Independent Human Rights Act Review

Response to Call for Evidence

Herbert Smith Freehills ("HSF") is a leading global law firm which has a dedicated and established public law and human rights team across multiple jurisdictions. We have been advising in the field of public and administrative law and human rights for many years on a wide variety of cases and matters. Unlike many other practitioners, we regularly act for all parties in such proceedings (claimants, defendants, interested parties and interveners). We have a wide ranging client base covering individuals, public bodies, corporates and non-profit organisations and have experience of human rights across many different sectors, not only for our commercial clients but also over many years regularly assisting interveners in high profile human rights cases. We believe this broad perspective enables us to consider the questions put forward in the Call for Evidence objectively without prioritising the interests of any one particular group.

We set out below our views on the specific questions raised in the Terms of Reference ("ToR") and repeated in the Call for Evidence. As will be apparent, we consider that the current regime functions well and does not need to be subject to any major reform. We have not included any more general comments about the substantive rights contained within the European Convention on Human Rights ("the Convention") or whether the UK should remain a signatory to it since we understand that the Review is proceeding on the basis that the UK will remain a signatory to the Convention, a position we welcome and support.

Given the fundamental importance of many of the issues contained in the ToR and Call for Evidence, we assume that any concrete proposals arising from this Review will be subject to a thorough, fair and lawful Government consultation including with those who would be directly impacted by any such reforms and those who would be able to offer views based on their experience of practising in the area.

Finally, whilst we have sought to restrict our comments to the questions in this Call for Evidence, we would note that consideration of any reform to the Human Rights Act ("HRA") is closely linked to public and administrative law more generally and judicial review in particular. Although reviews on both areas appear to be proceeding separately and on different timescales, we urge those involved in both reviews to work closely together and to ensure that a holistic approach is taken to assessment of any need for reform given the areas are inextricably linked.

1. The relationship between domestic courts and the European Court of Human Rights ("ECtHR")

Under the HRA, domestic courts and tribunals are not bound by the jurisprudence of the ECtHR but are required by section 2 to "take into account" that jurisprudence (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

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?

In our experience, in practice the domestic courts tend to follow ECtHR jurisprudence particularly where there is a clear and consistent line of authority. Although therefore the practice could be said to go further than simply "taking into account", we would not be in favour of amending section 2. Our view is that the present approach with

the current application of the "take into account" test works effectively, making clear that courts should not be taking a different approach to the ECtHR without good reason but still allowing in theory for departure in appropriate cases. Strengthening the formulation to increase the obligation to remain linked with ECtHR jurisprudence would remove the important ability to depart where that was considered necessary or appropriate. Neither would we be in favour of changing the test to allow greater departure from ECtHR jurisprudence because it could create significant uncertainty.

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?

In our view domestic courts have generally been conscious of, and careful not to stray into, what in Convention language would be regarded as the margin of appreciation. However, there are always cases in relation to the qualified Convention rights where different judges have varying approaches to the question of whether the executive has exceeded the margin of appreciation in a particular case. That issue is apparent in ECtHR jurisprudence itself where different ECtHR judges have different views on what the limits of the margin of appreciation are and whether those limits have been exceeded.

The most difficult issue as we see it is defining the margin of appreciation in any specific context which is not something that can be codified. However it is an area already familiar to the domestic courts who frequently consider the appropriate margin of discretion to be afforded to public authorities in the context of judicial review.

From our perspective therefore no formal changes are required to the legislation and the question of what falls within or outside of the margin of appreciation cannot sensibly be addressed by amending UK legislation. If the approach of individual judges in individual cases is open to question then there might be a case for considering judicial training to ensure they all always approach it in the way in which the law intends.

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?

Judicial dialogue by its nature is unlikely to benefit from set rules and procedures. It requires the fostering of good relationships, flexibility and the willingness to understand the respective positions and approaches. It is therefore hard to see how such dialogue can be "strengthened and preserved" through any legislative or procedural changes.

One route available to the domestic courts, in addition to judicial dialogue, if there are concerns about the application of ECtHR jurisprudence, is the ability to give reasoned judgments which will be considered by the ECtHR, which may provide a mechanism for highlighting concerns and influencing ECtHR jurisprudence.

2. <u>The impact of the HRA on the relationship between the judiciary, the executive and the legislature</u>

The judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review should consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy.

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)?

We note there are numerous instances of judges explaining that the section 3 interpretative obligation does not permit an interpretation that "goes against the grain" of the relevant legislation, or that departs from or is inconsistent with a fundamental feature of the legislation in question. From our perspective the domestic courts understand and respect the boundary between interpreting in a Convention compatible way where that is possible and straying into the role of the legislature or distorting the meaning and intention of the primary legislation.

Again as referred to above, the domestic courts are well versed in respecting the role of the legislature and ensuring they do not encroach into the territory of policy making given their role in judicial review, and we do not therefore consider there is any valid concern over "over-judicialising" public administration.

(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?

As explained above, based on our experience we see no reason to amend the legislation.

(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?

As set out above, the domestic courts try to interpret legislation compatibly with the Convention within the bounds of the intention of Parliament, rather than regularly straying outside that intention. Indeed it must be the case that, at least in relation to any legislation enacted since the HRA has been in force, Parliament intended an interpretation compatible with the Convention given the requirement for ministers to make a statement of compatibility under section 19. In the vast majority of cases a Convention compatible interpretation will be possible, as evidenced by the low number of declarations of incompatibility. Therefore we cannot see any reason to remove the interpretative stage in favour of earlier or parallel consideration of declarations of incompatibility. It is unclear how earlier or parallel

consideration would even work since the courts would always need to interpret the relevant legislation before reaching their final determination.

Greater use of declarations of incompatibility rather than Convention compatible interpretation and application of legislation in cases where that would be possible would lead to unnecessary delays in effective justice as well as placing additional strain on the resources of Parliament. We do not therefore consider that making declarations of incompatibility an option to be considered even before the courts examine whether a Convention compatible interpretation is possible would be either practical or desirable. Declarations of incompatibility should therefore remain a last resort where a compatible interpretation is not possible.

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

The decision to make a derogation order under section 14 is an act by the Secretary of State. It is not primary legislation. On that basis it should be subject to the same challenges as other executive acts on conventional judicial review grounds.

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?

We consider that the current framework for how domestic courts should approach incompatible delegated legislation, in particular as explained in RR v Secretary of State for Work and Pensions [2019] UKSC 52[1], is correct. Delegated legislation that is incompatible with Convention rights is unlawful and like other unlawful delegated legislation we would expect the courts to be likely to quash the legislation (save in those limited cases where, for example, a declaration might be more appropriate). Such an approach respects the proper separation of powers and the necessary role of the judiciary as a check on the executive, the importance of which is rightly accepted by the Review. It also assists with access to effective justice as the offending legislation can be quashed with immediate effect rather than waiting for separate processes to remove the legislation.

We see no need for any change to the law in this area which has only recently been helpfully clarified by the Supreme Court.

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?

In our view the current position whereby actions taken abroad by UK officials who exercise the authority of the State will be governed by domestic human rights law and therefore could be the subject of a claim under the HRA is appropriate. An example of how important this extra-territorial application can be is Smith and others v Ministry of Defence [2013] UKSC 41[2] where members of the armed forces serving abroad could benefit from the protections of the HRA. We therefore see no reason for a change to this position.

[1] A case in which our firm was involved, acting for the interveners

[2] A case in which our firm was involved, acting for one of the interveners

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?

This is not an area where we have direct experience and so do not comment.

Herbert Smith Freehills LLP

2 March 2021