Submission by Irwin Mitchell to the Independent Human Rights Act Review
Response to Call for Evidence

irwinmitchell

About Irwin Mitchell

Irwin Mitchell provides legal and financial services for individuals and businesses and has a depth of experience and knowledge across many areas of civil justice incorporating the leading personal injury and claimant medical negligence practice in England. We are one of the most active law firms in the UK courts.

Irwin Mitchell is a full-service law firm founded in 1912, with over 2,500 employees in 15 offices around the UK.

Our human rights lawyers are regarded as some of the best in the country by the independent legal directories Legal 500 & Chambers UK. Our Public Law and Human Rights lawyers specialises in administrative law, health and social care, mental capacity, education and civil liberties. The majority of our teams work is in advising and representing claimants, including individuals, campaign groups, charities and businesses, in cases against public bodies, including government departments, local authorities, NHS bodies and police or detaining forces.

We regularly take cases to the courts and win. We have taken cases all the way to the UK Supreme Court and the European Court of Human Rights.

We have Legal Aid Agency contracts for Public Law, Community Care and Actions Against Public Authorities. We act for individuals who are financially eligible for legal aid, as well as for private-paying clients and in cases which are crowdfunded.

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Introduction

1. Prior to answering the specific questions set out in the IHRAR Call for Evidence, we wish to make some introductory comments about the background and context to the IHRAH which will inform our responses to the specific questions.

2. In our experience, our civil liberties work has seen the most direct impact of the HRA on case brought on behalf of clients where the case engages rights protected by the European Convention on Human Rights (‘ECHR’ or ‘the Convention’) and, by extension,

the Human Rights Act 1998 ('HRA') in the UK. We have also seen the impact of the HRA in respect of community care and mental capacity cases and in judicial review cases where public law decision making has engaged Convention rights. In our view, the HRA has been successful in 'bringing rights home', a key aim of the legislation enacted by Parliament.

3. The application of the HRA has resulted in positive outcomes and access to justice for clients in situations where it would not have been possible prior to the HRA coming into force. We have assisted clients to rely on the HRA when addressing substantive, operational and procedural duties and obligations of state bodies. These include families appearing before inquests and public inquiries and children and adults who have suffered terrible abuse.

4. Before setting out our response to the specific questions posed by the IHRAR, it is important to recognise that the HRA was, at its inception, a compromise between the important goals of allowing individuals to rely on their Convention rights in the UK courts and allowing the UK's leading voice in the formulation and protection of Convention rights to continue, whilst protecting the fundamental principles of parliamentary sovereignty and the separation of powers. It is also important to recognise that it was hoped by many proponents of the HRA that the incorporation of the Convention would be to establish a floor, rather than a ceiling, of human rights, which would be enhanced by domestic law.

5. It is noted that the IHRAR panel states in its call for evidence: "*The Review is not considering the UKs membership of the Convention; the Review proceeds on the footing that the UK will remain a signatory to the Convention. It is also not considering the substantive rights set out in the Convention*." That the substantive rights in the Convention, and mirrored in the HRA, will not be diminished is welcome clarification; the HRA remains a vital mechanism for facilitating access to justice for individuals whose fundamental rights are interfered with by public authorities. Many of our clients consider that the 12 month limitation for bringing a claim under the Human Rights Act and the strictness of this limitation rule is unfair and that the limitation rule should be reviewed to extend the timescale or expand the circumstances where exceptions to the rule can be granted by the courts. Vulnerable clients who cannot, for a number of reasons, bring a claim within this limitation period are denied access to justice through the HRA.

6. In our experience, the HRA is more than a means of legal redress and has provided citizens/members of the public with a general consciousness of the importance and fundamental nature of key individual rights that exist and are accessible in our democracy. It has also changed the way individuals, and particularly those from vulnerable groups, are treated by public authorities. It provides a solid basis for positive behaviours in organisations dealing with individuals which in turn avoids the need for complaint and litigation. The HRA has a wider effect than the enforcement of rights by the judiciary in individual cases.

