INDEPENDENT HUMAN RIGHTS ACT REVIEW (IHRAR)

Response submitted by:

Civil Liberties & Human Rights Department, at Hodge Jones & Allen

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Introduction

1. We understand that the purpose of the IHRAR is not to consider the UK's continued membership of the European Convention on Human Rights ("the Convention") nor to consider the substantive rights set out in the Convention. We welcome this. We note the importance of the UK's role in the ensuring the effective implementation of Convention rights, as recognised by Sir Nicholas Bratza, former president of the European Court of Human Rights:

> "*The Human Rights Act, and the manner of its implementation by judges of the United Kingdom, have set a shining example to other states of how Convention rights can be brought home. The withdrawal of the United Kingdom from the Convention would do untold damage to the system itself. It would also, in my view, do immeasurable harm to the standing of the United Kingdom within the wider community of Europe in which it plays such an important part."* [1]

2. We do not consider there to be any need to amend the Human Rights Act ("the HRA") in any of the ways raised in the consultation. Properly analysed, we do not consider there to be any issue of concern regarding the current operation of sections 2 to 4 of the HRA. We agree with Baroness Hale, who stated on 3 February 2021 (JCHR), when commenting on ss.2, 3 and 4 of the HRA:

> "*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".*

3. As our response below sets out, Parliamentary sovereignty remains intact and the proposed changes risk not only undermining the balance of powers between Parliament, the Government and the judiciary, but fundamentally threatening our constitution.

Theme One: 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?

4. We do not accept that there is a need to amend section 2. We consider that the approach of the courts to interpreting the requirements of section 2 has been appropriate and has not given rise to domestic courts adopting Strasbourg jurisprudence which sits outwith the reasonable parameters of domestic jurisprudence.

5. We consider it necessary to first consider the language of section 2. The phrase, "*must … take into account*," in s.2(1) places a mandatory obligation on the Courts to consider Strasbourg jurisprudence. However it does not itself specify the way in which the judgments and decisions of the ECtHR should be taken into account, nor the weight to be given to them. Parliament has therefore chosen to leave this to the judgment of the domestic courts which have to apply the

[1] European Human Rights Law Review (E.H.R.L.R. (2011) No.5 Pages 505-512) (available on Westlaw)

statute. In a lecture at UCL on 14 December 2011[2] Lord Irvine stressed the importance of the language of section 2, he noted:

> "'*Take account of' is not the same as 'follow', 'give effect to' or 'be bound by'. Parliament, if it had wished, could have used any of these formulations.*
>
> *It did not. The meaning of the provision is clear. The Judges are not bound to follow the Strasbourg Court: they must decide the case for themselves*."

6. Lord Irvine went on to suggest that this interpretation had not been adopted by the courts and that instead the courts had proceeded "*on the false premise that they are bound (or as good as bound) to follow any clear decision of the [ECtHR] which is relevant to a case before them*".

7. We acknowledge that this comment was supported by some early decisions of the domestic courts. However, it is certainly not accurate now, and not borne out by a careful analysis of relevant case law.

8. Arguably Lord Irvine's fears, of a slavish adherence to Strasbourg jurisprudence are most clearly reflected in *Secretary of State for the Home Department v AF (No 3)*[3], involving control orders, where Lord Rodger commented:

> "*Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.*

9. However shortly afterwards the House of Lords had the opportunity in in *R v Horncastle*[4] to clarify that in AF: "*the House of Lords was faced with a definitive judgment of the Grand Chamber in* A v United Kingdom (2009) 49 EHRR 625 *on the very point at issue and where each member of the Committee felt they had no alternative but to apply it… Moreover not merely was the Strasbourg ruling in A clear and authoritative but, whatever view individual members of the Committee may have taken about it (and it is evident that, whilst many agreed with it, others did not), it expressed an entirely coherent view*."

10. The case of *Horncastle* concerned the use of hearsay evidence and the reliance by the prosecution on the evidence of absent or deceased witnesses. The European Court held that this amounted to a violation of the right to cross-examine, guaranteed by Article 6(3)(d), where such hearsay evidence led solely or decisively to conviction. (*Al-Khawaja and Tahery v United Kingdom*[5]). Giving the sole judgment for the Supreme Court, Lord Phillips was critical of the Strasbourg approach and commented:

> *"The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our*

[2] https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/british_interpretation_of_convention_rights_-_irvine.pdf

[3] [2009] 3 WLR 74 at para 98

[4] [2009] UKSC 14 at paras 112-113, per Lord Brown [5]
(26766/05) (2009) 49 E.H.R.R. 1

domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.[56]"

11. In light of the Supreme Court's decision the Grand Chamber, when considering *Al-Kawaja* and *Tahery*[7]. Sir Nicholas Bratza, the then incoming president of the ECtHR referred to Lord Phillip's judgment and accepted that the Strasbourg approach had been inflexible and conceded that this was a good example of "judicial dialogue", between national judges and the European Court of Human Rights[7].

