Equality and Human Rights Commission

Independent Human Rights Act Review Call for Evidence

Response of the Equality and Human Rights Commission

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Executive Summary

Introduction

1. The Equality and Human Rights Commission ('the Commission') has a statutory role to protect and promote human rights. Our established position is that there should be no weakening of the Human Rights Act (HRA), which provides essential protections for everyone in Britain. We would therefore oppose any changes to the HRA which risked reducing these protections or access to justice.

Overarching themes

2. We therefore welcome the recognition, implicit in this Review's relatively narrow scope, of the fundamental success and value of the HRA and its protection of the rights contained in the European Convention on Human

Rights (ECHR or 'the Convention'). This review and any actions arising from it should be guided by the principle of building understanding of and respect for human rights, which in our view depends on:

- ensuring that any consideration of the effectiveness of the HRA is done through a broad, participatory and evidence-based process;
- improving understanding of human rights and the HRA;
- strengthening access to justice for human rights breaches; and
- improving human rights practice among public authorities.

Theme One – the relationship between domestic courts and the ECtHR

3. In the Commission's view, section 2 of the HRA strikes an appropriate balance in the relationship between domestic courts and the European Court of Human Rights (ECtHR). The duty on domestic courts and tribunals to 'take into account' ECtHR case law is sufficiently flexible in that it enables courts to examine the specific case law in question, its clarity, pedigree and consistency, and to determine how closely to follow it. Any amendment to this duty could well result in an increase in the number of applicants seeking a determination from the ECtHR.

4. The relationship between domestic courts and the ECtHR in Strasbourg satisfactorily allows for active judicial dialogue between them. This is demonstrated by a number of productive exchanges between the UK courts and Strasbourg since the HRA came into force, and the increased confidence

   the ECtHR has in domestic courts' application of Convention rights under the HRA.

Theme Two – the impact of the HRA on the relationship between the judiciary, executive and legislature

5. We do not consider that section 3, on interpretation of legislation, should be amended or repealed. Our research of relevant case law shows that the courts have reached an appropriate balance in the way they apply section 3 that ensures respect both for parliamentary sovereignty and protection of human rights. Change to section 3 would create legal uncertainty as to the status of previous judgments in which it has been applied.

6. In the Commission's view it is not necessary or desirable to risk the increased use of section 4 declarations of incompatibility (DOIs) by removing the section 3 interpretative obligation. Increased use of section 4 DOIs as an alternative to use of the section 3 power could significantly increase the work of

Parliament, with little benefit for the protection of rights or parliamentary sovereignty.

7. The courts' power to review the legality of government actions, and quash them if unlawful, is a fundamental principle of public law in the UK. We believe that there should be judicial oversight to ensure lawful use by the executive of derogation orders since their purpose is to limit people's fundamental human rights. Without this domestic oversight, such challenges would have to be made before the ECtHR.

8. The courts' treatment of Convention rights is consistent with its treatment of secondary legislation when applying ordinary judicial review principles, and should remain so. Judicial scrutiny of delegated legislation is an important safeguard, given the comparative lack of Parliamentary scrutiny for delegated legislation.

9. Extra-territorial application of the HRA has brought advantages in terms of protection of human rights, including for British soldiers serving overseas. The current approach also helps secure the UK's position as a global leader on human rights and reinforces the integrity of UK operations overseas. Any domestic attempt to alter the HRA's extra-territorial application would create inconsistency between the scope of HRA and the Convention, and remedies for overseas violations would need to be sought from the ECtHR. It could also set an unwelcome precedent, leading other countries in the Council of Europe to follow suit, including those with a weaker human rights record than the UK.

10. The Commission does not consider that the remedial order process requires modification. Remedial orders, if used in accordance with their limited purpose of amending a provision in order to remove an incompatibility with the HRA and therefore to enhance the human rights compliance of legislation, are an appropriate use of executive power, particularly in light of the parliamentary scrutiny mechanism ('draft affirmative procedure') which applies to them.

Conclusion

11. The HRA has substantially improved protection of rights, providing access to legal redress in a way which maintains a high degree of parliamentary sovereignty.

12. We consider that changes to the HRA are not required. Instead, attention should focus on improving knowledge and understanding of human rights among the public, politicians, the media and public authorities, and improving the application of the HRA by public authorities.

Introduction

13. The Equality and Human Rights Commission ('the Commission') has been given powers by Parliament to advise government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice on any matter related to equality, diversity and human rights.[1] The Commission is accredited at UN level as an 'A status' National Human Rights Institution (NHRI) in recognition of our independence, powers and performance, a status which requires us to promote human rights including by advising government.[2] The Commission is also Great Britain's Equality Body with responsibility for enforcement of the Equality Act 2010.

14. The Human Rights Act (HRA) is an essential tool in ensuring that public authorities in the UK – including government – respect, protect and fulfil the fundamental rights and freedoms to which everyone is entitled.

15. Consistent with our statutory and NHRI remit to protect and promote equality and human rights, our established position is that there should be no regression in equality and human rights, nor any weakening of the protections provided by the HRA. We would therefore oppose any changes to the legislative framework of the HRA arising from the Independent Human Rights Act Review (IHRAR) which risked reducing protection of rights or access to justice for individuals seeking to enforce their rights.

16. The HRA is a vital component of the legal framework we uphold. While the Commission cannot provide legal assistance in cases solely concerning human rights issues, we can do so in discrimination cases with a human rights element. We also have the power to intervene in court proceedings in human rights cases initiated by others and to use judicial review to ensure respect for human rights law. By using these powers we have prompted positive changes in policies and practices which have been to the benefit of broad sections of society and across a range of public bodies.

17. Our response draws on wide experience of the HRA in England and Wales.[3] The IHRAR Panel ('the Panel') has noted that the HRA is a protected

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[1] Equality Act 2006, section 11; Equality and Human Rights Commission, 'About us'.

[2] See The Paris Principles

[3] In Scotland the EHRC shares its human rights remit with the Scottish Human Rights Commission, which will submit evidence dealing with Scottish case law

enactment under the devolution settlements and that the review will not consider the scope of the substantive rights scheduled to the HRA. Nonetheless, it is imperative that the Panel considers whether any changes to the HRA resulting from the review could change the powers of the Welsh Government or Senedd (including their ability to strengthen equality and human rights), since the powers both of Welsh Ministers and the Senedd are limited by reference to the Convention to the extent that it is given effect by the HRA.

18. Our submission comprises: a summary of overarching issues which frame our response; our analysis and responses to the specific questions posed in the call for evidence; and an annex containing details of cases identified in our research for this review, which we hope will assist the Panel.

and potential devolution issues. This submission is therefore confined to consideration of case law in England and Wales

Overarching themes

19. This section briefly outlines some general issues relating to the protection of human rights which are important in framing our response.

20. The IHRAR Terms of Reference are focused on the mechanisms in the HRA which relate to functions of the domestic courts in interpreting human rights (sections 2, 3, 4, 10, 14, and the question of extraterritoriality). Many of the core features of the HRA are excluded from this review and therefore not subject to debate. These include Schedule 1, the substantive rights from the ECHR protected by the Act, as well as section 6 (the duty of public authorities to act compatibly with Convention rights), and sections 7-9 (the ability of an individual to bring proceedings for a breach of Convention rights and to receive remedies). The Government has also signalled the UK's continued adherence to the ECHR. We understand that this indicates an implicit recognition by the IHRAR and the Government (which drafted the Terms of Reference)[4] that the HRA has fundamentally been a success and that the ECHR should continue to be domestically protected through judicially enforceable rights under the HRA.

21. We welcome the IHRAR Panel's intent to consult widely in this call for evidence and subsequent engagement. We recommend that the Panel ensure that its conclusions are based on robust evidence and expert advice, encompassing civil society, including groups representing protected characteristics (some of which organisations may be under-resourced and therefore struggle to provide all relevant evidence in the time available). The Panel should also take account of the views of Regulators, Inspectorates and Ombudsman, businesses and voices from across the devolved jurisdictions. Such a participatory process will help to ensure that the Review's recommendations command broad public and political support and have longevity, and contribute to a strengthening of respect for human rights.

22. A full analysis of the effectiveness of human rights should also consider the following barriers and challenges:

[4] The Terms of Reference were drafted by Government and agreed by the IHRAR Panel. See: Public Administration and Constitutional Affairs Committee (8 December 2020), Oral evidence: The Government's Constitution, Democracy and Rights Commission, HC 829, Q. 110.

23. There is significant public scepticism and lack of understanding about the operation of human rights, and inaccurate negative reporting on the HRA in the media is a contributory factor.[5] Our research has found that greater knowledge of human rights tends to correlate with greater levels of support,[6] and is also likely to strengthen people's ability to enjoy their rights and seek redress when they are breached. The EHRC has a statutory duty to promote understanding of the importance of human rights,[6] and a responsibility under the Paris Principles to promote human rights, including through education, outreach, the media, publications, training and capacity building.[7] Government, public authorities, schools, civil society, and the media also have important roles to play in building public understanding of human rights.

24. In particular, Government, public authorities and the media should ensure they communicate clearly and accurately about human rights, from a position of respect for the rule of law and the principles of human rights, reinforcing the universal values which human rights embody, and avoiding the perpetuation of misconceptions.[8] Public authorities should build knowledge among staff and service users of the human rights issues relevant to their sectors, and how these relate to policies, practice and service standards.[9]

25. Schools have a particular role to play in educating young people about human rights and their relationship with societal values, equipping them to be well-informed and engaged citizens. Our research on best practice in schools found that a focus on human rights in the curriculum and wider learning

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[5] EHRC and ComRes (May 2018), Human Rights Audiences and Messaging, pp. 9-10; published summary at: EHRC (September 2018), Talking about human rights: how to identify and engage a range of audiences, p. 7 [6] *Ibid*.

