HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence (Virtual Proceeding): The Government's Independent Human Rights Act Review, HC 1161

Wednesday 27 January 2021

Watch the meeting

Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Lord Dubs; Baroness Ludford; Dean Russell; Lord Singh of Wimbledon.

Questions 10-16

Witnesses

II: Saira Salimi, Speaker's Counsel, House of Commons; Eve Samson, Clerk of the Journals, House of Commons.

Examination of witnesses

Saira Salimi and Eve Samson.

Q10 **Chair:** We now turn to our next panel, Eve Samson and Saira Salimi.

Eve Samson is Clerk of the Journals, and former clerk of the Joint Committee on Human Rights. She has served the House of Commons since 1986, so she understands as well as anybody what the situation was like in terms of the House of Commons before the Human Rights Act and how it has been since, so we are very grateful to her for giving evidence to us.

Saira Salimi is Speaker's Counsel, a very important office that many people are unaware of. It is the office responsible for providing legal advice to the Speaker and the Clerk of the House and to the House service generally.

I would like to take the opportunity to thank them both for their work as well as for giving evidence to us, looking at the parliamentary side of the Human Rights Act. Could I ask Lord Brabazon to introduce himself and ask the first question to this panel?

Q11 **Lord Brabazon of Tara:** Good afternoon. I am a Member of the House of Lords and a member of the Joint Committee on Human Rights. My first question is to you both. Can you give any examples of tensions or difficulties that have arisen as a result of the approach taken by the Human Rights Act to balancing the separation of powers between Parliament, the Executive and the courts?

Eve Samson: I think it is undeniable that there are sometimes tensions between Parliament, the Executive and the courts, but whether those arise from the Human Rights Act and the extent to which that is true is more debatable. It has arisen in a lot of contexts. The idea that a statute could be struck down has sometimes been ascribed to the growth of EU law. It has arisen partly from the unintended consequences of the Supreme Court. I was very struck when Lady Hale told the Joint Committee on the Fixed-Term Parliaments Act a few weeks ago that things have fundamentally changed as a result of the changes to the position of the Lord Chancellor. Once the Lord Chancellor is not a member of Cabinet, the two-way communication flow has been stopped.

There are lots of reasons why the relationship can sometimes not be entirely as one would wish, but it would be wrong to say that the HRA had not contributed something to the direction of travel,

because most rights are qualified rights, and each of the three players—the Executive, Parliament, in so far as you can separate it from the Executive, and the judiciary—may have a different view of how they should be balanced. Parliament will usually look at things in terms of the rights of the broad population and how you balance that out, whereas the judiciary will be very concerned about this person here in this court and how they bear down. I think it is quite creative that you have both considerations in play at once in the same system.

I also very much support what Dominic Grieve said about needing to remember that, when you are thinking about the Executive, you are not just thinking about what we think of central government Ministers, but thinking about all the other public authorities that have been looking at and interpreting rights, and doing so, as he said, maybe not as much as I seem to remember we wished they would when I was clerk of this Committee, but certainly more than they did before.

Saira Salimi: To add to that, from my perspective I would ascribe some of the tensions and difficulties not specifically to the Human Rights Act but to the very great developments in judicial review that have taken place in the last 30 or 40 years, which have inevitably, as your previous panel has described, involved greater involvement by the courts in decisions taken by the Executive.

In support of that, I would point out in particular that the convention was cited in UK courts and taken into account, although it was not directly applicable, in proceedings in the UK courts before the Act. One example is the case of Brind, which is about the ban on certain Northern Ireland politicians speaking their own words on UK broadcasts. The claimants in that case asserted a breach of Article 10 of the human rights convention. The House of Lords did not consider itself precluded from considering the point, although it acknowledged that it had no rights directly to enforce the Article 10 right.

As Dominic Grieve touched on a few minutes ago, the tensions and difficulties are also often either exacerbated or created by a media presentation of Human Rights Act cases rather than by the content of what was actually said in the judgment.

Chair: Thank you very much. We will now go to Baroness Ludford for our next question.

Q12 **Baroness Ludford:** Thank you for being our witnesses. Do you think the requirement under Section 3 of the Act to give effect to legislation compatibly with convention rights could be said to have

resulted in legislation being interpreted in a manner inconsistent with the intention of the Parliament, as is posited by the review's call for evidence? It asks a specific question on this.

Saira Salimi: I think it is inevitable that that will happen occasionally as a consequence of the requirement to read down legislation to ensure that it is compatible with the convention. It would be astonishing, especially given that the Act applies to pre-Human Rights Act legislation, if it was not interpreted sometimes in a manner inconsistent with the original intention of Parliament.

Lord Neuberger has already cited the case that I was going to mention in this context, which is the Rent Act case on the interpretation of spousal rights of succession. Relevant housing legislation provided that the surviving spouse had a right of succession to a tenancy on death, and the case very significantly predated the Marriage (Same Sex Couples) Act. The surviving partner in that case was not a spouse on the ordinary meaning of that word, but the House of Lords applied Section 3 to read the legislation compatibly with the convention and provide the surviving partner with that statutory right of succession. That probably was not the intention of Parliament at the time when the legislation was passed.

