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# ELA L&P Committee: Government Independent Human Rights Act Review Consultation

## Response from the Employment Lawyers Association

**2 March 2021**

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## INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party Chaired by Shantha David was set up by the Legislative and Policy Committee of ELA to respond to Independent Human Rights Act Review. Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

## EXECUTIVE SUMMARY

4. The Human Rights Act 1998 ("HRA") has enabled UK citizens to obtain a remedy from UK Courts where their human rights have been violated, rather than having to go to the European Court of Human Rights ("ECtHR"). The UK judiciary is tasked with adjudicating such breaches consistently with Convention Rights and the HRA. In this role, it has not only taken account of Strasbourg jurisprudence, but influenced the development of the ECtHR's jurisprudence as shown below. In all of this Parliament remains supreme: it can amend a piece of legislation following a court judgment identifying a

breach of the HRA or Convention right, or it can choose to do nothing at all. ELA has not identified any amendments that should be made to the HRA, other than a requirement that Parliament promptly consider any changes to the law where the judiciary identifies breaches of the HRA or Convention rights. This will allow UK citizens to have certainty in the law that applies to them.

## INTRODUCTION

5. By way of a political declaration made on 22 November 2018, the EU and the UK stated that their future relationship should be based on "shared EU and UK values" and that this included 'the UK's commitment to respect "the framework of the European Convention on Human Rights ("ECHR")[1].

6. The basis for the Independent Human Rights Act 1998 ("HRA") Review ("IHRAR") is a: "… *perception that, under the HRA, courts have increasingly been presented with questions of "policy" as well as law".* This response by ELA reviews previous court decisions and focusses on the interpretation of Convention rights in the field of employment and industrial relations law.

7. As a body of solicitors and barristers, ELA makes clear its unequivocal support for the rule of law and access to justice which is enhanced where UK judges make decisions, nationally, under the provisions of the ECHR and the principles enshrined under the HRA. Convention rights are embedded in judicial decision making as was laid bare in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, where the United Kingdom Supreme Court ("UKSC") referred to the: "*principle of effective judicial protection as a general principle of EU law, stemming from the constitutional traditions common to the member states, which has been enshrined in articles 6 and 13 of the European Convention on Human Rights…*".

8. When asked to determine the lawfulness of policy decisions, ELA is satisfied that it is within the role of the judiciary to make this decision. It is for UK judges to adjudicate on breaches with the HRA or Convention rights, as Baroness Hale posed in her oral evidence to the Joint Committee for Human Rights[2]: "*Were we therefore to* say, *'We're not going to interfere. We're not going to say that this is contrary to the fundamental rights, the convention rights', or were we, on occasions, to make up our own minds consistently with the principles of the convention as to whether it was or was not incompatible. In a way, that takes us back to our previous discussion about when we go further than Strasbourg would have gone. It is fairly clear that the promoters of the Human*

[1] Political declaration made on 22 November 2018
[2] Transcript of the hearing

*Rights Act did want us to go further and to develop the convention rights on occasions, but equally, of course, we have been quite cautious about that, on the whole".*

9. ELA makes its submission and commentary on the two separate themes identified within the IHRAR namely:

   9.1. The relationship between domestic courts and the European Court of Human Rights (ECtHR)**;** and

   9.2. The impact of the HRA on the relationship between the judiciary, the executive and the legislature

10. ELA's comments make specific reference to the questions and terms of reference on the IHRAR where appropriate. Where there are overlapping or repeated requests for evidence and comments in the terms of reference and/or the questions, ELA has cross-referenced responses to avoid repetition.

## SECTION 1: THE RELATIONSHIP BETWEEN DOMESTIC COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

### QUESTION 1A

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

11. There has been much commentary, both in the case law and academically, about the meaning of section 2 HRA and whether it requires domestic courts to apply or 'mirror' Strasbourg judgments or whether it can rule inconsistently with Strasbourg, and what to do when Strasbourg has not spoken on a topic.

12. In *R* (*Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, the House of Lords ruled (applying *R (Alconbury Developments Ltd ) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295) that "in the absence of special circumstances, [domestic courts should] follow any clear and constant jurisprudence of the Strasbourg court". Lord Bingham's judgment reads, at [20]:

    "In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*

[2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 HRA for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

13. The Supreme Court considered the scope and nature of the interpretative duty most recently in *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2. In *Hallam* the Supreme Court was tasked with deciding whether to follow a previous Supreme Court authority (*R(Adams) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 AC 48) or a more recent Grand Chamber decision of the ECtHR (*Allen v UK* (application. no. 25424/09)) on the question of whether certain UK law provisions concerning compensation for miscarriages of justice were compatible with Article 6 of the ECHR. Five of the seven judges hearing the case opted to follow the UK precedent, and outlined a number of scenarios in which UK courts (and, seemingly, the Supreme Court in particular), may depart from a clear line of ECtHR jurisprudence. These appear to include (i) inapplicability of ECtHR case law on the facts (ii) weak authority (e.g. where the cited proposition does not necessarily follow from the ratio) (iii) where the ECtHR failed to consider some fundamental facet of UK law (iv) where applying ECtHR case law would make no difference to the eventual outcome (v) poor reasoning of the ECtHR's decisions (vi) the ECtHR decision being "wrong".[3]

14. The cases below show how section 2 HRA is being interpreted by judges in the employment context in practice. By its very nature, adjudication requires judges to interpret the law, including statutes, which has an element of discretion in it and requires judges to use their analytical faculties. Nonetheless, ELA's research shows that judges are taking a pragmatic and practical approach to section 2. Judges in the lower courts are applying the decisions of the higher domestic courts, by which they are bound. Those

[3] See Lewis Graham's helpful exposition of the scenarios in his article L. Graham, '*Hallam v Secretary of State*: Under What Circumstances Can the Supreme Court Depart from Strasbourg Authority?', U.K. Const. L. Blog (4th Feb. 2019).

decisions tend to have synthesised the domestic case law with the Strasbourg case law and give lower employment courts an indication of the applicable law in any given case. The lower courts will also apply Strasbourg case law directly where it makes sense to do so (e.g. where this represents the domestic position or is otherwise uncontentious or domestic authorities on the point are clearly out of date and no longer applicable). In ELA's view, this approach seems sensible. There will always be an element of discretion in adjudicating, but the UK judges, in an employment context, are constrained by decisions of the higher courts, and they are otherwise applying the section 2 duty in a restrained manner (e.g. applying Strasbourg case law directly where that is appropriate).

15. Generally speaking, employment law jurisprudence which overlaps with human rights law tends to adopt and apply the Strasbourg law where at all possible. This appears to be in line with the objective of the Human Rights Act to 'bring rights home' (that is, allow a remedy in domestic law for breaches of the ECHR).

16. It is ELA's view that there is no need to amend section 2 HRA at present. The section is working well, with the judges in the employment context being well-trained, and relatively pragmatic, practical, and restrained in their approach to judging in the human rights and employment law context.

## THE OBLIGATION TO "TAKE INTO ACCOUNT" ECtHR JURISPRUDENCE IN THE UK EMPLOYMENT LAW CONTEXT – A REVIEW OF THE CASE LAW

17. Articles 8, 9, and 14 of the Convention are frequently engaged in the employment law context, including in the following scenarios:

    17.1. Whether anonymity orders should be made in respect of individuals involved in employment tribunal proceedings, or whether passages in judgments should be redacted to protect the individual's Article 8 rights. For example, where the reason for an individual's delay in bringing proceedings relates to their transition from female to male, involving surgery for breast removal, and their mental health issues.[4]

    17.2. Whether interim relief hearings may be held in private to protect Article 8 rights.[5]

    17.3. Whether the Employment Tribunal has any power to prohibit publication of a judgment to protect Article 8 rights.[6]

[4] See e.g. *X v Y* UKEAT/0302/18/RN
[5] See e.g. *Queensgate Investments LLP v Millet,* UKEAT/0256/20/RN.
[6] See e.g. *L v Q Ltd* [2019] EWCA Civ 1417.