[6] Equality Act 2006, section 9.

[7] See The Paris Principles

[8] EHRC and ComRes, Talking about Human Rights. Our report provides practical advice to help public bodies, NGOs and others communicate about human rights in a way that effectively builds understanding of their importance.

[9] The Equality and Human Rights Commission provides advice and guidance for public authorities on their legal obligations and other human rights considerations relevant to their remits.

environment has the potential to reduce prejudice, strengthen well-being and equip pupils to participate in democratic life.[10]

26. Human rights are relevant to the missions of many civil society organisations. We recommend that civil society organisations take opportunities to build human rights tools and language into their service provision and communications. Resources and support are available to support this approach,[11] which has the potential both to enhance impact, and to increase public awareness of the importance and relevance of human rights.

27. We take seriously our own role in building understanding of human rights. Our current Strategic Plan contains a priority focused on education (including work to embed human rights in policies, teacher training and curricula), and communications activities to build public support for human rights standards, in line with our statutory duties.[13] However, these priorities must be balanced against competing demands on our limited and reducing resources.

28. It is also necessary to address practical barriers to the enforcement of human rights. These include reductions in legal aid provision, advice deserts and cost regimes for HRA and judicial review cases.[12]

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[10] For best practice examples and evidence of the benefits of human rights education, see EHRC (2020) Respect, equality, participation: exploring human rights education in Great Britain.

[11] Organisations such as the British Institute of Human Rights and Equally Ours provide training and resources to support civil society organisations to make effective use of human rights and equality in their work. [13] EHRC (2019) Strategic Plan 2019-22, p. 25 and p. 16.

[12] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 affected access to justice in England and Wales, including by weakening people's ability to enforce their human rights. For example, removal of legal aid provision in many family law and immigration cases affects those seeking redress for violations of the right to respect for family life under ECHR Article 8, and removal of provision in education cases has affected those seeking redress for breaches of the right to an education protected by ECHR Protocol 1, Article 2. People with certain protected characteristics have been particularly affected including disabled people, women, children and people from ethnic minorities. The Commission on Justice in Wales emphasised that this had a particular negative impact in Wales where there are areas with no access to legal aid practitioners at all. See: EHRC (September 2018), Response of the Equality and Human Rights Commission to the Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and Commission on Justice in Wales (24 October 2019), Justice in Wales for the People of Wales, p. 10).

29. The Commission also has an important role to play in enforcement, although at present our enforcement powers in relation to human rights are weaker than our equality powers: for example, we cannot undertake investigations into possible breaches of the HRA or provide legal assistance to individuals in HRA cases.[13] Granting us these powers, and providing us with the necessary resources to use them effectively, would enable us to better support individuals to exercise their human rights. It would also help to improve practice among public authorities.

30. The HRA places a duty on public authorities to comply with Convention rights and, while this has had a positive impact (including by providing a common framework that promotes high-quality, user-focused services and guides decisions about competing priorities[16]), some public authorities still need to do more to fulfil their human rights obligations.[14] The solutions include better human rights training in public authorities, and better dissemination of the implications of human rights judgments.

[13] For further detail see: EHRC (September 2020), Written evidence from the Equality and Human Rights Commission (RHR0023); EHRC (July 2018), Further written evidence from the Equality and Human Rights Commission (AET0051).

[16] For example, the HRA and human rights have been built into core principles for policing (see College of Policing 'Core Planning Principles') and healthcare regulation (see CQC 'Our human rights approach').

[14] For example, during the Covid-19 pandemic, the HRA has offered a framework for local authorities to balance the right of care home residents to private and family life in the form of visits with the requirement to take steps to protect their right to life; however, we have seen repeated blanket bans on visits throughout the pandemic. EHRC (October 2020), Equality and human rights in residential care in England during coronavirus; EHRC (October 2020), Equality and human rights in residential care in Wales during coronavirus.

Comments on specific questions

Theme One – the relationship between domestic courts and the ECtHR

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

Relevant case law: see Annex, paras 1-11

31. The Commission does not consider that there is a need to amend section 2. The duty to 'take into account' is appropriate and effective, and it would be unrealistic and undesirable for the Act to increase or reduce this duty.

32. The duty to take into account ECtHR case law is an important, but not overbearing obligation. It does not make Strasbourg case law binding on domestic courts. The then Lord Chancellor, Lord Irvine, made clear the purpose of section 2 in a parliamentary debate during the passage of the HRA:

> *'We believe that Clause 2 gets it right in requiring domestic courts to take into account judgments of the European Court, but not make them binding … The Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so'.*[15]

33. The courts have interpreted this requirement in different ways, initially adhering to the view that they should follow Strasbourg case law[16] but more recently recognising greater freedom to depart from Strasbourg cases, even from Grand Chamber decisions.[17]

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[15] Hansard, HL vol.583, cols 514-515 (18 November 1997)

[16] See eg. *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at para 20: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".

[17] See, eg. *R v Abdurahman (Ismail)* [2019] EWCH Crim 2239; [2020] 4 WLR 6 where the Court of Appeal departed from a Grand Chamber decision. More generally, see eg. *R (Quila) v SSHD* [2011] UKSC 45; *Poshteh v Kensington and*

34. Section 2 enables courts to examine the specific Strasbourg case law in question, its clarity, pedigree and consistency, and to determine how closely to follow it. It is currently open to domestic courts to interpret Convention rights in a more protective manner than the ECtHR.[18] They can – and (as noted above) sometimes do – depart from ECtHR decisions where they consider it appropriate to do so in light of the domestic context[19], or if the Strasbourg case law is unsettled.

35. If domestic courts were not required to 'take into account' ECtHR case law when interpreting Convention rights, judgments would not be required to explain why they have followed or departed from ECtHR case law in appropriate cases. This could well result in an increase in the number of applicants seeking a determination from the ECtHR. Not only would this increase litigation, delay and expense for public authorities, it would diminish the influence of domestic courts on the outcome of UK cases in Strasbourg and in the development of ECtHR jurisprudence more broadly. As can be seen from the case law cited in the Annex and our response to the judicial dialogue question 1(c) below, the UK courts are a well-respected contributor and partner in the development of ECHR case law.[20]

36. To conclude, the domestic courts apply the duty to 'take into account' with sufficient flexibility to enable departure from ECtHR jurisprudence where it is considered appropriate. In the Commission's view this is consistent with the intent of Parliament in enacting section 2, and allows for appropriate judicial consideration of the domestic context. We see no argument for reform of this provision, and note that any change could create legal uncertainty and have unforeseen legal consequences.[21]

Chelsea Royal LBC [2017] UKSC 36; *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250; *R (Hallam) v SSJ* [2020] UKSC 2.

[18] See eg. *Commr of Police of the Metropolis v DSD & Another[2018] UKSC 11; [2018] 2 WLR 895,* para 153*.*

[19] This includes consideration of the domestic legal framework and constitutional principles.

[20] See eg. Hutchinson v UK (App no.57592/08, 17 January 2017). See also JCHR (February 2021), Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011).

[21] See answer to Q1(b) below.

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

Relevant case law: see Annex, paras 12-18

37. It has not been feasible for the Commission to survey all the relevant domestic case law in order to draw general conclusions about how courts have approached issues falling within the margin of appreciation permitted to States by the ECtHR. However, examples of the approach of the Supreme Court in recent cases in which the relevance of the 'margin of appreciation' to the determination of the case was at issue are set out in the Annex to this submission.[22]

38. The margin of appreciation is a concept derived from international law, applicable in supranational courts, in order to ensure that those courts give due latitude to national institutions which have a better understanding of the domestic context.[23]

39. Domestic courts and tribunals can consider the extent to which the use of the margin of appreciation by the ECtHR is relevant to the dispute before the domestic court in assessing the weight to be attributed to Strasbourg case law.

40. However, it is not appropriate for domestic courts to apply the concept in the same manner as the ECtHR, as a form of deference[24] to the decision making of the executive, or as a means of avoiding what constitutes a violation of the right in the domestic context.[25] The same margin of appreciation applied by

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[22] Annex, paras 12-18

[23] In *In re Recovery of Medical Costs of Asbestos Diseases (Wales) Bill* [2015] UKSC 3, Lord Mance stated at [54]: "*At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level*."

[24] In some cases there has arguably been an undesirable domestication of the margin of appreciation by our courts. See eg. *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327

[25] See eg. *R (Steinfeld) v SSID* [2018] UKSC 21; [2020] AC 1, paras 28-29

ECtHR to member states in areas of social and economic policy may not apply but domestic courts will give weight to the legislature's choice when deciding whether an interference is proportionate and therefore justified. The weight will be greater in cases such as social welfare policy matters, and less in others, depending on the specific context.[26]

41. We think the principles concerning the weight to be accorded to choices of the legislature when challenged under the HRA can best be refined through the development of case law in context specific examples rather than by considering legislative change.

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

Relevant case law: see Annex, paras 19-22[27]

42. In the Commission's view, the current relationship between the ECtHR and domestic courts satisfactorily allows for active judicial dialogue between them and no changes are required. As explained above, the manner in which English and Welsh courts apply ECtHR jurisprudence is largely a matter for them, and in our view they have generally exercised their discretion to do so appropriately.

43. There have been a number of examples of exchanges between the domestic courts and Strasbourg.

44. In *R v Horncastle* (2009)[28] concerning the admissibility of hearsay evidence in criminal trials, the Supreme Court addressed an issue that had been

[26] See eg. *R (On the Application Of Drexler) v Leicestershire County Council* [2020] EWCA Civ 502, paras 52-56.