7. On 3 February 2021, Baroness Hale gave evidence to the Joint Committee on Human Rights ("JCHR") and said "*I do not think there is a problem or any need to fix it. I cannot myself think of a fix that would make things better as opposed to potentially making things worse*."[1] We echo this view. The consequences of any amendments on the overall balance must therefore be carefully and cautiously considered.

8. It is our view that the HRA in its current form should not be changed in any way that would have the effect of diluting the rights of individuals. Rather than focus on changing the law or legal framework, the Government should show human rights leadership from within the UK by promoting the rights available. This requires a focus on ensuring that the rights we currently have are respected, protected and fulfilled. This means supporting people to know their rights and get access to justice, supporting those with legal duties to uphold those rights and ensuring people's human rights are integrated into national and local policy and practice. It is concerning to see the recent damaging commentary on purported judicial and lawyer 'activism'. Human rights lawyers work to hold public authorities to account within the confines of the UK legal system and the portrayal of legal professionals as trouble makers must not be allowed to continue.

Theme 1 – The relationship between domestic courts and the European Court of Human Rights (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?

[1] Baroness Hale of Richmond, Oral Evidence to Joint Committee on Human Rights, Inquiry into the Governments Independent Human Rights Act Review, HC 1161, 3 February 2021

9. Section 2(1) of the Human Rights Act requires UK courts or tribunals determining questions of Convention rights to "*take into account"* ECtHR jurisprudence. UK courts are not bound by decisions of the Strasbourg courts and can disagree with, depart from or go further than ECtHR decisions when interpreting and applying Convention rights in cases before the UK courts.

10. This duty is about consistency and certainty, ensuring that decisions about rights in the UK courts are not completely different from the judgments of ECtHR. Legal certainty is a long-established principle of English law.

11. The wording of section 2 provides domestic courts with the flexibility to depart from the jurisprudence of the ECtHR where it is considered necessary in the interests of justice to do so. In doing so, domestic courts may be considered to enter into a dialogue with the ECtHR as to the correct interpretation of ECHR rights in different circumstances.

12. The purpose of section 2 of the HRA is succinctly explained by Lord Scott in the case of *R (On The Application of Animal Defenders International) V Secretary of State For Culture, Media and Sport (Respondent) [2008] UKHL 15*, at paragraph 44:

> *"… The 1998 Act incorporated into domestic law the articles of the Convention and of the Protocols set out in Schedule 1 to the Act. So the articles became part of domestic law. But the incorporated articles are not merely part of domestic law. They remain, as they were before the 1998 Act, articles of a Convention binding on the United Kingdom under international law. In so far as the articles are part of domestic law, this House is, and, when this House is eventually replaced by a Supreme Court, that court will be, the court of final appeal whose interpretation of the incorporated articles will, subject only to legislative intervention, be binding in domestic law. In so far as the articles are part of international law they are binding on the United Kingdom as a signatory of the Convention and the European Court is, for the purposes of international law, the final arbiter of their meaning and effect. Section 2 of the 1998 Act requires any domestic court determining a question which has arisen in connection with a Convention right to take into account, inter alia, "any judgment, decision, declaration or advisory opinion of the European Court of Human Rights" (ss.(1)(a)). The judgments of the European Court are, therefore, not binding on domestic courts. They constitute material, very important material, that must be taken into account, but domestic courts are nonetheless not bound by the European Courts interpretation of an incorporated article."*

13. UK judges have demonstrated that they can be critical of decisions of the ECtHR when they take them into account, and have refused to follow them. This can be seen in the Supreme Court's judgment in *R v Horncastle and others (Appellants) [2009] UKSC 14,* in which the Chamber decision of the ECtHR in *Al-Khawaja and Tahery v UK*[2] was heavily criticised. The case was concerned with the question of whether a conviction based solely on the statement of an absent witness would automatically prevent a fair trial and result in a breach of Article 6(1) of the ECHR. The Supreme Court endorsed the Court of Appeal's judgment, stating that the jurisprudence of the Strasbourg Court in relation to Article 6(3)(d) had developed largely in cases relating to civil law rather than common law jurisdictions and suggested that the Strasbourg Court had not given detailed consideration to the English law on admissibility of evidence.

