

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises them on the full range of employment rights issues through its specialist employment rights department. Thompsons has particular expertise in pursuing freedom of association cases in domestic courts and in the European Court of Human Rights.

Question 1: Do you think there is any room for reform of (a) the HRA; (b) the ECHR; (c) and/or the European Court of Human Rights that would improve them and strengthen the case for their retention? If so, what kind of reform would you suggest?

At present, we don't think that there is a case for reforming the Human Rights Act. It represents a carefully calibrated mechanism for incorporating European Convention rights into UK law which respects both parliamentary sovereignty and the UK's democratic traditions. We don't think the time is right to try to improve upon that mechanism, and we can't see that attempts to improve the HRA would strengthen the case for its retention.

In terms of the ECHR, we think that the UK should sign and ratify Protocol 16, which is now open for signature, concerning the facility for Higher Courts to seek advisory opinions from the European Court of Human Rights. Otherwise, as widely recognised at the International Conference on the Future of the European Court of Human Rights in April 2014, the Convention rights themselves should be regarded as 'untouchables', subject of course to the 'living instrument' doctrine.

The European Court of Human Rights should be encouraged to strengthen its own procedures especially in two important regards: (i) eliminating its backlog of cases (following the unacceptable delay in the ratification of Protocol 14); and (ii) ensuring (so far as it can) that those appointed to the Court are of suitable calibre, and with extensive international human rights experience.

Question 2: What do you think is the best way to win public support for the HRA/ECHR? How can we make human rights more appealing to people?

We think the best way to win public support for the HRA/ECHR is to try to re – focus public attention away from the types of cases which have attracted such adverse (though entirely unjustified) media attention, such as prisoners' voting rights and Abu Qatadar.

The media focus should be directed towards how the HRA/ECHR is used in situations arising in everyday life – especially as benchmarks for the provision of public services. Examples include health and social care for the elderly, education and, particularly, the NHS.

Attention should also be paid to the reforms the European Court has made after the Brighton conference, and especially the introduction of Protocol 15 which will give added impetus to the principle of subsidiarity and the margin of appreciation.

We also think that human rights should be advanced as a 'rule of law' issue. It is well settled that compliance with international obligations is an aspect of the rule of law, which is now formally protected by Section 1 of the Constitutional Reform Act 2005. Also included within the rule of law is compliance with the UK's other international law obligations – such as under the Conventions of the International Labour Organisation.

Question 3: Do you think there is a case for introducing a British Bill of Rights? If so, what forms could this take? If not, you are welcome to explain why not.

We think that, before answering this question, it is essential to re-affirm the fundamental conclusions reached by the Joint Committee on Human Rights in its report 'A Bill of Rights for the UK?' of July 2008, and in particular the conclusions that:

- (i) assuming that the UK does not denounce the Convention, a UK Bill of Rights would not lead to the UK ceasing to be bound by judgments of the European Court of Human Rights;
- (ii) '.....any UK Bill of Rights has to be 'ECHR plus'. It cannot detract in any way from the rights guaranteed by the ECHR'; and
- (iii) '...it is imperative that the HRA not be diluted in any way in the process of adopting a Bill of Rights. Not only must there be no attempt to redefine the right themselves....but there must be no question of weakening the existing machinery in the HRA for the protection of the Convention rights'.

Once these conclusions are re-affirmed, we think that arguments favouring a British Bill of Rights become less relevant.

Question 4: How has the HRA/ECHR affected you or your members? Please give examples.

The HRA/ECHR affect many aspects of the functioning of trade unions and their members' working lives. However, the aspect we wish to draw attention to is Article 11 of the European Convention and the protection of the rights of freedom of assembly and association.

This is an area where we have particular expertise. We were successful in the European Court of Human Rights in the *Wilson and Palmer v United Kingdom* (unlawful inducements to give up collective bargaining rights) and *ASLEF v United Kingdom* (a trade union's freedom not to associate with a BNP member) cases.

We think that there is a serious failure to acknowledge the foundation of rights to conduct collective bargaining and to take collective action in Article 11 and other international instruments. It is true that the European Court of Human Rights has recently rejected the RMT's complaints under Article 11 concerning the requirements of the industrial action ballot notice and the outright ban on secondary industrial action in the UK. However, these findings were, in relation to the ballot notice, on the ground of non – admissibility, and, in the case of the ban on secondary action, because of a wide margin of appreciation for the State.

But the fundamental points which were confirmed were that: (i) Article 11 is engaged in the fields of collective bargaining and collective action; and (ii) that included secondary action, meaning that interferences required justification.

Those fundamental points relate back to the seminal judgment in the *Demir and Baykara* case, where the Grand Chamber unanimously held that the content of the Article 11 right was to be determined by reference to international law other than the Convention, and the laws and practices in other Member States. Those international laws in turn included ILO Conventions 87 (Freedom of Association) and 98 (Right to Organise and Collective Bargaining), as well as other international treaty obligations (which bind the UK) in the sphere of collective bargaining and collective action. Those international treaty obligations are directly relevant to compliance by the UK with Article 11, and also as an aspect of the rule of law.

Unite has an application pending before the European Court of Human Rights in relation to the State's positive duty to promote collective bargaining arising out of the abolition of the Agricultural Wages Board. That application refers specifically to the State's obligations under ILO Convention No.98.

We think that it essential that aspects of the European Convention, and also of other international law obligations including those under ILO Conventions, are properly considered and taken into account, both by UK courts and by the legislature.

Question 5: What role, if any, do you see for the EU in the debate on human rights (in particular the EU's Charter of Fundamental Rights)

The EU has an important role to play in the debate on human rights – not least because of its accession to the European Convention. At the level of the Court of Justice of the European Union, there is current uncertainty as to the extent to which EU Charter rights are to be used to 'read down' non – compliant national legislation – seemingly with different results for different rights. That needs to be resolved by the Court.

In the field of collective labour rights, there is an inconsistency between the CJEU's approach, where infringements of free movement and market access rights have to be justified in the contest of competing 'fundamental' social rights, and the stance to Article 11 rights adopted by the European Court of Human Rights. That inconsistency is effectively entrenched in the EU Charter by the frequent requirements that the exercise of EU Charter rights is subject to 'Union law'. The inconsistency needs to be resolved.

There is another matter that we believe is attracting wholly inadequate public attention: the Transatlantic Trade and Investment Partnership Agreement currently being negotiated between the EU and the US (with a similar agreement virtually concluded between Canada and the EU). It is essential that free trade agreements on such a massive scale are used as vehicles for the furtherance of human rights, and the EU has a central role to play in that.

For further information contact

Richard Arthur / richardarthur@thompsons.law.co.uk

Thompsons Solicitors LLP
30 May 2014