[27] We note the evidence of Baroness Hale to the JCHR inquiry [JCHR (3 February 2021, 'Oral evidence: The Government's Independent Human Rights Act Review, HC 1161'] detailing the nature of informal judicial dialogue between the UK judiciary and the Strasbourg court.

[28] *R v Horncastle* [2009] UKSC 2014; [2010] 2 AC 373

considered by the ECtHR in *Al-Khawaja v UK* (2009)[29] and, in departing from that decision, encouraged Strasbourg to 'take account of' the Supreme Court's reasons for doing so[30]. As can be seen from its judgment in Horncastle v United Kingdom, the ECtHR did take account of the Supreme Court's judgment in deciding Horncastle's appeal must fail.[34]

45. In the case of *Hutchinson v UK* (2017)[31], concerning the compatibility of 'whole life sentences' with the Convention, the Grand Chamber reached a different conclusion from a previous Grand Chamber decision in *Vinter v UK* (2013)[32] which had held that whole life tariffs breached Article 3 ECHR. In changing its assessment of the compatibility of whole life sentences in the UK with the ECHR, the Grand Chamber considered the domestic decision in *R v McLoughlin* (2014)[33] in which the Court of Appeal expressly disagreed with and declined to follow the Grand Chamber decision in *Vinter.* At §70 the Grand Chamber stated:

> *'the McLoughlin decision has dispelled the lack of clarity identified in Vinter arising out of the discrepancy within the domestic system between the applicable law and the published official policy'.*

46. As a result, the Grand Chamber concluded that the whole life sentence was Article 3 ECHR compliant.[34]

47. According to the President of the ECtHR, in the last four years the number of applications brought to Strasbourg against the UK has been the lowest per head of all of the 47 Member States of the Council of Europe, and in 2020 the

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[29] *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1

[30] *Horncastle, ibid. per* Lord Phillips, para. 108. At para. 11, Lord Phillips stated that the case represented one of the *"rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course."* [34] *Horncastle v UK* (2015) 60 E.H.R.R 31 para 78, 143

[31] *Hutchinson v UK* (App no.57592/08, 17 January 2017)

[32] *Vinter v UK* (2013) 63 EHRR 1

[33] *R v McLoughlin* [2014] EWCA Crim 188; [2014] 1 WLR 3964

[34] *Hutchinson v UK*, para 73

ECtHR found a violation in just two out of 284 cases against the UK.[35] These statistics may well reflect the fact that the domestic protection of human rights under the HRA has been a success and the ECtHR has acquired confidence in the UK courts' application of the ECHR.[36] We think the current judicial dialogue is strong, and would be best preserved by leaving the HRA intact.

[35] Joint Committee on Human Rights (17 February 2021), 'Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011)'. In "Responding to human rights judgments" (Ministry of Justice, December 2020), the Government notes at p.9 that applications to the ECtHR against the UK have been on a downward trend since 2010 and that the UK still had, by population, the fewest applications of all states: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf

[36] This was the view of the President of the ECtHR. See *Ibid*. 'Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011)'

Theme Two – the impact of the HRA on the relationship between the judiciary, executive and legislature

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

Relevant case law: see Annex, paras 23-25

48. The Commission does not consider that there is any evidence that section 3 requires amending, or that it should be repealed. The relationship between section 3 and section 4 reflects a distinction between the judiciary's role in interpreting the law and Parliament's ultimate sovereignty in making law. Where it is not possible to interpret a law compatibly with the ECHR then the courts make a declaration of incompatibility (DOI). This gives Parliament the opportunity to change the law. The HRA model thereby provides a greater degree of parliamentary sovereignty than constitutional models in jurisdictions such as the United States, where courts can strike down rights-conflicting legislation.

49. Our research of relevant case law shows that the courts have reached an appropriate balance in the way they apply section 3 (see Annex, paras 2325).

50. The courts have held that there are limits to an interpretation under section 3. Recent Supreme Court judgments have consistently stated the principle that it is not permissible for courts to interpret legislation under section 3 in a way that goes 'against the grain', or is inconsistent with a fundamental feature, of

the legislation.[37]

51. If section 3 was weakened, for example so that courts were only required to interpret legislation compatibly with the ECHR in cases of ambiguity, this would to some degree reduce the strength of the HRA in protecting rights, and would place greater emphasis on the declaration of incompatibility.

52. A frequently cited example of section 3 being used by the judiciary to override the original intention of Parliament is the case of *Ghaidan v Godin-Mendoza* (2004)[38], in which the House of Lords considered the application of Schedule 1, para. 2 of the Rent Act 1977. Para. 2 provided for the succession rights of surviving 'spouses' who lived together as 'husband and wife'. The House of Lords held that para. 2 infringed Articles 8 and 14 of the Convention and thus violated the HRA, as there was no justification for the difference in treatment of same-sex couples. Accordingly, the House of Lords, after much discussion as to the permissible limits of interpretation under section 3, held that pursuant to section 3, para. 2 was to be interpreted such that it applied to same-sex couples.[39]

53. We note in this regard Baroness Hale's evidence to the Joint Committee on Human Rights (JCHR)[40] that the use of section 3 to provide an ECHRcompliant interpretation is often the option urged upon the court by the Secretary of State, in preference to a section 4 DOI, and that this was the case in *Godin-Mendoza.*[41]

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[37] See for example *Gilham v MoJ* [2019] UKSC 44; [2019] 1 WLR 5095 per Baroness Hale (for the majority) at §39*; McDonald v McDonald* [2016] UKSC 28; [2017] AC 273 at §68 per Lord Neuberger and Baroness Hale.

[38] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557

[39] *Ibid.* Lord Nicolls held that their interpretation would be consistent 'with the social policy underlying paragraph 2' (para. 35).

[40] JCHR (February 2021), Oral evidence: The Government's Independent Human Rights Act Review, HC 1161, Q. 27, Q. 28

[41] *Mendoza ibid*, para 144, *per* Lady Hale, *'As Mr. Sales, for the Secretary of State, said in argument, this is not even a marginal case. It is well within the bounds of what is possible under section 3(1) of the Human Rights Act 1998 . If it is possible so to interpret the term in order to make it compliant with Convention rights, it is our duty under section 3(1) so to do.'*

54. Our analysis suggests that the courts have been cautious in their use of this provision.[42][43] It is also always open to Parliament to legislate if it is disagrees with the effect of a judicial interpretation under section 3.[44] We are unaware of any occasions on which Parliament has chosen to do so, or evidence of section 3 interpretations causing problems in practice.

55. Furthermore, we do not have evidence as to how often section 3 is used to interpret legislation. This is obviously an important question, not least because any change to section 3 could re-open many disputes about the proper interpretation of legislation. Without this evidence it will not be possible to properly assess the potential negative consequences of any change to section 3.

ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

56. For the reasons provided above we do not consider that section 3 should be amended or repealed. Recent Supreme Court jurisprudence[45] has produced an appropriate set of principles that ensure respect both for parliamentary sovereignty and protection of human rights. There is no evidence that there is a need to amend or repeal section 3, and such an attempt would create both legal uncertainty and practical difficulties.

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[42] See for example *WB v W District Council* [2018] EWCA Civ 928, the Court of Appeal declined to apply s.3 to interpret a provision of the Housing Act 1996 because doing so would give the provision a meaning which it was clear from the legislative history was contrary to Parliament's intention. See also *Anderson (R v Secretary of State for the Home Department ex parte Anderson* [2002] UKHL [43]), which concerned the power of the Home Secretary under section 29 of the Crime (Sentences) Act 1997 to release a prisoner serving a mandatory life sentence on licence. The House of Lords rejected the argument that it could 'read down' section 29 to exclude the role of the Home Secretary.

[44] In *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at para 43 *per* Lord Steyn, *'If Parliament disagrees with an interpretation by the courts under section 3(1), it is free to override it by amending the legislation and expressly reinstating the incompatibility'.*

[45] See Annex, para 23

57. If there is a concern about the use of section 3, a reporting mechanism could be introduced for cases where the court has used it.[46] This would enable the Government to consider the effect of the judgment and take appropriate action. This would also provide a robust evidence base to inform debate about the use of section 3.

58. If (contrary to our recommendation) section 3 were to be amended, we do not think it should be applied retrospectively to cases in which the interpretative power was used before the amendment to section 3 was enacted. The status of those cases and interpretation of the relevant legislation would become uncertain, and could lead to re-litigation of issues previously decided.

59. Even if an amendment or repeal was limited to having prospective effect, this would create significant uncertainty as to the degree of weight to be placed on previous case law.

iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

60. It is the Commission's view that there should be no change in the balance between section 3 and section 4.

61. If the review is contemplating the possibility of weakening or removing the section 3 interpretative obligation to increase use of section 4 DOIs, we do not consider this is necessary or desirable.

62. As set out in the previous section, the interpretative obligation under section 3 appears to be working as Parliament intended.