17.4. Whether a right to claim interim relief in cases arising from victimisation and discrimination claims arising from dismissals must be read into the EqA 2010 to protect against Article 14 discrimination in conjunction with Article 8 and 6, when such relief is available in whistleblowing cases.[7]

17.5. Whether an individual's belief is a philosophical belief for the purposes of s.10 EqA 2010 and discrimination law more generally; or if it is to be interpreted in a human rights context, pursuant to s.3(1) HRA 1998.[8]

17.6. The tapping of a police inspector's telephone calls from her office.[9]

17.7. The monitoring of an employee's phone, email, and internet usage.[10]

17.8. The legality of employers' restrictions on visibly wearing Christian crosses at work.[11]

17.9. The legality of a dismissal resulting from an employee's refusal to sign a copyright agreement conferring certain rights on the employer in respect of works created by the employee, because of the employee's belief that there was a "statutory human or moral right to own the copyright and moral rights of her own creative works and output."[12]

17.10. On the whole, these cases do not tend to refer expressly to the obligation on UK courts and tribunals to "take into account" ECtHR judgments and decisions." Rather, the tribunals and courts tend to apply domestic case law which has itself applied ECtHR case law or to apply Strasbourg case law directly when reaching their decisions. We set out below illustrative examples.[13]

18. Examples of the ET, EAT and other domestic courts' approaches to Strasbourg case law:

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[7] See e.g. *Steer v Stormsure Ltd*, UKEAT/0216/20/AT.
[8] See e.g. *Fostater v CGD Europe, Centre for Global Development, Masood Ahmed* [2019] 12 WLUK 516, involving the Claimant's belief that biological sex is immutable.
[9] *Halford v UK* [1997] 24 ECHR 32.
[10] *Copland v UK* [2007] ECHR 253.
[11] *Eweida v UK* [2013] ECHR 37
[12] *Gray v Mulberry Co (Design) Ltd* [2019] ICR 175.
[13] Please note that given the wide array of cases covering Convention rights in the employment context, it has not been considered feasible or desirable to include an analysis of all such cases. A selection of cases engaging the Convention rights has been included to serve as an illustration of how the courts have been treating these cases in practice.

## Article 6

18.1. In *Queensgate Investments LLP v Millet*, the EAT (HHJ Tayler) directly applied the ECtHR's reasoning in *Micallef v Malta* [2010] 50 EHRR 37 holding that applications for interim relief (in this case, under section 128 of the Employment Rights Act 1996) are within the scope of Article 6. HHJ Tayler noted that, prior to *Micallef*, the ECtHR had held that interim applications fell outside the scope of Article 6.[14] This approach had been adopted in domestic decisions by the Court of Appeal in *R(M) v Secretary of State for Constitutional Affairs and Lord Chancellor and others* [2004] EWCA Civ 312, where Article 6(1) was held not to be engaged when an interim antisocial behaviour order was made. Nonetheless, HHJ Tayler applied the ECtHR's "new approach" from *Micallef* to "conclude that Article 6 does apply to an application for interim relief."**[15]** HHJ Tayler makes no further comment on the matter, simply applying the more recent ECtHR "new approach" over the less recent domestic law approach.

## Article 14

18.2. In *Steer v Stormsure Ltd* the EAT (Cavanagh J) held that the lack of interim relief for discrimination and victimisation cases in the Employment Tribunal **amounts** to a breach of Article 14 when read together with Article 6 ECHR.[16] In so finding, Cavanagh J relied solely on domestic law authorities (which themselves referred to Strasbourg case law). For example, the EAT stated that "proper approach for considering whether there has been a violation of Article 14" was that described by Lady Black in *R (Stott v Secretary of State for Justice* [2018] UKSC 59, [2020] AC 51 at paragraph [8]. Cavanagh J further relied on his previous judgment in *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin) (in which Cavanagh J had been sitting as a Deputy High Court Judge) in determining whether the appellant had a "status" for the purpose of Article 14 (which also drew heavily on Lady Black's judgment in *R(Stott)*).[17] Cavanagh J's analysis in *R (Leighton)* on when Article 14 "status" arises refers to one Strasbourg case[18] and two UK

[14] See *Queensgate Investments LLP v Millet* at [53].
[15] *Queensgate Investments LLP v Millet*, UKEAT/0256/20/RN at [52] – [55].
[16] Cavanagh J did not consider it necessary to address whether the question comes within the ambit of Article 8 / A1/P1, at [181].
[17] *Steer v Stormsure Ltd,* UKEAT/0216/20/AT, at [183].
[18] *Clift v UK* CE:ECHR:2010:0713JUD000720507; The Times, 21 July 2010

Supreme Court cases.[19] After considering those cases, John Cavanagh QC, as he then was, stated in *R(Leighton)* at [180]:

"180. The issue of "status" has also recently been considered by the Court of Appeal in *R(SC) v Secretary of State for Work and Pensions [2019] EWCA Civ 615*, paragraphs 60-77, and in *R (SHU) v Secretary of State for Health and Social Care [2019] EWHC 3569 (Admin)*, per Foster J, at paragraphs 78-89. In *SC*, at paragraph 62, Leggatt LJ said that no clear or coherent test of what constitutes a "status" for the purpose of Article 14 has emerged in the case law of the European Court of Human Rights. In *SHU*, at paragraph 85, Foster J said that "It is beyond contention …. that, according to the case law, the concept of "other status" must be given a broad interpretation. The claimed status does not have to be innate or acquired, it may be imposed or (as described in paragraph 71 of *SC*) it may be "the upshot of circumstance, as with homelessness." Even more recently, the issue of "other status" was considered in *Carter and another v Chief Constable of Essex Police and another* [2020] EWHC 77 QB, at paragraphs 50-57. In *Carter*, Pepperall J held that being a post-retirement widow of a police officer with pre-1978 service (who did not have the same survivors' pension rights as a pre-retirement spouse) was an "other status" for the purposes of Article 14.

181. Also in *Carter*, at paragraph 56, Pepperall J referred to *Stevenson v. Secretary of State for Work & Pensions* [2017] EWCA Civ 2123, in which Henderson LJ, commenting on the clear direction of travel in the Strasbourg jurisprudence, observed at paragraph 41:

"In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point."

I hope that it is not an oversimplification to express the view that, in practice, it will be rare that the "status" issue will be the decisive issue in an Article 14 case. If a court regards treatment as amounting to unjustified discrimination for the purposes of Article 14, the court will be likely to regard the class of persons which has suffered from this treatment as having the necessary "other status". In *SHU* [2019] EWHC 3569 (Admin), at paragraph 84, Foster J observed that "there may be an element of circularity in seeking to identify status separately from the

[19] *R (RJM) v Secretary of State for Work and Pensions [2009] AC 311*; *Mathieson v Secretary of State for Work and Pensions [2015] 1 WLR 3250*

notion of discrimination, although the courts have accepted certain self-defining cases." (our emphasis added)

18.3. In stating the law, John Cavanagh QC, as he then was, relied on both the "clear direction of travel in the Strasbourg jurisprudence" and how this has been interpreted by domestic courts. This appears to be a case in which the domestic courts have followed the clear and consistent case law of the ECtHR, while seeking to clarify the law (by drawing together the domestic and ECtHR case law to "discern a rule or set of principles" on when Article 14 "status" might apply),[20] and acknowledging Strasbourg's shortcomings (e.g. the lack of clarity around the test for 'other' status for Article 14 purposes).

**Article 8**

18.4. *R (RD) v Secretary of State for Justice* [2020] EWCA Civ 1346 concerned the compatibility of the requirement in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 for applicants for the position of a police constable to disclose to their prospective employer any reprimand received as a child, regardless of the circumstances, with Article 8. Lord Justice Males, giving the lead judgment, states:

"42. There have been a number of cases, in the European Court of Human Rights and the Supreme Court, in which the compatibility of exceptions to the Rehabilitation of Offenders legislation and the retention of "conviction data" with Article 8 ECHR has been considered. The cases have also been concerned with the similar but not identical regime established pursuant to Part V of the Police Act 1997 in which convictions and cautions are disclosed to a prospective employer in the form of a Criminal Record Certificate by the Disclosure and Barring Service. It will be enough to refer to three of these cases."

