Future proofing: running human rights arguments under the common law.

- Adam Straw -

1. There have been lots of exciting things going on in the courts recently regarding the constitution and fundamental rights. Michael Fordham QC has delivered an overview of these changes in his earlier talk. This seminar aims to fill in the detail. It outlines the recent changes and argues that there is as yet no certainty that a repeal of the HRA will make no difference. It gives suggestions for what may be done now to try to enhance the protection of fundamental rights by the common law and to safeguard your cases from the potential repeal of the Human Rights Act.

Resurgence of common law protection of rights

2. There have been several recent Supreme Court decisions that have suggested that there is little difference between the protection that the common law affords to fundamental rights, and that afforded by the Convention or EU law. For example, in *Kennedy v. Information Commissioner* [2015] AC 455 Lord Mance observed that Convention rights "may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law." §46[1].

3. Similarly, in *R (Rotherham MBC) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, §55 it was observed that "the grounds of (i) breach of the EU principles of equality or proportionality and/or (ii) breach of domestic

[1] See also *Pham v. Secretary of State for the Home Department* [2015] 1 WLR 1591, §98; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 717 (HL); see also Roger Masterman and Seshauna Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] EHRLR 57; Richard Clayton, 'The Empire Strikes Back' [2015] PL 3; Dinah Rose, What's the Point of the Human Rights Act? (Politeia 2015); Lady Hale 'UK Constitutionalism on the March?' (Constitutional and Administrative Law Bar Association Conference, 12 July 2014, www.supremecourt.uk/docs/speech--- 140712.pdf;
Lord Neuberger, '"Judge not, that ye be not judged": Judging judicial decision--- making' (F A Mann Lecture, 29 January 2015) www.supremecourt.uk/docs/speech--- 150129.pdf.

public law principles… march together very closely, and it is hard to envisage circumstances in which only one of them was satisfied…".

4. The most significant recent changes involve the standard of review by the Administrative Court or by equivalent tribunals, such as the Information Commissioner or SIAC. There appears to be no reasons why these should not also apply in other contexts, such as in civil claim for damages.

The standard of review

5. A key case is *Kennedy.* This involved a challenge to the Charity Commission's refusal to disclose to a journalist information relevant to a statutory inquiry it had carried out into an appeal founded by George Galloway MP.

6. The majority of the Supreme Court endorsed a flexible approach to the principles of judicial review, and observed that the courts no longer simply apply *Wednesbury* unreasonableness. The intensity of review and weight to be given to the view of the decision maker depend on the context, in particular on whether a common law right or constitutional principle is involved. The more substantial the interference with human rights, the more the court will require by way of justification.

7. Lord Mance did not think there was any significant difference between the nature or outcome of the court's scrutiny of the decision, whether that was under domestic law (having regard to the importance of accountability in the Charities Act and common law) or under article 10 ECHR (the right to freedom of expression). It was for the defendant to show some persuasive counterveilling consideration. The court should ascertain whether the relevant interests had been properly balanced.

8. Lord Mance, with whom the majority essentially agreed, decided that proportionality was a ground of judicial review:

> "The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of

> benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law." §54.

9. These aspects of *Kennedy* have been approved in several more recent authorities, such as *Pham v. Secretary of State for the Home Department* [2015] 1 WLR 1591*; R (Rotherham MBC) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, §55; and *Rainbow Insurance Company Limited v. The Financial Services Commission and others (Mauritius)* [2015] UKPC 15, §39.

10. *Pham* is another important case. The claimant challenged a decision by the Home Secretary to deprive him of British citizenship, on the ground that he was alleged to have received terrorist training. Lord Mance decided that, because the removal of citizenship was "a radical step… the tool of proportionality is one which would… be both available and valuable for the purposes of such a review…": §98. It was unlikely that there would be any difference between domestic, and EU or ECHR proportionality review.

11. Similarly, Lord Sumption observed that the range of rational decisions available to the decision maker depends on the context. In some cases there will only be one lawful decision available (§107). The common law can assess the appropriateness of the balance drawn by the Home Secretary between the right to citizenship and the interests of national security.

12. Next, in *R (Bourgass) v. Secretary of State for Justice* [2015] 3 WLR 457 the Supreme Court decided that procedural fairness meant a prisoner should normally have a reasonable opportunity to make representations before being segregated. The Supreme Court observed:

> "the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests: see, for example, *Pham* ... The potential consequences of prolonged segregation are so serious that a court will require a cogent justification before it is satisfied that the decision to authorise its continuation is reasonable." §129.

