

Executive Summary

Impact on UK law

- Decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law, or on the Government's ability to fight crime.
- The Human Rights Act has had an impact upon the Government's counter-terrorism legislation. The main difficulties in this area arise not from the Human Rights Act, but from decisions of the European Court of Human Rights.
- In other areas the impact of the Human Rights Act upon UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights.
- The Human Rights Act has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary.

Impact upon policy formulation

- The Human Rights Act has had a significant, but beneficial, effect upon the development of policy by central Government.
- Formal procedures for ensuring compatibility, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, had improved transparency and Parliamentary accountability.
- The Human Rights Act leads to better policy outcomes, by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services.

Myths and misperceptions

- The Human Rights Act has been widely misunderstood by the public, and has sometimes been misapplied in a number of settings.
- Deficiencies in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the interests of the wider community.
- This process has been fuelled by a number of damaging myths about human rights which have taken root in the popular imagination.

The way forward

- The Government remains fully committed to the European Convention on Human Rights, and to the way in which it is given effect in UK law by the Human Rights Act.
- The Government is conducting a thorough review of how police, probation, parole and prison services balance public protection and individual rights and, if necessary, will legislate to ensure that public protection is given priority.

- There will be a major push led by the DCA for the provision of better and more consistent guidance and training on human rights within Departments, with specific reference to areas in which such guidance is currently lacking.
- The DCA will revise and strengthen generic guidance on human rights for public sector managers, placing particular emphasis upon safety arguments.
- The Government must take a proactive, strategic and co-ordinated approach to human rights litigation, so that it has the maximum possible impact on future case law under the Human Rights Act.
- The Government will lead a drive to ensure that the public as well as the wider public sector are better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights.

Introduction by the Lord Chancellor

The Prime Minister has asked me to lead a review looking specifically at problems with the implementation of the Human Rights Act. The review was commissioned in the immediate aftermath of the Inquiry Report (by HM Chief Inspector of Probation) into the release of Anthony Rice, which had suggested that human rights arguments, and the Human Rights Act, had been contributory factors in the events leading to the murder of Naomi Bryant.

Impact on UK law

The impact of the Human Rights Act upon the development of UK law has been significantly less, and significantly less negative, than some predictions made for it from 1997 onwards. Arguments based on the Human Rights Act have been raised across a whole range of civil and criminal litigation, and have been explicitly considered in about one third of the cases considered by the House of Lords since the Act came into force. But in many instances the courts would either have reached the same conclusion under common law, or found that the decision being challenged had been properly taken. And, in very many cases, human rights arguments have been rejected by the courts as being either misconceived or irrelevant to the case.

Two cases highlight the impact which human rights have had upon UK law. First, in *A and Others v The Home Secretary* the House of Lords decided that the detention without trial of foreign nationals under the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Article 14 of the European Convention on Human Rights because it discriminated on the grounds of nationality or immigration status. However, all but one of the nine members of the court decided that the Government had been entitled to conclude that there was (in the words of the Convention) a “public emergency threatening the life of the nation” and – since UK courts do not have the power under the Human Rights Act to strike down primary legislation – the applicants remained in detention. The Government therefore had time to identify alternative ways of ensuring that the public continued to be protected, by introducing the regime of Control Orders passed by Parliament in the Prevention of Terrorism Act 2005. That system is currently being considered by the courts.

The other case concerns the UK’s ability, in law, to deport or remove those who threaten us or who have entered illegally or whose claim for asylum has failed. A proportion of those eligible for deportation or removal are not removed because the country to which they would be returned is considered unsafe, and because we are not currently able to balance the threat posed by an individual to national security against the risk of mistreatment if the individual concerned is returned to their own country. We are prevented from making this balance by the judgement in the European Court of Human Rights in 1996 in the case of *Chahal v United Kingdom*. We are seeking to change this through our intervention in a case before the European Court of Human Rights. We want to be able to take account of the threat to national security and also to be able to rely on assurances given by the returnee country. However, the Human Rights Act makes no difference in this instance, not only because the *Chahal* decision predates it, but also because it is an example of the Strasbourg Court directly interpreting Article 3 of the European Convention on Human Rights.

