



Human Rights Act Reform

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Section 2 Reforms

Positive Rights

Section 2 Reforms: a Case for Reform?

- ‘must take into account’ judgments of the European Court of Human Rights
- Shattering of the mirror principle in *R (Ullah) v Special Adjudicator* [2004] UKHL 26
 - *Manchester City Council v Pinnock* [2010] UKSC 45
 - ‘Where, however, 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.’
- Not a floor
 - *R v Horncastle* [2019] UKSC 14
 - *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9
 - *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2
- Not a ceiling
 - *Rabone v Pennine Care NHS Trust* [2012] UKSC 2
 - *R (Nicklinson) v Ministry and Justice* [2014] UKSC 38
 - *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56
 - *Kennedy v Charity Commission* [2014] UKSC 20

Option 1

- Meaning of Convention rights is not determined by the Strasbourg Court
- UK Courts **NEED NOT**
 - Give the same meaning to rights in the new Bill as the ECHR or the HRA 1998
 - Follow decisions of the Strasbourg Court
- **MUST**
 - Follow precedent from cases interpreting the rights in the new Bill
- **MAY**
 - Follow decisions from other countries, other international courts and the Strasbourg court when they are relevant

Option 2

- UK Supreme Court is specifically referred to as having 'ultimate responsibility' to determine the content of the rights in the Bill
- NEED NOT
 - Follow decisions of the Strasbourg Court
- MUST
 - Follow precedent as regards decisions on the rights in the new Bill
- MUST HAVE REGARD TO
 - The text of the right
 - The Travaux Préparatoires
- MAY HAVE REGARD TO
 - UK common law
 - Decisions of other common law courts outside the UK
 - Decisions of the Strasbourg court

Concerns

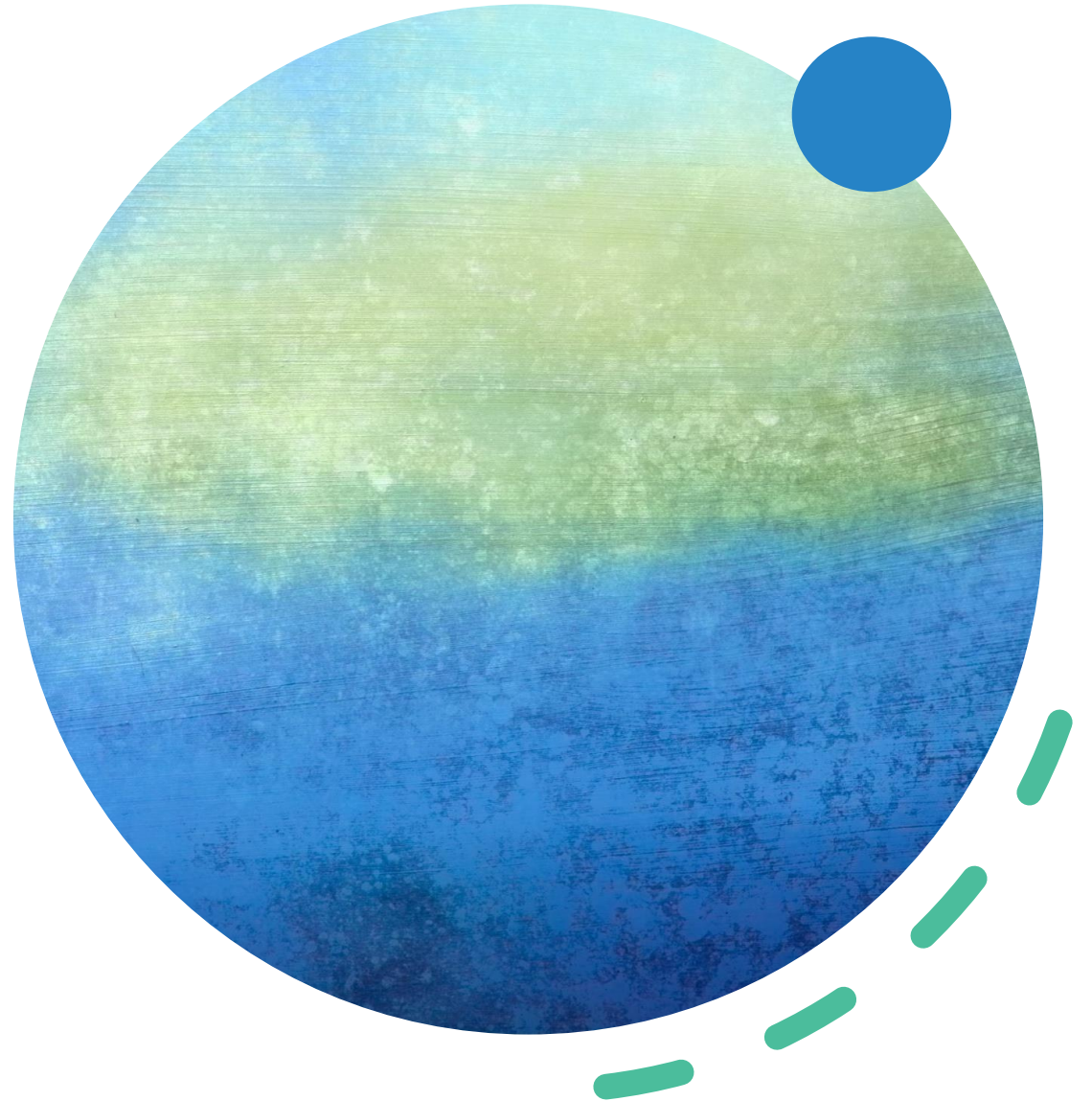
- Legal Certainty
 - Range of sources that the courts may have regard to in the future
 - Inherent tension
 - Requirement to follow precedent from cases interpreting the 'new' rights
- Possible Article 46(1) issues
 - Attention to the text and the travaux préparatoires
- Undermine formal and informal dialogue
 - Must not follow Strasbourg – but may when relevant

Positive Rights: a Case for Reform?

Concerns in the Consultation Paper

‘extended the Convention by judicial implication’

- Legal uncertainty for public authorities
- Positive obligations interfere with policy choices
- Policy choices are being made by the courts and not by Parliament



Assessment of concerns

Rabone v Pennine Care NHS Trust [2012] UKSC 2

- Extension of positive obligation to protect the right to life to those who had voluntarily admitted themselves into hospital care and then were given permission to leave

Osman v United Kingdom (2000) 29 EHRR 245

- ‘Threat to Life Notifications’
- Still space for democratic deliberation
- Backstop role of the court

