Clause 2 gets it right in requiring domestic courts to take into account judgments of the European Court, but not making them binding. To make the courts bound by Strasbourg decisions could, for example, result in the Bill being confusing if not internally inconsistent when the courts are faced with incompatible legislation. In addition, the word “binding” is the language of precedent, but the convention is the ultimate source of the relevant law. It is also unclear to me how “binding” would fit within the doctrine of margin of appreciation under the convention...”

We must remember that Clause 2 requires the courts to take account of all the judgments of the European Court of Human Rights, regardless of whether they have been given in a case involving the United Kingdom. That was the point made by the noble Lord, Lord Lester: the United Kingdom is not bound in international law to follow that Court's judgments in cases to which the United Kingdom had not been a party, and it would be strange to require courts in the United Kingdom to be bound by such cases. It would also be quite inappropriate to do so since such cases deal with laws and practices which are not those of the United Kingdom. They are a source of jurisprudence indeed, but not binding precedents which we necessarily should follow or even necessarily desire to follow.

The Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might give a successful lead to Strasbourg. For example, it would permit the United Kingdom courts to depart from Strasbourg decisions where there has been no precise ruling on the matter and a commission opinion which does so has not taken into account subsequent Strasbourg court case law”.

Subsequent case law has developed and clarified the meaning of section 2.

Lord Bingham in the case of *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26 before the Appellate Committee of the House of Lords, stated:

“The House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow clear and constant jurisprudence of the Strasbourg court... This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law...” this is the founding statement of the mirror principle “that the domestic law of human rights should in content and scope mirror its Strasbourg counterpart”.

Lord Rodger of Earlsferry speaking, with classical flair, in the case of *Secretary of State for the Home Department v AF* [2009] UKHL 28 stated “Argenteratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed”.

However more recent case law has developed the judicial discretion available to the court. The court in *Horncastle* [2009] UKSC 14; stated that it would only follow ECHR case law which was “clear and constant” but even so decisions of the ECtHR can be departed from where that court misunderstood, misapplied or failed to consider some fundamental facet of law in the UK. The Supreme Court followed this approach in *Pinnock v Manchester City Council* [2010] 3 WLR 1441:

“This Court is not bound to follow every decision of the ECtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of value to the development of Convention law (see e.g. *R v Horncastle* [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the ECtHR: *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. But we are not

actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham* [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to “take into account” ECtHR decisions, not necessarily to follow them. 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.”(Lord Neuberger at para 48).

In *Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2017] UKSC 36; the Court refused to follow the conclusion reached by the ECtHR. The issue was whether a civil right and obligation was being determined under Article 6.1 ECHR when housing authorities made certain decisions under the Housing Act 1996. In *Ali v United Kingdom* (2016) 63 EHRR 20, the ECtHR had held that Article 6.1 was engaged notwithstanding the reservations made in *Ali v Birmingham City Council* [2010] UKSC 8 about extending the application of Article 6.1. The UK Supreme Court however refused to follow this in *Poshteh*, on the basis that Article 6.1 was not engaged by the Housing Act.

The ECtHR had adopted its stance in *Ali v UK*. The ECtHR had not responded to the expressions of concern and so the UK Supreme Court made its position clear in *Poshteh*.

In *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2 the question was whether English law concerning compensation for miscarriages of justice was compatible with the right to a fair trial under Article 6 of the ECHR. The court followed domestic precedent notwithstanding contrary ECtHR case law.

It is worth pointing out that public authorities which are obliged to avoid acting incompatibly with Convention rights have been able to apply this jurisprudence to their own interpretations of what is and is not permissible in HRA terms (although this is more in connection with section 6 than with section 2; but the requirement to take ECtHR case law into account is equally relevant under section 6).

Analysis of the case law and judicial attitudes suggest that the UK courts have arrived at an interpretation of “take account” which respects both the jurisprudence of the ECtHR and fundamental substantive and procedural law as it applies in the UK. Accordingly, we do not accept that there is a need for any amendment of section 2.

We believe that the current approach to judicial dialogue between domestic courts and the ECtHR allows domestic courts to raise concerns about the application of ECtHR jurisprudence and consequently adhere to the terms of section 2 of the HRA.

As we have drawn attention to above, recent case law indicates the UK courts can persuade ECtHR to interpret Convention standards to fit UK contexts. As Professor Bates states, “the boundaries of ECHR law can be adjusted such that UK law fits within them” see <https://ukstrasbourgsportlight.wordpress.com/> Principled Criticism and a Warning from the ‘UK’ to the ECtHR? Page 232.

Dialogue between the ECtHR and UK courts can be analysed as follows:

a. The ECtHR approach when it addresses features of UK law for the first time, which law has already

been upheld at the domestic level (under the HRA) as compatible with Convention rights; and

- b. The UK courts 'preparedness to use dialogue with ECtHR to seek a rectification of an ECtHR conclusion that a specific feature of UK law is incompatible with the Convention.

An example relating to Article 10 ECHR is *R (On the Application Animal Defenders International) v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15. In this case the House of Lords explained that a restriction on Article 10 ECHR was constitutionally important for the UK taking into account the parliamentary consideration when the Communications Bill was being considered.