In general, therefore, the Human Rights Act has not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration, and has not led to the public being exposed to additional or unnecessary risks. In addition, the UK courts have recognised that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the legislature or the executive. Whether and to what extent the courts will recognise a "discretionary area of judgment" depends upon the subject matter of the decision being challenged. But policy decisions made by Parliament on matters of national security, criminal justice and economic policy are accorded particular respect.

There is no doubt that the Human Rights Act has also established a "dialogue" between English judges and the European Court of Human Rights. The close analytical attention paid by the English courts to the European Convention on Human Rights case law is respected in Strasbourg, and has become influential on the way it approaches English cases. This in part accounts for the significant reduction in a number of adverse decisions against the UK Government by the European Court of Human Rights since the Human Rights Act came into effect.

Moreover, there have been only 11 occasions upon which the superior courts have upheld Declarations that Acts of Parliament were incompatible with the Convention rights, and on each occasion Parliament has passed further legislation putting the law back into conformity. Similarly, the courts have used Section 3 of the Act (which requires the courts, if possible, to interpret legislation in a way compatible with the Convention), on only 12 occasions. Arguments that the Human Rights Act has significantly altered the constitutional balance between Parliament, the Executive and the Judiciary have therefore been considerably exaggerated.

Impact upon policy formulation

The Human Rights Act has exerted a more powerful influence upon policy formulation by Government, in three ways:

- through formalisation of the **process** for ensuring compatibility with Convention rights, including the requirement for a positive statement of compatibility for all Bills, a memorandum required for Bills to be approved for introduction and the scrutiny of the Joint Parliamentary Committee on Human Rights;
- in response to **litigation** which may force a change in policy or a change in the method by which a particular policy is delivered; and
- through changes in **behaviour** driven by the greater immediacy of the Act, which makes it unlawful for a public authority to act in a way incompatible with the Convention rights.

Overall, the Human Rights Act can be shown to have had a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation which leads to better outcomes, and ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating the policy and by those putting it into effect. In particular, the evidence provided to the DCA by Departments shows how the Act has led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals.

Myths and misperceptions

But the purpose and effect of the Human Rights Act has been widely misrepresented and misunderstood. Misapprehensions abound not only among the general public, but also among public servants. The events leading to the murder of Naomi Bryant provide a very conspicuous and sobering example of the operational problems which have arisen for key agencies as a result of these misconceptions, and of the failure by Departments across Government consistently to ensure that key decision takers have access to the best possible training, guidance and legal advice. It is not sufficiently appreciated that the State has an overarching duty (deriving from Articles 1 and 2 of the European Convention on Human Rights itself) to maintain the safety and security of its citizens.

So far as the wider public are concerned, there are three different types of myth in play. First, there are those which derive from the reporting (and often partial reporting) of the launch of cases but not their ultimate outcomes. This leaves the impression in the public mind that a wide range of claims are successful when in fact they are not – and have often been effectively laughed out of court. The most notable example in this category is the application made by Denis Nilson in 2001 to challenge a decision of the Prison Governor to deny him access to pornographic material. The case is now often cited as a leading example of a bad decision made as a result of the Human Rights Act. In fact it failed at the very first hurdle.

Secondly, there are pure urban myths: instances of situations in which someone (often it may not even be clear who) is reported to have said that human rights require some outcome or other, and this is subsequently trotted out as established fact. A recent example is the case in which food, drink and cigarettes were supplied to Barry Chambers who, in the course of evading arrest, had taken refuge on a roof of a domestic dwelling. The suspect had, of course, no “human right” to receive food in these circumstances, but instead, as part of a police operational decision aimed at resolving a stand-off quickly and peaceably, his demands for food and other refreshments were met as part of a negotiating strategy aimed (successfully in the event) at coaxing him down from the roof without injury to himself or others.

