HRJ (13-14) 003

The Law Society

The Law Society's Response to the Parliamentary Joint Committee on Human Rights'

Call for evidence on Government's response to judgments identifying breaches of human rights

September 2013

Contents

© The Law Society 2015

For information on alternative formats go to http://www.lawsociety.org.uk/accessibility.law

The Law Society's Response to the Parliamentary Joint Committee on Human Rights' call for evidence on Government's response to judgments identifying breaches of human rights in the UK

Introduction

- The Law Society of England and Wales (the 'Society') is the professional body representing more than 166,000 solicitors in England and Wales. Its concerns include the independence of the legal profession, the rule of law and human rights throughout the world.

- This submission has been produced by the Society through its Human Rights Committee in consultation with its International Department [1] and Legal Policy Department.[2] The Committee is a specialist body of the Society comprised of practitioners and experts in domestic and international human rights law. It is networked with a broad spectrum of international professional legal bodies, inter-governmental organisations, and non-governmental and civil society organisations.

  One of the Committee's activities is to monitor compliance with judgments of the European Court of Human Rights ("ECtHR"), annually in relation to the UK, and periodically in relation to other members of the Council of Europe.

  Thus, the Law Society welcomes the opportunity to respond to this call for evidence, having previously responded to the call for evidence in relation to judgments identifying breaches of human rights in October 2010.

- The Society regularly writes reports and provides specialist submissions on these subjects to UK, international and inter-governmental bodies. Many of these reports are referenced in this submission.

This paper is divided into 3 sections. First, we respond to the specific list of issues arising from cases referred to in the Joint Committee on Human Rights' (JCHR) call for evidence.[3] Second, we set out a general response to the Ministry of Justice's report entitled "Responding to human rights judgments" (the "MoJ's Response") [4] and third we make some concluding comments.

---

[1] The International Department of the Society connects with similar professional lawyers associations and civil society organisations across the world. The Department is divided into regional teams, each managed by a regional expert consulting with a specialist committee of international lawyers.

[2] The Legal Policy Department at the Society reviews, comments and amends policy affecting the legal profession and the rule of law. It regularly submits evidence to Government. It undertakes its work by consulting with specialist committees. There is a specialist committee for each legal practice area. Committee members are legal practitioners who are experts in their field.

[3] See http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/human-rights-judgments-call-for-evidence/

© The Law Society 2015

1. Issues listed in the JCHR's call for evidence.

1.0 This section responds to some of the issues and cases mentioned in the JCHR's call for evidence as ones in which they are particularly interested in receiving submissions.

The Right to a Review for "whole life tariff" prisoners (Vinter and others v United Kingdom[5])

1.1.1 In July this year by an overwhelming majority (16-1) the Grand Chamber in the case of Vinter and Others v UK found that "whole life orders" imposed under s.269(4) of the Criminal Justice Act 2003 violated Article 3 of the ECHR (Prohibition on Inhuman or Degrading Treatment.) The judgment did not hold that whole life orders as such were incompatible with Article 3. It held that prisoners must be able to have their sentence reviewed at some stage to ensure that they remain justified on "legitimate penological grounds'.[6] Based on a review of existing mechanisms in other member states[7] and international and comparative law practice, the Court found that life prisoners should be entitled to a review no later than twenty five years after sentence was imposed and to further periodic reviews thereafter.[8]

1.1.2 The judgment gives no hope of imminent release to any of the applicants[9] or the 42 other "whole life" prisoners in the UK. The Grand Chamber emphasised that the Government has wide leeway within the "margin of appreciation" to choose how to take remedial action.[10] In the short term, the UK could comply with the judgment by issuing new Prison Service Instructions.[11] This might immediately avert fresh claims from serving whole life prisoners.[12] In the long term, however, **the Law Society considers that it would be desirable for the Government to consult on proposals for a dedicated mechanism, integrated within the sentencing legislation, providing for review of whole life tariffs after a set period of, for example, 25 years and further periodic reviews thereafter.** This would accord with the practice adopted in the majority of states party to the Convention.

