

Just Fair’s Written Submission of Evidence to the Joint Committee on Human Rights ‘The Government’s Independent Human Rights Act Review’ Inquiry

Background

- Just Fair is a UK charity that is working to realise a fairer and more just society by monitoring and advocating for Economic, Social and Cultural Rights (ESCR) in the UK. We ensure that the UK Government’s law, policy and practice comply with international and domestic human rights obligations pertaining to ESCR.
- This submission is written by Just Fair and is a response to the Joint Committee on Human Rights ‘The Government’s Independent Human Rights Act Review’ Inquiry.
- This submission responds to the first point in the call for evidence “Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?”.

Executive Summary

1. The Human Rights Act (HRA) has led to individuals being more able to enforce their human rights in the UK. However, there are barriers faced by different individuals to enforce their human rights at the devolved, national and supranational levels. In particular, there are procedural and substantive limitations to the enforcement of Economic, Social and Cultural rights (ESCR) in the UK under the current framework.
2. Despite shortcomings to the level of protection available in the HRA, the instrument plays a fundamental role in protecting human rights. The HRA is an important pillar of the UK constitution providing a framework for individuals beyond the limited rights available under the common law system and uncodified constitution. Therefore, we strongly submit that there is no case for a weakening of enforcement mechanisms in the HRA. The UK Government should not undermine the current level of human rights protection.
3. It is appropriate that ESCR are defended and enforced. Legitimate enforceability requires adequate institutional mechanisms and access to justice. We urge the UK Government to take progressive, *not regressive*, steps towards adopting a legal framework which realises all human rights according to the principle of indivisibility. We believe the UK Government should build on the HRA instrument by incorporating ESCR into domestic law.

4. This submission consists of four parts. First, we address the current level of protection of ESCR in the UK under the HRA as it currently stands. Second, we consider the adjudication for ESCR under the enforcement mechanisms available in the HRA. In the third section we explore access to justiciable remedies under the HRA. We conclude by urging the UK Government to build on the HRA so as to improve enforcement of *all* human rights in the UK.

(I) Protection of ESCR

1. This section sets out the current level of protection of human rights in the UK under the HRA as it currently stands. We focus on the protection of ESCR.
2. ESCR are legally enforceable rights contained in international and regional instruments. Increasingly, states are recognising ESCR in their domestic legal orders. By contrast, the UK has not incorporated these rights. This is despite having ratified relevant international treaties, particularly the International Covenant on Economic Social and Cultural Rights (ICESCR). The Council of Europe's European Social Charter (ESC) includes rights (ESCR) not protected in the European Convention on Human Rights (ECHR). The UK has not ratified the Revised Charter (1996) and nor is it party to the Additional Protocol providing for a collective complaints procedure.
3. As a member of the Council of Europe, and under the terms of the HRA, the ECHR is incorporated into domestic legal system. Therefore, individuals can rely on ECHR protection in domestic courts. However, the ECHR does not reflect the principle of indivisibility enunciated in the Universal Declaration of Human Rights; the instrument bifurcates human rights, largely protecting civil and political rights, not ESCR (with some exceptions).
4. Therefore, there are procedural and substantive limitations to the enforcement of ESCR in the UK under the current framework.

(II) ESCR Adjudication

5. While the HRA and ECHR instruments provide only for civil and political rights, the ECtHR's teleological interpretive process plays an evolutionary role in human rights protection.¹ The ECtHR has extended its interpretation of civil and political rights by

adjudicating on socio-economic issues. Increasingly, ECtHR judgments directly reference ‘economic, social and cultural rights’. In the subsequent paragraphs we set out why this means that individuals are more able to enforce their human rights in the UK.

6. The dynamic interpretative approach of the ECtHR is set out in *Tyrer v UK*, in which the Court said that “the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions”.²
7. The approach taken by the ECtHR has meant its jurisprudence is increasingly in line with the principle of indivisibility. In *Airey v Ireland* the Court suggests that “the Convention sets forth what are essentially civil and political rights” but “many of them have implications of a social or economic nature”.³ Therefore, “that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention”.⁴
8. The ECtHR also references the ICESCR; as seen in the cases of *Yordanoova and Others v Bulgaria* and *Winterstein and Others v France*.⁵

¹ See Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020); Rhona Smith, *Textbook on International Human Rights* (5th ed., Oxford University Press 2012), 98; and Ida Koch, ‘Economic, Social and Cultural Rights as Components of Civil and Political Rights: A Hermeneutic Perspective’ (2006) 10 *The International Journal of Human Rights*, 405, 410.

² (1978), 2 EHRR 1, Ser A, No. 26, para 31.