63. Section 3 also has the advantage of providing a timely and cost-effective mechanism to rectify HRA compatibility issues. Some section 4 DOIs are not remedied through the relatively streamlined mechanism of a remedial order

[46] For example, court rules require claimants to give the Equality and Human Rights Commission notice if they commence claims under s.114 Equality Act 2010, which enables us to monitor the nature and volume of discrimination law cases being brought to the courts. See Practice Direction – Proceedings under enactments relating to equality (England and Wales) for cases brought in the county court (England and Wales), and Rule 44.2 of the Ordinary Cause Rules and Rule 17.14 of the Simple Procedure Rules for claims in the sheriff court (Scotland).

under section 10. Amendments to primary legislation often take time to occur and may not apply retrospectively to provide a remedy in the case that gave rise to the declaration.[47]

64. Between the HRA coming into force in October 2000 and July 2020, only 43 declarations of incompatibility have been made. Of those, nine have been overturned on appeal; five related to provisions that had already been amended by the time of the declaration; eight were addressed by remedial order and 15 were addressed by later legislation.[48]

65. Furthermore, increased use of section 4 DOIs as an alternative to use of the section 3 interpretative power could significantly increase the work of Parliament, with questionable benefit for the protection of rights, and without a demonstrated need to protect parliamentary sovereignty given the lack of evidence that use of section 3 has created problems that needed to be reversed.

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

66. The Commission considers that courts should be able to review whether derogation orders are lawful, for example whether the threshold conditions for a derogation under Article 15 ECHR are met, or whether the manner in which the derogation has been made is *ultra vires*.[49] The courts' power to review the legality of government actions and quash them if unlawful is a fundamental

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[47] See Hickman, "Bill of Rights Reform and the Case for Going Beyond the Declaration ofIncompatibility Model", [2004] New Zealand Law Review, pp. 5051. The article cites research that found of 20 DOIs made up to May 2014, only one had ben addressed by remedial legislation with retrospective effect (p.51).

[48] See JCHR report 2020, details here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020_pdf.pdf at Annex A. pp31-34 and 35 -43

[49] In *A v SSHD* [2004] UKHL 56; [2005] 2 AC 68 the House of Lords held that a derogation was impermissible and should be quashed because the threshold conditions at Article 15 had not been established.It is not clear from the judgment whether the HRA itself afforded any jurisdiction for them to do so See paras 151152, 164 and 225.

principle of public law. The ability of courts to quash a designated derogation order made under section 14(1) is simply an application of that principle, and is consistent with the purpose of the HRA.

67. It is also proper that there should be judicial oversight to ensure proper use by the executive of this emergency measure since its purpose is to limit people's fundamental human rights. If that were not the case, such challenges would have to be made before the ECtHR, which would entail significant delay and cost.[50] It would also mean that the domestic courts, which are best placed to consider the validity of derogations, did not do so, and the matter would be left entirely to the Strasbourg court.

68. The ability of domestic courts to review the lawfulness of derogations is particularly critical in light of the proposed duty on the Secretary of State to consider derogation regarding overseas operations contained in the Overseas Operations (Service Personnel and Veterans) Bill 2019-21 Bill currently before Parliament,[51] which if passed may increase their use.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

Relevant case law: see Annex, paras 26-28

69. The Commission does not consider that any change to the current framework is required. The courts treat secondary legislation no differently when

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[50] See the White Paper for the Human Rights Bill (October 1997), para 1.14. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

[51] Overseas Operations Bill, Clause 12. We have recommended that Clause 12, which imposes a duty on the Secretary of State to consider whether to make a derogation under Article 15(1) of the ECHR in relation to any 'significant' overseas operations, should be removed from the Bill. At the very least, Government should amend Clause 12 to require that future proposals to derogate from the ECHR in relation to overseas operations are put to a parliamentary vote for approval. See: EHRC (January 2021), 'Briefing: Overseas Operations (Service Personnel and Veterans) Bill House of Lords, Second Reading'.

applying Convention rights than when applying ordinary judicial review principles. That is, they may quash such legislation where incompatible with a Convention right in the same way that they may quash such legislation if, for example, they find it is irrational or *ultra vires*. It is right that those two approaches are consistent, and they should remain so.

70. A recent study[52] found that courts rarely declare delegated legislation incompatible with the HRA, and are very cautious about exercising their power to quash the delegated legislation when they do so. The study found only 14 cases in the last seven years[53] in which human rights challenges to delegated legislation have succeeded. The study found that the court quashed the delegated legislation or otherwise disapplied the offending provisions in just four of the 14 cases. Usually the court simply declared that the delegated legislation violated the HRA and left it to the Government to decide the appropriate means of addressing the incompatibility.

71. The Commission notes that judicial scrutiny of delegated legislation is an important safeguard, given the lack of effective parliamentary scrutiny of delegated legislation. Thousands of pieces of delegated legislation are made every year and none have been rejected by the House of Commons since 1978.[54] Half of the successful challenges identified by the study concerned delegated legislation that had been made under the negative resolution procedure, meaning that there had been minimal scrutiny with no requirement for parliamentary debate or approval.[58]

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

[52] The study addressed claims made about alleged inappropriate use of the HRA by judges to quash subordinate legislation that had been published by the Policy Exchange's Judicial Power Project. https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-andalexandra-sinclair-does-judicial-review-of-delegated-legislation-under-thehuman-rights-act-1998-unduly-interfere-with-executive-law-making/

[53] Four of which were under the Welfare Reform Act 2012

[54] Only 17 were rejected between 1950 and 2017. See Commons Library (2017), Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016.

Relevant case law: see Annex, paras 29-30

72. The ECtHR has held that ECHR rights apply to acts of public authorities that take place outside the territory of the UK where the UK (or its agents) is exercising 'authority and control'.[55] This approach has brought advantages in terms of protection of human rights. For example, it has afforded protection to British soldiers when serving overseas.[56] The current approach also helps secure the UK's position as a global leader on human rights and reinforces a sense of integrity in UK operations overseas.[57] If the review is considering whether it is appropriate for domestic courts to adjudicate on the acts of

[58] Under the negative resolution procedure, statutory instruments do not require approval, but will be annulled if either House passes a motion within a specified period (usually 40 days). *Ibid*, p. 23

public authorities taking place outside of the UK, it is noted that all branches of Government operating abroad, including the military, are required to comply with human rights and applicable international law, such as international humanitarian law. Any change to the extra-territorial jurisdiction of the HRA would not alter these obligations, or the ECtHR's view on

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[55] *Al-Skeini v* (Application No. 55721/07, 7 July 2011). In *Al-Jedda v UK* (Application No. 27021/08, 7 July 2011), the ECtHR also held that Convention rights apply outside UK territory where the UK is exercising 'effective control' A review of domestic cases since 2011, in which ECHR rights are held to have extra-territorial application are set out in the Annex at paras 29-30. See also ECtHR Fact Sheet on Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights.

[56] *Smith v Ministry of Defence* [2013] UKSC 41; Following *Al-Skeini* the Supreme Court determined where the state exercised jurisdiction extraterritorially, the protection of Article 2 ECHR extended to both individuals and its agents, and under its control, so that the armed forces are protected by Article 2. See also, *Lord Advocate v Dean* [2017] UKSC 44; ECHR obliges states not to extradite persons to third country were there are grounds to believe they will be subject to treatment contrary to Article 3.

[57] The ECtHR's approach is also consistent with the UK's international human rights obligations, including under ICCPR. The Human Rights Committee has made clear that the rights contained in ICCPR (which is of course very similar in scope to the EHCR) apply "to anyone within the power or effective control" of the State, "even if not situated within the territory of the State Party": Human Rights Committee (2004), General Comment No. 31, para 10. See also Human Rights Committee, *López v. Uruguay*, para. 12.3.

extraterritorial application of the ECHR. Any attempt to restrict extra-territorial application of the HRA could therefore lead to an increase in the number of cases brought before the ECtHR.

73. It could also set an unwelcome precedent, leading other countries in the Council of Europe to follow suit, including those with weaker human rights records than the UK.[58]

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

74. The Commission does not consider that the remedial order process requires modification.

75. Remedial orders provide a means for Government and Parliament to swiftly remedy an incompatibility with the HRA in primary legislation. The alternative process of passing amending legislation can entail significant delay, during which period the incompatible legislative provisions and any dependent secondary legislation remain in force.

76. The Commission considers that remedial orders, if used in accordance with their limited purpose of amending a provision in order to remove an incompatibility with the HRA[59] and thereby to enhance the human rights compliance of legislation, are an appropriate use of executive power.[60]

77. Moreover, under Schedule 2, remedial orders are subject to a draft affirmative procedure, requiring approval of a draft by both Houses. This procedure gives Parliament an opportunity to debate, and approve or not approve such

[58] The facts of cases in which the ECtHR has determined that the Convention has extra-territorial application illustrate the risks inherent in such an approach. See ECtHR Fact Sheet on Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights.

[59] Remedial orders should only be used to bring the law into line with the ruling of the domestic court, in contrast to a discretionary power conferred on ministers to introduce new policies.

[60] This is in contrast to the concerns we expressed about the use of 'Henry VIII powers' to amend primary legislation, in relation to the European Union (Withdrawal) Bill's granting ministers delegated powers which could be used to restrict rights without adequate parliamentary debate and oversight. See: EHRC (2018) European Union (Withdrawal) Bill House of Commons Report Stage Briefing.

measures. This is the most stringent form of parliamentary scrutiny of delegated legislation that is generally adopted.

78. Remedial orders are rarely used. Between the HRA coming into force in October 2000 and July 2020, only eight declarations of incompatibility have been addressed by remedial order. In contrast, 20 declarations of incompatibility (almost 50 per cent of all those made) were addressed by legislation, either before or after the declaration.[61]

[61] See Ministry of Justice (2020) Responding to human rights judgments, Annex A.

Conclusion

79. In our view, the HRA has substantially improved protection and enjoyment of human rights for everyone in Britain, by ensuring that public authorities focus on their obligations to protect people's rights, and providing for redress when breaches occur.

80. Our analysis shows that the mechanisms under the HRA are operating effectively and as Parliament intended. They provide a balanced model for safeguarding fundamental rights through access to justice in the British courts, while ultimately respecting parliamentary sovereignty by giving the final authority to Parliament on how to deal with legislation that is found to be incompatible with human rights.