Eve Samson: As Saira says, it is inevitable, and, as your previous witnesses said, there will be tensions and there will be cases where Parliament and the courts may disagree.

The case I would cite would be R v A, which was a case about the interpretation of Section 41 of the Youth Justice and Criminal Evidence Act, which prevented certain sorts of evidence being used in rape cases. Parliament had been very worried that a lot more evidence about previous sexual history had been used in rape cases than was appropriate, and had enacted a very careful restriction on exactly when you could use such evidence.

The whole purpose of the Act was to fetter judicial discretion. When it came to the courts, they looked at it and decided it was incompatible with the Human Rights Act. There was general agreement that it was impossible to interpret it as anything other than incompatible on any normal method of statutory construction, but they went on to use Section 3 to redefine the Act to say, "The test of admissibility is whether the evidence and questioning in relation to it is, nevertheless, so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the convention. If this test is satisfied the evidence should not be excluded."

It had put back, speaking very broadly, the broad look that the Act had been precisely designed not to do it. You can think that this is an excellent thing: Parliament had gone further than was appropriate in restricting a fair trial. You can take the absolutely contrary view and say there is some Strasbourg jurisprudence that says Article 6 fair trial rights include fairness to witnesses and to the accuser, as well as to the accused. You could just say that is one particularly striking case in an Act that has now been in place for 20 years, and that these things will happen sometimes. That is a matter for your judgment.

Q13 **Chair:** I will intervene at this point. Is it not the case in terms of legislation that is post, not prior to, the Human Rights Act—this goes back to Saira's point—that it should be unlikely that the courts are in a position of interpreting any legislation being in breach of the European Convention on Human Rights, because the Secretary of State introducing the legislation has to certify that the legislation is compliant with the European convention? Therefore, surely the only time the courts will find themselves in that situation is if the Secretary of State is wrong in asserting that the legislation that has subsequently come before the courts is compliant with our obligations under the European convention.

Eve Samson: I think the difficulty is that there are perfectly legitimate differences of view on how you balance rights. This legislation was passed after the Human Rights Act; it is 1999 legislation. The concern was that rape victims, although not on trial, were not getting a fair trial because too much evidence about previous sexual history was adduced.

Chair: My point was that the Secretary of State in that instance would have certified that the Youth Justice and Criminal Evidence Act—or Bill, as it was—was compliant.

Eve Samson: In his view—and in Parliament's view, because in my experience I have never known Parliament to be actively unconcerned about rights—the Secretary of State and the Parliament that passed it thought that this measure was balanced, struck the appropriate balance, and respected human rights. There can be legitimate differences in opinion about where the balance should be struck. You can cite ECHR case law that says that it is perfectly legitimate when you are thinking about fair trials to think about fairness to witnesses and to victims as well.

Q14 **Baroness Ludford:** The next question is about Section 19, ministerial statements of compatibility. Do you think that there have been problems with this? Section 3 requires the courts to give effect to legislation so far as it is possible to do so in a way

compatible with convention rights. If the Minister has made a statement of compatibility, but the courts are struggling to find that legislation is compatible, has this caused tensions between ministerial statements and the interpretation of the legislation by the courts? More importantly, have they thereby undermined both Ministers and Parliament?

Saira Salimi: Eve has already made the most important point in response to this, which is that it is possible for people in good faith to come to quite different conclusions about the compatibility and particular interpretation of legislation with the convention rights. I will add to what she said and say that the ministerial statement of compatibility expresses the view to which the Executive collectively has come at the point of introducing the Bill to Parliament on the compatibility of its provisions. That may not necessarily be reflected in Parliament, and this committee will, of course, be very well aware that it is quite possible for parliamentarians or groups of parliamentarians to take a very different view of the compatibility at least of some provisions in a Bill when it is going through its parliamentary stages. I think that is a valuable creative tension between the Executive and Parliament in debate on primary legislation.

Eve Samson: The only thing that I would add is that there are judgments where they have noted this statement of compatibility and said, "That is what the Minister thinks. We have to make our own assessment". I do not think there is any difficulty in that. Parliament, the Executive and the judges will all come at it from slightly different angles, in so far as Parliament, which is a multi-member and multi-party organisation and institution, can have a collective will.

Chair: The clerks have just reminded us that the 1999 Youth Justice and Criminal Evidence Act preceded the Human Rights Act, because the Human Rights Act did not come into force until October 2000.[1] It was, to all intents and purposes, prior to the Human Rights Act. Moving swiftly on, I invite Lord Dubs to put a question.

Q15 **Lord Dubs:** My question is this. Is the mechanism provided for by Section 4 of the Human Rights Act, whereby the courts can give declarations of incompatibility but not strike down primary legislation, effective in maintaining parliamentary sovereignty?

[1] S.19 of the Human Rights Act (Statements of compatibility) came into force on 24/11/98 see S.I. 1998/2882 and the Youth Justice and Criminal Evidence Bill was introduced into the House of Lords on 3 December 1998.

