SECRETARY OF STATE
MINISTRY OF DEFENCE
FLOOR 5, ZONE D, MAIN BUILDING
WHITEHALL LONDON SW1A 2HB

Telephone 020 7218 9000
Fax: 020 721 87140
E-mail: defencesecretary-group@mod.gov.uk

1.9.2

9 July 2021

Dear Sir Peter,

Tom Hickman QC submitted a paper, dated 3 March 2021, in response to the Independent Human Rights Act (HRA) Review (IHRAR) call for evidence. In his response to question (d) about whether there is a case for change as regards the application of the HRA to acts of public authorities taking place outside the territory of the UK (at paragraphs 53-64), he suggested that a separate tribunal should be established to hear HRA complaints relating to the conduct of overseas military operations. The Chair of the Review, Sir Peter Gross, has asked us for our reaction to this proposal.

At paragraph 63 of his paper, Tom Hickman says, *"There are justified concerns about the ordinary court process to determine complaints under the HRA concerning military activities abroad"*. We understand from the paper, and from a discussion at an IHRAR event at UCL on 27 May 2021 which Tom Hickman attended, that he believes the "*justified concerns*" to be along the following lines:

a. **Domestic judges lack familiarity with the military context in overseas war zones and do not have the resources to understand the context** – Tom Hickman suggests that a new tribunal could include commissioned officers (or someone with a military background with relevant expertise) to support the tribunal, help to give it authority and have the confidence of the services.

b. **Difficulties of evidence gathering and evidence evaluation** – Tom Hickman suggests that a tribunal with inquisitorial powers would address this issue. A tribunal could have special powers to enable it to "look under stones" without having to get witness statements and "would be likely to be more effective than ordinary court procedures in evaluating complaints about non-compliance with the UK's obligations under the ECHR" (paragraph 63(5)). He suggests that such a tribunal's "bespoke procedures" could include provision for considering confidential material (paragraph 63(5)).

c. **Access** – Tom Hickman suggests a new tribunal would ensure that people could make complaints about HRA matters in the same way

Sir Peter Gross

c/o Iain Miller
Email: Iain.Miller2@justice.gov.uk

that they can make complaints to the Investigatory Powers Tribunal against the intelligence agencies. We understand Tom Hickman indicated in discussion that the MOD had "cut off" legal aid and that the new tribunal would provide an avenue for complainants; he suggested in discussion that the tribunal should have jurisdiction to hear "tip offs" about grievances and that it was difficult for people to apply to the courts, which was not necessarily the best model for resolving grievances.

MOD response

We have consulted national security legal colleagues across Whitehall. In summary, we do not agree that there are justified concerns with ordinary court processes in dealing with HRA claims relating to the armed forces and we do not support the idea of setting up a new tribunal to deal with HRA complaints.

As we have indicated to the IHRAR, MOD considers the central issue to be the implications of the evolving jurisprudence regarding the extent to which the ECHR and HRA apply to military activities abroad. A key instance of this, for example, was where military detention in the course of an armed conflict overseas was held by the Strasbourg court to contravene Article 5 ECHR when it could not be brought within one of the six permitted bases for detention in Article 5 (*Al Jeddah v UK* (2011)) – although *Hassan v UK* in 2014 held that Article 5 should accommodate international humanitarian law as the *lex specialis*, at least in an international armed conflict. We do not perceive there to be a problem with the *processes* used by the domestic courts to determine HRA claims in this context. The proposal of a new tribunal would not address the fundamental question about how the ECHR and HRA apply to military operations overseas.

Judges lacking in knowledge of the military context

We do not perceive there to have been any lack of domestic court understanding of military matters in the many hundreds of HRA claims against the MOD concerning military overseas operations. On the contrary, for those cases heard in the domestic courts, our view (tested with counsel who represented the MOD in our key HRA litigation), is that judges, informed by our evidence and submissions, did understand and appreciate the military context. Where a matter comes before a judge that involves considering the exercise of military judgement, we expect the court to be likely to defer to the armed forces' particular expertise in military matters.