---

[4] *Responding to human rights judgments: Government Response to the Joint Committee on Human Rights' Fifteenth Report of Session 2009-10*, 27 July 2010, Cm 7892, http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/8502.htm

[5] Vinter and Others v UK, Grand Chamber Judgment [2013] ECHR 645 (09 July 2013)

[6] para.124.

[7] para.68

[8] para.122.

[9] Para.131.

[10] Para. 120 and Para. 21 Para. 21 of Judge Mahoney's concurring opinion.

[11] Para. 21 of Judge Mahoney's concurring opinion.

[12] http://www.telegraph.co.uk/news/uknews/law-and-order/10255239/Murderer-lodges-first-whole-life-appeal-in-wake-of-European-human-rights-ruling.html

© The Law Society 2015

The state's positive obligation to secure employees' right to manifest their religion or belief (Eweida v UK)

1.2.1 The ECtHR found that Eweida's right to manifest her religion, by wearing a crucifix necklace over her uniform, had been infringed by her employer's uniform policy which only permitted such symbols to be worn discreetly. Since Eweida's employers were British Airways, there were no allegations the State had directly interfered with her rights. Instead the allegation was that the State had failed to provide adequate protection for Eweida's right to manifest her religious beliefs.

1.2.2 The ECtHR found that English courts had failed to strike a fair balance between Eweida's right to manifest her religion and her employer's right to protect their corporate image. They noted that domestic courts had to 'operate within a margin of appreciation' in analysing the legitimacy and proportionality of the uniform policy. Although the ECtHR agreed that British Airways had a legitimate aim in protecting its image, they found that domestic courts had attributed too much weight to the aim.

1.2.3 Thus, the ECtHR's critique appears to focus on how the Court of Appeal failed to apply the balancing test correctly in this fact-specific case. If domestic courts can, in future, attribute greater weight to the rights of individuals to manifest their religions, particularly when assessing the proportionality of any interference, then the domestic legal system could afford Article 9 rights sufficient protection to satisfy the UK's positive obligations. Since the HRA requires courts to take account of the Strasbourg case law when applying Convention rights, this should be possible without any formal guidance. However, the Equality and Human Rights Commission is well placed to issue guidance on this matter.

1.2.4 However, some commentators have also suggested that this case highlights a possible inadequacy in UK employment equality law when dealing with religion cases, in particular the definition of indirect discrimination. "The exercise of trying to find a disadvantaged 'group' should be unnecessary if what law is really seeking to do is fulfil a basic principle that those with religious beliefs should be able to manifest them *reasonably* in the workplace."[13]

1.2.5 The Government should consider whether a positive duty should be imposed on employers to make reasonable adjustments to accommodate religion (as currently exists in the US and Canada) and whether such could be implemented by relatively small amendments to the Equality Act 2010.

[13] see e.g. http://www.lewissilkin.com/Journal/2012/September/Reinventing-indirect-discrimination.aspx

The Right of "IPP" prisoners (serving indeterminate sentences for public protection) to a speedy review of the lawfulness of their detention and to access rehabilitative courses

(*James, Wells and Lee v United Kingdom*[14] and *Betteridge v United Kingdom*[15])

1.3.1 Article 5 of the European Convention on Human Rights ('the Convention') provides that no one is to be imprisoned unless convicted by a competent court and in accordance with a procedure prescribed by law. It also provides that anyone imprisoned is entitled to take proceedings to decide without delay whether the detention is legal and, if it is not, he or she should be released.

1.3.2 These two cases against the United Kingdom concern a form of prison sentence introduced in England and Wales in 2005 by section 225 of the Criminal Justice Act 2003. This is known as 'imprisonment for public protection' ('IPP'). It is a sentence of indeterminate length as it consists of a fixed tariff at the end of which the prisoner has no automatic right to release but instead is entitled to apply to the Parole Board for release. In both cases the applicants faced problems in relation to their ability either satisfy the requirements for parole or to actually manage to have a parole review hearing.