14. The UK court's analysis of precedents and rationale from the ECtHR has aided the courts in the development of case law under the HRA. See *Manchester City Council v Pinnock [2010] UKSC 45*, where the Supreme Court found that Article 8 of the ECHR (the right to family life) requires that the court must have the power to assess the proportionality of making an order for possession of someone's home after being asked by a local authority to do so. In this case, the Supreme Court followed the decisions of the European Court like *Kay and Others v United Kingdom ECHR 1322* and *Connors v UK ECHR 27 May 2004* but made the point that they would have moved in this direction even without the European cases. The judgment emphasised that where there is a clear and consistent line of decisions from the ECtHR "*whose reasoning does not appear to overlook or misunderstand some argument or point of principle*" it would be "wrong" for the Supreme Court not to follow that, whilst also acknowledging that the obligation on the Supreme court was only "to take into account" decisions of the European Court.

15. There are also cases where the ECtHR has not yet considered an issue as in *Ghaidan v Godin-Mendoza [2004] UKHL 30*, *Rabone and another (Appellants) v Pennine Care NHS Trust (Respondent) [2012] UKSC 2* and *P v Cheshire West & Chester Council & Another [2014] UKSC 19*. In these cases, the courts have been able to anticipate what the ECtHR would decide by careful reasoning of existing UK and Strasbourg jurisdiction.

[2] Al-Khawaja and Tahery v United Kingdom (2009) 49 EHRR 1

16. There are also cases where the UK courts have advanced further than the existing ECtHR jurisprudence. An example of this is *re P and others (AP) (Appellants) (Northern Ireland)*[3]. In this case, the House of Lords held that the Northern Ireland Assembly's blanket ban on homosexual couples jointly adopting, even where it would be in the best interests of the child for them to be allowed to do so, was incompatible with the claimants' Article 8 and Article 14 rights. The ECtHR case law was, at that time, equivocal. In *Rabone*[4], the Supreme Court went beyond existing ECtHR jurisprudence on the application of Article 2.

17. In our view, no change to section 2 is necessary. It is far from clear how section 2 could be amended in a way which maintained the flexibility of the UK judiciary to decide whether or not to follow Strasbourg jurisprudence. Currently section 2 operates in a way which allows UK judges to apply Convention rights in the context of domestic law, having regard to Strasbourg jurisprudence. It is because UK judges have become adept at weighing the ECtHR jurisprudence that so few cases are successful in Strasbourg. Any change which reduced the weight to be attached to ECtHR jurisprudence is likely to have a negative impact on the accessibility of effective rights for individuals and would increase the frequency of cases proceeding to the ECtHR and judgments against the UK.

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?

18. The margin of appreciation refers to the degree of flexibility accorded by the ECtHR to national authorities in fulling their obligations under the Convention. This is to allow the national interests of an individual country to prevail where necessary, thus allowing national and European courts to enjoy a balanced relationship. In other words, the UK is best placed to decide how human rights should be applied within its authority. This recognises that circumstances vary considerably between Convention states and that within the margin of appreciation, the ECtHR will not attempt to impose uniformity or specific requirements on domestic courts.

[3] [2008] UKHL 38 https://www.bailii.org/uk/cases/UKHL/2008/38.html
[4] Rabone v Pennine Care NHS Foundation Trust [2012] UKSC 2

19. It is important to distinguish between the margin of appreciation, which allows accommodation of national circumstances, and the principle of deference by the UK courts to the executive and legislature on policy questions, which is dealt with below.