When the case reached the Grand Chamber: *Animal Defenders International v UK* [2013] 57 EHRR 21 the Grand Chamber noted the parliamentary consideration and held that UK law prohibiting political advertising on television did not breach Article 10 ECHR. When the Communications Bill 2003 was introduced into Parliament, the Government considered that it was not able to make a statement of compatibility under the HRA, in light of an ECtHR precedent against Switzerland, which had imposed a similar ban (see Communications Bill Second Reading Hansard HL Deb 25 March 2003 col 658). The UK Government believed, however, that if its legislation were to be challenged it would be able to show that its position was legitimate and respectful of human rights. Following such challenge, that was the position which the Grand Chamber later accepted (see also oral evidence by Baroness Hale JCHR HC 1161 3 February 2021 Q19 page 4).

Although in the vast majority of instances UK judges will follow the relevant Strasbourg jurisprudence, the application of the Pinnock criteria and the development of the dialogue in *Animal Defenders International*, *Horncastle*, *Poshteh* and *Hallam* shows that the UK courts have indicated that they will not follow the ECtHR on the question of whether "a defined aspect of UK law is in fact a breach of Convention rights".

5. Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?

Those who wish to change the way the the HRA applies to the actions of the UK or its agents overseas need to justify exactly why change is necessary. We have not yet seen a legal justification for such change.

Article 15 ECHR allows the state parties to the Convention the possibility of derogating from obligations to secure some of the Convention's rights. Derogation is subject to supervision and challenge on the ground that it is exercised in breach of its Article 15.

The Article states:

"1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations....to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

“2. No derogation from Article 2 (right to life), except in respect of death resulting from lawful acts of war, or from Articles 3 (torture), 4 para 1 (slavery) and 7 (no punishment without law) shall be made under this provision.”

(No derogation also now applies to Protocol 13 on the total abolition of the death penalty, where it has been signed and ratified as was made clear in the case of *Al-Saadoon and Mufdhi v the UK 2010* in which the court held that two Iraqi nationals accused of the murder of two British soldiers and transferred by the British authorities in Iraq into Iraqi custody for trial where they faced a possible death penalty had had their Article 2 rights violated, as Protocol 13 applied in all circumstances and could not be derogated from and ranked as a fundamental right.)

“3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General...when such measures have ceased to operate and the provisions of the Convention are being fully executed.”

Article 15 was not incorporated in the HRA however, under Section 14 the Secretary of State is empowered to make an order incorporating any derogation into the Act, so that it has effect domestically.

Section 16 provides that any such domestic derogation can only last a maximum of five years and then is automatically repealed unless extended again by a fresh order and further requires repeal if the derogation from the ECHR itself has been withdrawn.

These issues have been considered in an opinion by Rt Hon Dominic Grieve QC for the Northern Ireland Assembly <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/derogation-from-human-rights-briefing-paper/> . Mr Grieve stated in that opinion “In practice the arrival of the HRA has had a significant impact on the functioning of derogation, as it has opened the ability of the UK domestic courts to look at the matter first and make decisions that might be potentially different, as to the validity of a derogation, from what the European Court itself might do”.

An example of a challenge is *A v Secretary of State for the Home Department [2004] UKHL 56*. In this case concerning detention under the Anti-Terrorism, Crime and Security Act 2001 the House of Lords recognised an emergency threatening the life of the nation to justify a derogation but issued a declaration of incompatibility under the HRA because the detention scheme discriminated unjustifiably against foreign nationals. The derogation order made under Section 14 HRA was quashed. This was followed by the ECtHR in *A and Others v the UK 2009*, which upheld the House of Lords and found a violation of Article 5(1) and awarded damages. The offending section of the Act had been repealed in 2005, following the 2004 House of Lords decision.

The remedies which a court can order include:

- a. Judicial review, by which the court can declare that a public authority has acted unlawfully, quash the relevant order, cancel the decision or order a public authority to stop acting. In Scotland the remedies are categorised as reduction, declarator, suspension, interdict, implement, restitution, or interim order. If

a decision is found to be unlawful the court will remit the issue back to the public authority to make the decision again. In *Wood v Commissioner for Police of the Metropolis* [2009] EWCA Civ 414, the Court of Appeal decided that the Metropolitan Police had acted unlawfully when it retained photographs of an anti-arms trade campaigner as he was leaving the AGM of Reed Elsevier Plc. This is an important judgment on the scope of the Article 8(1) right to privacy and on the scope of the justification defence available under Article 8(2).

- b. Awarding compensation to the extent the court considers it necessary, just and appropriate (under section 8 of the HRA). In *R (B) v DPP* [2009] EWHC 106 (Admin) The decision to discontinue a prosecution for wounding with intent and witness intimidation, on the basis that the victim's mental illness meant he could not be placed before the jury as a credible witness, was irrational on the facts; there had been a breach the positive obligation under Article 3 (which includes the duty to provide a legal system for bringing to justice those who commit serious acts of violence against others) and £8000 was awarded in compensation.
- c. Making a declaration that the law (rather than the decision made under the law) is in breach of human rights.

These remedies cover the range of options which a court could reasonably be expected to provide.



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