Establishing a separate tribunal would have resource and cost implications and we cannot see the advantage that would ensue, given that our (considerable) experience of human rights litigation in the context of military operations overseas has not revealed any of the difficulties mentioned by Tom Hickman. Further, any possible benefits derived from the composition of a new tribunal would have to be tested against the requirements of independence and impartiality in Article 6 ECHR, particularly if commissioned officers were adjudicators. It is likely that any tribunal established in this way would be tested by litigation to ensure its operation complied with the ECHR, including before the Strasbourg court.

Difficulties in evidence gathering

Whilst it is right to suggest that military activities abroad give rise to special challenges in terms of evidence gathering and evidence evaluation, (see paragraph 63(4) of Tom Hickman's paper), the MOD has a rigorous disclosure process that operates in any legal proceedings, aiming to produce clear witness evidence and, most importantly, to comply with the duty of candour; in the light of that duty, it is difficult to see how conferring inquisitorial powers on a new tribunal, operating with the benefit of an appointed Counsel to the Tribunal, would produce any additional information.

At paragraph 63(6), Tom Hickman cites the Investigatory Powers Tribunal (IPT) as a precedent for his proposal. We do not believe the IPT to be an appropriate analogy; it was established in order to provide a closed material procedure for HRA claims against the intelligence agencies in circumstances where previously the sensitivity of their material precluded the agencies from being able properly to defend the claims. The military context and issues are entirely different and any issues with sensitive classified material (to which Tom Hickman refers to in paragraph 63(5) of his paper), can now be dealt with by using closed material proceedings under the Justice and Security Act 2013. Given the availability of such proceedings, it is difficult to see the advantage of another bespoke set of procedures for classified material.

There is also the question as to whether claims brought against the armed forces, but also against other departments and/or the intelligence agencies, in respect of the same matters, would be heard before a specialist military tribunal.

Access

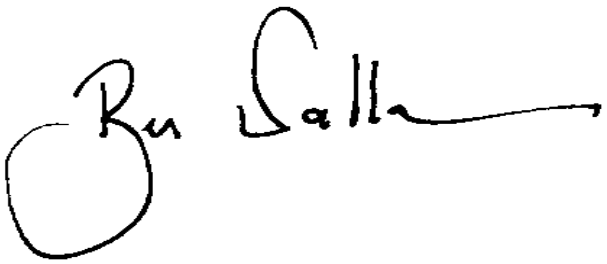
We are slightly mystified by the reference to the MOD having "***cut off***" legal aid as suggested; this has not happened. Both civilian and military claimants have equal rights to legal aid, although there are obviously conditions attached to a grant of legal aid, including means testing. Even if a potential claimant does not qualify for legal aid because their case is not within the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, they could be eligible for financial support under the MOJ's exceptional case funding, which exists to enable individuals to enforce their rights under the ECHR.

We have no evidence of people finding it difficult to bring domestic court proceedings to enforce their rights under the ECHR, which Tom Hickman indicated might be a concern. On the contrary, the reverse is true in our experience, with many hundreds of cases being brought against the MOD claiming breach of ECHR rights. In so far as there is a need to provide a less formal model for resolving grievances, the MOD has sought to do so in relation to particular operations; for example, a claims office was established in Helmand Province, Afghanistan, which made ex-gratia payments to compensate for damage to property.

At paragraph 63(4) of his paper, Tom Hickman cites the Service Justice System as a good example of a jurisdiction that operates differently to deal with the issues of judicial knowledge and evidence gathering, "*which includes trial by jury of commissioned officers*". We do not agree that this is an appropriate analogy. The Service Justice System exists to hold individuals to account for criminal offences which might well be committed in the context of military operations. The Court Martial is constituted with a civilian judge advocate and a panel of service personnel which performs a similar function to a civilian jury. That panel will understand the special context of any military operations – in contrast to a jury of civilians if alleged offences arising in a military context were tried in the civilian system. However, this is not analogous to a special tribunal (headed by a judge, without a jury) which would be responsible for holding the State to account for alleged violations of human rights on overseas operations.

In short, we see no advantage in such a tribunal, which, in our view, would not improve on the present system and indeed would be likely to create further litigation and complaints against the armed forces when there are already existing and well-tried avenues for claims and complaints.

Yours sincerely,



THE RT HON BEN WALLACE MP