20. An example of the margin of appreciation being applied by Strasbourg is the case of *Evans v UK*[5], concerning the domestic law relating to in-vitro fertilisation (IVF) (the Human Fertilisation and Embryology Act 1990). The ECtHR noted that after detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, the UK parliament could have chosen to regulate such matters differently but did not do so. It held that since the legislation was clear and struck a fair balance between competing interests, there was no violation of Article 8 of the ECHR. The approach of the domestic court concurred with this approach. Lady Justice Arden stated that: "[*a]s this is a sensitive area of ethical judgment, the balance to be struck between the parties must primarily be a matter for Parliament…*'

21. The HRA was intended to give effect to Convention rights reflecting the status of the Convention as a 'living instrument' rather than create a rigid set of rights which could not be expanded upon. The HRA therefore allows the courts to find a breach of Convention rights even where Strasbourg may have reached an alternative determination by allowing the UK a margin of appreciation.

22. In cases involving sensitive and complex issues, the domestic courts have deferred to the legislature in areas concerning the margin of appreciation. In the *Nicklinson*[6] assisted suicide case, although there were some developing Strasbourg principles, the ECtHR had consistently held that whether an interference such as this is justified was for each Member State to decide. The Supreme Court was unanimous in its decision that this was a domestic question for the United Kingdom courts to decide under the Human Rights Act but determined that it was a matter which Parliament was better qualified to decide. See also the case of *Conway*[7] where the Supreme Court in refusing permission to appeal stated that "*The Human Rights Act 1998 has added a new dimension to the debate. All are agreed that the ban on assisting suicide is an interference with the right to respect for private life protected by article 8. As the European Court of Human Rights has said, in Pretty v United Kingdom (2002) 35 EHRR 1, para 65, 'The very essence of the Convention is respect for human dignity and human freedom'. But several*

[5] Evans v United Kingdom: ECHR 7 Mar 2006
[6] R (Nicklinson) [2014] UKSC 38
[7] R (on the application of Conway) v Secretary of State for Justice

justifications have been put forward to support a hard and fast rule – the protection of weak and vulnerable people from insidious pressures, respect for the sanctity of all human life, and the preservation of trust and confidence in the medical profession. The European Court has held, in Nicklinson v United Kingdom (2015) 61 EHRR 97, that whether an interference such as this is justified is for each Member State to decide. There is no European consensus on the matter."

23. However, where the court considers it has constitutional responsibility, it has not shied away from determining issues where it considers there is a breach of human rights. In *re P and others (AP) (Appellants) (Northern Ireland),* it was noted that the area of adoption by same sex couples was one that fell within the margin of appreciation afforded to member states. Lord Hoffman stated that in such cases "*it is for the court in the United Kingdom to interpret [the relevant article or articles of the Convention] and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom*." Baroness Hale said that the margin of appreciation as applied in Strasbourg "*has no application in domestic law*" and that in these situations, the judgment must be one for the national authorities. Lord Hope, while recognising that a political or social policy issue may be best left to the judgment of the legislature, considered that cases about discrimination in an area of social and economic policy fell within the constitutional responsibility of the courts: "*Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests*."

24. In the matter of an application by the *Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)*[8], the majority of judges ruled that the Northern Ireland abortion law breached Article 8 of the Convention by not allowing abortions in cases of sexual crime (rape and incest) and fatal foetal abnormalities. Despite the majority of the judges ruling that the law was a breach of human rights, a formal declaration of incompatibility could not be made. This is because the court found that the Northern Irish Human Rights Commission (the body that brought the case) did not have the power to bring these proceedings forward, as it was not itself a 'victim' of any unlawful act.