12. Even at an early stage, the Courts did not follow Strasbourg decisions to the letter. Another early interpretation of the court's duty under s2, can be found in in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*[8], where Lord Slynn noted:

> "*Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights*." [26]

13. Lord Hoffman's view was more nuanced; he doubted that a Strasbourg decision which led to a result which was "*fundamentally at odds with the distribution of powers under British constitution*" [76] should be followed. As we discuss further below, the domestic courts have adopted Lord Hoffman's approach, when appropriate.

14. The case of *Manchester City Council v Pinnock*[9], provides a further example of the courts' appropriate application of s2 of the HRA and compliance with Lord Irvine's approach to the interpretation of the words "*take account of*":

> *"This Court is not bound to follow every decision of the [ECtHR]. 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 [ECtHR] which is of value to the development of Convention law*** *(see e g R v Horncastle [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the [ECtHR]: R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty v Birmingham [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" [ECtHR] decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or*

[5] Para 11

[6] 766/05 [2011] ECHR 2127 (15 December 2011)

[7] Ibid, concurring opinion of Judge Bratza, para 2

[8] [2001] UKHL 23

[9] [2010] UKSC 45 at para 48

point of principle, we consider that it would be wrong for this Court not to follow that line." (Our emphasis.)

15. The controversial case of *Hirst (no 2)* on prisoner voting rights is discussed below. But it is worth noting that during the period between the Strasbourg Court's 2005 judgment and the 2017 resolution of the incompatibility, the Supreme Court *in R (Chester) v Secretary of State for Justice* [10] declined to issue a declaration of incompatibility as the issue was under active consideration by Parliament. This was notwithstanding the Supreme Court's refusal to go behind with Strasbourg decisions and disapprove of them, as they were invited to do by the Government.

16. The courts continue to adopt a balanced approach to the application of Strasbourg jurisprudence. Thus in the case of *R (Hicks) v Commissioner of Police of the Metropolis*[11] the Court of Appeal applied two well-known Strasbourg cases but decided not to follow a more recent, and factually similar, third case from Germany[12] instead following the minority decision in that case. The court also used domestic law to construe the provisions of Art.5 (1)(c)(lawful arrest or detention). Lord Toulson noted:

> "…*while this court must take into account the Strasbourg case law, in the final analysis it has a judicial choice to make*" (para 32).

17. In *Poshteh Kensington and Chelsea Royal LBC*[13] the Supreme Court considered whether to depart from the Strasbourg decision in *Ali v UK* (2016). The ECtHR had held that Article 6 of the ECHR applied to the duty owed by local housing authorities under s193 of the Housing Act 1996, giving Ms Ali the right to challenge the local authority's decision that it no longer owed her a duty as a homeless person. The Supreme Court declined to follow the Strasbourg decision, not regarding the ECtHR's decision as being sufficient reason to depart from the fully considered and unanimous judgment of the Supreme Court in its earlier decision of *Ali v Birmingham County Council*[14].

18. The recent case of *R (Hallam) v Secretary of State for Justice*[15] raised the issue of whether the restrictive eligibility test for compensation for a miscarriage of justice [16] breached the presumption of innocence under Article 6(2) of the ECHR. It was argued that the decision to refuse Mr Hallam compensation was contrary to the decision of *Allen v UK*[17]. The Supreme Court diverged from Strasbourg case law and the decision in *Allen*, refusing to find the legislation incompatible with the ECHR.

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[10] [2013] UKSC 63 [2014] AC 271
[11] [2014] EWCA Civ 3
[12] Ostendorf v Germany (15598/08), 7 March 2013
[13] [2017] UKSC 36 [2017] AC
[14] [2010]UKSC 8
[15] [2019] UKSC 2; [2019] 2 W.L.R 440
[16] s133(1ZA) of the Criminal Justice Act 1998
[17] 25424/09, 12 July 2013

19. The above summary of relevant case law demonstrates that, aside from some early teething problems, the courts have interpreted and continued to interpret the language of s.2(1) not as creating an obligation on them to follow Strasbourg jurisprudence, but rather as a relevant consideration when interpreting Convention rights allowing for judicial discretion.

20. It cannot be right that domestic courts should be permitted to simply disregard Strasbourg case law; such an approach would tend to undermine principles that are essential to the basic rule of law. It would severely reduce predictability in application of the law, both under the HRA itself and in the interpretation of legislation under s.3(1) (discussed further below). Citizens and public authorities would be less able to obtain clear advice or to inform themselves regarding their rights and obligations. There would be a risk that different interpretations would be given to the same Convention rights. Confusion would result and the costs of litigation would increase.