13. This line of authority was applied in *Zaw Lin v Commissioner of Police of the Metropolis* [2015] EWHC 2484 (QB). The Claimants were Burmese nationals on trial in Thailand for the murder there of two Britons. They confessed to the murder but later retracted the confessions, saying they had been obtained by torture. The Claimants face the death penalty.

14. The Metropolitan police conducted an independent inquiry, but it was agreed with the Thai authorities that the investigation was not for the purpose of the criminal trial, and the report of it was merely to be disclosed to the families of the victims. The Claimants applied under the Data Protection Act 1998 for disclosure of the report. The High Court noted that in determining the application, because the case involved common law right to life and to a fair trial, there would be "intensive scrutiny of *all* relevant interests arising and which injects a proportionality exercise into the weighing process" §49. It was agreed that it was most unlikely that there would be any real difference to the outcome as between the common law and Convention. In considering the proportionality exercise, the burden was on the police to demonstrate significant and weighty grounds for intruding on the Claimants' prima facie right under the Data Protection Act to the report.

15. The court decided the police were not required to disclose the report. But that was on the basis of the court's view of the particular facts of the case, including that the report would not assist the Claimants and that disclosure would undermine the ability of the police to engage with foreign authorities in future.

Summary

16. Those four authorities may be summarized as follows. The test a court will apply in deciding whether a decision was lawful depends on the context. Two important factors are where the decision interferes with fundamental rights, and the gravity of any adverse effects of the decision. If so:

    1. The intensity of review and of scrutiny of the decision is greater.
    2. It will be for the Defendant to show any interference is justified.
    3. Proportionality is available. This may mean that the interference should be necessary to achieve a legitimate aim.

4. The more serious the adverse impact, the more the court will require by way of justification.
5. The court should decide whether the relevant interests have been properly balanced.
6. The weight given to the view of the decision maker is less.
7. While the question is whether the decision was reasonable, that does not involve asking whether it was *Wednesbury* irrational.

What are the common law rights?

17. Common law fundamental rights are similar to those in the Convention. They include the right to:

17.1. Life: *R. v. Home Secretary, Ex p. Bugdaycay* [1987] AC 514, at 531G

17.2. Freedom from degrading and inhuman treatment/cruel and unusual punishment: Article 10 of the Bill of Rights 1688, *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, §12.

17.3. Open justice, and open administration: *Kennedy*, §47.

17.4. Freedom of expression: *R v. Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

17.5. Citizenship: *Pham* §60.

17.6. A fair trial: *Bernard v. State of Trinidad and Tobago* [2007] UKPC 34; [2007] 2 Cr. App. R. 22 at §§ 22, 24, 30

17.7. Access to the courts, to legal advice and representation: *R v. Shayler* [2003] 1 AC 247, §73.

17.8. Equality of arms: *Attorney-General's Reference (No. 82A of 2000)* [2002] EWCA Crim 215; [2002] 2 Cr.App.R. 24 per Lord Woolf at §14.

17.9. Legal professional privilege: *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532.

17.10. Respect for human dignity: *R (Osborn) v. Parole Board* [2014] AC 1115, §68

17.11. Freedom of expression: *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.

17.12. Equal treatment: *AXA General Insurance Ltd & Ors v. HM Advocate & Ors* [2012] 1 AC 868, §97.

Rationale for the changes

18. There are a number of reasons that were given for these developments, or might be relied on to try to continue with this trajectory.

19. That the common law is dynamic and can develop markedly is well recognized. An example in the context of fairness is Lord Bingham in *R v. H* [2004] 2 AC 134 at §11 and 15.

20. One basis for arguing that the common law should reflect fundamental rights is the principle of legality. A public body may not act beyond its statutory authority, and there is a presumption that a statute does not authorize a breach of fundamental rights unless it is explicit (*R v Lord Chancellor, ex parte Witham* [1998] QB 575, at 581; and *R v Secretary of State ex p Simms* [2000] 2 AC 115 at 131E).