1.3.3 In *James, Wells and Lee* the applicants claimed that the UK was in breach of Article 5 (1) on the basis that their detention in prison following the expiry of the fixed tariffs was unlawful, and also that there was 'no meaningful review of the legality of the period of detention after the expiration of the tariff by a body which could order the release in violation of Article 5 (4)'. In particular the applicants applied without success to attend certain courses while in detention, in an attempt at rehabilitation to satisfy the Parole Board that they should be released. It was clear to the Court that despite having brought in this particular type of legislation the UK government had not provided adequate resources to make these courses available. Also, the UK government had not provided sufficient resources to enable Parole Hearings to take place within a reasonable time after the end of the tariff.

1.3.4 In *Betteridge* the applicant, after his tariff had ended, made many attempts to have a hearing before a Parole Board, but despite being given several dates for these to take place he was faced with a series of postponements. Accordingly he had been imprisoned beyond the end of his fixed tariff for a period of approximately nine months without having had the opportunity to be assessed by the Parole Board. The Court agreed with his submission that this was in breach of Article 5 (4).

1.3.5 In *James et al* the Court considered that '… following the expiry of the applicants' tariff periods and until steps were taken to progress [the applicants] through the prison system with a view to providing them with access to appropriate rehabilitative courses, their detention was arbitrary and therefore unlawful within the meaning of Article 5 (1) of the Convention'.

1.3.6 In *Betteridge* the Court noted that the Government had accepted that there had been a violation of Article 5 (4) due to the persistent delays but explained

[14] Application nos: 25119/09; 57715/09; 57877/09, 11/02/13.

[15] Application no. 1497/10, 29/04/13.

to the Court that steps were being taken to address these problems. The Court concluded that the delay in the applicants being able to receive a review before a Parole Board was a violation of Article 5 (4).

1.3.7 So the Court found that the UK government was in breach of both Articles 5 (1) and (4) and all of the applicants were awarded compensation for having been detained in breach of these articles.

1.3.8 IPP sentences have been abolished by the LASPO Act so cannot be imposed any more. **In order to comply with the judgment the Government should provide adequate resources to ensure that prisoners who are still serving such sentences have the opportunity to attend relevant courses for the purpose of rehabilitation, and the opportunity to appear before a Parole Board within a reasonable time after the end of the fixed tariff. [Note that information has been provided to the Committee of Ministers, which considered implementation of the judgment at its last session].**

© The Law Society 2015

The state's positive obligation to protect employees against discrimination based on political affiliation or belief

(Redfearn v United Kingdom)

1.4.1 Arthur Redfearn had been dismissed due to his membership of the BNP. The ECtHR held his right to freedom of association had been infringed because the appropriate remedy, unfair dismissal, was not available to him because he had not been employed for the minimum one year qualifying period. The ECtHR also stated that the Race Relations Act 1976 did not offer appropriate protection.

Thus, the Government had failed to fulfil its positive obligation under Article 11 to enact legislation that would protect that right to freedom of association.

The ECtHR indicated that reasonable and appropriate measures to protect employees from dismissal on grounds of political opinion or affiliation, would be either through the creation of:

1. a further exception to the qualifying period; or
2. a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation".

1.4.2 Since the judgment, the Government has increased the qualifying period from one year to two. However, on 25 June 2013, section 13 of the Enterprise and Regulatory Reform Act exempted claims for unfair dismissal in cases of political opinions or affiliations from the 2 year qualifying period. This appears to be sensible and straightforward solution as recommended by the ECtHR.

Therefore, it appears that the Government has taken the necessary action step to cure the deficiency highlighted in Redfearn.

© The Law Society 2015

The state's positive obligation to investigate allegations of slavery, servitude, forced or compulsory labour (CN v. United Kingdom)

1.5.1 Article 4 entails a specific positive obligation on states to investigate, penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour.

1.5.2 In CN.v UK, a young Ugandan woman had been held as an involuntary domestic servant from 2003 to 2006. When she complained of her treatment and applied for asylum, the authorities expressed concerns about her credibility and found much of her account implausible. No apparent weight was attributed to her allegations that her passport had been taken from her, that she had had no access to her wages, and that she was explicitly and implicitly threatened with denunciation to the immigration authorities.