21. Further, if the domestic courts interpret Convention rights more restrictively than the ECtHR, individuals aggrieved at decisions of the domestic courts will likely exercise their right of petition to the ECtHR to vindicate their Convention rights. The ECtHR will then give rulings in their favour and grant them remedies. The proper protection of their Convention rights at domestic level will have been found to have been inadequate. A primary objective of the HRA, to bring rights home so as to spare individuals from having to go to Strasbourg to vindicate their rights, would be defeated.

(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?

22. Research from 2012, suggests that less than 2% of applications to the European Court of Human Rights result in a finding of a violation. The vast majority of those applications are struck out as being manifestly unfounded and therefore inadmissible[1819]. This suggests that domestic courts are applying the European Court of Human Rights' jurisprudence appropriately and the doctrine of the margin of appreciation is properly respected by both the domestic courts and Strasbourg.

23. In *Hirst v United Kingdom* (No 2)[20] the Grand Chamber found that "*although the margin of appreciation is wide, it is not-all embracing*" and the prisoner voting ban in the UK (via s.3 Representation of the People Act 1983) fell "*outside any acceptable margin of appreciation, however wide that margin might be*" [82], [76].

24. The government invited the Grand Chamber to reconsider its position by way of intervention in *Soppola v Italy (No 3)*[20] but was unsuccessful. The government was prevented by domestic opposition from bringing in legislation to comply with the judgment. In 2015 the Committee of Ministers called upon the UK to continue to engage in a high level dialogue to facilitate

[18] **https://ukhumanrightsblog.com/2012/01/22/is-the-european-court-of-human-rights-obsessivelyinterventionist-andrew-tickell/**

[19] -IX; 42 EHRR 41

[20] (2013) 56 EHRR 19

compliance with the judgment. This resulted in administrative changes to prisoner voting that the Committee of Ministers approved in 2017 on the basis that they satisfied the ECtHR's case law due to the wide margin of appreciation and in 2018 the Council of Europe confirmed that the case was closed[21].

25. The episode was controversial, and took years to resolve, but it showed that where Strasbourg judgments are problematic for member states, the Strasbourg court tends to allow the national authorities leeway on the changes required. It is noteworthy that the changes introduced by the UK are not legislative, but instead administrative. The Strasbourg's court's acceptance of these, limited changes suggests that no changes to the doctrine of the margin of appreciation are required.

26. It is important to note that the real problem in *Hirst* was not the ECtHR's interventionist approach, but the misrepresentation by the UK Government and some media outlets of what the case determined. It was suggested that 'Europe' was requiring the UK to give dangerous prisoners the right to vote, an affront to British democracy, but this was a wholly inaccurate characterisation. The ECtHR simply stated that a blanket ban, without any consideration at all of a more nuanced approach, (such as allowing prisoners on remand who had not been convicted of any offence, or those in the very latter rehabilitative stages of a sentence to vote) was not lawful; there was no requirement to give all prisoners the vote, merely to give some consideration to something less blanket than an outright ban for all prisoners. It is notable that the final 'compromise', accepted by the Council of Europe some 12 years after the UK's approach was first held to be unlawful, gave approximately 100 prisoners (namely those on temporary release and at home under curfew) the right to vote.

27. A further example of the national court's appropriately applying the margin of appreciation can be found in the 'right to die' cases. We refer in particular to the case of *R (Conway) v Secretary of State for Justice*[22] where the Court of Appeal rejected the Justice Secretary's contention that the court was bound to go no further that the ECtHR's ruling in *Pretty v United Kingdom*[23], noting the circularity of this argument

> "*…on his argument the domestic court has to make a decision for itself under a domestic Re G interpretation because the ECtHR has held the matter to fall within the United Kingdom's margin of appreciation, only for the domestic court to be prevented from doing so by having to take into account the very decision which gives the domestic court latitude to make its own decision.*" [28]

28. Thus the Court of Appeal had recognised the ECtHR's ruling that Article 8 was engaged but went on to apply its own analysis of the position. The Court held that the blanket ban on assisted suicide in the Suicide Act 1961 s2(1) was a necessary and proportionate interference with ECHR Article 8.

[21] https://researchbriefings.files.parliament.uk/documents/CBP-7461/CBP-7461.pdf

[22] [2018] EWCA Civ 1431

[23] [2002] EHRR 1

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

29. We consider this question to have a mistaken premise, or at least one which wrongly implies that the current system is inadequate or at risk. In our view there is no issue with the current system, no need to do anything to strengthen it (aside from one possibility addressed at para 40 below), and no risk to its preservation.

30. It is important to note at the outset that it is very rare for the European Court of Human Rights to find a violation by the UK, and to overturn the decisions of the appeal courts in the three United Kingdom jurisdictions. There is a high threshold of admissibility, meaning only cases with substantial merit get past the initial hurdle. Of those that do, defeat is very rare. As such, this is not a significant issue that needs to be addressed.