81. In our view, changes to the HRA mechanisms are not required. We consider that the primary focus of proposals for any change that may be recommended should be on two inter-related factors: namely improving understanding, and improving public authorities' implementation, of the HRA.

82. Substantial work is still required by Government, public authorities, politicians, civil society and the media to improve understanding of the value of human rights and their relevance to people's everyday lives, and to reduce misconceptions of human rights. Work is also needed to improve the application by public authorities of the HRA to their policies and practices.

83. Together, these measures will help improve confidence in public service providers and help to ensure that the HRA continues to be applied sensibly and appropriately, is well understood and respected, and properly fulfils its potential to protect rights and improve lives.

We set out below details of cases identified in our research for this review that may assist the Panel.

Theme One – the relationship between domestic courts and the ECtHR

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice?

The following are examples of departures from ECtHR jurisprudence (or judicial explanations of the parameters of the duty to 'take into account' at section 2 of the HRA), since 2010:

1. In *Manchester City Council v Pinnock (2010)*[62] the Supreme Court noted that ECtHR decisions are not binding on domestic courts. At §48, the Court (*per* Lord Neuberger giving the judgment of the Court) held:

   "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law … Of course, we should usually follow a clear and constant line of decisions by the European court … But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber … 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."[63]

2. In *R (Quila) v SSHD* (2011)[64] the Supreme Court considered whether a rule stipulating the minimum age for the grant of a marriage visa was unlawful. In reaching its conclusion, the Court declined to follow the decision of the ECtHR in *Abdulaziz v UK (1985)* on the basis, *inter alia*, that it was an old decision.[65].

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[62] *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104

[63] In *Pinnock*, the Court followed the relevant ECtHR jurisprudence: §49.

[64] *R (Quila) v SSHD* [2011] UKSC 45; [2012] 1 AC 621,

[65] *R (Quila) ibid*, §43, *per* Lord Wilson with whom Baroness Hale and Lords Phillips and Clarke agreed

3. In *R (Chester) v SSJ* (2013)[66], the Supreme Court (*per* Lord Mance with whom Lords Kerr, Hughes and Hope agreed) drew a distinction between Chamber and Grand Chamber decisions and held (at §27):

   "It would have to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level".

4. In *R (Kaiyam) v SSJ* (2014)[71] the Supreme Court (*per* Lord Mance and Lord Hughes, with whom Lords Neuberger, Toulson and Hodge agreed) noted that the application of *"take into account"* is context specific and that it would be *"unwise"* to treat judicial commentary on this as more than *"attempts at general guidelines"* (§21). In *Kaiyam* the Supreme Court declined to follow the ECtHR jurisprudence on the basis that it did not form part of a clear and consistent line of decisions: §35.

5. *Kaiyam* and the relevant Strasbourg jurisprudence were again considered by the Supreme Court in *Brown v Parole Board for Scotland* (2017)[67]. In *Brown*, the Court considered whether it should follow Strasbourg and depart from the position adopted in *Kaiyam* because by 2018 the relevant ECtHR jurisprudence did form part of a clear and consistent line of decisions (§38*, per* Lord Reed for the majority). At §44, Lord Reed held

   that the appropriate course was for the Court to depart from *Kaiyam* and adopt the same approach as Strasbourg.

6. In *Moohan v Lord Advocate* (2014)[68], at §104, Lord Wilson (in a dissent) presented a timeline of the courts' application of s.2 of the HRA and *"retreat from the Ullah principle"*[69]. The timeline sets out the key decisions, from which Lord Wilson concludes at §105, that *"protracted consideration over the last six years has led this court substantially to modify the Ullah principle"*. However, in *Moohan*, the Court was concerned with going beyond rather than declining to follow the ECtHR: in

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[66] *R (Chester) v SSJ* [2013] UKSC 63; [2014] AC 271. NB: In *Chester*, the Court followed the relevant ECtHR jurisprudence: §34 [71] *R (Kaiyam) v SSJ* [2014] UKSC 66; [2015] AC 1344

[67] *Brown v Parole Board for Scotland* [2017] UKSC 69; [2018] AC 1

[68] *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901

[69] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 (see *fn 19*).

that regard, Lord Wilson concluded that where there is no directly relevant ECtHR decision, the domestic Court *"can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right"*.

7. In *R (Hicks) v Comr of Police of the Metropolis* (2017)[70] the Supreme Court considered the *"difficult question of law"* relating to how preventative detention can be accommodated within Article 5 of the Convention. The Court noted that *"[t]he Strasbourg case law on the point is not clear and settled"* and observed that *"while this court must take into account the Strasbourg case law, in the final analysis it has a judicial choice to make"* (§32, *per* Lord Toulson for the majority). The Court departed from the majority decision in the relevant ECtHR case: §§38-40.

8. In *Poshteh v Kensington and Chelsea Royal LBC* (2017)[71] the Supreme Court considered a challenge to the decision of a reviewing officer in relation to the allocation of suitable housing. A previous Supreme Court decision (in *Ali v Birmingham City Council* (2010)[72] held that duties imposed on housing authorities did not give rise to 'civil' rights or obligations so as to engage Article 6. *Ali* had been appealed to a Chamber of the ECtHR, which held that Article 6.1 did apply but was not violated. The *Poshteh* case was the first opportunity since the ECtHR decision in *Ali* for the Court to decide whether the approach of the ECtHR should be

followed in England. At §33, Lord Carnwath noted that it was *"disappointing"* that the ECtHR had (i) failed to address, in its decision on appeal from *Ali*, the detailed reasoning of the Supreme Court, and concerns expressed therein; and (ii) focussed its attention on two *obiter* comments. At §36, Lord Carnwath noted the duty under s.2 of the HRA but observed that the Chamber in *Ali* was *"consciously going beyond the scope of previous cases"* and concluded (at §37):

> *"In my view, this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion of the [Supreme Court] in [Ali] … It is appropriate that we should await a full*

[70] *R (Hicks) v Comr of Police of the Metropolis* [2017] UKSC 9; [2017] AC 256

[71] *Poshteh v Kensington and Chelsea Royal LBC* [2017] UKSC 36; [2017] AC 624

[72] *Ali v Birmingham City Council* [2010] 2 AC 39

consideration by a Grand Chamber before considering whether (and if so how) to modify our own position".

9. In *In re McLaughlin* (2018)[73] the Supreme Court considered whether denying a widowed parent's pension to an unmarried mother following the death of her partner and father of her children violated Article 14 (§1). At §47, Lord Mance (for the majority) noted that the Court was faced with a difficulty in that a similar complaint (which included as one element challenge to the refusal to an unmarried mother of a widowed mother's allowance following the death of her partner) had been declared inadmissible by the ECtHR. In declaring that case inadmissible, Strasbourg concluded that the woman's ineligibility was compatible with the Convention. At §49, Lord Mance noted that as a result the Supreme Court had to consider whether the ECtHR's approach in that case *"should now be regarded as wrong or should not be followed"*. Lord Mance concluded that the Strasbourg decision should not be followed. He noted that the ECtHR's reasoning failed to address the purpose of the allowance (i.e. catering for the child) and that refusal of that allowance could not simply be regarded as a detriment to the survivor of the couple (§49). He also noted that the ECtHR did not appear to have addressed the point that the effect of the refusal thus discriminated against illegitimate children (§51). (Also see Baroness Hale, §28.)

10. In *R v Abdurahman (Ismail)* (2019)[74] the Court of Appeal recently considered the status of ECtHR jurisprudence in domestic law at §97ff and provided a helpful overview of the relevant Supreme Court authorities at §§98-106. At §110, the Court set out the approach it would adopt when considering the ECtHR authorities:

    a. The domestic courts should usually follow any *"clear and constant line of decisions"* from the ECtHR but could depart from such a clear and constant line where (i) it is inconsistent with some fundamental substantive or procedural aspect of our law; or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle (see *Pinnock*, §48, above).

    b. Nonetheless, the position expressed at §a) above should be viewed as guidance rather than a straightjacket. The degree of constraint that the ECtHR jurisprudence imposes is context-specific and even

[73] *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250

[74] *R v Abdurahman (Ismail)* [2019] EWCH Crim 2239; [2020] 4 WLR 6

where the Grand Chamber has endorsed a line of authority it is not necessary for the domestic court to conclude that it involved an 'egregious' oversight before declining to follow it.

Adopting that approach, the Court in *Abdurahman* departed from the Grand Chamber decision in an appeal brought by the same applicant: *Ibrahim & Ors v UK* (2016)[75].