[8] In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 27

25. The judges recognised the compelling evidence, however, and the majority set out their conclusions of the breaches of human rights they had found, which, they felt, 'could not be safely ignored'. Baroness Hale, in giving evidence to the Joint Committee on Human Rights on 3 February 2021, described her recollection of the case. She said that some of the judges held a view that Strasbourg would accept abortion as being within the margin of appreciation. However, the majority decided that the court would be abdicating responsibility if it didn't try to resolve the issue. It is submitted that this was an appropriate approach by the court. The press summary issued by the Supreme Court on the handing down of judgment distinguished the *Northern Ireland* case from *Nicklinson* in reaching a decision that it was institutionally appropriate for the Supreme Court to consider the compatibility of the existing law on abortion with the Convention rights. In contrast to Nicklinson, the Northern Ireland Assembly was not about to consider the issue. The court also noted that the attitude of the UK Parliament in Nicklinson reflected a similar attitude across Europe, as compared to the position of Northern Ireland which was "*almost alone in the strictness of its current law*."

26. The question asks whether any change is required in the way the UK courts have applied the margin of appreciation. As set out above, the margin of appreciation is largely something applied by the ECtHR to the member states. However, to the extent which the UK courts have taken into account Strasbourg jurisprudence and addressed whether an issue falls within their constitutional responsibility, it is considered no change is required to the way in which domestic courts and tribunals approach issues falling within the margin of appreciation.

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?

27. The starting point in domestic courts is that the Strasbourg jurisprudence should be followed wherever it is possible and appropriate to do so as addressed above. The strength of the reasoning applied in UK court judgments has produced an alignment of thinking between the UK courts and the ECtHR.

28. Dialogue, both through formal judgments and informal exists and allows any concerns the courts have as to the application of ECtHR jurisprudence in the UK to be addressed.

The courts have not shied from this approach. See Lord Neuberger in the case of *Manchester City Council v Pinnock [210] UKSC 45 at [48*]:

This Court is not bound to follow every decision of the EurCtHR. 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 EurCtHR which is of value to the development of Convention law."

29. As discussed above, the wording of section 2 provides domestic courts with the flexibility to depart from the jurisprudence of the ECtHR where it is considered necessary. In doing so, as Lord Neuberger identifies, domestic courts may be considered to enter into a dialogue with the ECtHR as to the correct interpretation of ECHR rights in different circumstances. This is a process which has worked well and has benefitted the UK.

30. This was endorsed by Baroness Hale in her recent evidence to the Joint Committee on Human Rights, explaining that in fact, by taking into account the reasoning of the ECtHR and applying a similar line of reasoning when justifying decisions in UK courts, the UK courts are able to influence ECtHR jurisprudence. This is in line with the initial aims of the HRA as outlined by Lord Irvine, the Lord Chancellor, when describing the Labour Party's 1997 election manifesto commitment to redefine the status of the ECtHR in domestic law: "*The government's position is that we should be leading in the development of human rights in Europe, not grudgingly driven to swallow the medicine prescribed for us by the Court is Strasbourg when we are found in breach of the Convention. Our citizens should be able to secure their human rights not only from a court in Strasbourg but from our own judges*."

31. In an interview in November 2011, Michael O' Boyle, Deputy Registrar of the ECtHR, further considered that the relationship between UK courts and Strasbourg is one of 'cross-fertilisation' stating: "*The UK courts are referring to judgments of the Strasbourg Court where they are relevant and the ECtHR has been inspired by statements made in the judgment of the House of Lords / Supreme Court. The starting point is one of great admiration for the way the Human Rights Act 1998 has worked out in practice*." [9]

[9] Lord Irvine (1997) 'Constitutional reform and a Bill of Rights' European Human Rights LR 483 at 485

32. Judicial dialogue can be seen to be effective in the *Horncastle/Al-Khawaja* litigation. In 2011, the Grand Chamber issued its final ruling in *Al-Khawaja.* This highly anticipated ruling re-examined the United Kingdom's laws that allowed convictions based primarily on the statement of a witness unavailable for cross-examination. This was the second time the ECtHR had visited this issue, after the Supreme Court declined to follow the decision of the Grand Chamber of the ECtHR in A*l-Khawaja and Tahery v. the United Kingdom*. The then President of the Court, Lord Phillips, noted:

…I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case."

