# SUPPLEMENTARY NOTE

1. In the course of the Human Rights Act Review roadshow at UCL on 27 May 2020 I was asked several questions to which I responded orally at the time. I thought it might be useful for me to put my response to those points in writing by way of a supplementary note of evidence which, although not within the date for receipt of evidence, I place before the review panel in case it wishes to take it into account.

## A. Armed Forces Tribunal

2. In my written evidence I have suggested the creation of an Armed Forces Tribunal ("AFT") that would be a designated tribunal under section 6 of the Human Rights Act to determine complaints relating to military action overseas. I was asked if I could develop this idea during the roadshow.

3. The basic premise for the proposal is that the application of the ECHR to the armed forces abroad is not in issue. It is not in issue both because the UK Government has made clear its continued commitment to the ECHR (and therefore it has to accept the extraterritorial application of the treaty) and also because the ECHR norms are already thoroughly absorbed into military processes and policies. The real issue for the review is therefore how the ECHR should be applied under the HRA. It needs to be applied in a manner that is effective and that has the confidence of the Government and the services. The mechanism of application of the ECHR also need to contribute to the satisfaction of the investigative duties arising under Articles 2 and 3.

### i. Personnel

4. The personnel of the AFT would need to satisfy three requirements. First, they would need to be sufficiently independent. Second, they would need to have the confidence of the services and the wider public. Third, they would, as a panel, need to have sufficient experience of military activities abroad.

5. An analogy can be drawn with the Special Immigration Appeals Commission which adjudicates national security matters in the context of immigration and citizenship. It is chaired by a High Court Judge and the other members are an immigration judge and former member of the Foreign Office or intelligence services. Another analogy can be drawn with the Investigatory Powers Tribunal ("IPT"), which has a greater number of members that aids its more inquisitorial role. All its members are independent lawyers or judges, most of whom have experience of military or intelligence matters.

6. This would suggest that an AFT could be presided over by a High Court judge with at least one member drawn from the services. They would need to be independent of the events in question and from the relevant chain of command, but they do not need to be independent of the services. A very senior services' lawyer with experience of giving

legal advice in operational situations overseas would be a good person to either have as a member of the tribunal or acting as Counsel to the tribunal.

### ii. Powers

7. An AFT would need to have power to order the production of documents and require attendance of witnesses.

8. Consideration would need to be given to ways in which an AFT would be able to request assistance from other authorities, such as the military police, if evidence gathering is required (similarly, the IPT can request that the Investigatory Powers Commissioner conducts an investigation or inspection on its behalf, or provides relevant documents).

9. The AFT would need to have a jurisdiction to consider national security sensitive information if it was relevant to a complaint. There are now well-established procedures that enable this in the tribunals to which I have referred to.

10. There would be a limitation period for issuing complaints which could be extended if good reason could be shown. The HRA generally has a one year limitation period (the IPT has a 6 month limitation period).

### iii. Access

11. Access to the tribunal would need to be real and effective. This would mean that, as with the IPT, the tribunal should be accessible to people who are not legally represented.

12. In addition, Article 2 ECHR requires authorities to investigate matters of their own motion where a possible violation has come to their attention, whether or not a complaint has been raised by a next of kin.

13. I therefore suggest that an AFT should accordingly, (a) be a no costs jurisdiction (save in the event of unreasonable or vexation conduct by any party), (b) have the duty and capacity to investigate complaints made to it where appropriate, (c) receive and determine issues referred to it from military authorities or other oversight bodies, and (d) have the ability to designate a complaint as suitable for legal aid where this is justified and a party could not reasonably be expected to pursue the complaint without instructing lawyers (or where ensuring that a party is legally represented would be of assistance to the tribunal).

## B. Bindingness of Strasbourg Case law / section 2 of the Human Rights Act

14. In the roadshow debate, an issue was raised as to whether section 2 might be amended in a way that would loosen the ties between the Strasbourg Court's case law and that of domestic authorities.

15. As I sketched orally during the roadshow, the HRA itself and the case law relating to it currently evince a tension between two different views of the HRA (see Hickman*, Public Law After the Human Rights Act* (2010) pp. 24-49). In short,

    a. On one view, the HRA should be regarded as a domestic constitutional measure setting out domestic constitutional rights which should be developed and applied in a distinctively domestic manner. Thus, Laws LJ stated in an early case,[1]

        > "I think it important to have in mind that the court's task under the Human Rights Act 1998, in this context as in many others, is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as section 2 of the 1998 Act enjoins us to do."

    b. However, the more dominant approach is to view the HRA, "as a pragmatic, time and cost-saving measure that provide[s] a remedy for breach of international law in domestic courts … on this view the rights themselves float somewhere in the stratosphere of international law and are not grounded in domestic constitutional law." (Hickman, p.31) Viewed as a mere remedial provision for breach of an international treaty, it is only logical that domestic courts should feel compelled to steer close to the Strasbourg case law, since the Strasbourg Court is the sole authoritative exponent of the meaning and effect of the ECHR.

16. The reason why domestic courts stay close to the Strasbourg case law is therefore not because of section 2 of the HRA –as the quote from Laws LJ demonstrates -- but because of other features of the HRA which indicate that it is giving effect to treaty rights not domestic rights. In particular, the HRA defines the protected rights as "Convention rights" by reference to the ECHR. Since the Strasbourg Court is the ultimate authority on the interpretation of that treaty it is inevitable that its judgments have special force.

17. To ensure domestic courts are free to develop domestic jurisprudence on protected rights the following changes should be made to the Act rather than (or, perhaps, in addition to, amending section 2):

    a. References to "the Convention rights" in the HRA be changed to read "the Human Rights" or "the Protected Rights".

    b. Subsections 1(1) and (3) should be amended to refer to the Human Rights / Protected Rights set out in Schedule 1.

[1] *Begum v Tower Hamlets LBC* [2002] 1 WLR 2491 at [17]

c. Schedule 1 should be amended so that the rights are set out as stand-alone rights without reference to the ECHR or treaty numbering, albeit that the rights can be cast in identical terms.

18. Some further changes to terminology in the Act might also be required. But it would still be possible without illogicality for the application of the Human Rights / the Protected rights to be subject to designated derogation from the ECHR and to enable additional rights to be added by order if further protocols if the ECHR are ratified (sections 1(2), (4)).

19. Notwithstanding such remaining connections between the HRA and the ECHR, the rights protected would, if these changes are made, become more soundly rooted in domestic constitutional law and freed from the interpretative inertia caused by defining the rights as treaty rights in a context in which an international court has authoritative jurisdiction over the meaning of the treaty in question.

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