³ *Airey v. Ireland*, 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, para 26.

⁴ *Airey v. Ireland*, 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, para 26. See also *R v Secretary of State for the Home Department, ex parte Limbuela* [2005] UKHL 66 [7] in which the House of Lords found that the “deliberate action of the state” that “denies the most basic needs of any human being” and renders asylum seekers destitute constituted treatment contrary to Article 3; and *M.S.S. v Belgium and Greece* Application no. 30696/09, (ECtHR 21 November 2011) [252] in which the ECtHR held that “a situation of extreme material poverty can raise an issue under Article 3”. On partial judicial recognition of economic and social rights (the right to housing and right to work) see Liam Thornton, ‘Socio-Economic Rights, the Constitution & the ECHR Act 2003: O’Donnell v SDCC in the Supreme Court’, *Exploring Law, Exploring Rights*, 16 March 2015 <<https://liamthornton.ie/2015/03/16/socio-economic-rights-the-constitution-the-echr-act-2003-odonnell-v-sdcc-in-the-supreme-court/>>accessed 18 February 2021; and Liam Thornton, ‘February 2018: Asylum, Refugee and Immigration Law in Ireland’, *Exploring Law, Exploring Rights*, 21 March 2018 <<https://liamthornton.ie/2018/03/21/february-2018-bulletin-asylum-refugee-immigration-law-in-ireland/>>accessed 18 February 2021.

⁵ Application no. 25446/06, (ECtHR 12 April 2002); Application no. 27013/07, (ECtHR 17 October 2013).

9. Importantly the ECtHR is reluctant to adjudicate on issues that are political or policy-related.⁶ Therefore, on such issues the Court is particularly slow to interfere in the realm of the legislature/executive.
10. The ECtHR's evolutive interpretation of civil and political rights increases the level of human rights protection enjoyed by people in the UK (where ESCR are not recognised in domestic law). By way of section 2 of the HRA, domestic courts or tribunals determining a question that has arisen in connection with a Convention right must 'take into account' the jurisprudence of the ECtHR.
11. By its teleological interpretation of civil and political rights, the ECtHR's jurisprudence makes ESCR enforceable at the supranational and domestic level. However, we recognise that there are limitations to this bifurcated approach as it impedes full realisation of all human rights and instead provides only piecemeal adjudication of ESCR. We strongly submit that there is no case for a weakening of enforcement mechanisms in the HRA, rather the UK Government must build upon the existing human rights framework.

(III) Justiciable Remedies for ESCR Violations

12. We strongly submit that domestic courts act as an important accountability mechanism for those who are disadvantaged and marginalised.⁷ Administration of justice requires that procedural and substantive claims are accessible and affordable.⁸ However, there are legal and practical limitations to accessing appropriate and justiciable remedies at the domestic level for ESCR violations under the HRA mechanisms.
13. First, there are legal limitations to the HRA; the instrument does not provide a mechanism for achieving justiciable remedies for ESCR at the devolved or national level in the UK.⁹ The

⁶ *Chapman v United Kingdom* Application no. 27238/95, (2001) 3 E.H.R.R. 18 para. 99.

⁷ Aoife Nolan, Bruce Porter, and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (16 July 2009) Working Paper No. 15 CHRGI.

⁸ Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020). On the importance of the procedural and substantive aspects of adjudication of economic and social rights by the courts, see Colm O'Connell, 'The constitutionalisation of economic and social rights' in Helena Alviar García, Karl Klare, and Lucy A. Williams (eds.), *Social and Economic Rights in Theory and Practice, Critical Inquiries* (Routledge 2015) 274.

⁹ Despite the UK Government stating that it "considers that protection for ICESCR-based rights is already afforded by domestic law, including under the Human Rights Act 1998 and the Equality Act 2010; individuals may therefore seek remedies in UK courts or tribunals if they feel that their rights have been breached" in United Nations International Covenant on Economic, Social and Cultural Rights, United Kingdom, British Overseas Territories, Crown Dependencies 6th periodic report, 2014,

current level of human rights protection is therefore not in line with the international position which maintains that where no legal remedies are available the UK contravenes its international legal obligations. Generally speaking, domestic law must be consistent with international obligations (customary international law),¹⁰ and provide available adequate, effective, prompt and appropriate remedies, including reparation for violations of ESCR.¹¹ More specifically, the Maastricht Guidelines on violations of ESCR recommend that the right to an effective remedy covers violations of economic and social rights as well as civil and political rights, and access to effective judicial or other appropriate remedies at the national level.¹² Moreover, the UK has an obligation to progressively realise the rights contained in ICESCR. Article 2 (1) of the ICESCR coexists with the obligation to provide remedies to an aggrieved individual.¹³ International law requires access to justiciable remedies at the domestic level for violations of ESCR. The HRA does not meet this requirement.