11. In *R (Hallam) v SSJ* (2020)[76] the Supreme Court considered whether Article 6.2 of the Convention was applicable to compensation claims under s.133 of the Criminal Justice Act 1988 (CJA); and if so, whether a provision (s.133(1ZA) of the CJA) requiring proof beyond a reasonable doubt that the relevant person did not commit the offence violated Article 6.2 (§24). The Court (*per* Baroness Hale and Lords Wilson, Lloyd-Jones, Mance, Hughes; Lords Reed and Kerr dissenting) held that the Article 6.2 presumption of innocence had no application once criminal proceedings had terminated, save (*per* Baroness Hale and Lords Lloyd-Jones, Mance and Hughes) to prohibit a public authority from suggesting that an acquitted defendant should have been convicted. In their judgments (as relevant to s.2 of the HRA):

    a. At §72, Lord Mance cited *Kaiyam* with approval. At §§73-74, he concluded that the current state of ECtHR case law was not *"coherent or settled on the points critical to this appeal"* and that it would be inappropriate to introduce into English law a wider application of Article 6.2.

    b. Lord Wilson noted that in the early years of the HRA the English courts were *"strikingly loyal"* to ECtHR jurisprudence under s.2 of the HRA at §87. At §88, Lord Wilson then considered Lord Slynn's observation in *R (Alconbury Developments Ltd) v SSETR* (2003)[77] that in the absence of special circumstances, the English courts should *"follow any clear and constant jurisprudence"* from the ECtHR; Lord Wilson observed that those words were chosen to describe a reasonable approach to a particular case and should not be scrutinised and applied as though a statute. At §89, Lord Wilson cited *Kaiyam* with approval. At §90, he then observed that the ECtHR jurisprudence relevant to the case before him was *"not just*

[75] *Ibrahim & Ors v the UK* (App No. 50541/08, 13 September 2016)

[76] *R (Hallam) v SSJ* [2020] UKSC 2; [2020] AC 279

[77] *R (Alconbury Developments Ltd) v SSETR* [2003] 2 AC 295

wrong but incoherent". At §§92-93, Lord Wilson concluded that the Supreme Court should depart from ECtHR and not find any violation. He observed in particular that he regarded himself as *"conscientiously unable to subscribe to the ECtHR's analysis of the extent of the operation of article 6.2 and thus to declare to Parliament that its legislation is incompatible with it"* (§94).

c. Lord Hughes considered s.2 of the HRA at §125. He observed that notwithstanding s.2 the Court is responsible for arriving at its own decision on Convention rights (noting, however, that the English courts have demonstrated a desire for consistency with Strasbourg). At §126, Lord Hughes noted nonetheless that the relevant ECtHR jurisprudence in the case before him created difficulties in its application, *"frequently leading either to inconsistent outcomes or to over sophisticated semantic analysis"*. Lord Hughes concluded that Article 6.2 did not apply to s.133 compensation claims (save to prohibit questioning the acquittal).

c. Lord Lloyd Jones noted at §§133 and 138 that, *"[h]aving regard to the present unsettled state of ECtHR case law"*, he did not consider there to be an incompatibility between s.133(1ZA) and Article 6.2.

d. Lord Reed (dissenting) at §172 considered the obligations imposed by s.2 of the HRA. He noted that *"it can sometimes be inappropriate to follow Strasbourg judgments, as to do so may prevent this court from engaging in the constructive dialogue or collaboration between the [ECtHR] and national courts on which the effective implementation of the Convention depends"*. At §173, however, Lord Reed noted that *"[t]he circumstances in which constructive dialogue is realistically in prospect are not, however, unlimited"*. Illustrating those limits on departure from the ECtHR, Lord Reed cited (i) *Pinnock*, noting that there is unlikely to be dialogue where the ECtHR cases present a clear and constant line of decisions which is not inconsistent with some fundamental substantive or procedural aspect of our law; and (ii) *Chester*, noting that there is unlikely to be scope for dialogue where the Grand Chamber has authoritatively considered an issue. At §174, Lord Reed concluded that the case before him did not present those circumstances. At §175 he noted that *Pinnock* and *Chester* were not to be treated as statutes but held that they were persuasive and that he therefore found it *"difficult to accept that this court should deliberately adopt a construction of the Convention which it knows to be out of step with the approach of the*

[ECtHR], established by numerous Chamber judgments over the course of decades, and confirmed at the level of the Grand Chamber, in the absence of some compelling justification for taking such an exceptional step. For my part, I can see no such justification". Lord Reed concluded that the relevant domestic provision was incompatible with Article 6.2 (§192).

e. Lord Kerr (dissenting) at §§205-206 addressed the ECtHR jurisprudence. He agreed with Lord Reed that there was a clear and constant line of decisions establishing the relevant test and that the Supreme Court should apply that test, with the result that s.133(1ZA) violated Article 6.2.

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence?

Below are recent examples (from 2018 to date) setting out how the Supreme Court has considered and applied or declined to apply the margin of appreciation

In some of these cases clear distinction is drawn between (i) the nature of Strasbourg's application of the margin of appreciation on the one hand, and (ii) the domestic court's proportionality assessment on the other. However, in others, that distinction is somewhat elided (or at least not expressly drawn out).

12. In *Commr of Police of the Metropolis v DSD & another* (2018)[78] the Supreme Court considered the Commissioner's appeal against a decision that he had breached Article 3 in failing to conduct an effective investigation into serial assaults committed by a sexual offender. Lord Mance (alone) stated at §153:

"There are however cases where the English courts can and should, as a matter of domestic law, go with confidence beyond existing Strasbourg authority … If the existence or otherwise of a Convention right is unclear, then it may be appropriate for domestic courts to make up their minds whether the Convention rights should or should not be understood to embrace it. Further, where the European Court of Human Rights has left a matter to states' margin of appreciation, then domestic courts have to decide what the domestic position is, what

[78] *Commr of Police of the Metropolis v DSD & another* [2018] UKSC 11; [2018] 2 WLR 895

degree of involvement or intervention by a domestic court is appropriate, and what degree of institutional respect to attach to any relevant legislative choice in the particular area…".

13. In *R (Steinfeld) v SSID* (2018)[79] the Supreme Court considered the compatibility of provisions precluding different sex couples from entering into civil partnerships with Article 14 (read with Article 8). Considering justification, Lord Kerr (with whom Baroness Hale, Lady Black and Lords Reed and Wilson agreed) held:

"28. … the approach of the ECtHR to the question of what margin of appreciation member states should be accorded is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified …

29. It follows that a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid that obligation by reference to a margin of appreciation to be allowed the Government or Parliament (at least not in the sense that the expression has been used by the ECtHR). The court may, of course, decide that a measure of latitude should be permitted in appropriate cases."

14. In *In re McLaughlin* (2018)[80] the Supreme Court considered whether precluding entitlement to a widowed parent's allowance by a surviving unmarried partner violated Article 14 (read with Article 8).

a. Considering justification, Baroness Hale (with whom Lords Mance and Kerr and Lady Black agreed) observed:

"33. … The margin of appreciation is the latitude which the Strasbourg court will allow to member states, which is wider in some contexts and narrower in others …

34. Strictly speaking, the margin of appreciation has no application in domestic law. Nevertheless, when considering whether a measure does fall within the margin, it is necessary to consider what test would be applied in Strasbourg - that is why the [manifestly without reasonable foundation (MWRF)][81] test has generally been applied

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[79] *R (Steinfeld) v SSID* [2018] UKSC 21; [2020] AC 1

[80] *In re McLaughlin (Northern Ireland)* [2018] UKSC 48; [2018] 1 WLR 4250

[81] The test for the court to apply with respect to justification in relation to entitlement to welfare benefits, is whether the approach taken by the government is 'manifestly without reasonable foundation' (MWRF): *R (DA) v Secretary of*

domestically in benefit cases. In cases which do fall within the margin which Strasbourg will allow to member states, the domestic courts will then have to consider which among the domestic institutions is most competent and appropriate to strike the necessary balance between the individual and the public interest. In a discrimination case … it may be the courts. In other cases, it may be the Government or Parliament."

b. Lord Hodge (in a dissent) at §81 merely noted that contracting states are *"given a certain margin of appreciation in their assessment of whether differences in otherwise similar situations justify a different treatment in law".*

15. In *R (Stott) v SSJ* (2018)[82] the Supreme Court considered whether provisions limiting the eligibility of prisoners for parole were compatible with Article 14 (read with Article 5).

a. At §153, Lady Black (who formed part of the majority), in the context of considering the proportionality of the measure, held:

"The starting point for a determination of these questions is that the ECtHR would allow a contracting state a margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify different treatment, and would allow a wide margin when it comes to questions of prisoner and penal policy, although closely scrutinising the situation where the complaint is in the ambit of article 5. This court must equally respect the policy choices of parliament in relation to sentencing."

b. At §198, Lord Hodge (who formed part of the majority) observed (in obiter comment on justification):

"when the court considers the justification of different treatment under article 14 of the ECHR it gives a wide margin of appreciation to the democratic legislature in its determination of criminal sentencing policy but exercises close scrutiny where the allegation is that detention is arbitrary or unlawful."

SSWP [2019] UKSC 21. There is some debate as to whether the test should be applied outside the context of welfare benefits: *R (On the Application Of Drexler) v Leicestershire County Council* [2020] EWCA Civ 502.