31. There is a dearth of accurate, comprehensive and up to date research, but a 2012 report by the Equality and Human Rights Commission provided an analysis of applications versus findings of violations. They examined the time periods of 1966 to 2010, as well as between 1999 and 2010. The report found that [p.34-35]:

    - A very small proportion of applications lodged against the UK are admissible. This was 3% for both periods (1999 – 2010 and 1966 – 2010).
    - The UK has a very 'low rate of defeat' at Strasbourg. Of all the applications brought against the UK and allocated for a decision (i.e. before the admissibility stage), only 1.8 per cent eventually result in a judgment finding at least one violation. Put another way, the UK 'loses' only around one in fifty cases brought against it in Strasbourg. This figure is true for both time periods examined.
    - They found that when adjustment was made for repetitive cases, the rate of defeat fell to 1.4 per cent, or about one in 70.
    - Of the total number of judgments in UK cases between 1999 and 2010, around 66% found at least one violation and 16% found no violation. For 1966 to 2019, the figures are 61% and 19% respectively. These statistics include friendly settlements and other types of judgment. If these are not included, the percentage of adverse judgments is higher (81% for 1999-2010; 76% for 19662010).

32. More recently, the 2019 Ministry of Justice report analysing the Court's annual statistical reports from 1959 to 2018 found that:

    - Applications to the Court made against the UK have been on a general downward trend since 2010 [p.12].
    - The UK has the fewest applications of all States at 5 per million. The number for all States combined is 52 per million [p.12].
    - "The numbers of judgments and adverse judgments remains low". [p.12]

33. The case law evidences a healthy level of judicial dialogue between the UK courts and Strasbourg, and where the UK courts do not agree with a Strasbourg decision, or find it insufficiently reasoned, they tend not to follow it. As we have shown in our answer to question 1(a), while some very early cases indicated a lack of judicial dialogue between domestic courts and the ECtHR, and a tendency to follow Strasbourg jurisprudence "*slavishly"*; that is no longer the case.

34. As for the Strasbourg court, other than the rare occasions on which a violation is found to have occurred by the UK, the ECtHR is generally respectful of the judgments of UK courts. In 2011, shortly before becoming President of the European Court of Human Rights, Sir Nicolas Bratza published an article entitled: "The relationship between the UK Courts and Strasbourg"[24], covering the question of whether the court pays adequate respect to judgments of the UK's highest courts:

> *"the Strasbourg Court has… been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act and this because of the very high quality of the judgments of these courts, which have greatly facilitated our task of adjudication. In many cases, the compelling reasoning and analysis of the relevant case-law by the national courts has formed the basis of the Strasbourg Court's own judgment."*

He further writes:

> "*The Court's judgments are replete with statements that customs, policies and practices vary considerably between Contracting States and that we should not attempt to impose uniformity or detailed and specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required in the particular area".*

35. Bratza did not apologise for the more controversial decisions of the court, including:

> *"the laws criminalising all homosexual acts in Northern Ireland (Dudgeon), the total ban on homosexuals joining the military (Lustig-Prean); the court-martial system, with its lack of structural independence between the prosecution and the court itself (Findlay) and more recently and much more controversially, the blanket restriction on the voting rights of serving prisoner (Hirst (No.2).*

36. In those cases, he stated, "*the Court has been careful not only to explain the nature of the incompatibility but, in general, to leave the national authorities to devise a more Conventioncompliant system without itself imposing specific requirements on the State."*

37. He accepted that the court was "*not omniscient*" and should "*show greater awareness of the consequences of its judgments on domestic law and practices*". He recognised that while the Strasbourg court's case law should evolve to address new situations, it "*should show respect for precedent and recognise the vital need for consistency*" and "*legal certainty*". He proposed: "*increased dialogue between the judges of the courts, both informally and through their judgments*".

[24] European Human Rights Law Review (E.H.R.L.R. (2011) No.5 Pages 505-512) (available on Westlaw)

38. The case of *Horncastle*, cited above, is a good example of that dialogue working well. Lady Hale commented shortly before the Strasbourg judgment was published:

> *"The Criminal Justice Act 2003 provides for the admissibility of hearsay evidence in certain circumstances, including when the person making a witness statement has since died. In AlKhawaja, a Chamber of the Strasbourg Court held that it was a breach of Article 6 where this was the sole and decisive evidence against the defendant even though there was ample corroboration for what the deceased victim had said. So when the same problem came up before the Supreme Court in Horncastle, the Court went to a great deal of trouble to explain to Strasbourg why we thought they were wrong and that a fair trial could still be had in those circumstances. The object was to persuade the Grand Chamber to hear the AlKhawaja case and to reach a different conclusion."*[25]

39. In the event the Strasbourg judges agreed with the Supreme Court that a conviction based solely or decisively on the statement of an absent witness would not automatically result in a breach of article 6. After the judgment Sir Bratza commended the approach of the Supreme Court and called it: "*a very valuable exchange, conducted in a constructive spirit on both sides*."[26]