18.5. Lord Justice Males refers to three cases, one from the ECtHR - *MM v United Kingdom* (Application 24029/07, 13th November 2012) ("MM") and the other two from the UK Supreme Court (*(T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2015] AC 49 ("T"); and *P* [2019] UKSC 3, [2020] AC 185.) *MM* was concerned with the system in Northern Ireland for the retention and disclosure of criminal record data. The system was found by Strasbourg to be unlawful. In *T*, which concerned the provision of criminal record checks relating to cautions

[20] *Steer v Stormsure Ltd,* UKEAT/0216/20/AT, at [183], per Cavanagh J: "It is much more difficult to discern a rule of set of principles which enable one to work out whether a more transient or inchoate 'status' counts for this purpose."

received as an adult and warnings received as a child, the Supreme Court applied the ECtHR's reasoning in *MM* and held the regime was "not in accordance with the law" and was disproportionate. At paragraph [46] of *R*(*RD)*, Lord Justice Males cites Lord Reed's judgment in *T:*

"In the light of the judgment in *MM v United Kingdom*, it is plain that the disclosure of the data relating to the respondents' cautions is an interference with the right protected by Article 8(1). The legislation governing the disclosure of the data, in the version with which these appeals are concerned, is indistinguishable from the version of Part V of the 1997 Act which was considered in *MM*. That judgment establishes, in my opinion persuasively, that the legislation fails to meet the requirements for disclosure to constitute an interference "in accordance with the law". That is so, as the court explained in *MM*, because of the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data under section 113A."

18.6. Lord Justice Males then cites the UKSC's judgment in *P*, which concerned the obligation on certain applicants for jobs involving working with children to disclose certain convictions and cautions to their prospective employers despite the fact that they were spent. Lord Justice Males discusses Lord Sumption's judgment in *P* in which he says there was:

"….an extensive review of the Strasbourg and domestic case law, including *MM* and *T* […]. That review demonstrated that the principles summarised in the paragraphs cited [from *P*] above had continued to represent the approach of the Strasbourg court; and that *T* had been an application of those principles […]

56. Applying these principles, Lord Sumption concluded at [42] that […] the rules governing the disclosure of criminal records, both by ex-offenders themselves under the Rehabilitation of Offenders legislation and by the Disclosure and Barring Service under the Police Act 1997 were highly prescriptive and exactly defined, with no discretion governing what was disclosable."

18.7. Lord Justice Males goes on to apply the Supreme Court's reasoning in *P* (which had articulated and applied the Strasbourg case law) to find that "the requirement for full disclosure by a would-be police constable of all convictions and cautions, including reprimands received as a

child, is in accordance with the law within the meaning of Article 8 ECHR and that it is necessary in a democratic society for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

**Article 9**

18.8. *Gray v Mulberry Company (Design) Ltd* UKEAT/0040/17/DA concerned an employee's refusal to sign a copyright agreement in favour of her employer. She was then dismissed and claimed discrimination (direct and indirect) on the grounds of her philosophical belief in "the statutory human or moral right to own the copyright and moral rights of her own creative works and output". The Claimant argued that the Employment Tribunal set the bar too high in deciding that her belief was not a 'philosophical belief' for the purposes of the EqA 2010.

18.9. The judgment cites the Equality and Human Rights Commission's Code of Practice on Employment 2011, which states that the meaning of "belief in the [EqA 2010] is broad and is consistent with Article 9 of the [ECHR] (which guarantees freedom of thought, conscience and religion)."

18.10. In determining whether or not the Tribunal set the bar too high, Choudhury J in the EAT refers to *Maistry v BBC* [2014] EWCA Civ 1116, in which Underhill LJ referred to *Grainger plc v Nicholson* [2010] ICR 360 at [24] and the need for a philosophical belief to have "a similar status or cogency to a religious belief" without demur or criticism. In support of the court's view that "no distinction is to be drawn between religious and philosophical beliefs in terms of the level of cogency, seriousness, cohesion and importance", the EAT relied on *R (Williamson) v Secretary of State* [2005] 2 AC 246 at [76], where Baroness Hale stated:

"76. Convention jurisprudence suggests that beliefs must have certain qualities before they qualify for protection. I suspect that this only arises when the belief begins to have an impact upon other people, in Article 9 terms, when it is manifested or put into practice. Otherwise people are free to believe what they like. The European Court in *Campbell v Cosans v United Kingdom* (1982) 4 EHRR 293, 303, para 36, equated the parental convictions which were worthy of respect under the first Protocol with the beliefs protected under Article 9: they must attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society; and not incompatible with human dignity. No distinction was drawn between religious and other

beliefs. In practice, of course, it may be easier to show that some religious beliefs have the required level of cogency, seriousness, cohesion and importance."

18.11. In relation to not setting the bar too high generally, Choudhury J relies on Lord Nicholls' judgment in *Williamson* at [23] which states:

"Everyone … is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in Article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. … Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention: see Arden LJ [2003] QB 1300, 1371, para 258."

18.12. Choudhury J also relied on *Eweida v UK* [2013] 57 EHRR 8 and *Arrowsmith v UK* [1981] 3 EHRR 218 before he articulates the main principle:

"The question therefore is whether doing an act, or, as in this case, not doing a particular act (i.e. not signing the Agreement), amounts to a direct expression of the belief concerned and whether it is "intimately linked" to it. If the act or omission does not satisfy those requirements then it does not fall to be protected".

18.13. The Court of Appeal's subsequent judgment does not overturn Choudhury J's decision.[21] This is another case in which the judges have

[21] *Gray v Mulberry Co (Design) Ltd* [2019] EWCA Civ 1720.

relied on domestic case law (here, for example, *R (Williamson) v Secretary of State* [2005] 2 AC 246) and Strasbourg case law directly in order to synthesise and apply the relevant legal principles.

18.14. In *Forstater v CGD Europe* [2019] 12 WLUK 516, the Employment Tribunal (Employment Judge Tayler as he then was) held that an individual's belief that sex is immutable and that trans women are in fact men, was not a philosophical belief or lack of belief protected by the Equality Act 2010 ("EqA 2010"). It did not satisfy the fifth requirement set out in the EAT's judgment in *Grainger Plc v Nicholson* UKEAT/0219/09/ZT that the belief is "worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others." Employment Judge Tayler's analysis is (in part) as follows:

"84. However, I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned. I do not accept the Claimant's contention that the Gender Recognition Act produces a mere legal fiction. It provides a right, based on the assessment of the various interrelated convention rights, for a person to transition, in certain circumstances, and thereafter to be treated for all purposes as the being of the sex to which they have transitioned. In Goodwin a fundamental aspect of the reasoning of the ECHR was that a person who has transitioned should not be forced to identify their gender assigned at birth. Such a person should be entitled to live as a person of the sex to which they have transitioned. That was recognised in the Gender Recognition Act which states that the change of sex applies for "all purposes". Therefore, if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman. That is not something that the Claimant is entitled to ignore.

85. Many trans people are happy to discuss their trans status. Others are not and/or consider it of vital importance not to be misgendered. The Equal Treatment Bench Book notes the TUC survey that refers to people having their transgender status disclosed against their will. The Claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a person, even if that person has a Gender Recognition Certificate. In her statement she say of people with Gender Recognition Certificates "In many cases people can identify a person's sex on sight, or they may have known the person before

transition There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain." The Claimant's position is that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act.

86. There is nothing to stop the Claimant campaigning against the proposed revision to the Gender Recognition Act to be based more on self-identification. She is entitled to put forward her opinion that these should be some spaces that are limited to women assigned female at birth where it is a proportionate means of achieving a legitimate aim. However, that does not mean that her absolutist view that sex is immutable is a protected belief for the purposes of the EqA. The Claimant can legitimately put forward her arguments about the importance of some safe spaces that are only be available to women identified female at birth, without insisting on calling trans women men.

