

Human Rights Act Reform: A Modern Bill of Rights What difference will it make?



Alex Goodman

Command Paper paragraph 184

The rights as set out in Schedule 1 to the Human Rights Act will remain. We regard the Convention as offering a common-sense list of rights. The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels.

Command Paper paragraph 116

... the Human Rights Act requires the courts to **alter the meaning** of primary legislation in order to make it compatible with the Convention rights, whenever it is possible to do so (section 3). It is one thing for the UK courts to declare legislation incompatible with human rights, but quite another for them to be **required to revise that legislation**, in material respects, in order to ensure compatibility without there being any direct or meaningful Parliamentary oversight (emphasis supplied)

Section 3 of the HRA 1998

- 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
- This Section...
 - (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

How the Command Paper Understands the HRA

Paragraph 154, in context of discussion about article 6 the paper states:

“We accept that government should be restrained by the protection of fundamental rights. The incremental expansion of rights into novel areas, however, creates a democratic tension with the prerogative of elected representatives to determine what may amount to finely balanced questions of public policy.”

At paragraph 177, the conclusion is this:

“The shift of law-making power away from Parliament towards the courts, in defining rights and weighing them against the broader public interest, has resulted in a democratic deficit.”

Section 117C of the NIA 2002

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where—
 - (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

The Living Instrument Doctrine

Hirst v The United Kingdom (No.2) [2004] 38 EHRR 40

- Article 3, protocol 1, the duty to hold free elections.
- When the UK signed the Convention it had a prohibition on voting rights for felons,
- *Hirst* brought in the UK in 2001 decided in Strasbourg in 2005. 2018 UK proposed to the Council of Europe that prisoners on licence would be permitted to vote. Case closed.
- No legislative amendment; guidance to prison governors and a leaflet advising prisoners of voting rights. The government's estimate is that amendment would permit up to 100 prisoners on licence to vote at any one time.
- Concerns the Convention and the Council of Europe: it has nothing to do with the Human Rights Act 1998. Parliament has not been forced to do anything it does not want by virtue of that domestic legislation.

Costs and Benefits

- Question 29 of the Consultation is “what do you consider to be the likely costs and benefits of the proposed Bill of Rights?”
- Are the benefits perceived or real?
- What are the costs of amendment? Is there a value in immutability of human rights instruments?
- Poll:

Bill of Rights

Or

Human Rights Act?

Thank you for listening

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