JUDICIAL REVIEW UPDATE

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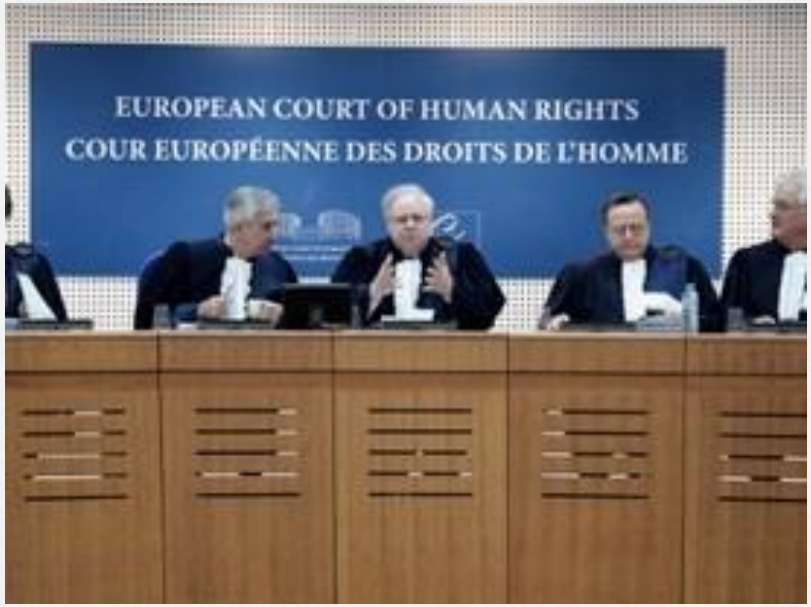
Cases in the last year

- 287 petitions (2013 figure)
- Asylum and immigration
- Prisoners rights
- Planning
- Legislative competence

PART ONE

- STRASBOURG JURISPRUDENCE IN JUDICIAL REVIEW



Human Rights Act 1998, s.2

"(1) A court or tribunal determining a question which has arisen in connection with a Convention right must ***take into account*** any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

…

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

Established principles

- *Ullah* principle
- Constructive dialogue with Strasbourg
- Application of judicial precedent

Ullah principle

- The “duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less” (*R (Ullah) v Special Adjudicator* [2004] 2 AC 323 per Lord Bingham at para 20)

Clear and constant line

- "Where … there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line" (*Manchester City Council v Pinnock* [2011] 2 AC 104 at para 48)

Keeping pace with Strasbourg

- The sentence “could as well have ended: “no less, but certainly no more”” (*R (Al-Skeini and others) v Secretary of State for Defence* per Lord Brown at para 106)

Constructive dialogue

- "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law …" (*Manchester City Council v Pinnock* at para 48)

Judicial precedent

- "… As Lord Hailsham observed … "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection". That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent." (*Kay v Lambeth LBC* [2006] 2 AC 465, per Lord Bingham at para 43)

Variation 1: Limits of constructive dialogue

- *McGeoch v Lord President of the Council* 2014 SC (UKSC) 25
- Review of exclusion from franchise on EU law and Convention rights grounds
- *Hirst v United Kingdom (No.2)* (2005) 42 EHRR 849, GC
- *Scoppola v Italy (No. 3)* (2012) 56 EHRR 663, GC

Constructive dialogue is valuable …

- "In relation to authority consisting of one or more simple Chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns … in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg…

… up to a point

- "… But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level" ([2014] SC (UKSC), para 27)

The limits of constructive dialogue

- “argentoratum locutum iudicum finitum”
- “Strasbourg has spoken, the case is closed”
- *Home Secretary v AF (No. 3)* [2010] 2 AC 269 per Lord Rodger at para 98.

Variation 2: Keeping pace with Strasbourg

- *Moohan & Others, Petitioners* 2014 SLT 213
- Scottish Independence (Franchise) Act 2013
- Contrary to rule of law and fundamental rights
- Contrary to EU law
- Contrary to international obligations
- Contrary to A3P1 and Article 10

To boldly go where Strasbourg had not gone before

- no duty to follow Strasbourg jurisprudence unaccompanied by reasoning
- no duty to follow line of Strasbourg jurisprudence not decided by the Grand Chamber
- likely that if a similar case were to go to Strasbourg now, ECtHR would find that A3P1 and/or Article 10 extended to referenda

Ullah affirmed …

- “I could only uphold [the] contention that A3P1 applied to voting in a referendum … if there was a clear and constant line of Strasbourg jurisprudence to that effect; or if, in the absence of a clear and constant line, there were clear pointers in that direction which would enable me to conclude that when the case next came before the court in Strasbourg it would undoubtedly, or at least very probably, come to that conclusion. The domestic court should keep pace but not get ahead. Not only is there no such clear and constant line of Strasbourg jurisprudence, but such indications as there are … almost all point towards the opposite view, namely that A3P1 does not protect the individual's right to vote in a referendum.” (2014 SLT 213 at para 25)

… at least for now

- "It may be, therefore, that *Ullah* and *Al-Skeini* may one day not represent the last word on the subject. But they do now (2014 SLT 213, para 13)