Saira Salimi: I do not think that I can possibly improve on what your previous panel have said already on this point. I will just add very briefly that the 1998 Act is a very careful balancing act, which was intended at the time to preserve the Dicey concept of parliamentary sovereignty, specifically by not conferring power on the courts directly to interfere with primary legislation. It remains open to Parliament to decline to make a remedial order or any amending primary legislation in the face of a declaration of incompatibility. The clear intention was to allow the courts to send a powerful signal concerning a particular provision, but not to override the sovereignty of Parliament.

Eve Samson: The only thing I will add is that it was recognised in the debates in the Bill that this meant a great deal of power in the hands of the courts. If they said something was incompatible, there would be huge pressure on Parliament and the Government to put it right.

It does indeed preserve formal sovereignty. The interesting thing in a multi-veined and creative tension world is that there is no way, of course, for Parliament to say, "Hang on, we don't agree". It has done once or twice, in the prisoner voting case, which was more a Strasbourg decision. There was a resolution to say, "Hey, hang on a minute. We think it's right that prisoners shouldn't have a vote". There was a case where there was a resolution of the House of Commons that affirmed the House's belief that Article 8 rights were respected by the Immigration Rules. But, of course, those are non-statutory.

Q16 **Lord Dubs:** If primary legislation is incompatible with convention rights, the usual options are to amend that Act with either a Bill or a remedial order, both of which are subject to parliamentary scrutiny. The review's call for evidence suggests that Section 4 could be amended to enhance Parliament's role in determining how any incompatibility should be addressed. What options might there be for enhancing Parliament's current role in this process?

Saira Salimi: I should start by saying that that seems to me to be primarily a political question, because it depends very much on whether there is a greater appetite among parliamentarians generally for an enhanced role and scrutiny of human rights compatibility of legislation. It raises related and quite difficult questions about control of the parliamentary agenda and whether there is an appetite for a process that would enable more detailed scrutiny, particularly in a case of a matter that the Executive did not wish to provide additional parliamentary time for. I think I will stop there.

Chair: I would like to press you on that. You could tell us whether or not MPs knock at the door and say, "I'm not happy with this remedial order process. Can you advise whether there's any way around it?" You would know whether or not that is a point of tension, even if you do not describe the examples that have arisen. I will ask Eve the same question. Has there ever been examples, and how frequent are they, where MPs have been knocking their heads on the wall and saying, "We're not happy with this process. How can we find a way to address it?"

Saira Salimi: Not in my experience, although my time in the House has been very much shorter than Eve's, so she is better placed than I to respond to that.

Chair: Okay. It is not really a political question we are asking but a question about the experience of those who then advise MPs. Let us move to Eve. Are people knocking on your door? MPs are asking clerks all the time, "How can we do things that we're not allowed to do?" That is what we are always asking clerks. In your experience, has there been a big posse of people from time to time asking how to get around the limits of the remedial order?

Eve Samson: I would not know, of course, but when I was clerk of JCHR, and since then in the Committee Office in general in the last four or five years, I would be the sort of person people might have approached, and they did not.

The other question I would ask is whether the scrutiny of a single clause in a Bill about other things—scrutiny is often what is done to remedy an incompatibility—is really any better than a remedial law where you have the support of your expert legal advisers, who can look at things and who can put it to the committee. That power is quite strong. The Act does not mention the committee, because it was felt to be improper to do so, and the committee had not yet been set up. The whole presumption was that a committee would look at these things properly. You can always tweak the procedure, and if the committee wanted to change its methods so that it emailed all MPs, as well as putting a thing on the website saying, "Hey, we have a remedial order. Do come and get in touch", that would be perfectly within your power.

Chair: Having been Leader of the House, and Shadow Leader of the House, and having been in the House for a long time, I cannot think of a time at Business Questions when colleagues got up and asked for greater time to consider and debate a remedial order. I can see many occasions when they have asked for extra time to debate all sorts of things, but not remedial orders. Even, can you remember a time when there has been a big head of steam where

Parliament wanted to debate remedial orders? Otherwise it is a bit hard to understand why this might be a solution if it appears to not be a problem.

Eve Samson: The super-affirmative procedure is not just used in the Human Rights Act. It is considered a good balance between getting proper technical scrutiny, holding a small number of parliamentarians' noses to the grindstone, and asking them to really look hard and to report back to the rest of the House, which can then take a decision. I do not think there is anything inherently wrong with that. I suppose I agree with you.

Chair: Okay. Unless any of my other colleagues have any other questions to either of our witnesses, it has been incredibly helpful for us to have the two of you, who are involved in the actual mechanics of this from the parliamentary side, to shed some light on it. I am very grateful to you for giving evidence to us, and I hope you will be on standby if we need some further assistance from you as we prepare our evidence to the independent review. Thank you very much indeed.

That concludes the Joint Committee on Human Rights evidence session for this afternoon. Thank you to the broadcasting team, our clerks, and to the members of the committee and those who have given evidence to us this afternoon.