87. Human Rights law is developing. People are becoming more understanding of trans rights. It is obvious how important being accorded their preferred pronouns and being able to describe their gender is to many trans people. Calling a trans woman a man is likely to be profoundly distressing. It may be unlawful harassment. Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them." [emphasis added]

18.15. Employment Judge Tayler expressly relied on the ECtHR's reasoning in *Goodwin*, while also referring, earlier in the judgment, to a number of domestic law authorities. This is a case in which the judge relies on both domestic and ECtHR case law to support his reasoning, and synthesis of the legal principles.

## QUESTION 1B

**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?**

19. The margin of appreciation gives a member state room for manoeuvre in fulfilling some of its principal obligations under the ECHR. When asked if Courts take account of this margin of appreciation, Baroness Hale, giving evidence to the Joint Committee for Human Rights [22] said:

    "One of the most difficult questions for us was what to do if a situation was fairly clearly one that Strasbourg would regard as being within the UK's margin of appreciation. Were we therefore to say, 'We're not going to interfere. We're not going to say that this is contrary to the fundamental rights, the convention rights', or were we, on occasions, to make up our own minds consistently with the principles of the convention as to whether it was or was not incompatible?"

20. The case law identified below sets out the application of the margin for appreciation by UK courts, and based on the evidence considers that the judicial approach to this provision allows, in fact, for sufficient deviation from ECtHR jurisprudence so as to allow sufficient appreciation for UK policy and/or respect for UK domestic law. The evidence shows that the UK courts have remained independent. They have neither abused this margin nor reduced it so as to further any activist agenda that has unduly interfered with government policy. Indeed, it has often been required of UK judges to clarify the *law* rather than any policy position, to ensure certainty.

21. ELA do not think, based on the evidence below, that the case for any change has been made out.

### EXAMPLES OF CASE LAW

#### Article 11

21.1. There are two aspects of Convention rights most relevant to trade unions: individual rights and collective rights. A number of these rights are set out in the Trade Union Labour Relations (Consolidation) Act 1992 ('TULRCA 1992') that enshrine a worker's freedom to join and participate in an effective trade union. Article 11 ECHR provides that everyone has, in principle, the right of freedom of association, including

[22] See the transcript of the hearing

the right to form or join a trade union for the protection of their interests. The Grand Chamber of the ECtHR held in *Sindicatul 'Pastorul cel Bun' v Romania* [2013] ECHR 646 that 'everyone' means 'everyone in an employment relationship'. However, the UK High Court decided in *IWGB v CAC and Roofoods Limited t/a Deliveroo* [2018] EWHC 3342 (Admin) that meal delivery riders were not in an employment relationship and so their trade union was not permitted to exercise its right to apply for statutory recognition on behalf of those individuals each as a 'worker' under s.296 TULRCA 1992.The court held that restrictions and interference with the rights under Article 11 ECHR were permissible in achieving a fair balance with competing interests under the UK's statutory recognition procedure. The Court of Appeal will now consider whether or not workers are barred from enjoying rights under Article 11 ECHR.

21.2. The ECtHR held in *Aslef v UK* [2007] ECHR 184 that freedom of association under Article 11 ECHR implies freedom in association, whereby trade unions should in principle be free to draw up their own rules and administer their own affairs and the state should only interfere where there are convincing and compelling reasons to do so. This case involved two competing Convention rights (an individual's freedom to join and the union's freedom to refuse membership). The ECtHR found that the state's margin of appreciation is narrow because freedom of association is so fundamental to democratic ideals.

21.3. In *Danilenkov v Russia* [2009] ECHR 1243 the ECtHR held that the victimisation of trade unionists was 'one of the most serious violations of freedom of association' because it is capable of jeopardising the existence of the union. The UK provides protections under s.146 TULRCA 1992, but that statutory right is drafted with the protection to apply only for activities that are taken at an 'appropriate time'. Although legal commentators have asserted that it is likely that the absence of protection from detriment at times other than the "appropriate time" is contrary to Article 11 ECHR[23] the narrower interpretation has survived by reason of the margin of appreciation.

21.4. In *RMT v UK* [2014] ECHR 366, the ECtHR held that the UK's statutory ban on all forms of secondary industrial action (under s.224 TULRCA) fell within the margin of appreciation and did not infringe Article 11 ECHR; and in *Unite v UK* [2016] ECHR 1150, the ECtHR found the abolition of the Agricultural Wages Board did not violate the union's right to collectively bargain (on behalf of the 18,000 members employed

[23] See Harvey's Volume, NII, paragraphs 699-700

in the agricultural industry) under Article 11 ECHR. In both these cases, the ECtHR relied on the UK having a wide margin of appreciation in rejecting the complaints by the two trade unions. This judgment was considered in *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66, where the Court of Appeal referred to the wide margin of appreciation in *Unite* when holding that the statutory recognition mechanism provided under Schedule 1 Part VI of TULRCA 1992 adequately balanced the independent trade union's rights under Article 11 ECHR. Some legal commentators[24] question whether the Court of Appeal's solution for an individual notionally represented by the non-independent union to apply to the Central Arbitration Committee for it to be derecognised adequately addresses the problem but the margin of appreciation was respected by the Court when it held that there was no breach of Article 11.

**Article 9 - Eweida and Chaplin[25]**

21.5. Both of these cases involved the wearing of religious items at work, and the discrimination and alleged breached of Article 9 rights. In *Eweida,* the ECtHR held that the domestic courts had not balanced the interests between Ms Eweida's right to manifest her religious beliefs and that of the employer's right to protect its corporate image. The employer prohibited Ms Eweida from wearing a cross around her neck, and the ECtHR concluded that whilst the employer's interest to keep up its corporate image was important, the wearing of a discreet cross (where other employees could wear their religious symbols and garments) ought to be permitted. Thus, in considering the competing rights and interests of the parties, the ECtHR held that the balance favoured Ms Eweida and that even though wearing a cross was not mandated by her Christian faith, she had a right to manifest such belief and bear witness to her faith through the wearing of this item.

21.6. In *Chaplin*, it was decided that the wearing of a cross interfered with the health and safety in the hospital ward where Ms Chaplin worked. The health and safety risk therefore tipped the balance in favour of the hospital and the margin of appreciation played a role in that "hospital managers were better placed to make decision about clinical safety

[24] 'Article 11 ECHR and the right to collective bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd'* by Alan Bogg and Ruth Dukes, Industrial Law Journal, published by Oxford University Press, Volume 44, No.4, December 2017
[25] *Eweida and Others v UK* [2013] ECHR 37.

than a court" and that "the interference with her freedom to manifest her religion was necessary in a democratic society and that there was no violation of Article 9" [26].

21.7. The above illustrates that the ECtHR recognises and applies the margin of appreciation , agreeing with the UK's interpretation in *Chaplin*, and providing helpful guidance for all courts and tribunals going forward. The ECtHR placed emphasis on the facts of the specific cases as opposed to imposing blanket rules. It provides courts and tribunals with helpful tools to adjudicate similar matters in the future using the principles of weighing up the competing rights, giving effect to the margin of appreciation and consideration as to whether there is a good reason to prohibit such rights in the case of either party.

## QUESTION 1C

**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?**

22. ELA is satisfied, on the evidence, that the current approach to 'judicial dialogue' between UK courts and the ECtHR is sufficiently robust to allow UK courts to raise concerns regarding the application of UK law. The answer to this question can best be seen from the comments of the judiciary but can also be shown by evidence from the case law.