33. The Grand Chamber reconsidered and subsequently ruled that Article 6 entitlements do not inevitably lead to a breach of the Convention where the hearsay statements allowed under UK law play a sole or decisive role. In an interview in 2012, Baroness Hale commented that the *Al-Khawaja* case was the closest the UK domestic courts and Strasbourg have come to conflict since the coming into force of the HRA and that the judicial dialogue prevented this from happening.

34. The current approach to judicial dialogue is satisfactory and should continue to be encouraged in order to preserve this working relationship. In 2012, Sir Nicolas Bratza (then president of the ECtHR) commented that since the HRA came into force, on a number of occasions, the Strasbourg Court has been respectful of UK court decisions because of the high quality of the judgments, which have "*greatly facilitated the ECtHR's task of adjudication*[10]". This emphasises the benefit to the UK of the dialogue; the quality of domestic judgments has in turn led to the ECtHR being respectful of UK judgments.

35. If there was a desire to formalise the judicial dialogue further, Protocol 16 introduces the possibility for the Supreme Court to ask the ECtHR for an advisory opinion. This particular protocol to the ECHR aims to strengthen the national implementation of the Convention by increasing interaction between the ECtHR and domestic courts.

[10] https://www.independent.co.uk/voices/commentators/nicolas-bratza-britain-should-be-defending-european-justice-not-attacking-it-6293689.html

36. The advantage of the UK signing Protocol 16 is that it would enable clarity to be sought without a case having to proceed to the ECtHR. There is a concern that seeking an advisory opinion could lead to delays in resolving a domestic case although the aim is to try and reduce the backlog of the ECtHR. If Protocol 16 were adopted, it could perhaps be caveated with a direction to judges to consider the impact on access to justice and the need for a swift remedy.

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

a) Should Any Change be made to the framework established by sections 3 and 4 of the HRA?

42. Section 3 HRA does not just apply to the courts, but also applies to decision makers, whether they are judges, social workers, police, healthcare or local authority staff. Legislation must be read compatibly with Convention rights. This has a much wider effect than the operation of the judiciary, the executive and the legislature alone and should be taken into account when assessing the impact of the HRA.

43. Sections 3 and 4 HRA are two crucial provisions which define the relationship between the judiciary, executive and legislature. The HRA expressly retains and preserves parliamentary sovereignty. It is open for a declaration of incompatibility to be ignored or reversed by parliament. This is not the same as constraining it and it remains the case that Parliament will always have the veto. Use of the remedial provisions of the HRA by a court does not bind or fetter Parliament in any way; Parliament is free to legislate to reverse any court decision or simply not take into account any declaration of incompatibility.

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)?

44. Section 19 of the HRA requires the responsible minister to make a statement of compatibility with Convention rights in respect of every piece of primary legislation. The

requirement that ministers attach a statement of compatibility to legislation can therefore be taken as an explicit statement of intention that it be applied compatibly.

45. When there is a tension with the so called intentions of Parliament and the practice under that legislation, it is right that it should be assumed that Parliament had no intention of breaching those rights given the express declaration of compatibility for primary legislation. However, where Parliament's intention is explicit, then the courts cannot interfere.

46. Case law shows that the courts have declined to impose an interpretation compatible with the ECHR where to do so would be inconsistent with the clear intention of Parliament or would draw the courts unduly into questions of policy. There are areas of the law where it is possible to point to clear and explicit Government policy that the courts have consistently upheld despite assertions of breach of Convention rights. A line of case law has developed in respect of deportation cases, for example, and has shown that it is very difficult to challenge these types of cases even where the application of Government policy has given rise to allegations of breaches of human rights. This is evidence that where Parliament's intention is explicit, the courts have held back from interpreting legislation inconsistently with the intention of Parliament.