40. A less explicit example is found in the case of *AM (Zimbabwe) v SSHD*[27]. In that case, the Supreme Court considered whether the removal of seriously or terminally ill persons would breach their rights under Article 3 ECHR. There had previously been a number of domestic and ECtHR cases dealing with this issue. Both courts had appeared hesitant to broaden the applicability of Article 3 in situations of such removals (which was very strictly applied in exceptional circumstances). In 2016, the ECtHR addressed this in *Paposhvili v Belgium* (see above) and ultimately slightly broadened the scope of Article 3 in these situations. The Supreme Court then followed this approach in *AM*, diverging from the more stringent test set out by the House of Lords in *N v SSHD*[28]. This is quite a complicated line of case law, which is explained well in a note from One Pump Court, which concludes that:

> "[*T]he Supreme Court used its judgment as an opportunity to assert both its independence from and its agreement with the ECtHR. Initially, the Court openly states that its refusal to follow a decision of the ECtHR can no longer be regarded as always inappropriate. However, it subsequently finds that there is no question they are refusing to follow the decision in Paposhvili. Instead, the Court declares it will depart from the House of Lords decision in N, due partly to the "unease" of the distinction contained within it*."

41. We have only one suggestion for a way of strengthening judicial dialogue, namely the UK considering signing and ratifying Protocol 16 of the ECHR. This would allow the UK Supreme Court to seek advisory opinions from the ECtHR. However this has significant disadvantages which need to be carefully considered. One obvious disadvantage would be the likely delay that would be caused to the resolution of cases, while the court awaited Strasbourg court's opinion.

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[25] *Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?* Human Rights Law Review 12:1 Crown Copyright [2012]

[26] *"Dialogue between judges, European Court of Human Rights, Council of Europe, 2012*

[27] [2020] UKSC 17

[28] [2005] 2 AC 296

Theme 2: 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. We do not consider any change to the framework to be justified or necessary. While s.3 in particular may have been construed by government as dangerously undermining parliamentary sovereignty, issues have only arisen in a tiny minority of cases, and far from risking undermining parliamentary sovereignty, ss.3 and 4 HRA are vital in preserving it.

43. The HRA is a very carefully and intentionally drafted piece of legislation. Every government bill is required, on publication, to be prefaced by a statement from the responsible minister as to whether, in his or her opinion, the provisions of the bill are compatible with the Convention. If unable to do so, a minister can make a statement that the government recognises the legislation is incompatible but wishes to proceed anyway.

44. A minister would therefore be perfectly entitled to state that a bill was not Conventioncompliant, and provided parliament so approved it, this would become law. Any bill introduced with a statement of compatibility, and enacted by parliament, is considered and expressly stated and intended by parliament to be compatible with the HRA.

45. In turn, s.3 HRA requires the courts to give effect to legislation passed by parliament in a way which is compatible with rights under the ECHR "*so far as it is possible to do so*." Since a minster has proposed and parliament has enacted legislation on the specific basis that it is HRA compatible, it is by no means controversial that the domestic courts, as required by parliament by virtue of s.3HRA, should try their utmost - going "*as far as it is possible"* - to give effect to parliament's will by interpreting legislation as being, and being intended to be, HRA compatible.

46. S.4 is a discretionary remedy whereby, if the court cannot reach an HRA–compatible interpretation under s.3, the court holds a provision of primary legislation to be incompatible with the ECHR. Only certain courts, namely the High Court and above, have the power to grant this remedy.

47. Significantly, a declaration is not binding on any party and does not affect the continuing operation, validity, meaning or effect of the legislation in question. It merely triggers the power to take remedial action under s.10 of the HRA. Government may introduce primary or secondary legislation to correct the incompatibility or alternatively decide to do nothing.

48. Declarations of incompatibility under s4 are only rarely granted. In the most recent report to 7 December 2020[29], 43 were stated as having been made in the 20 year period since the enactment of the HRA, nine of which had been overturned on appeal and one of which was still potentially repealable.

[29] https://www.gov.uk/government/publications/responding-to-human-rights-judgments-2019-to-2020

49. On a very blunt analysis, s.3 takes power away from the government of the day, the Courts interpreting legislation in line with parliament's intention (though government is fully entitled to introduce new amended legislation to address the issue), while s4 hands it squarely to the government (until and unless they introduce new legislation to be considered by parliament). It appears that this is at the crux of the government-led review of the HRA.

50. Parliamentary sovereignty is not placed at risk by ss.3 and/or s4 HRA, as some of the questions would seem to suggest/invite. Any change to ss.3 and 4 of the HRA would risk dangerously empowering government and fundamentally de-stabilising the vitally important power balance between parliament, government the judiciary. This must be resisted at all costs.

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)?

51. Despite the current Government's apparent belief that the courts have been over-zealous in their re-interpretation of legislation, inconsistent with the will of parliament, and its indication that this is a dangerous and pressing issue; in reality there are very few cases in which legislation has been interpreted in this way.