23. Baroness Hale of Richmond[27], told the Joint Committee on Human Rights in response to this question said that "there have obviously been informal links of a variety of sorts". When asked for examples of how domestic cases have influenced the thinking of the ECtHR, she said:

*"…UK courts are now reasoning the cases in the same way in which the Strasbourg court would be reasoning them. They are not necessarily reaching the same conclusion, but they are taking the rights, looking at the limitations of the rights and asking whether those limitations apply, so it is the same sort of reasoning as Strasbourg. This means that when Strasbourg gets a case from the United Kingdom it recognises the way the United Kingdom court has been*

[26] See *Eweida and Others v UK (above)* at paras 99-100.
[27] Baroness Hale of Richmond's response

*arguing the case and reasoning to the result. That means that it has influenced the thinking of the Strasbourg court. It now very rarely disagrees with us".*

24. The UKSC is well-respected for its clear judgments on the application of the law and has been known to influence decisions from Strasbourg. In *R (on the application of Quila) v SSHD*[28], Lord Wilson determined that the court need not follow the line in the ECtHR decision *Abdulaziz v UK*[29], as there was no "clear and consistent jurisprudence" to follow. However, the UKSC decided that it was "exceptionally acceptable" to depart from ECtHR jurisprudence regarding Article 6 in *R v Horncastle*[30], as the ECtHR's decision in *Al-Khawaja*[31] did not properly consider the domestic process in the UK, which the UKSC said struck "*the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general*". The Strasbourg test was not seen to strike this balance, and this view was later endorsed by the Grand Chamber, when the UK appealed the decision in *Al-Khawaja & Tahery v UK*[32].

25. In *R v Horncastle* the UKSC did not follow the ECtHR because of a "lack of clarity" and "practical difficulties" in their approach and concluded that there were sufficient safeguards in UK law that ensured that the use of hearsay did not violate Article 6. See also *Brown v Stott* [2001] 2 WLR 817 and ECtHR's subsequent judgment in *O'Halloran and Francis v UK* (15809/02 and 25624/02) (2008) 46 EHRR 21.

26. ELA would suggest that the evidence shows not only that the domestic Courts can raise concerns but their reasoned decisions can and do change the approach of the ECtHR so that UK judicial decisions influence the very development of the law by the ECtHR. The evidence shows that the decisions of the ECtHR are more likely to respect the traditions of and conform to UK law as a result. The evidence shows that this relationship can be preserved, and dialogue strengthened if all UK Governments continue to support the independent judiciary and its efforts to graft UK traditions on to the framework of rights provided by the ECHR and, as has been evidenced in this response, results in fewer UK decisions being successfully challenged in the ECtHR.

[28] R (on the application of Quila) v SSHD
[29] ECtHR decision Abdulaziz v UK
[30] R v Horncastle
[31] ECtHR's decision in Al-Khawaja
[32] 15.12.11 (Applications nos. 26766/05 and 22228/06

## SECTION 2 - THE IMPACT OF THE HRA ON THE RELATIONSHIP BETWEEN THE JUDICIARY, THE EXECUTIVE AND THE LEGISLATURE

### QUESTION 2A

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

#### QUESTION 2A(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)?**

27. ELA's view is that the framework in sections 3 and 4 HRA strikes a proportionate balance between Parliamentary sovereignty and permitting ECHR rights to be exercised fairly. In fact, the case law below illustrates that courts are mindful and cautious in exercising their duties under s.3 of the HRA. See further below re s.4 HRA.

28. The hierarchy of the judicial structure is such that the Courts in which binding decisions are made usually involve more than one decision maker. The chances of an inconsistent or absurd interpretation are thus considerably lower at this level. For the same reason, appeal courts are well-placed to consider whether tribunals/courts of first instance have incorrectly applied s.3 in a manner that is inconsistent with the intention of Parliament. In any event, Tribunals and lower courts have no powers to make declarations of incompatibility, and this is reserved for courts at the equivalent level of High Courts (but excluding the Employment Appeal Tribunal) and the appeal courts.

### THE APPLICATION OF SECTION 3 HRA

29. The approach to the application of s.3 is now well-established in case law, and can be summarised by reference to the House of Lords' decision in *Ghaidan*[33]:

    29.1. Section 3 is the "prime remedial remedy and that resort to s.4 must always be an exceptional course" (paragraph 49).

[33] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

29.2. Courts should focus on the "substance of the measure" opposed to the language choices of the drafters (paragraph 123).

29.3. Give effect to the intentions of the Parliament that enacted the HRA

29.4. Interpretations should "go with the grain" of the particular legislation and respect the fundamental principles of it (paragraph 33).

29.5. When interpreting legislation, the courts are not required to make decisions that they are not suited to (i.e. not to venture into policy making), nor to create situations which have unworkable practical repercussions (paragraph 33).

30. In *Gillham*[34], the Supreme Court read s.230(3) of Employment Rights Act 1996 in a manner to include judicial office-holders (as opposed to just employees and workers) and read words into s.47B of the ERA, to extend whistleblowing protection to judicial office-holders, and in doing so cured any breaches of Article 10 and Article 14.

31. In *Rowstock Ltd*[35] the Court of Appeal read words into the Equality Act to extend victimisation to include incidents which occurred after employment had been terminated. Although the comments were obiter, Underhill LJ commented on the approach courts apply where s.3 of the HRA is engaged, and that in cases where there has been a drafting error, there is no substantial difference between the Ghaidan and domestic approach regarding interpretation and reading in[36]. He concluded that:

"[i]n the … case of a frank drafting error – that is, where the Court can be satisfied that the draftsman positively intended to include a provision which in fact he omitted – there is no real difference between the Ghaidan approach and the approach based on purely domestic principles. It would be different in a case where no such intention is established and the argument is simply that

[34] *Gilham v Ministry of Justice (Protect Intervening)* [2019] 1 WLR 5905.
[35] *Rowstock Ltd and another v Jessemey* [2014] EWCA Civ 185.
[36] See paragraph [38]; "It is generally said that the power of the Court to depart from the natural reading of the language of the statute, including by the implication of words which alter its effect as drafted, is wider on the *Ghaidan* approach than is permissible on the conventional domestic approach to the construction of statutes. That is no doubt right as a generalisation, though I have to say that it is not possible usefully to calibrate the extent of the difference, especially now that the need to take a purposive approach is well-recognised in construing purely domestic legislation; and it may be that at least in cases of drafting error the difference is insubstantial".

the implication sought is necessary in order to comply with EU law or the requirements of the Convention."[37]

32. In *OFGEM*[38], the Employment Appeal Tribunal held that the Employment Tribunal had erred in its decision to read words into s.105(1) of the Utilities Act 2000 which would have required an employer to disclose documents in relation to the protected disclosure of Mr Pytel. Pytel had claimed that such restrictions would not only have a restrictive effect on his whistleblowing claim but would also infringe his rights to a fair hearing and freedom of expression (Articles 6 and 11). The EAT highlighted the clear distinction between interpretation and legislation and that "s. 3 of the HRA does not permit courts to cross that line"[39], and held that it was not possible to read words into section 105 to ensure compatibility.[40]

33. In NUPFC v Certification Officer[41], the Employment Appeal Tribunal refused to read in words to cure an alleged incompatibility with Article 11, in respect of the definition of worker and whether that could include a foster carer.

34. As illustrated above courts take great care in exercising their duty under s.3 HRA to ensure that words are only read in where it is *possible* and appropriate to do so.

**INSTANCES WHERE LEGISLATION *MAY* HAVE BEEN INTERPRETED IN A MANNER INCONSISTENT WITH INTENTION OF THE ENACTING PARLIAMENT**

35. There are countless instances in employment law jurisprudence where Tribunals and Courts have read legislation in a manner to give effect to the intention of the legislative body. However, it is difficult objectively to identify instances where it is clear that an interpretation has deviated from the intention of the enacting Parliament, and the overarching intention of the 1998 Parliament. We have identified a sample of cases across the spectrum of which may fall into this category below.

[37] See para [53].
[38] *Office of Gas and Electricity Markets v Pytel* [2019] ICR 715.
[39] See para [82].
[40] The EAT notes at paragraph 92: "If Parliament and the Secretary of State have decided, as it is apparent that they have, that this type of information cannot be used in whistleblowing claims, that is a matter for them, not for the courts. The balance to be struck between the rights of putative whistleblowers, and the safeguarding of rights to restrict the circulation of business information which has been obtained, broadly, in the exercise of regulatory functions, is for them, not for the courts."
[41] UKEAT/0285/17/RN.