47. In *Ghaidan v Godin-Mendoza,*[11] which concerned the interpretation of the Rent Act 1977 ('the 1977 act') and the right of a same-sex partner to succeed to a statutory tenancy as a 'spouse' following the death of their partner. The House of Lords had previously ruled, prior to the HRA coming into force, that a person living with a tenant in a stable and monogamous same-sex relationship was not to be regarded as a 'surviving spouse' entitled to succeed to a statutory tenancy.[12] However, in *Mendoza* it was held that, through section 3, Parliament had intended to impose a broad duty on the courts to do everything possible to achieve compatibility through interpretation. Therefore, it was possible for the court to use section 3 to read and give effect to the 1977 Act in a manner which would remove the discrimination against same-sex couples and ensure compatibility with Article 14 ECHR.

48. In giving evidence to the Joint Committee on Human Rights, Baroness Hale explained that in the *Mendoza* case, the Government pushed for a section 3 interpretation to be made (if a breach was determined), in preference to a declaration of incompatibility. It

[11] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[12] *Fitzpatrick v Sterling Housing Association LTD* [2001] 1 AC 27.

can be said that this outcome saved Parliament valuable time and allowed it to focus on bringing new legislation into force.

49. Other cases where the courts have drawn the limits of section 3 show that the UK judiciary are conscious of the limits of interpretation where it would effectively constitute amendment of legislation; see for example the case of *R (On the application of Wright and others) (Appellants) v Secretary of State for Health and another (Respondents) [2009] UKHL 3*, which is cited by the British Institute of Human Rights on their website. This case concerned a challenge to the Care Standards Act 2000, which allowed the listing of care workers as being unsuited to work with vulnerable adults after a complaint had been made about them, without giving them an opportunity to respond to the allegations. Care workers were placed on the provisional blacklist, known as the 'Protection of Vulnerable Adults' list; this meant that they were immediately suspended from the workplace without pay, and faced a wait of up to a year or more before the case against them could be heard. Many care workers and nurses were suspended based on allegations that turned out to be groundless and suffered significant stress and loss of earnings.

50. Giving the lead judgment, Baroness Hale concluded that the procedure for provisional listing did not meet the requirements of article 6(1). She stated:

"*No other solution could properly be adopted by way of the interpretative obligation in section 3(1) of the Human Rights Act 1998". I would therefore return to the solution adopted by Stanley Burnton J and make a declaration that section 82(4)(b) of the Care Standards Act 2000 is incompatible with the Convention rights. However, I would not make any attempt to suggest ways in which the scheme could be made compatible. There are two reasons for this. First, the incompatibility arises from the interaction between the three elements of the scheme - the procedure, the criterion and the consequences. It is not for us to attempt to rewrite the legislation. There is, as I have already said, a delicate balance to be struck between protecting the rights of the care workers and protecting the welfare, as well as the rights, of the vulnerable people with whom they work. It is right that that balance be struck in the first instance by the legislature*."

51. In *McDonald v McDonald [2016] UKSC 28*, the Supreme Court considered whether a court, when entertaining a claim for possession by a private sector owner against a residential occupier, should, in light of section 6 HRA and article 8 ECHR, be required to

consider the proportionality of evicting the occupier. The Supreme Court dismissed the appellants appeal but also concluded that had the appellant succeeded in showing a breach of the HRA, it would not have been possible to read the relevant legislation in the way the appellant contended it should be, and a declaration of incompatibility under s4 HRA would have been the only remedy.

52. As a final point, section 3 is also important in providing individual justice, as it allows an immediate remedy which would otherwise be delayed when using a declaration of incompatibility. Declarations of incompatibility also render damages unavailable. It is very difficult to imagine what could replace section 3 HRA in a way which both respects parliamentary sovereignty and protects individuals' rights. The executive, the legislature, judiciary, individuals and public bodies are now familiar with the HRA and to abandon section 3 would be a step backwards and would run against the principle of legal certainty.