14. Second, there are practical limitations to accessing redress and remedies. For example, in England and Wales, whilst legal aid is reasonably accessible for HRA claims, it is less available for issues that engage social rights issues.¹⁴

para 89 <<https://www.gov.gg/CHttpHandler.ashx?id=103320&p=0>> accessed 18 February 2021. This can be interpreted as “tacit acceptance of (if not support for) the domestic justiciability of ESR [economic and social rights]”, see Katie Boyle and Edel Hughes, ‘Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights’ (2018) 22 *International Journal of Human Rights* 43-69.

¹⁰ UN Basic Principles and Guidelines on the Right to a Remedy, the Reparation for Victims of Gross Violations of International Human Rights Law, Serious Violations of International Humanitarian Law.

¹¹ Basic Principles and Guidelines on the Right to a Remedy; and the maxim *ubi jus, ibi remedium* ‘where there is a right, there is a remedy’ in 1928 Permanent Court of International Justice, *Chorzow Factory*, 1928 P.C.I.J. (ser. A) No. 17, at 47.

¹² The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997 (1998) 20 *Human Rights Quarterly* 691, para 23.

¹³ CESCR General Comment. 3 December 1998, E/C.12/1998/24.

¹⁴ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) significantly reduced access to justice for social rights issues. See Alison Pickup, Public Law Project, ‘Public Law Project, Top Legal Aid and Access to Justice Cases of Recent Years’ (Public Law Project North Conference 2018) <<https://publiclawproject.org.uk/wp-content/uploads/2018/08/Top-legal-aid-and-access-to-justice-cases-of-recent-years.pdf>> accessed 18 February 2021. On the reliance of ‘crowd fund sources’ see also Sarah Marsh and Patrick Greenfield, ‘Legal Aid Agency Taken to Court for Refusing to Help Rough Sleepers’, *The Guardian*, 23 October 2018 <<https://www.theguardian.com/society/2018/oct/23/legal-aid-agency-taken-to-court-for-refusing-to-help-rough-sleepers>> accessed 18 February 2021. For evidence of other practical barriers to accessing remedial justice, including barriers arising from the digitisation of the court estate which disproportionately impacts different groups of people, see Just Fair, ‘Written submission to the Justice Committee inquiry into Court Capacity’ (September 2020) <<http://justfair.org.uk/wp-content/uploads/2020/12/Written-submission-to-the-Justice-Committee-inquiry-into-Court-Capacity%E2%80%8B.pdf>> accessed 18 February 2021.

15. We therefore submit that the UK Government should take concrete and progressive steps to remove the legal and practical barriers faced by different individuals to enforce their ESCR in the UK.

(IV) Future Protection of ESCR

16. We differ greatly from States which embed and enforce ESCR through administrative and legal structures, or enshrine ESCR in legislation or constitutional instruments. When the HRA was introduced, it was said that courts should not adjudicate on socio-economic issues arising in human rights cases:

“The judiciary are institutionally incompetent to deal with the socio-economic issues that frequently arise in these cases. Not only is adjudication an inappropriate process for assessing complex issues of policy, but the courts also lack the resources and the judiciary the training and expertise to adequately weigh the issues.”¹⁵

We submit that ESCR are justiciable, can be legitimately enforced by a domestic court, uphold the principle of parliamentary supremacy, and have the same universal status and moral urgency as civil and political rights. Domestic courts can seek expertise on ESCR, by appointment of *Amicus Curiae*, domestic experts, and can rely on comparative case law or international guidance.¹⁶ Where there are policy considerations, domestic courts can request that the legislature or executive justifies the approach. Even where the court finds that ESCR are not adequately protected it often merely grants a declaration, leaving the executive to fashion a suitable remedy to the violation.

Conclusions

17. We submit that the UK Government should not weaken the enforcement mechanisms in the HRA and must build on the existing human rights framework, meet its international obligations and close the procedural and substantive gaps in the enforcement of ESCR.

¹⁵ Richard Edwards, ‘Judicial Deference under the Human Rights Act’ (2002) 65 *Modern Law Review* 859, 859.

¹⁶ Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020).

18. We consider this to be all the more imperative as we emerge from the pandemic. Robust protection of all human rights can play a pivotal role in ensuring that we rebuild a more equitable society.¹⁷

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Further information

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¹⁷ Just Fair, 'Just Fair statement in response to COVID – 19' (2020)
<<http://justfair.org.uk/home/covid-19-and-human-rights/>> accessed 18 February 2021.