What are the impacts, if any, of the ECtHR judgements on the U.K legal system?

Introduction

The UK became a signatory to the European Convention on Human Rights 1950 (ECHR) in 1950 and since then has been bound by Convention obligations; since 1959 when the European Court on Human Rights (ECtHR) was established the UK has been bound to bring judgements made against it into domestic law through legislation. The Human Rights Act 1998 (HRA98) added to these obligations, in that UK courts and tribunals are now required to take account of decisions of the ECtHR when applying human rights obligations under the ECHR. The impacts of ECtHR on the UK legal system will be addressed in four parts. The first part considers how the human rights system under the ECHR was established and came into effect in the UK and then through the HRA98 courts in the UK was obligated to take account of decisions of the ECtHR when applying Convention rights. Second, the negative and positive obligations under the right to life will be evaluated. The third part discusses how Courts decisions have altered the rights of States to deport terrorist suspects. Fourth, the rights of prisoners to vote in UK elections will be discussed; this is an area where the UK continues to be in breach of its Convention obligations.

Human Rights in Europe

The UK was one of the original signatories to the ECHR, which was open for signature on 4 November 1950. Scholars have suggested that the original membership had little conception of the extent of the influence that the Convention and the Court would eventually have upon their domestic legal systems.[1] In the early days of the ECHR, there existed a dual system of dispute resolution including a European Commission on Human Rights, established in 1954 and the ECtHR, established in 1959.[2] In 1998, Protocol No.11 to the ECHR abolished the Commission and established a full time Court.[3]

The UK's relationship with the Convention changed fundamentally in 2000, when the HRA98 came into force. Prior to the HRA98, judgements of the ECtHR still had a significant impact on the UK legal system.[4] The UK accepted the right of individual petition under the Harold Wilson government in 1966; which meant that UK citizens could take the UK to the ECtHR to address alleged breaches of human rights, where domestic remedies had been exhausted.[5] The impact of the HRA98 has been that since

2 October 2000, UK citizens have been able to rely on their Convention rights in the UK courts directly.[6]

Specifically in relation to the judgements of the ECtHR, Article 2(1) HRA98 requires that when determining a question that relates to a right under the ECHR, a UK court or tribunal must take into account judgements, decisions, declarations or advisory opinion of the ECtHR. In addition, it must take account of a decision of the European Commission or the Committee of Ministers, when relevant to the proceedings.[7] The UK judges must be aware of decisions of the ECtHR and apply them when interpreting Convention rights, so that decisions in UK courts develop in a manner that is consistent with the way that the Convention is applied throughout the rest of Europe.[8]

In *Leeds v Price*[9] the Court of Appeal was faced with a decision regarding a possession order by a public authority for a residential property; the Court was faced with the decision as whether Article 8 is engaged in this case. The Court of Appeal referred to a decision of the House of Lords in *Harrow LBC v Qazi*,[10] however, a more recent decision of the ECtHR in *Connors v UK*,[11] meant that the *Qazi* decision might need to be reconsidered. The Court of Appeal referred the matter back to the House of Lords,[12] who confirmed that this was the correct approach, in order to provide legal certainty within UK law.

Negative and Positive Obligations to Protect Life

McCann v UK[13]laid down standards for the lethal use of force by the security services. The case concerned the fatal shooting in Gibraltar of IRA terrorist suspects by British Special Air Service (SAS) officers. The deceased men's relatives brought a complaint before the ECtHR alleging a violation of Article 2 ECHR (the right to life). The ECtHR found a breach of Article 2 in this case. They held that although the SAS members had genuinely believed that the IRA members had a bomb which they would detonate leading to the loss of life, that the right to life had been violated due to failures in the conduct of planning the operation.

The UK Deputy Prime Minister, at the time, argued that the decision was encouraging terrorism and that the Government would not take action because of it.[14] However, attitudes changed over time, the standards established in the judgement for the planning and control over shoot to kill policies gained acceptance and became part of policy guidance on the management, command and deployment of armed officers.[15]

Another leading case concerned with the protection of the right to life is that of *Osman v UK*,[16] in which the ECtHR established criteria for authorities to uphold their obligations under Article 2. The case concerned a teacher who had developed an

obsession with one of his pupils, Ahmet Osman. The family of the student experienced threats and criminal damage, culminating in an attack by the teacher in which Ahmet Osman was injured and his Father killed. The Osman judgement then established criteria for whether or not police forces are in violation of positive obligations to protect their citizens under Article 2. The test as summarised asked whether the authorities were aware or ought to have been aware at the time of the immediate risk to life of a specified person due to criminal acts, and failed to take measures to avoid that risk.[17]

The outcome of the *Osman* case was that the test was later adopted as part of policing policy and practice across a range of areas.[18] The Equality and Human Rights Commission found that the majority of police forces in England and Wales now have in place policies on the handling of threats to life by third parties, which are established based directly upon the test established in the *Osman* case.[19] An 'Osman warning' is used to let an individual know that the police perceive their life to be at risk.[20]