1.5.3 The Grand Chamber of the Court found that the above factors indicated a case of forced labour and that further, the absence of specific legislation criminalising such treatment resulted in an ineffective investigation into the applicant's complaints of domestic servitude. Consequently there had been a violation of Article 4. The authorities had limited themselves to investigating and penalising criminal offences which may accompany the offences of slavery, servitude and forced or compulsory labour, with the result that victims of such treatment who were not also victims of one of these related offences were left without any remedy. The Court relied on its findings in *Siliadin v. France* in coming to this conclusion.

1.5.4 The Court emphasised that authorities should be enabled to investigate and penalise such treatment as domestic servitude and that 'domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another. In the present case, the Court considers that due to the absence of a specific offence of domestic servitude, the domestic authorities were unable to give due weight to these factors.'

1.5.5 According to the Court, the State's positive obligation to investigate allegations under Article 4 arises whenever there is credible suspicion that an individual's rights under the Article have been violated. Once the matter has come to their attention, the authorities must act of their own motion – the requirement to investigate is not dependent on the making of a complaint by the victim. An effective investigation requires independence from those implicated in the events and must also be capable of leading to the identification and punishment of individuals responsible. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next of kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.

© The Law Society 2015

1.5.6 Subsequently, Section 71 of the Coroners and Justice Act 2009 created a specific criminal offence of holding another person in slavery or servitude or requiring them to perform forced or compulsory labour. The offence came into force on 6 April 2010.

1.5.7 **However, the Government must fully address the need to ensure that all relevant UK authorities that investigate all allegations and situations that suggest that such activities have taken place, are properly trained, funded and are centred around the needs of the victim.**

© The Law Society 2015

The right to a judicial hearing on proportionality in possession proceedings against Gypsies (Buckland v UK)

1.6.1 The decision of the ECtHR in Buckland v United Kingdom is a case that requires change in the law in the UK. It asserts that it may not be enough for a court simply to dismiss a possession claim as being disproportionate. It states that Article 8 may require the court to have power to ensure that the occupier enjoys an actual right of occupation, e.g. a tenancy or licence. Further, it gives support for the argument that Article 8 applies to private sector possession claims.

1.6.2 In Connors v United Kingdom [2004] HLR 52, the ECtHR held that the absence of any procedural safeguard in respect of occupiers of local authority sites was incompatible with the rights of the occupiers under Article 8. In response to Connors, the 1968 Caravan Sites Act was amended by Housing Act 2004 s.211(1), to extend the court's power to suspend a possession order to claims brought by local authorities. This amendment came into force in England and Wales on 18 January 2005. A further amendment was made by the Housing and Regeneration Act 2008, which likewise extended the 1983 Act to local authority sites. This amendment is in force in England and has been since 30 April 2011, but it is not yet in force in Wales.

1.6.3 Ms Buckland's case arose prior to second amendment cited above. She was a Welsh Romany Gypsy who had lived in a caravan plot on a caravan site in Port Talbot, Wales between 1999 and 2008 latterly pursuant to a licence agreement with the Gypsy Council dated 29 March 2004. Following allegations of nuisance and anti-social behaviour against a member of her family, the Council issued possession proceedings and the Judge, who was bound by Lambeth LBC v Kay [2006] UKHL 10, [2006] 2 AC 465, [2006] HLR 22), found that the Council's decision to seek possession was not unreasonable and he made a possession order. However, he found that the allegations were at the lower end of the scale and he postponed enforcement of the Order under s.4 of the Caravan Sites Act 1968 until 24 November 2006.

1.6.4 Ms Buckland appealed to the Court of Appeal, who decided on 12 December 2007 that the Court's power to postpone under s.4 imported the requisite judicial scrutiny to claims brought under the Act and that the Act was within the margin of appreciation permitted to States under Article 8. The Appeal was dismissed and Ms Buckland left the site in May 2008.The Council She complained to the ECtHR that she had been unable effectively to challenge the making of the possession order and that her eviction was disproportionate. The Court found that the grounds applied by the Appeal Court were insufficient to ensure the necessary Article 8 protection and that the power to grant 12 month suspensions of the order under s.4 provided inadequate procedural guarantees. Accordingly, it found Ms Buckland was deprived of her home without the opportunity of having the proportionality of her eviction determined by an independent tribunal.