Finally, there are rumours and impressions which take root through a particular case or decision, and which then provide a backdrop against which all subsequent issues of the type in question are played out. Examples here are false suggestions that the Human Rights Act would prevent the filming of school nativity plays, or prevent teachers from putting plasters on children who have cut themselves. Such stories have undoubtedly had an accumulative and corrosive effect upon public confidence both in the Human Rights Act and in the European Convention on Human Rights itself.

A “UK Bill of Rights”

Before setting out the way forward, it is worth considering briefly an option which has been subject to recent comment. This would be the option of repealing the Human Rights Act and enacting a separate set of fundamental rights which would not, in law, be connected to the European Convention on Human Rights. The suggestion is that these rights could be given some sort of entrenched or superior status in our constitution.

One perceived advantage of this option is that we would have a charter of rights designed and drafted with reference exclusively to British values and priorities. They would be interpreted by UK courts alone, and not in Strasbourg. But there are two major difficulties.

The first is the effect on Parliamentary sovereignty. If the rights were entrenched, so that Parliament cannot amend or violate them, that would remove a central pillar in our constitution. We would lose Parliamentary sovereignty, and the supremacy of the elected House of Commons. On questions of rights and morality, the ultimate arbiter would be the judiciary. Future Parliaments might be unable to act to protect national security. The Human Rights Act avoids that. It allows Acts of Parliament to become law even if they are not compatible with the European Convention on Human Rights.

The second difficulty is the uncertainty and confusion that would result from having two sets of fundamental rights. On the one hand, the Government would remain obliged to comply with all the rights in the European Convention on Human Rights. And the citizen would remain able to take a case to Strasbourg. On the other hand, Government, citizens and courts would be confronted by a separate (but presumably overlapping) set of rights for the purposes of domestic law.

The precise effects of this option must be a matter of speculation. Our courts would certainly be urged to have regard to Strasbourg decisions, even where the domestic rights do not precisely correspond with those in the European Convention on Human Rights. That is likely to lead to a prolonged period of uncertainty in the case law, and to expensive and unnecessary litigation. Decision makers throughout the public sector would have to bear in mind two sets of rights, which might make them more cautious and risk-averse, rather than less. The European Court of Human Rights would probably pay less respect to our case law, which would result in greater scrutiny of UK cases, and more adverse findings. And our citizens would no longer have a single clear catalogue of their rights and freedoms, which the Human Rights Act provides and which is shared by 800 million people across Europe.

The way forward

The Government remains fully committed both to the European Convention on Human Rights, and to the way effect is given to it in the UK by the Human Rights Act 1998. But it is necessary to ensure that agencies (particularly within the criminal justice system) accord appropriate priority to protecting the public when they are balancing rights. The Home Office is conducting a thorough review of how police, probation, parole and prison services balance public protection and individual rights. If necessary, legislation will be introduced to ensure public protection is given priority and the Government will also ensure it is supported by robust and effective administrative processes.

In addition, and to address the way in which the effect and requirements of the European Convention on Human Rights have been misunderstood and misapplied, the DCA will lead a major push on guidance and training within Departments, and within wider public sector agencies. A Ministerial Group will ensure that Departments and Agencies whose work involves decisions affecting the security of the public will urgently analyse and revise the guidance and training they provide for front line staff. In parallel, the DCA will itself revise and strengthen its own generic guidance on human rights for public sector managers, placing particular emphasis on public safety.

The Government will also continue to take a robust and co-ordinated approach to legal advice and litigation. Guidance and training from Government lawyers will contribute to this, as will guidance to lawyers and officials in the wider public sector. The Government will continue to emphasise in its litigation strategy the importance of public safety obligations under the Human Rights Act. The Government will also set up a web-based hot line for front line staff (like the police) to get clear advice on the application of human rights.

Finally, there is an urgent need for the public to be better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights and the way they have been applied, both domestically and in Strasbourg. The European Convention and Court of Human Rights occupy a proud place in the new order which followed the Second World War, and the UK played a leading role in their creation. The Government will ensure that the generations of today and the future understand their continuing importance to our democracy.

Charlie
Falconer

LORD FALCONER OF THOROTON