21. There are various ways by which international law may influence the common law. For example, "there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation": *R v. Lyons* [2003] 1 AC 976, at §27. In addition, customary international law is observed and enforced as part of the common law unless in conflict with an Act of Parliament: *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529, at 557; and *R v*

Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 1) [2000] 1 AC 61, 89-90). 'CIL' consists of those legal obligations about which there is a clear consensus among relevant states.

22. Thus, in *R (Osborn) v. Parole Board* [2014] AC 1115 the Supreme Court observed that the:

> "ordinary approach to the relationship between domestic law and the Convention was described as being that the courts endeavour to apply and if need be develop the common law, and interpret and apply statutory provisions, so as to arrive at a result which is in compliance with the UK's international obligations", at §62.

23. Similarly, the common law should be "interpreted and developed in accordance with the [HRA] when appropriate", §57.

24. Although at times it is suggested that international law can only be relied on if it is not in conflict with domestic law, the recognition that the domestic law may be 'developed' indicates that there is more flexibility.

25. The Supreme Court appeared to invite the argument that statute should be re-interpreted to ensure it is consistent with international law, if possible, in *Nzolameso v Westminster City Council (Secretary of State for Communities and Local Government and another intervening)* [2015] UKSC 22; [2015] P.T.S.R. 549, at §29:

> "We have not heard argument on the interesting question of whether, even where no Convention right is involved, section 11 [of the Children Act 2004, which requires certain public authorities to safeguard child welfare] should nevertheless be construed consistently with the international obligations of the United Kingdom under article 3 of the UNCRC. That must be a question for another day."

26. The focus on statutory interpretation is important. A powerful aspect of the HRA is section 3 – the need to read and give effect to legislation in a way which is compatible with Convention rights so far as it is possible to do so. It is unclear how much the same approach is reflected in the common law.

Damages claims

27. Sections 7 and 8 HRA give a victim of a breach of the Convention a right to claim a declaration and, if necessary to afford just satisfaction, damages. If the HRA is repealed, will that cause of action still be available under the common law? For example, will claimants be able to sue the police for negligent failure to protect life or prohibit inhuman treatment if that Act goes, on the same basis as they could obtain damages if they took their case to the European Court of Human Rights?

28. The answer is as yet unclear. In some areas, the Convention has led to rights to damages being created under the common law where they did not previously exist. An example is the new tort of misuse of private information (e.g. disclosing or selling website metadata without permission). This reflects the HRA right to damages for breach of the right to privacy under article 8: *Vidal-Hall v. Google Inc.* [2015] 3 WLR 409.

29. In *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11 the Supreme Court altered an aspect of medical negligence, so that a doctor is now under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment. The reasons for doing so included social changes, and also that: "Under the stimulus of the Human Rights Act 1998, the courts have become increasingly conscious of the extent to which the common law reflects fundamental values." §80. Strasbourg authorities, and even the Oviedo Convention on Human Rights and Biomedicine, were relied on to support the alteration to the common law.

30. There was debate in *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] 2 WLR 343 about whether the tort of negligence should reflect the duties that articles 2 and 3 place on the police to protect those at risk. The decision in that case was that it was not necessary for negligence to do so, but that was in part because those rights could be vindicated by a claim under the HRA. The question of whether a different result would arise if the HRA was repealed was not answered.

31. Similarly, in *Zenati v. Commissioner of Police of the Metropolis* [2015] 2 WLR 1563 the Court of Appeal decided that delay by the police in investigating the circumstances of a man who was in custody breached article 5.1(c) ECHR, entitling him to damages. However, that was not reflected in any right to damages for false imprisonment.

32. But again, one of the reasons for the decision that false imprisonment did not reflect the Convention was that the Claimant was entitled to damages under the HRA. That justification would be absent if the HRA was repealed.

33. There were supplementary reasons in *Zenati* and *Michael* for the doubts expressed as to the ability of the common law to reflect damages claims that are available under the Convention. One reason was that there was no clear basis in the common law for the particular cause of action sought, and that the common law may only be developed slowly and incrementally. But as has been seen above, the common law has developed quickly and markedly. Alternatively, that reasoning indicates it is important, where possible, to include in your pleadings a common law claim that is identical to that under the Convention.

34. A further reason was that HRA damages claims are different to domestic claims. For example, a breach of the Convention does not lead to damages as of right. But in some contexts, such as a violation of articles 2 or 3, damages are ordinarily awarded.

35. These are not compelling arguments against any future developments, but whether they can be overcome can only be fully tested if the HRA goes.