**Bilsbrough v Berry Marketing Services Ltd[42]**

35.1. Mr Bilsbrough had discovered a potential data breach, which he had reported to the Company. He wanted to report it to the ICO and began investigating how to go about this. In the process, his line manager became aware of his conduct and whilst no disclosure was made to the ICO, the possibility of Mr Bilsbrough doing so led his line manager to suspend him and subject him to disciplinary proceedings which resulted in his dismissal. He brought claims alleging he had been subjected to a series of detriments and dismissed because of his intention to blow the whistle. The Employment Tribunal found that the applicable legislation could be read to cover *proposed* protected disclosures as well as *actual* protected disclosures, in order to give effect to Mr Bilsbrough's right to freedom of expression under the ECHR.

35.2. This first instance decision, which has no wider binding authority may be seen to go beyond that which Parliament intended. However, it is also arguable that it may have been Parliament's intention for whistleblowing legislation to cover instances where individuals were intending to blow the whistle, but had not yet done so, and in that knowledge the employer subjected the individual to detriments.

**Kostal UK Ltd v Dunkley and others[43]**

35.3. Section 145B prohibits employers from making offers directly to trade union members, regarding changing their terms and conditions, in order to avoid collective bargaining. The sole or main purpose of making the offer must be to achieve a prohibited result (as set out in s.145B(2)). Kostal UK Ltd approached members directly regarding a pay offer, and Unite members argued that doing so breached Article 11. The Employment Tribunal and Employment Appeal Tribunal agreed referring to the natural meaning of the words used in s.145(E)(2)(b)[44].

35.4. On appeal, the Court of Appeal held that the literal interpretation accepted by the Employment Tribunal and Employment Appeal Tribunal would not have been what parliament had intended and would give a recognised trade union a veto right over even minor changes to terms

[42] ET/1401692/2018.
[43] [2019] EWCA Civ 1009.
[44] At paragraph 35.

and conditions of employment. This interpretation would go beyond alleviating the mischief identified in *Wilson*[45].

35.5. This case is difficult. Both arguments concerning the interpretation of the legislation are compelling, and a great deal will turn on what inference a Court can draw as to what was the intention of Parliaments. The Supreme Court, when it hears this appeal in May 2021 will have a difficult balance to strike to ensure that that employers do not use this as a mechanism circumvent well established principles of collective bargaining by approaching members directly, and likewise that trade unions are not given a "blanket" veto on every decision.

**NUPFC v Certification Officer[46]**

35.6. Currently awaiting judgment from the Court of Appeal, this case examines whether a foster carer can be included in the definition of "worker" for the purposes of classifying NUPFC as a trade union (an organisation consisting wholly or mainly of "workers"), and whether to ensure compliance with Article 11, a reading of TULRCA requires an extension of such definition. The Employment Appeal Tribunal held that even if the legislation was incompatible with Article 11, it would be impossible to read s.296(1)(b) in a manner which would exclude the requirement that a worker ought to work under a contract. The Employment Appeal Tribunal concluded that the distinction between those who worked under contracts and those who did not was a defining feature of the legislation. The Appellant has asked the Court of Appeal for a declaration of incompatibility.

35.7. This case illustrates that tribunals are cautious to read in words to comply with Convention rights where this may defeat the purpose or intention of the particular legislation. Tribunals have limited powers and cannot make declarations of incompatibility, which some might say increases the temptation for tribunals to concoct wider readings of legislation. However, the case law demonstrates that lower courts and tribunals are content to defer to higher courts, willingly grant leave to appeal, and do not enter into the arena of creative interpretation which would stretch the legislation beyond the intention of the legislature.

[45] Wilson v UK [2002] IRLR 568 identified an incompatibility between trade union legislation and Article 11 of the ECHR in that Employers could make offers to members in exchange for relinquishing their membership, and thus served to undermine collective bargaining and frustrate a trade union's ability to protect its members' interests. This prompted the insertion of s.145(A)-(F).
[46] UKEAT/0285/17/RN.

**Vining v London Borough of Wandsworth[47]**

35.8. Two local authority parks' police officers were made redundant, and they brought claims alleging their dismissals engaged Articles 8, 11 and 14. Whilst their claims for unfair dismissals were dismissed, the second part of the claim, brought by UNISON, the trade union, regarding their exclusion from the protections of TULRCA was held to be a breach of Article 11 (i.e. that they and their representatives were excluded from the consultation rights afforded in TULRCA and as such could bring a claim for a protective award for the failure to inform and consult).

35.9. Section 280 of TULRCA specifically excludes individuals in the police service. The court considered whether s.280 of TULRCA could be construed in a manner which would not infringe on the Article 11 rights, by excluding individuals (and their representatives) from the rights accorded in s.188-192. As parks police officers were employed by the Council, some difficulty arose in this matter with regards to the distinction between categories of employees that should be caught by s.280, to avoid a breach of Article 11. The court was unable to formulate an amendment which would distinguish between certain types of employees sufficiently clearly. However, the court held that in this instance, and in the absence of any justification defence from the Council or the secretary of State, TULRCA should be read to include parks police officers in terms of collective redundancy consultation. The court explained that such construction did not go against the grain of the legislation nor did it contradict its fundamental features (in line with the *Ghaidan* principles set out above).

**IF THERE IS INCONSISTENCY, SHOULD SECTION 3 BE REPEALED OR AMENDED?**

36. Judicial officers do not have the power to change legislation and s.3 simply places the duty on them to interpret legislation in a manner which is consistent with the intention of the 1998 Parliament, to give effect to compatibility with Convention Rights.

37. The judiciary have been careful not to overstep, and in instances where they have been unable to read in, or interpret particular legislation in a manner to ensure compatibility with Convention Rights, they have made a declaration of incompatibility, leaving it up to Parliament either to remedy the offending provision or indeed, to do nothing at all.

[47] [2017] EWCA Civ 1092.

38. We have not been able to identify any decisions which in our view are grossly inconsistent with the intention of UK Parliament.

39. The HRA does not infringe on the separation of powers. Parliament remains sovereign. If legislation has been interpreted in manner which is inconsistent with the intention of the Parliament which enacted it, Parliament has the authority to amend legislation to make their intentions clear. Likewise, the government has the opportunity to apply to intervene in matters of concern. Parliament can also choose not to act.

40. Section 3 HRA gives effect to the purpose of the HRA itself, in assisting the judiciary with the necessary discretion it requires to interpret legislation so as to ensure UK citizens and residents have access to the same rights in the UK which they would have in the ECtHR. That was the clear intention of the HRA.

41. As the ECHR form the very foundation on which the HRA is based, it would not make sense to repeal s.3. It has served as an important mechanism in keeping the number of adverse judgments in the ECtHR against the UK government low. As a result, fewer cases have been referred to the ECtHR. In the past decade there has been a significant decline in the number of cases which have been brought against the UK government in the ECtHR, with a mere 4 judgments in 2020[48].

42. Further, when new legislation is promulgated, a statement regarding its compatibility with the Convention Rights is required. Legislators must therefore have given thought as to how it will be interpreted by domestic courts in this context and whether it is compatible.

43. A key factor underpinning the Convention Rights is democracy, and the ability of an individual tangibly to access such rights. Lord Justice Reed stated that:

    "the emphasis placed by the Strasbourg court [is] on the protection of rights which are not theoretical and illusory, but practical and effective. That is consistent with the recognition in domestic law that the impact of restrictions must be considered in the real world"[49].

    This judgment goes further to state that access to justice is not a European ideal, but a fundamental principle long entrenched in our common law.

44. With that in mind, ELA notes that in instances where a conforming interpretation is not possible by lower courts and/or Tribunals, individuals may

[48] Stats violation 2020
[49] See para 108 of *Unison v Lord Chancellor* [2017] UKSC 51.

experience delay as well as incur substantial costs before a declaration of incompatibility is made, whilst their claim works its way up the judicial chain.