[82] *R (Stott) v SSJ* [2018] UKSC 59; [2020] AC 51

16. In *R (DA) v SSWP* (2019)[83], the Supreme Court considered a challenge to the legality of the revised welfare benefits cap. As part of their judgment, the court considered the standard of review under the Convention.

    a. Lord Carnwath (with whom Lords Reed and Hughes agreed) noted that the same margin of appreciation does not necessarily apply at the national level as compared with that applicable before Strasbourg; but that nonetheless that did not prevent domestic courts from applying a test which allows *"the political branches of the constitution an appropriately generous measure of leeway when assessing the proportionality of measures concerning economic and social policy"*: §118.

    b. Baroness Hale (in a partial dissent) held at §147:

    > *"Lord Kerr JSC is surely right to question whether the test which the Strasbourg court will apply in matters of socio-economic policy should also be applied by a domestic court. The Strasbourg court applies that test, not because it is necessarily the proper test of proportionality in this area, but because it will accord a 'wide margin of appreciation' to the 'national authorities' in deciding what is in the public interest on social or economic grounds. The national authorities are better able to judge this because of their 'direct knowledge of their society and its needs' … It does not follow that national courts should accord a similarly wide discretion to national governments (or even Parliaments). The margin of appreciation is a concept applied by the Strasbourg court as part of the doctrine of subsidiarity. The standard by which national courts should judge the measures taken by national governments is a matter for their own constitutional arrangements."*

    c. Lord Kerr (in a partial dissent) noted at §164 that the margin of appreciation is something which Strasbourg accords to decisions of the national authorities. And at §167 highlighted that *"there is plenty of authority which acknowledges that measures falling within the United Kingdom's margin of appreciation, when viewed from the supra-national perspective of the ECtHR, will not necessarily survive judicial scrutiny on the national stage".* Accordingly, Lord Kerr concluded at §169 that the MWRF test applied by Strasbourg in order to promote its proper application of the margin of appreciation:

[83] *R (DA) v SSWP* [2019] UKSC 21; [2019] 1 WLR 3289

> *"has no place in the national court's consideration of whether a measure which interferes with a Convention right is proportionate, since … at the domestic level, the margin of appreciation is not applicable. Indeed, in the national setting, this court, in a number of cases, has articulated an approach to examination of the proportionality of the interference where consideration of the question whether it was [MWRF] is conspicuously absent".*

Commenting on Lord Reed's statement in Bank Mellat, Lord Kerr observed at §171 that it was "important" in emphasising the different proportionality assessments relevant to Strasbourg and domestic courts:

> *"In Strasbourg it is recognised that the court may be 'less well placed than a national court to decide whether an appropriate balance has been struck'. By contrast, the national court may consider itself constrained by 'national traditions and institutional culture'. One can quite see how the concept of [MWRF] assists in the examination by the Strasbourg court of the proportionality of a measure. Very different considerations arise when the national court examines proportionality."*

17. In *R (Z) v Hackney London Borough Council* (2020)[84] the Supreme Court considered the Convention compatibility of s.193 of the Equality Act 2010; in particular, whether the requirement for a proportionality assessment should be read into s.193(2)(b). The court held that Parliament had carefully and deliberately framed that section so as not to require a separate proportionality assessment. In reaching that conclusion, Lord Sales (with whom Lords Reed, Kitchin and Kerr agreed) observed that:

> *"107. The margin of appreciation to be afforded to Parliament when it has sought to strike a balance between competing interests varies depending on context. Where, as here, Parliament has had its attention directed to the competing interests and to the need for the regime it enacts to strike a balance which is fair and proportionate and has plainly legislated with a view to satisfying that requirement, the margin of appreciation will then to be wider. A court should accord weight to the judgment made by the democratic legislature on a subject where different views regarding what constitutes a fair balance can reasonably be entertained. 108.*

[84] *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327

… When the state provides social welfare benefits, the margin of appreciation afforded to Parliament is wide. Its judgment will be respected in relation to general measures of economic or social strategy unless manifestly without reasonable foundation … 109. … Allowing the state a wide margin of appreciation in [the context of welfare benefits] recognises the legitimacy of such decisions of social and economic policy being taken by a body which has democratic authority and the responsibility for raising taxes and deciding how they are spent. It is also a matter of social and economic policy for Parliament to decide how best to stimulate private benevolence which will allow charities to supplement state provision of welfare benefits."

18. In addition to the above cases, in *In re Recovery of Medical Costs of Asbestos Diseases (Wales) Bill* (2015)[85], Lord Mance made the following observations on the nature of the margin of appreciation at §54:

"At the domestic level, the margin of appreciation is not applicable, and

the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level … However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis … But again, and in particular at the fourth stage [i.e. considering whether the measure strikes a fair balance]*, the domestic court may have an especially significant role"*[86]

[85] *In re Recovery of Medical Costs of Asbestos Diseases (Wales) Bill* [2015] UKSC 3

[86] See also §67 *per* Lord Mance with regard to the court's power to question the judgment of the Assembly; and §§114 and 118-120 *per* Lord Thomas [92] *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK?

Below are examples of cases since 2009, which formed part of a judicial dialogue between Strasbourg and the domestic courts.

19. In 2010, a judicial exchange between Strasbourg and the House of Lords culminated in *Manchester City Council v Pinnock* (2010)[92]. The House of Lords had initially taken the view that the proportionality of an order for possession by a local authority of a residential property had already been considered and taken into account by Parliament when enacting the relevant legislation (summarised at §§25-30). However, Strasbourg subsequently held that the existence of the legislation did not prevent the occupier from raising article 8 rights when possession of her home was being sought (summarised at §§30-44). In *Pinnock*, the Supreme Court then concluded that four propositions had been clearly established by Strasbourg and that it was important to emphasise the "unambiguous and consistent" approach of Strasbourg when considering departing from previous decisions of the House of Lords (§§45-46). At §48, the Court noted that it was not bound to follow Strasbourg as doing so would be impracticable and would "*destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law*". But at §49, the Court concluded that if domestic law was to be compatible with Article 8, the court must have the power to assess the proportionality of possession orders. (The Court went on to note, however, that in virtually every case there would be a very strong argument that the order for possession would be proportionate: §54.)

20. In *Ambrose v Harris* (2011)[87] the Supreme Court considered whether a provision regulating access to a lawyer prior to police questioning violated Article 6. In a dissenting judgment, Lord Kerr noted that:

> *"If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those*

[87] *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435

arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable": §130.

21. In *R (Chester) v SSJ* (2013)[88] the Supreme Court considered whether to give effect to rulings of the Grand Chamber (which held that the ban on convicted prisoners voting was incompatible with Article 3).

a. Lord Mance (with whom Lords Hope, Kerr and Hughes agreed) referred to *Pinnock* and identified circumstances where there was unlikely to be scope for further dialogue (and in which Strasbourg authority should therefore generally be followed):

> *"27. In relation authority consisting of one or more simple chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as [Horncastle] to refuse to follow Strasbourg case law in the confidence that the reasoned expression of a diverging national viewpoint will lead to serious review of the position in Strasbourg. But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level."*

b. As a consequence, the Supreme Court in *Chester* held that (i) there was no scope for further meaningful dialogue; (ii) prisoner voting did not engage some fundamental principle of domestic law such as the Supreme Court could justify refusing to apply the Strasbourg decisions
(§§34-35); but (iii) as the matter was already under consideration by Parliament it was not appropriate to make a declaration of incompatibility.

22. In 2013-2017, a further judicial exchange occurred over the compatibility of whole life sentences with the Convention.

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[88] *R (Chester) v SSJ* [2013] UKSC 63; [2014] AC 271

a. In *Vinter v UK* (2013)[89], the Grand Chamber criticised the English law on whole life sentences. It held that for the sentence to be compatible with Article 3 there had to be a possibility of review and release; and that in introducing whole life orders (release from which was only possible at the discretion of the Secretary of State on compassionate grounds) the UK had violated Article 3: §§119, 121, 130.

b. The issue then came before the Court of Appeal in *R v McLoughlin* (2014)[90]. The Court in McLoughlin summarised the exchange on that issue to date with Strasbourg at §2. At §§14-23 the Court of Appeal considered *Vinter*, concluding that the Strasbourg judgment did not have the consequence that the imposition of a life tariff itself violates article 3 (§23). However, at §29 (and §35) the Court of Appeal expressly disagreed with Strasbourg as to whether domestic English law provided an avenue of redress: the Court of Appeal held that such redress was available because the Secretary of State was bound to exercise his power in a manner compatible with domestic administrative law and Article 3.

c. The matter then came before Strasbourg again in *Hutchinson v UK* (2017).[91] There, the Grand Chamber considered *Vinter* and *McLoughlin* and other relevant authorities and concluded at §70, *"the McLoughlin decision has dispelled the lack of clarity identified in Vinter arising out of the discrepancy within the domestic system between the applicable law and the published official policy"*. At §71, the Grand Chamber went on to hold: *"the Court of Appeal drew the necessary conclusions from the Vinter judgment and, by clarifying domestic law, addressed the cause of the Convention violation"*. As a result, the Grand Chamber concluded that *"the whole life sentence can now be regarded as reducible, in keeping with Article 3 of the Convention"*: §73

[89] *Vinter v UK* (2013) 63 EHRR 1

[90] *R v McLoughlin* [2014] EWCA Crim 188; [2014] 1 WLR 3964

[91] *Hutchinson v UK* (App no.57592/08, 17 January 2017)

Theme Two – the impact of the HRA on the relationship between the judiciary, executive and legislature

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it?

The Commission has not been able to review all relevant section 3 cases within the timeframe of the review and due to the resources this would require. However, we have identified the following examples from searches possible in the time available.

23. In general, the courts have held that there are limits to an interpretation under s.3, such that it should only be in rare cases that parliamentary intention is undermined. The relevant principles can be summarised as follows:

    a. It is not the function of s.3 to require the courts to apply a Conventioncompliant interpretation if other principles of interpretation prevent it from doing so: *WB v W District Council* (2018)[92] at §35.[93]

    b. Although what is *"possible"* for the purposes of s.3 goes *"well beyond the normal canons of literal and purposive statutory construction"*, it is not permissible to *"go against the grain"* of the legislation or to

[92] *WB v W District Council* [2018] EWCA Civ 928; [2018] HLR 30

[93] In *WB*, the applicant contended, *inter alia*, that a provision in the Housing Act 1996 could be interpreted using s.3 of the HRA so as to place applicants for priority housing with a mental disability on the same footing as those with no such disability. The Court concluded that the relevant provision could not be interpreted under s.3 in that way because to do so would give the relevant provisions of the 1996 Act a meaning which it was clear from the legislative history was contrary to that which Parliament intended: see §35.

interpret inconsistently with some fundamental feature of the legislation: *Gilham v MoJ* (2019)[94] *per* Baroness Hale (for the majority) at §39; also see *Sheldrake v DPP* (2004)[95], *per* Lord Bingham (for the majority) at §28;[96] *McDonald v McDonald* (2016)[97] at §68 *per* Lord Neuberger and Baroness Hale.[98]

c. Section 3 does not confer a power on the courts to overrule decisions which the language of the statute shows have been taken on the very point in issue by the legislator: *R v Lambert* (2001)[99] *per* Lord Hope

[94] *Gilham v MoJ* [2019] UKSC 44; [2019] 1 WLR 5095

[95] *Sheldrake v DPP* [2004] UKHL 43; [2005] 1 AC 264

[96] In *Sheldrake*, Lord Bingham noted that (i) the interpretative obligation is a *"very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament"*; (ii) the interpretation under s.3 is the primary remedial measure, and a declaration under s.4 an exceptional course; (iii) there is a limit beyond which a Convention-compliant interpretation is not possible, e.g. if *"incompatible with the underlying thrust of the legislation"*, or against the grain of it, or requiring legislative deliberation, or changing the substance of a provision, or violative of a cardinal principle of the legislation.