Practical tips

36. There are several reasons why it is advisable to start your human rights claim (judicial review of civil claim), wherever possible, with a common law ground, but to also include Convention and/or EU grounds.

37. The first is that the Supreme Court has repeatedly said, in recent cases, that the 'starting point' for any human rights argument should be the common law, not the Convention (*Kennedy* at §46; *A v BBC* [2014] UKSC 25 at §57; and *Pham* §110.)

38. The second reason is that the common law is often said to develop incrementally. That suggests it would be more difficult to wait until the HRA is repealed, before arguing that big changes should be made to domestic law.

39. The third reason is that the courts are more likely to change the common law, if they are persuaded that is necessary to reflect what is in EU and Convention law. *Pham* is a good example of this working in practice. But if the HRA goes, the impetus of Convention law will be much weaker.

40. Finally, if the HRA is repealed with retrospective effect before your claim is determined, amending your claim to add a common law ground may be problematic.

41. Another practical tip is to look long and hard for some credible authority for what you say the common law now is. One difficulty in trying to elicit changes is that the courts try to pretend that the common law has always been the same, and so try to find some authority on which to base their current decision.

42. If you can find a helpful authority, whether from domestic law, international law, or otherwise, use it. This may come from an unlikely source, as in *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11. That decision also shows that highlighting social and professional changes can help. Similarly, one reason why the Supreme Court felt able to adopt proportionality review was that academic analysis demonstrated this was in fact implicit in a substantial body of domestic law for more than half a century. Another reason was that the courts have demonstrated their ability to apply this approach under EU and Convention law: *Pham* §108-9.

43. A further option is to rely on broad explicit or implicit common law rights, and then apply those by means of proportionality review. An example is to rely on the

principle of open justice when arguing you need disclosure of a police report about a client on death row abroad. It may be easier to argue that the broad common law rights are long established, than to find an authority about the specific factual scenario of your case. For example, it has been said that they were an important basis for the Convention[2]. As has been seen above, there are several reasons which provide the foundation for the changes that have been made to proportionality review in this context.

Example

44. The following example may help illustrate some of the changes set out above. Your client's daughter was killed by a third party, when the police were aware of a real and immediate risk that her life was at threat, but failed to take steps that might have prevented the killing. At the inquest into her death, public funding for legal representation is available because the article 2 procedural duty is engaged and funding is necessary to enable the family to participate effectively. Further, a coroner must enable the jury to leave a judgmental conclusion about the important factual issues, because that is what the procedural duty within article 2 requires. If it was an ordinary domestic inquest, usually no judgmental conclusions would be left. Finally, sections 7 and 8 HRA mean your client can claim just satisfaction from the police.

45. If the HRA were to be repealed, it is unclear whether any of those benefits for your client would be available. One reason it is unclear is that the Convention has been embedded in many legislative provisions other than the HRA (e.g. s.10 Legal Aid, Sentencing and Punishment of Offenders Act 2012, regarding legal aid, and s.5(2) Coroners and Justice Act 2009, regarding the scope of the inquest).

46. Assuming s.10 LASPO is also repealed, leaving the Director with a discretion whether to grant funding, it is arguable that a family ought to be given legal aid in the same circumstances as now. The reasons include that the funding decision impacts on a common law fundamental right, the right to life, which is also recognized in international law, for example under the Convention. Any decision

[2] *Kennedy* at §46 and 133; See also Lady Hale, "UK Constitutionalism on the March?" (July 12, 2014).

to refuse funding should be subject to proportionality review, and (as the courts have frequently stated) it is unlikely that there is any difference between the outcome under the HRA and that under the common law.

47. The principle of legality could also be used. Assuming s.5(2) and s.10 CJA 2009 were to be repealed, it might still be argued that a coroner should leave a judgmental conclusion in a case where the article 2 procedural duty is triggered. The reasons may include that there is an international law duty, for example under article 2 of the Convention, to identify what went wrong. There is a presumption that section 10 CJA 2009 (which requires there to be a determination of how the deceased came by his or her death) is interpreted and applied consistently with that international law duty.

48. To claim damages, you would need to address the reasoning in *Michael* and *Van Colle.* But it is at least arguable that if the HRA 1998 were to be repealed, it would be necessary for the common law of negligence to be adapted to reflect the right to just satisfaction that an applicant would have in Strasbourg.