52. The Conservative Party's 2014 strategy report argued that the effect of s.3 HRA was to undermine "*the sovereignty of Parliament, and democratic accountability to the public*"[30]. The report claims that this rule has been abused by judges who have gone to "*artificial lengths*" to ensure the meaning of the legislation is reconcilable with Convention rights even in cases where this interpretation is inconsistent with parliament's legislative intention. This is as misleading as it is inaccurate.

53. The above report gives just one example of this occurring, from 2001. It refers to *R v Lambert*[31] in which the House of Lords found s.28 Misuse of Drugs Act 1971 (MDA) incompatible with Article 6 as it effectively reversed the burden of proof in respect of offences under s.5(3) MDA. Applying s.3 HRA, the court interpreted s.28 MDA to mean that the evidential burden lay with the defendant, while the prosecution retained the burden of proof.

54. We do not accept, certainly on the basis of this example, that s.3 has been abused by judges. Indeed, where the s.3 obligation has arisen the courts have taken care to interpret legislation consistently with parliament's intention in enacting that piece of legislation wherever possible, and only straying beyond that in specific and justified circumstances, in line with parliament's stated intention in s.3 of the HRA.

[30] Conservatives, 'Protecting Human Rights in the UK: The Conservatives' Proposals for changing Britain's Human Rights Laws, published by Chris Grayling MP on 3 October 2014

[31] [2001] UKHL 37

55. In *Ghaidan v Godin-Mendoza*[32] the Rent Act 1977 was read in such a way as to allow equal rights to the surviving partner from a homosexual couple as from a heterosexual couple.
Parliament could have responded by amending the law to make clear that only heterosexual couples were intended to benefit from those specific tenancy rights, but chose not to, presumably because the court's approach was reasonable, despite being inconsistent with parliament's original intention.

56. This is not an example of judges going to artificial lengths, nor of the sovereignty of parliament, or democratic accountability, being undermined. Indeed in that case , Lord Nicholls outlined how narrowly the court's powers of interpretation under s.3 should be used, citing previous examples of cases which would have gone too far:

> *"33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant.* ***The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must****, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, '****go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped****. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.*
>
> *34. Both these features were present in In re S (Minors)(Care Order: Implementation of Care Plan) [2002] 2 AC 291. There the proposed 'starring system' was inconsistent in an important respect with the scheme of the Children Act 1989, and the proposed system had* ***far-reaching practical ramifications for local authorities****. Again, in R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837 section 29 of the Crime (Sentences) Act 1997 could not be read in a Convention-compliant way without giving the section* ***a meaning inconsistent with an important feature expressed clearly in the legislation****. In Bellinger v Bellinger [2003] 2 AC 467 recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973* ***would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures****."* (Our emphasis.)

57. Post-*Ghaidan,* there is the notable case of *R. (on the application of Wilkinson) v Inland Revenue Commissioners*[33] which clearly illustrates the Courts' hesitancy about interpreting a statute inconsistently with parliament's intention. In that case the House of Lords dismissed the appeal, holding that it was not possible to read 'widow' as 'widower' under s.262 of the Income and Corporation Taxes Act 1998, notwithstanding s.3 of the HRA. This meant that Mr Wilkinson was not entitled to a tax allowance equivalent to a widow's bereavement allowance, which he would have been allowed had he been a widower; he invited the Court to read s.262 as including widowers.

[32] [2004] UKHL 30

[33] [2005] UKHL 30

58. Lord Hoffman stated in the leading judgment:

> *"18. It is therefore sometimes possible, as my noble and learned friend Lord Nicholls of Birkenhead pointed out in Ghaidan v Godin-Mendoza* [2004] 2 AC 557*, paras 26-33, to construe a statutory provision as referring to, or qualified by, some general concept implied rather than expressly mentioned in the language used by Parliament. Thus in the Ghaidan case, the words "as his or her wife or husband" (my emphasis) were interpreted to refer to a relationship of social and sexual intimacy exemplified by, but not limited to, the heterosexual relationship of husband and wife. The deemed background of the Convention enabled the House to adopt this construction in preference to the more restricted construction adopted before the 1998 Act came into force. It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the Ghaidan case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the "intention of Parliament". But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.*
>
> *19. In the present case, there is no way in which any reasonable reader could understand the word "widow" to refer to the more general concept of a surviving spouse. The contrary indications in the language of Part VII of the 1988 Act are too strong*."

59. In practice, s.3 works as a sophisticated protocol for when parliament inadvertently compromises rights of individuals (especially disadvantaged minority groups) that are enshrined in the ECHR.

60. As currently drafted, s.3 enables the domestic court, then and there, to give effect to the will of parliament that legislation in question be interpreted in line with the ECHR, and thereby to remedy the wrongs being suffered by the a claimant. It is often not just the claimant who stands to be positively impacted by this, but frequently countless other vulnerable individuals, whose welfare, safety or livelihood depend on the decision of the court.

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?