53. We do not consider section 3 HRA should be amended or repealed.

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?

54. Please see above.

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?

55. In order to provide individuals with an effective and domestic remedy for breach of their human rights, it is important that section 3 is utilised first. An increase in declarations of incompatibility would risk weakening the protections that individuals have under the HRA and their access to effective justice.

56. A declaration of incompatibility does not affect the validity, operation or enforcement of the law (s4(6) HRA). This means that the law will not automatically change following a declaration of incompatibility. Instead, the law remains in force until Parliament approves change (if it decides to do so). It is up to the Government and Parliament to resolve the problem with the law. This can take time. Damages are unavailable and the courts must

continue to apply the legislation in the meantime. A declaration of incompatibility does not, therefore, provide an effective or efficient remedy for the individual.

57. It is considered that the current system works well and the judiciary has shown that it is able to identify cases where a declaration of incompatibility is most appropriate and/or is required.

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

58. No comment.

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?

59. The courts have been cautious in challenges to the validity of delegated legislation. Many challenges have been unsuccessful and the courts have restricted rulings to specific aspects of the delegated legislation rather than more generally.

60. The available remedies of quashing or disapplying the incompatible secondary legislation are not confined to the HRA and reflect the court's role, through judicial review, in ensuring that ministers and public authorities only act within the powers given to them by Parliament.

61. The power to quash secondary legislation is a remedy that has long been available in administrative law and should remain so that the courts are able to quash subordinate legislation where it is considered appropriate to do so. Where the court has determined breaches in challenges involving subordinate legislation, however, the court has more often disapplied the offending legislation in preference for reading down the subordinate legislation or quashing the legislation. Case law shows this is the case, even when the court has been asked to quash the legislation. It can therefore be said that it appears overall that the courts have chosen to be deferential to the function of the executive by use of the declaration of incompatibility rather than quashing. This can result in delays to amendment of subordinate legislation.

62. By way of example, in the *Criminal Records* case, the court was asked to quash the subordinate legislation found to be in breach of Convention rights, but decided to make a declaration instead. This meant that the Government was left with the constitutional function of deciding to amend the legislation which was not changed for a significant period of time.

63. In the case of *RR*[13], the unanimous ruling of the Supreme Court confirmed that decision-makers must not make bedroom tax deductions if the deductions would breach the claimant's human rights. The five Supreme Court judges reaffirmed that where it is possible to do so a provision of subordinate legislation (like the regulations in this case) which results in a breach of a right under the Human Rights Act must be disregarded.

64. As Baroness Hale stated in *RR*: *"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."*

65. Baroness Hale went on to state:

"…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. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision. But that was not the case in Francis, where the maternity grant could be paid to the holder of a residence order who qualified for it in all other respects; nor was it the case in In re G, where the unmarried couple could be allowed to apply to adopt (in reaching my Opinion, I satisfied myself that this would not cause problems elsewhere in the statutory scheme); nor was it the case in Burnip and Gorry, where housing benefit could simply be calculated without making the deduction for under-occupation; nor was it the case in Mathieson, where DLA could simply continue to be paid during the whole period of hospitalisation; nor was it the case in JT, where criminal injuries compensation could be paid without regard to the "same roof" rule; and nor is it the case here, where the

[13] RR (Appellant) v Secretary of State for Work and Pensions (Respondent) [2019] UKSC 52

situation is on all fours with Burnip and Gorry. There is no legislative choice to be exercised."

66. In confirming the powers of social security tribunals and local authorities to take steps to avoid breaches of human rights by disregarding secondary legislation where it is possible to do so, the court has left the wider remedial action to the Secretary of State for Work and Pensions, and Parliament.

67. In summary, the court's approach has been one of appropriate deference to the executive and no change is required.

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?

68. No comment. Our expertise is concerned with the domestic application of the HRA.

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?

69. No comment.