45. In addition to *NUPFC v Certification Officer*[50] above, another recent example of where such a right would give an effective remedy to the successful party is *Steer v Stormsure Limited*[51], where despite the Employment Appeal Tribunal agreeing that the Claimant (Appellant in the EAT) had made out a breach of Article 14 (prohibition on discrimination on enforcement of rights because of sex, race… or other status), the Employment Appeal Tribunal had no powers to make a declaration of incompatibility. The Employment Appeal Tribunal was unable to read in a conforming interpretation, leaving the judge with no choice but to allow leave to appeal to the Court of Appeal to make a determination on this issue.

46. ELA's membership has differing views on whether lower courts or tribunals should be permitted to make declarations of incompatibility, and whether this would address the speedy and cost-effective access to justice or produce inconsistency and a lack of certainty. ELA notes the competing consideration in allowing lower courts to make declarations of incompatibility.

**QUESTION 2A(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?**

46.1. In light of the responses above, and because we do not know the content of any potential amendments, we do not provide a detailed answer here. However, if there is an inclination to amend or repeal s.3, we would note that all legislation post-implementation of the HRA has been drafted with s.3 in mind given the required statement on compatibility. Where legal proceedings have already commenced or are in the appeal stages, it would be impossible for retrospectivity to apply in such instances, and there would need to be clear guidance as to how such matters would be dealt with. In light of the fact that the government has confirmed that there is no intention to leave the Convention, the existing case law and past interpretations will continue to provide helpful insight to the judiciary when adjudicating matters

[50] UKEAT/0285/17/RN.
[51] UKEAT/0216/20/AT

involving Human Rights, and the law should simply develop onwards in the usual way, from the implementation of any amendments.

**QUESTION 2A(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?

46.2. In the employment law context, only the High Court, the Court of Appeal or the Supreme Court have the ability to make a declaration of incompatibility under section 4 HRA. Employment tribunals are excluded.

46.3. ELA's view is that cases should be heard in their entirety before a court can make a declaration of incompatibility in any event. To do so too early in proceedings may mean that declarations were being made on the basis of assumptions or potentials, without evidence to substantiate the alleged incompatibility.

46.4. It has been useful to contextualise the use of section 4 in practice when considering an answer to this question:

46.4.1. In the 20 years that the Human Rights Act has been in force, only 43 declarations of incompatibility have been made by the UK judiciary.[52]

46.4.2. Of these, 2 are still under consideration, 10 have been overturned and the remaining 31 either addressed by remedial order, set out in legislation (primary or secondary) or are being proposed for remedial order.[53]

46.5. According to these statistics set out in the Ministry of Justices' Corporate Report on Responding to Human Rights Judgements, 72% of declarations have resulted in positive action by the UK legislature to rectify incompatibility. This persuades us to conclude that for the majority of cases where declarations of incompatibility are made, this has led to positive action by Parliament, thus recognising the importance of the ECHR and its contribution to UK law and law making.

[52] Assets Publishing - Responding to Human Rights Judgments 2020
[53] Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020 (publishing.service.gov.uk)

46.6. This is important to note as there is no legal obligation on the legislature to take remedial action in response to a declaration under s10 HRA. Despite this, the statistics show that for the majority of cases, action has been taken.

46.7. This is despite the fact that section 4(6) HRA protects parliamentary sovereignty by setting out that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made.[54]

46.8. In addition, in relation to new legislation, ministers who are in charge of Bills are able to make statements under s19 HRA either to convey their view that the Bill proposed is compatible with the ECHR[55] or, in the alternative they may make a non-committal statement that the Bill may not be compatible but that they want to proceed in any event[56]. In reality, the latter statement is made rarely. However, such statements assist to focus the judiciary in their interpretation of the legislation when it is passed.

46.9. Arguably then, this should assist the courts in identifying potential cases where incompatibilities with the ECHR will arise, even before proceedings have been brought.

46.10. The benefit of the current system is that by the time a declaration of incompatibility has been made, a case will have been heard multiple times throughout the court system. This process is likely to assist the legislature in its decision making on any action that should be taken following a declaration (if any) due to the judgements previously gathered on the infringing legislation.

**QUESTION 2B**

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

47. ELA is not aware of any designation orders made under Section 14.1 as it relates to employment law, so is unable to usefully respond to this question.

[54] Section 4(6) Human Rights Act 1998
[55] Section 19(1)(a) Human Rights Act 1998
[56] Section 19(1)(b) Human Rights Act 1998

## QUESTION 2C

**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?**

48. The approach of the UK courts was explored above in relation to the application of s.3 HRA in *Ghaidan v Godin-Mendoza* [2004] AC 557, at paragraph 52. There are relatively few examples in employment law beyond those mentioned above, to show how courts and tribunals have dealt with provisions of incompatible subordinate legislation.

49. The ECtHR's judgment in *Wilson, Palmer and Doolan v UK* [2002] IRLR 568[57], led to the eventual repeal of statutory provisions found to be incompatible with rights under Article 11 ECHR. The law in this area stands to be determined by the UK Supreme Court in the *Kostal UK Limited v Dunkley and others* [2019] EWCA Civ 1009, as mentioned above.

50. As also mentioned above, the Court of Appeal in *Vining v UNISON* decided that s.280 TULRCA 1992 must be construed so as to give effect to UNISON's rights under Article 11 ECHR in relation to claims about collective consultation for parks police that would otherwise have been excluded. Whilst the Court of Appeal read words into the legislation to give effect to Convention rights there has been no amending legislation put to Parliament.

51. Another example mentioned above is the Court of Appeal's expected judgment in *IWGB v CAC and Deliveroo* where the union appealed the High Court's judgment that refused to read down the union's proposed interpretation of a 'worker' under s.296 TULRCA 1992.

52. Whilst Courts and Tribunals have dealt with provisions of subordinate legislation that are incompatible with the HRA convention rights by purposive interpretation, the rule of law suggests that Government should put any amending legislation to Parliament to remedy such incompatibility unless, as Parliament may choose to do, to carry on as before. Such an approach would also allow users individuals certainty in relation to the law.

[57] See footnote 42

## QUESTION 2D

**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?**

53. It is acknowledged that if the extraterritorial scope of the HRA were to be restricted, other legislative changes beyond the HRA may be required in order to maintain compliance with the UK's obligations under the convention. As such changes would fall outside the scope of the review, the panel is not asked to make specific legislative recommendations on this issue, but only to consider the implications of the current position and whether there is a case for change.

### THE DOMESTIC POSITION – HRA JURISDICTION IS CO-EXTENSIVE WITH ARTICLE 1 ECHR JURISDICTION

54. In *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, the House of Lords confirmed that section 6 of the HRA (it is unlawful for public authorities to act incompatibly with a Convention right) applies not only to public authorities acting within the UK, but also when a public authority acts within the jurisdiction of the UK for the purposes of Article 1 ECHR, but outside the territory of the UK. In *R (Al-Skeini*) Lord Rodger cited Lord Nicholls' judgment in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 546, at [58]:

> "the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg. Accordingly, in order to identify the territorial scope of a 'Convention right' in sections 6 and 7 it is necessary to turn to Strasbourg and consider what, under the Convention, is the scope of the relevant Convention right."

55. In turn, Lord Rodgers says, the Convention rights in the schedule to the HRA "must be read as applying wherever the UK has jurisdiction in terms of Article 1 of the Convention."

## JURISDICTION FOR THE PURPOSES OF ARTICLE 1 ECHR

56. Strasbourg's position on the extraterritoriality of the ECHR is set out in *Al Skeini v UK* [GC] App. No. 55721/07, holding at [137] that:

> "whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [ECHR] to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual."
>
> In this sense, therefore, the Convention rights can be "divided and tailored." This represented a shift from the ECtHR's position in *Bankovic* under which there would only be jurisdiction if the state exercised effective overall control over an area of territory. The new *Al-Skeini* position represents a "personal model", with the state needing only to exercise control over an individual (not an area). This was continued in *Hassan v UK* in which the ECtHR ruled that physical custody will ipso facto constitute Article 1 jurisdiction.[58] Further, in *Jaloud v Netherlands,* the Court held that individuals who passed through a Dutch-manned checkpoint in Iraq were within authority and control, and thus jurisdiction of the Netherlands.[59]

57. It is interesting that the words "authority and control" were used by the ECtHR in determining Article 1 jurisdiction.[60] These words are similar to those used by the UK courts, and courts around the world, in determining whether an employment relationship has arisen. Typically, the latter entails analysis of whether there is control, subordination, and / or dependency.[61] Although many

[58] *Hassan v UK* [GC] App. No. 29750/09, 16 September 2014.
[59] *Jaloud v Netherlands* [GC], App. No. 47708/08, 20 November 2014.