61. We disagree in the strongest of terms with any proposal to amend or repeal s.3 HRA. There is no problem that needs to be addressed and any problem inferred has been overstated; the current system works well and there is only a handful of cases in which real tension has arisen around interpretation under s.3 (see above).

62. It is a bold proposition to retrospectively amend case law in light of subsequent amendments to legislation. Without some indication of how it would be done and who it would be done by, it is difficult to engage with this question.

63. It would certainly be unprecedented, and we wonder if the time and cost of devising and implementing a process to effectively overrule some two decades of affected case law, would be justifiable, leaving aside the deleterious consequences for legal certainty that would follow.

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?

64. In enacting s.4 HRA in conjunction with s.3, parliament intended that where it is impossible to read legislation compatibly with the ECHR, it be left to the government and then parliament to remedy the situation. This was intended to be a position of last resort, and obviously so. Parliamentary sovereignty is entirely recognised and preserved by this arrangement. It is not clear how the role of parliament could better be enhanced than by giving effect to its will as clearly stated in the HRA.

65. The s.3/s.4 process works as it does precisely because it is assumed that parliament's starting point, by enacting any legislation (unless expressly passed with a declaration under s.19 HRA) intends it to be HRA compliant.

66. It appears that what is being proposed is for the declaration of incompatibility to be considered much sooner in the process of interpretation, so that rather than grappling with a potential incompatibility and putting their minds to whether the legislation in question can be interpreted compatibly, judges would proceed straight to a declaration of incompatibility and effectively refer any such difficulties to the government/parliament to resolve.

67. So presumably, rather than seeking to interpret legislation in line with the ECHR "*as far as is possible*", the domestic courts would be required to seek to interpret legislation in an HRA compliant way only very cursorily before jumping to the conclusion it was not HRA compliant and granting a declaration of incompatibility, thereby ensuring the matter is referred back to government to introduce new legislation and parliament to enact it.

68. This is quite simply not necessary. Cases such as of *R. (on the application of Wilkinson) v Inland Revenue Commissioners* (cited above) show clearly that as it is, the courts are hesitant about unduly straining the language of legislation under s.3. The balance between ss.3 and 4 is carefully drawn, and does not need to be re-drawn.

69. The proposition is problematic, not least from the perspective of undermining parliamentary sovereignty. If an Act states on its face that it is compatible with the HRA, parliament's intention could not be clearer. To require courts to give up on trying to give effect to that intention at an earlier stage, would reduce rather than enhance parliamentary sovereignty.

70. It would also over-burden parliament and significantly delay resolution for those affected by the decision, who are often the most vulnerable in society and the least able to wait . According to the most recent report, of the 43 declarations of incompatibility made since the HRA's inception, eight were corrected by remedial order and 15 by primary or secondary legislation. This hardly places an onerous burden on the government or parliament. Were the s4 process

to be changed as proposed, and to become commonplace, the numbers would soar and the position would rapidly become unworkable.

71. As above, s.3 provides an important safeguard, meaning that wrongs can be remedied immediately by the domestic court, where possible. Declarations under Article 4 result in nothing immediate, and the time taken between the decision of a domestic court and the HRA compatible legislation can be lengthy; in the meantime individuals continue to live without a HRA compliant remedy. As well as placing an intolerable burden on parliament, limiting the ability of judges to interpret legislation as they currently do would therefore likely deny citizens the right to an effective remedy.

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

72. Derogation orders can only be challenged on normal public law principles and subject to the usual constraints on judicial reviews. As such the remedies available are those available in judicial review, including quashing orders. We see no need to change this, though defer to others with greater experience in this area.

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?

73. The current approach is for the courts to interpret secondary legislation compatibly with the HRA, if possible, consistent with s.3. If it is incompatible then it is ultra vires and can be quashed. The ability of courts to quash secondary legislation that is ultra vires is not new and extends to all legislation, not just the HRA; this position is constitutionally orthodox. It would be without precedent if this power were limited solely in respect of the HRA.

74. Unlike primary legislation, introduced with scrutiny via an act of parliament, secondary legislation can be introduced by the government of the day, often very speedily and with little or no debate or parliamentary scrutiny (see for example the raft of regulations introduced following the outbreak of the coronavirus pandemic). Government, however large its majority, is not sovereign. It is answerable to parliament and the courts; this is vital to the UK's system of checks and balances. If the government introduces secondary legislation which exceeds the powers granted to government by parliament via the relevant primary legislation, or which is otherwise unlawful, it is essential that the courts act and have the power to act swiftly and decisively, quashing the legislation. Were it not for this power, government and not parliament would be sovereign.

75. It would be dangerous were a change to be made, granting the government more power and preventing the courts from quashing secondary legislation. It would seriously undermine the principle of parliamentary sovereignty.