[97] *McDonald v McDonald* [2016] UKSC 28; [2017] AC 273

[98] In *McDonald,* the court did not find the statutory provision incompatible but it nonetheless held that had it done so, the terms/context of the provision were such that a compliant interpretation under s.3 would not have been possible – such interpretation would *"not 'go with the grain of the legislation' but positively contradict it"* (see §§69-70).

[99] *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545

at §79;[106] see also *R v Shayler* (2002)[100] *per* Lord Hope at §52.

d. An interpretation which results in a meaning that departs substantially from a fundamental feature of a statute is likely to have crossed the boundary between interpretation and amendment (and thus be impermissible), especially where the departure has important practical repercussions which the court is not equipped to evaluate: *In re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 290, *per* Lord Nicholls at §§39-40.[101]

[106] In *Lambert,* Lord Hope explained how s.3 was to be employed consistently with the need to respect the will of the legislature so far as doing so remains appropriate, and to preserve the integrity of the UK's statute law (§78). He noted that the obligation under s.3 was powerful but *"not to be performed without regard to its limitations"* and in particular will not be available where the relevant legislation *"contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it compatible. The same consequence will follow if legislation contains provisions which have this effect by necessary implication … This function [of interpreting legislation] belongs, as it has always done, to the judges. But it is not for them to legislate. Section 3(1) preserves the sovereignty of Parliament. It does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point in issue by the legislature"* (§79). He further noted that *"the interpretation of a statute by reading words in to give effect to the presumed intention must always be*

[100] *R v Shayler* [2002] UKHL 11; [2003] 1 AC 247

[101] In *re S,* Lord Nicholls observed: *"In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament"* (§39). And: *"a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms"* (§40).

distinguished carefully from amendment. Amendment is a legislative act. It is an exercise which must be reserved to Parliament" (§81).

e. The courts have expressly noted that it is not for the courts to attempt to re-write legislation as the necessary delicate balance should be struck in the first instance by the legislature: *R (Wright) v SSH* (2009)[102] *per* Baroness Hale at §39.

f. In *R (Anderson) v SSHD* (2002)[103] the House of Lords held at §30 (*per* Lord Bingham) that a compatible interpretation in that case *"would not be judicial interpretation but would be judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act"*; and further at §59 (*per* Lord Steyn) that *"it would not be interpretation but interpolation inconsistent with the plain legislative intent … Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute"*.[104]

24. In *Ghaidan v Godin-Mendoza* (2004)[105] the Supreme Court described the limits of interpretation contrary to Parliamentary intent. At §30, Lord Nicholls (with whom Lords Steyn and Rodger and Baroness Hale agreed) observed that s.3 *"may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to that question depends upon the intention reasonably to be attributed to Parliament in enacting section 3"*. At §§32-33, Lord Nicholls held that:

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[102] *R (Wright) v SSH* [2009] UKHL 3; [2009] AC 739

[103] *R (Anderson) v SSHD* [2002] UKHL 46; [2003] 1 AC 837

[104] In *Anderson*, the House of Lords considered whether the SSHD's power to fix sentencing tariffs was compatible with Article 6. The Court found that it did violate Article 6 and that it was impossible to interpret the relevant statutory provision so as to preclude the SSHD's participation in the sentencing process and as such a declaration of incompatibility was made. In particular, at §30 Lord Bingham noted that Parliament had undoubtedly intended the provision to have the effect it did and that interpreting the provision to the contrary was therefore impermissible.

[105] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557

> *"32. … the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation"*.
>
> *33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."*

(ii) Examples where the Court has declined to exercise its s.3 power

25. The general principles set out above at paragraph 23 are reflected in the following relatively recent examples where the Court declined to exercise its s.3 power:

    a. In *WB v W District Council* (2018), the Court of Appeal declined to apply s.3 to interpret a provision of the Housing Act 1996 because doing so would give the provision a meaning which it was clear from the legislative history was contrary to Parliament's intention[106].

    b. In *R (Mathieson) v SSWP* (2015)[107] the Supreme Court concluded that the claimant's Convention rights were infringed by a provision and

[106] See Annex, para 23(a)

[107] *R (Mathieson) v SSWP* [2015] UKSC 47; [2015] 1 WLR 3250

made orders granting specific relief. However, they declined to read the legislation down under s.3 of the HRA because, *inter alia*, the

reading required was *"impossible"* and in any event the provision would not have violated Convention rights in every application (so the sought for interpretation was more than was necessary) (§49 *per* Lord Wilson with whom the majority agreed).

c. In *Kennedy v Charity Commission* (2014)[108] the Supreme Court held that there could be no use for the interpretative power at s.3 of the HRA where a Convention compliant outcome could be secured through another statute or use of common law powers (§35 *per* Lord Mance with whom Lords Neuberger and Clarke agreed).

d. In *Hounslow LBC v Powell* (2011)[109] the Supreme Court noted that given *"strong statutory language"* it was not possible to read down a provision to enable the Court to postpone the execution of certain orders for possession of a dwelling house. The Court cited *Mendoza* and observed that it was not permissible to adopt a meaning inconsistent with a fundamental feature of the legislation (§62).

e. In *Wright* (2009), the Supreme Court overturned the Court of Appeal's interpretation under s.3 and held that no solution to the violation of Article 6 could properly be adopted by interpretation under s.3 and that a declaration under s.4 was therefore necessary: see §38 *per* Baroness Hale (with whom Lord Brown agreed).

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights?

26. This question was recently considered by the Divisional Court in *R (W) v SSHD* (2020)[110]. In that case, the Court considered the legality of imposing a 'no recourse to public funds' (NRPF) condition on certain persons granted leave to remain. The claimant succeeded in his argument that the NRPF regime did not adequately recognise, reflect or

[108] *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455

[109] *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 AC 186

[110] *R (W) v SSHD* [2020] EWHC 1299 (Admin)

give effect to the SSHD's obligation not to impose the NRPF condition in cases where the applicant would suffer inhuman or degrading treatment

as a consequence. The claim involved a challenge to the Immigration Rules, which were treated as subordinate legislation. In that regard, the Court noted that (i) s.3 of the HRA requires subordinate legislation to be read and given effect in a manner which is compatible with Convention rights; and, importantly, (ii) that where subordinate legislation cannot be read in a manner compliant with Convention rights then *"because the material provisions are not mandated by primary legislation"*, s.6 of the HRA obliges the SSHD to ignore the subordinate legislation if and to the extent that applying it would require her to act incompatibly with Convention rights.

27. In *RR v SSWP* (2019)[111] (which was cited by the Divisional Court in *R (W)*) the Supreme Court (*per* Baroness Hale) held that:

> *27. … There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.*
>
> *28. The HRA draws a clear and careful distinction between primary and subordinate legislation. This is shown, not only by the provisions of section 6(1) and 6(2) … but also by the provisions of section 3(2)* [which provides that s.3(1) applies to primary and subordinate legislation but does not affect the validity of primary legislation or subordinate legislation to the extent that primary legislation prevents the removal of the incompatibility] *…*
>
> *29. The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. Again, under section 3(2), primary legislation which cannot be read or given effect compatibly with the*

[111] *RR v SSWP* [2019] UKSC 52; [2019] 1 WLR 6430

Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so.

30. … the courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded.

28. At §§21-23 of *RR* the Court cites examples of cases in which a provision of subordinate legislation which resulted in a breach of Convention rights had been disregarded in the individual Claimants' cases, as was the case in *RR*.

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK?

The HRA has been applied extraterritorially in the following cases since *AlSkeini* was decided in 2011:

29. In *Lord Advocate v Dean* [2017] UKSC 44; [2017] 1 WLR 2721 the Supreme Court held that the HRA was applicable based on ill-treatment following extradition. At §26, Lord Hodge noted that Article 3 imposes an obligation on the part of a contracting state not to extradite someone where substantial grounds are shown for believing that he will face in the receiving country a real risk of being subjected to treatment contrary to Article 3.

30. In *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52 the Supreme Court held that following the Grand Chamber decision in *AlSkeini*, the State exercised jurisdiction extraterritorially where *"through its agents [the state] exercises control* and *authority over an individual"* and in such circumstances both the state's agents and those they affected when exercising control or authority were brought within the state's jurisdiction. As a result, Lord Hope concluded that the jurisdiction of the UK under Article 1 of the Convention extends to securing the protection of Article 2 to members of the armed forces when serving abroad (§§46-55 *per* Lord Hope with whom Lords Walker and Kerr and Baroness Hale agreed).