Variation 3: Strasbourg and precedent

- *Brown v Parole Board & Scottish Ministers* [2013] CSOH 200
- *Duncan v Scottish Ministers* 2014 SLT 531
- Exceptions to the general rule in *Kay* in *D v East Berkshire Community NHS Trust and Others* [2004] QB 558
- Earlier decision pre-dated the Human Rights Act;
- Human Rights Act undermined policy considerations underlying the House of Lords decision; and
- Same claimants who lost in the House of Lords succeeded at Strasbourg

Background – James in the House of Lords & Strasbourg

- *James, Lee and Wells v Secretary of State for Justice* [2010] 1 AC 553
- *James v United Kingdom* (2013) 56 EHRR 12

Brown v Parole Board for Scotland & Scottish Ministers

- "For the reasons stated, I do not consider there is any real merit in the ECHR arguments presented on behalf of the petitioner. Had I concluded that the case of James Wells & Lee v United Kingdom was in point, I would in any event have regarded myself as bound by the decision of the House of Lords." [2013] CSOH 200 per Lady Wise at para 38

Duncan v Scottish Ministers

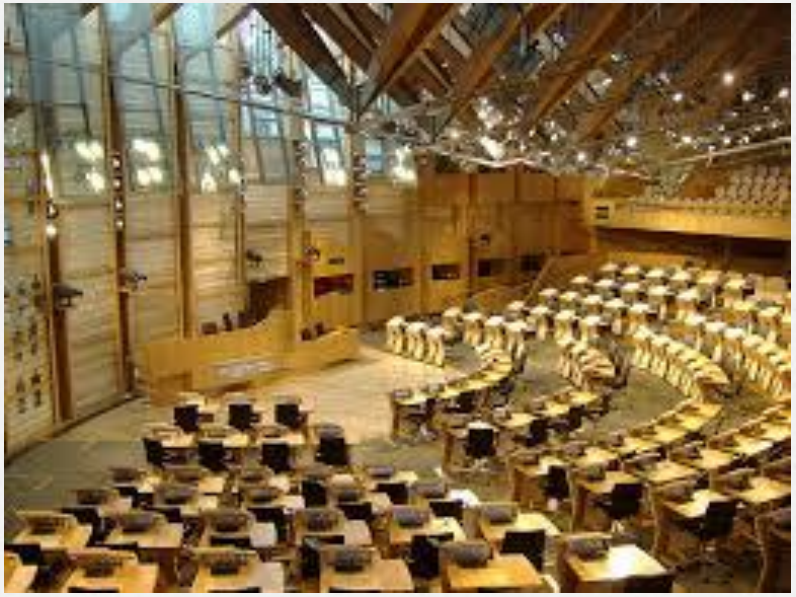
- decision in James (Strasbourg) was, in effect, a successful appeal from the decision of the House of Lords
- main point of difference was as to the proper interpretation of art.5(1) rather than a point of interpretation of domestic law
- decision of the Strasbourg court had, in effect, been recognised in subsequent cases in the Supreme Court (2014 SLT 531, per Lord Glennie at para 116(6))

Haney & Others v Secretary of State for Justice

- Constructive dialogue with Strasbourg?

PART TWO

- Judicial Review and the Courts Reform (Scotland) Bill



Principal changes

- three month limitation period for any review
- requirement to obtain the permission of the Court before a petition is allowed to proceed

Three month limit: Court of Session Act 1988 s27A

- “(1) An application to the supervisory jurisdiction of the Court must be made before the end of—
- (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or
- (b) such longer period as the Court considers equitable having regard to all the circumstances.”

Justice Committee Report

- "… those applying section 27A should do so with discretion and flexibility, balancing the rights of the party challenging decisions with the requirement for the public body to implement those decisions."

Other statutory provisions

- Wording identical to that of the time limit provisions in section 100 (3B) of the Scotland Act 1998 and section 7(5) of the Human Rights Act 1998.
- Section 27 A(2) disapplies the three month limit from any application “which, by virtue of any enactment, is to be made before the end of a period shorter than the period of three months”

Permission: Court of Session Act 1988 s 27

- *(1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.*
- *(2) Subject to subsection (3), the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—*
- *(a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and*
- *(b) the application has a real prospect of success.*
- *…*
- *(4) The Court may grant permission under subsection (1) for an application to proceed—*
- *(a) subject to such conditions as the Court thinks fit,*
- *(b) only on such of the grounds specified in the application as the Court thinks fit.*

Real prospect of success

- Not defined in Bill
- “a real prospect of success in the sense that it is not fanciful.” (Report of the Scottish Civil Courts Review, Chapter 12)
- “The court may refuse to make a protective expenses order if it considers that …the proceedings have no real prospect of success” (RCS 58A.2(6) on protective expenses orders)

Carroll v Scottish Borders Council

- *… this requirement should not result in a stringent and detailed examination of the applicant's case. Otherwise there is a danger that hearings on protective expenses orders will develop into something akin to full hearings on the merits of the case … That would obviously be time-consuming and expensive … the question of whether a real prospect of success exists should not be looked at too closely. The meaning of the expression "real prospect of success" is in my opinion that there should exist an arguable case: something that has more than a remote prospect of success. The test certainly does not require a probability of success …* (Lord Drummond Young at [2014] CSIH 30, para 14)

Justice Committee Report

- “invite the Scottish Government to consider further the points made in evidence that guidance should be provided on the meaning of “real prospect of success”