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Tom Hickman QC
Blackstone Chambers
20 July 2021

Dear Sir Peter Gross,

I am grateful for being provided with a letter from the Rt Hon Ben Wallace MP prior to its publication. The letter addresses a suggestion that I made, briefly, in my submission to the IHRAR and later during a Q&A at the IHRAR UCL roadshow. I am flattered that my suggestion has received such serious consideration and I am grateful to the time evidently given to considering it by officials and by Mr Wallace.

I hope it will be clear that one of the motivating reasons for making the suggestion was an effort to address concerns that have been expressed over a number of years from various quarters about military activities abroad being subject to ordinary court proceedings (e.g. the HC Defence Committee's *Twelfth Report of Session 2013-14* HC 931; and various Policy Exchange papers[1]). My suggestion represents a proposal for a more bespoke and more streamlined approach. I continue to consider that there is merit in a tribunal that would combine judicial and services expertise and that would not need always to follow a fully adversarial model.

That said, Mr Wallace's letter makes several very important statements which together represent a clear and firm expression of confidence in the ordinary courts in determining human rights complaints relating to overseas military action.

Mr Wallace states: (1) "we do not agree that there are justified concerns with ordinary court processes in dealing with HRA claims relating to the armed forces..."; (2) "We do not perceive there to be a problem with the *processes* used by the domestic courts to determine HRA claims in this context." (3) "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".

These represent very important expression of confidence in the courts applying human rights principles to military action overseas in the full breadth of cases,

[1] E.g. Ekins and Marionneau, *Lawfare, Resisting the Judicialisation of War,* Policy Exchange, 10 November 2019; Ekins, Morgan, Tugendhat, *Clearing the Fog of Law, Saving our armed forces from defeat by judicial diktat*, Policy Exchange 2015; *The Fog of Law*, Tugendhat and Croft, Policy Exchange 2013.

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including the treatment, transfer and questioning of detainees. My concerns that the ordinary court processes lacked the full confidence of UK services are therefore, I am very glad to say, unfounded. Mr Wallace's letter represents a very important endorsement of the Human Rights Act 1998 from the Ministry of Defence which should lay to rest concerns that the ordinary courts do not have the full confidence of the British military in applying human rights law to military action.

I would like to make two points of clarification, if I may, in response to the letter. First, my suggestion that a tribunal might consider "tip offs" was, although not well put, intended to refer to a mechanism for referrals from military authorities such as the RMP rather than any wider jurisdiction (as I hope my written evidence makes clear).

Finally, I am grateful to Mr Wallace for correcting a mistake in my comments during the Q&A about restrictions on legal aid (page 3). I believe I had principally in mind the bar on legal aid for persons not resident in the UK, reportedly introduced in part because of concerns about claims against UK forces (see e.g. *Legal aid in England and Wales for civil claims against UK armed forces*, HC Library Briefing paper No. 07477, 22 January 2016).[2] However, the residence test does not appear to have been reintroduced in any form following the Supreme Court's decision in *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 and therefore Mr Wallace is correct that legal aid is available in the ordinary way. Indeed, Mr Wallace's comments also provide very welcome recognition of the importance of equal access to legal aid in the context of military action abroad.

Kind regards,

Tom Hickman

[2] Another restriction, on representative claims, is now contained in para 19(3) of Sch 1 of LAPSO Act 2012. The background to this restriction is discussed in *Maya Evans* [2011] EWHC 1146 (Admin). Whilst this applies to all judicial review claims, it precludes claims such as *R (Maya Evans v Secretary of State for Defence)* [2010] EWHC 1445 (Amin) concerning transfer of British detainees to afghan authorities, unless such a claim was brought by a person subject to transfer.

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