Deportation of Terrorist Suspects

The treatment of terrorist suspects has presented one of the greatest challenges to human rights protections in the UK.[21] Although the threat of terrorist activity may be real, governments are still required to work within a human rights framework in the treatment of terrorist suspects. However, governments wishing to assure the public that measures are being taken to minimise the threat may breach their obligations under the ECHR.[22]

Where an individual is considered to be a threat to national security, the UK government have issued a deportation order for the individual to be returned to their country of origin. In *Chahal v UK*[23] the applicant was a Sikh activist who had gained residence in the UK after a general amnesty for illegal immigrants in 1974. [24] In 1990, the Home Secretary issued a deportation order against Chahal, based upon his alleged threat to UK national security. Chahal's case reached the ECtHR where it was found that there were substantial grounds that he would face a real risk of receiving treatment contrary to Article 3 (freedom torture, cruel, inhuman and degrading treatment or punishment) if deported to India. *Chahal* invokes the principle first established in *Soering v UK*, that a Convention Party could breach their obligations under the ECHR merely by deporting an individual to a state in which their Convention rights were at a substantial risk of being breached.[25]

The ECtHR also found a breach of Article 5(4) (the right to liberty) ECHR since there was no judicial involvement in the decision to deport Chahal on national security grounds, since Article 5(4) requires everyone who is deprived of their liberty by arrest or detention to challenge that decision before a court.[26] In order to adhere to their Convention

obligations, the UK amended the particular procedure that was lacking in Chahal's case by the Special Immigration Appeals Commission Act 1997.[27]

The *Chahal* case proved to be controversial, particularly in the light of the terrorist attacks in the United States and the UK in 2001 and 2005 respectively.[28] After the London bombings of 2005, the British government attempted to rebalance human rights considerations in favour of national security concerns.[29] The UK saw its opportunity to attempt to reverse the *Chahal* case when a case with similar facts came before the ECtHR in *Saadi v Italy*.[30] Saadi had served a custodial sentence for 4.5 years for terrorist related offence in Italy. On his release, an order was made for his deportation. The ECtHR found that the decision to deport Saadi would breach Article 3 if enforced.[31]

As third party intervener the UK attempted to reverse the decision in *Chahal*, which has prevented the deportation of terrorist suspects under section 3(5) Immigration Act 1971, where there was a substantial risk that their Article 3 rights would be breached. The UK made arguments based on the balancing of the rights of terrorist suspects under Article 3 with the right to life of UK citizens under Article 2. The ECtHR instead maintained an absolute stand on the protections available under Article 3, stating that the threat that the applicant would pose if not returned, does not diminish the risk of ill treatment to which he may be subjected on return. [32]

Post-*Saadi* the UK still relies upon diplomatic assurances to discharge their positive obligation not to return a terrorist suspect subject to a risk of breach of Article 3. This is in breach of the Grand Chambers ruling that the reliance on diplomatic assurances was not a reliable means by which a State could be confident that a returnee would not be subjected to a breach of their Article 3 rights. [33] There are a number of occasions where a judgement of the ECtHR fails to have significant enough an impact upon the UK legal system for conduct to be changed in relation to the ruling.

Voting Rights of Prisoners

This lack of observance of the ECtHRs rulings can also be observed in relation to a number of cases which reached the ECtHR in relation to the voting rights of prisoners. In *Hirst v UK*,[34] and *Greens and MT v the UK*,[35] and *Firth v UK*, [36] UK prisoners brought their case to the ECtHR protesting against the blanket ban on prisoner voting rights. In *Firth v UK*, ten prisoners brought a claimed under Article 3 of Protocol 1 to the ECHR, complaining of a breach of their right to vote in the European Parliament Elections of 4 June 2009. [37] The UK was first found to be in breach of its obligation under Article 3, Protocol 1 in 2005, and twelve years later the UK is still in breach of its obligations.[38]

Parliamentary reform became more urgent than ever in order to address this breach in obligations.[39] In December 2013, the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill published its report,[40] recommending that the Government bring forward a Bill as the start of the 2014-15 Parliamentary session to give effect to the commission's recommendations on an appropriate policy that would allow prisoners serving 12 months or less to vote in all UK elections.[41] Despite these recommendations on compliance with the UK's human rights obligations, the UK government has failed so far to enact any legislation in order to comply with the Court's judgements.[42]

Conclusion

There are many areas where a judgement of the ECtHR has influenced the UK legal system. For example, decisions of the Court relating to the negative obligations of the security services to refrain from taking life and the positive obligations to protect life have both been incorporated to police and security services procedural policies. Decisions of the deportation of terrorist suspects have been intergrated with much less compunction. The decision of the ECtHR in *Chahal* and *Saadi* have been modified so that the UK now relies on diplomatic assurances from states that they will not use behaviour contrary to Article 3 when deporting individuals who are at substantial risk of torture if deported. Further, there are cases where the UK legal system has not been influenced by a decision of the ECtHR at all. There are multiple cases in which the UK has been found to be in violation of the right to vote under Article 3 of Protocol 1, yet no legal change has been made in domestic law to give effect to these judgements.

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