[60] In *Al-Saadoon and Others v Secretary of State for Defence* [2015] EWHC 715 (Admin), Mr Justice Leggatt stated the scope of jurisdiction as being whenever the UK "purports to exercise legal authority or use physical force". See [106]:

> "The essential principle that I derive is that whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights. That is still a far-reaching principle of jurisdiction. It creates real and difficult problems as to how human rights law under the Convention can be accommodated to the realities of international peacekeeping operations and situations of armed conflict. There are strong reasons of policy for seeking to interpret the territorial scope of the Convention in a way which limits the extent to which it impinges on military operations interest he field, particularly where actual fighting is involved."

[61] See e.g. the Supreme Court of Canada's observations in *McCormick v Fasken Martneau DuMoulin LLP* 2014 SCC 39; [2014] 2 SCR 108 at [23], cited in the UK Supreme Court's decision in *Uber v Aslam* [2021] UKSC 5 at [75], and the UK's comments in paragraph [75] on subordination / dependency and control over employees by employers.

Article 1 ECHR cases apply in the military context, the test could be held to apply to employment contexts, where a UK public authority is engaging a person's services abroad. That view may align with increasingly broad applications of Article 1, including in *Jaloud v Netherlands* where a Dutch-manned checkpoint was deemed to satisfy the "control and authority" required for Article 1 jurisdiction. As Professor of Public International Law Marko Milanovic has argued, why should the concept of "authority and control" not extend to reading a person's email (e.g. for work purposes)?[62] As Milanovic states, "once state jurisdiction is defined as the exercise of authority or control over an individual, there is no reasonable, non-arbitrary way to limit this personal model."[63] Indeed, in *Smith v Ministry of Defence* [2013] UKSC 41 the Supreme Court, applying the "authority and control" test in *Al-Skeini* ruled that British soldiers serving abroad (employed by the Ministry of Defence) were within the UK's jurisdiction under Article 1 of the ECHR for the purposes of the Ministry of Defence securing their Article 2 rights to life while serving abroad (see paragraph 55), by, for example, providing appropriate equipment and technology to protect the soldiers against the risk of friendly fire.

58. In our view, it would be helpful for the applicability of the HRA to employment contexts outside of the territory of the UK to be clarified to bring certainty both to employees and employers. It is suggested this is achieved by way of guidance rather than statute, in order to avoid conflicting with the evolving case law on extraterritoriality emerging from Strasbourg. For example, the government could release a statement indicating in which circumstances, in its view, the HRA applies to public authorities acting abroad in an employment context. The guidance or statement should clarify the scope of public authorities' duties abroad, which could include an analysis of what "authority and control" means in the employment context. For example, it could mean that the HRA applies to public authorities' acts taking place outside the territory of the UK, where those acts relate to an employee or worker of the public authority (as defined in UK law). That would mean, for example, that employees working for public authorities abroad would have their Article 8 rights not to have their emails arbitrarily monitored respected. In ELA's view, while there is no current case for change in the statute, clarification on this issue in an employment context would be welcomed.

59. As an alternative, amendments could be made to the statute to clarify that the HRA applies to public authorities acting abroad generally (and / or specifically

[62] Marko Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in Anne van Aaken and Iulia Motoc (eds), *The ECHR and General International Law* (OUP 2018).
[63] Ibid.

in the employment context). Nonetheless, provision should be made to ensure that the case law can continue to develop in line with the Strasbourg case law.

**THE TERRITORIAL REACH OF BRITISH EMPLOYMENT LEGISLATION**

60. In answering this question, it is also worth noting that the law on the territorial reach of British employment legislation may also be relevant. That is because the Convention rights may import minimum standards into the interpretation of the employment legislation (and UK judges are bound, when interpreting British employment legislation applying abroad, to apply section 3 of the HRA – the duty to interpret legislation in a Convention right-compatible way). See for example, the discussion in *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, which concerned whether the 'band of reasonable responses' test for unfair dismissal provides sufficient procedural safeguards to comply with Article 8 ECHR, which the court accepted it must do to be lawful and to comply with section 3 of the HRA 1998, which does not discriminate between legislation governing public authorities and legislation governing private individuals.

61. The territorial reach of employment legislation was summarised by Lord Justice Underhill in *British Council v Jeffery* [2018] EWCA Civ 2253 at [2], as follows:

"(1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94 (1) of the Act); nor is there any such provision in the Equality Act 2010.

(2) The House of Lords held in *Lawson* that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.

(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as "the territorial pull of the place of work". (This does not apply to peripatetic workers,

to whom it can be inferred that Parliament intended the Act to apply if they are based in Great Britain.)

(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".

(5) In *Lawson* Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "British enclave" abroad. But the decisions of the Supreme Court in *Duncombe* and *Ravat* made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.

(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what *Ravat* was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/EU-funded international schools considered in *Duncombe*.

(7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438, [2016] ICR 975."

62. Clarification in this area is certainly welcome. The extent of UK public authorities' obligations to comply with the HRA and ECHR while outside the territory of the UK *in an employment context* should be addressed by the UK government, ideally through guidance or legislation, since this is not an uncommon scenario, and affects many individuals working abroad.

63. In our view, and subject to the principles in *British Council v Jeffery*, it is consistent with the UK's obligations under the ECHR to ensure that individuals working abroad benefit from the protection of the HRA, and this is the approach that should be adopted. There is no need for a 'change' from the House of Lords' decision in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, except to build on and clarify the concept of 'authority and control'. As stated, it is consistent with the UK's obligations under the ECHR and the ECHR's 'personal model' of jurisdiction for jurisdiction to apply to employment contexts involving public authorities overseas. The HRA will also apply to cases coming before judges in UK courts and tribunals when interpreting British employment legislation applying overseas.

**QUESTION 2E**

**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?**

64. The human rights provisions set out in the ECHR can only be truly effective if they are actional rights, having the full force of the law which includes real sanctions. The remedial provisions in section 10 have rarely been invoked by the UK government in response to declarations of incompatibility. Of the 43 declarations of incompatibility made since the Human Rights Act came into force in 2000, only 8 of these have been addressed by Remedial Order. Any modification made should be in respect of ensuring that declarations of incompatibility are considered by Parliament. Even if amending legislation is not put to Parliament, some consideration must be made as to declarations of incompatibility.

65. ELA's view is that the s.10 remedial order process is necessary. It operates well to allow government ministers to amend non-compliant legislation which has been declared incompatible, can be seen as a necessary emergency measure.

66. Its emergency status is underlined by its infrequent use e.g. in 2001 for the Mental Health Act 1983, and in 2009 for the Sexual Offences Act 2003. This in turn suggests that s.3 HRA is already operating effectively, and where s.10 has been used, as an "emergency measure", this is for cases of vulnerable citizens or criminal matters, outside of the employment sphere.

67. In the field of employment law, the overwhelming experience of ELA practitioners has been that s.3 HRA is operating to stretch interpretation of primary and secondary legislation sufficiently to make both s.4 declarations, and s.10 remedial orders almost unnecessary.

68. The deterrent effect of s.10 remedial orders may have added significantly to the exercise by the judiciary of s.3 interpretations. This deterrent effect cannot, of course be practically measured.

69. A removal or reduction of Section 10 and Schedule 2 would undermine the Rule of Law in that infringements of human rights would persist or reoccur for want of parliamentary intervention. This could reduce the incentive for government bodies to respect convention rights and could lead to an increase in breaches of the ECHR where the HRA loses its deterrent effect.

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