1.6.5 The ECtHR said in para 68 of its Judgment:

"The possibility of suspension for up to twelve months of the possession order is inadequate, by itself, to provide the necessary procedural guarantees under Article 8. Although further suspensions may be granted, suspension merely delays, and does not remove, the threat of eviction. The Court cannot accept that the fact that an individual may effectively be able to remain in her home in the long-term by making repeated applications to extend suspension of a possession order removes any incompatibility of the procedure with Article 8."

© The Law Society 2015

1.6.6 Those facing possession claims on mandatory or no grounds include demoted tenants, family intervention tenants, introductory tenants, non-secure local authority tenants, for example, those in accommodation provided by the local authority in performance of its homelessness duties, a housing association 'starter tenant' whose landlord is seeking possession of her/his assured shorthold tenancy using section 21 of the Housing Act 1988, a housing association tenant whose landlord is seeking possession using Ground 8, the mandatory rent arrears ground, particularly where there is an outstanding housing benefit claim. In these cases, there is the constant risk of repeat proceedings, not even confined to the occupier's circumstances.

1.6.7 In para 65 of the ECtHR's Judgment the Court stated: "As the Court has previously emphasised, the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end".

1.6.8 **The Government should consider whether all action by a local authority to terminate occupation of a home should carry the same rights as are provided for in respect of most other local authority tenancies and a requirement that the court must decide on the proportionality of the remedy sought so that the facts and circumstances of the case must be examined by the Court. We accept that this will mean that mandatory grounds will be abandoned as will the lesser protection provided for in relation to those occupying local authority sites. Further the distinction between the legal remedies available to those with bona fide tenancies and those who occupy their homes under licences will inevitably be removed. The principle must be that all legal action to evict a person from his/her home must result in a decision on proportionality after an examination of the facts of the case and that the court must be endowed in all cases with the power to refuse to make a possession order as well as other powers including suspending such an order.**

© The Law Society 2015

2. Ministry of Justice Report to the JCHR on human rights judgments 2011-12

2.1.1 We note the Ministry of Justice's Report to the Joint Committee on Human Rights on Responding to human rights judgments 2011-12. We are pleased that the report confirms that the Government remains committed to the European Convention on Human Rights, to giving effect to it in domestic law, and values the European Court of Human Rights as a vital part of the system for protecting the rights and freedoms of Europe's citizens.

2.1.2 We appreciate that the UK having a relatively large proportion of leading cases outstanding may be an indication that the UK is not responsible for many repetitive cases. However we are concerned that implementation of changes required as a result of a number of cases remain outstanding, particularly in areas of political sensitivity such as prisoner voting rights.

2.1.3 The Law Society would urge the Government to take urgent action to remedy the situation.

© The Law Society 2015

3. Systemic issues and concluding comments

3.1.1 In general, the UK has a good record of implementing judgments (with a few notable exceptions) and in several cases, solutions have been legislated or implemented to cure defects, even in some very recent cases.

3.1.2 However, the Government must ensure that the remaining judgments are not forgotten, that complicated or politically unpopular reforms are still pursued, that fiscal policy does not downgrade the importance of human rights and that the reviews and consultations produce tangible results without further undue delay. It should conduct a review of all ECtHR judgments that remain un-implemented and ensure that adequate steps are taken to comply.

3.1.3 The Law Society notes that there exists the risk of repetitive cases. The MoJ acknowledges the importance of minimising the burden on the ECtHR caused by clone cases. It is important that the Government resolves legacy cases, and takes pro-active steps to avoid future claims.

3.1.4 The Law Society is concerned that some ECtHR judgments have been outstanding for a long period of time and in certain cases the UK has received strong international criticism from the Committee of Ministers at the Council of Europe.

3.1.5 One of the strategic objectives of Law Society is to promote the English legal system as the jurisdiction of choice. High-profile non-compliance with international judgments or repetitive breaches going unrectified will diminish respect for human rights generally in the UK and the status and reputation that English law has around the world.

The Law Society, September 2013

© The Law Society 2015