76. As with the other questions in this consultation, this is a non-issue the majority of the time. It is rare that secondary legislation is quashed[34] Even though the courts have the power to grant a quashing order, they do not always do so[35] . While it may be distasteful to government when this happens, it is a vital part of our constitution; the fact that there is conflict between government and the courts at such times is not a sign that the system is broken but rather a sign of a healthily functioning democracy, with an appropriate system of checks and balances.

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?[36]

77. Hodge Jones & Allen has represented UK armed forces personnel ('soldiers') and their families in relation to combat deaths and training and other accidents whilst deployed on active service overseas. The most notable such case in relation to the legal application of human rights protections is *Smith v Ministry of Defence*[37]. This response draws primarily on those experiences and the effects of the proposals on soldiers rather than other extra territorial applications of the HRA.

78. First, to the extent that this review seeks to undermine the rights and protections of soldiers whilst deployed overseas, it is the latest in a long line of attempts to do so, both under the HRA and the common law.

79. In 2017 HJA responded to a Ministry of Defence ('MoD') consultation 'Better Combat Compensation' which under the guise of a commitment to the Military Covenant (which included suggesting a no fault compensation scheme for soldiers injured on deployment) the Government sought to restrict judicial oversight of the military on overseas deployment and expand the common law concept of 'combat immunity'. One point we made in our submission was that:

> *"The State should not be above the law - the principle established in Entick v. Carrington [1765] 19 State TR 1029 was that the state may act lawfully only in a manner prescribed by statute or common law. The executive cannot simply rely on the interests of the state as a justification for the commission of wrongs. The complaints about 'judicialisation' of law amount to tipping the balance in favour of the executive and removing limits to the scope of executive power.*

[34] See for example *re Brewster* in which local authority pension regulations were found to discriminate against unmarried couples.

[35] See for example RR v SSWP [2019] UKSC 52

[36] 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.

[37] Smith & Ors v Ministry of Defence [2013] UKSC 41

However, there is a balance to be struck. In relation to combat it is acknowledged that there should be restrictions to this judicial oversight and the concept of 'combat immunity' has grown up in the common law. "

80. In 2019 HJA responded to an MoD consultation 'Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the UK'. The Defence Secretary's foreword lauded the 'incredible job' done by soldiers and said "*They are prepared to risk their lives for us. We owe them a huge debt. We also owe them justice and fairness*". The Consultation then went on to conflate the issue of allegations made by third parties against our soldiers with issues relating to the protection of soldiers from failures by the MoD. Without declaring any conflict of interest the MoD consultation sought to introduce a longstop for bringing claims for death and injury which took place outside the UK (which could only serve to protect the MoD's own interests given that civil claims are brought against the MoD and not individual soldiers).

81. In 2020 the MoD introduced the Overseas Operations (Service Personnel and Veterans) Bill[38] which was again publicised as protecting our brave soldiers from vexatious litigation whilst seeking to remove avenues open for legal redress by soldiers who have been failed by the MoD such as a human rights longstop to restrict extensions to time limit for bringing claims to 6 years. As the Royal British Legion director general succinctly indicated to MPs on the Commons committee considering the Bill; "I think it is protecting the MoD, rather than the service personnel."

82. There is a striking dishonesty in the Government's approach to this issue. Often the truth has been turned on its head so that the act of removing rights and protections of UK soldiers has been sold as protecting them. Of course it has been immensely convenient to introduce restrictions to claims brought by soldiers against the MoD under the cover of seeking to restrict legal redress for vexatious allegations brought by third parties against UK soldiers. There is a war of attrition going on, no doubt in the hope that those calling out this dishonesty will grow weary of defending their position.

83. Behind the scenes there has been a, presumably well funded, campaign to restrict soldiers' rights and legal protections via the (opaquely funded) Policy Exchange think tank. This has involved a number of publications announcing that 'lawcreep' endangers our troops and national security. Publications include the 'Fog of War' (2013) 'Clearing the Fog of Law' (2015), and 'Resisting the judicialisation of War' (2019) and these involve, amongst other things, curtailing the application of the HRA in a military context and restricting avenues of redress for our troops when they are failed by the Government.

84. We note that one of the members of the panel is also a member of this highly influential think tank and we are concerned that there is a potential conflict of interest that arises. The panel should be vigilant in ensuring that the Policy Exchange publications, in so far as they are considered, are treated with the caution they deserve. They are partisan opinion pieces and not fact.

[38] (HC Bill 117)

The Snatch Land Rover case

85. This case led to the much debated *Smith v MoD* Supreme Court ruling which defined the application of the HRA to UK soldiers deployed overseas. In order to respond to the questions posed in this review (what is the current position and should it be changed) we make two broad points; firstly, the case highlights serious failures by the MoD to protect UK soldiers (which were exposed as a consequence of the legal challenges brought by their families) and second, the Supreme Court decision is carefully crafted to ensure that the obligations placed on the UK are proportionate and reasonable.

Highlighting the 'scandal' of defective vehicles

86. Phillip Hewett died in July 2005 in a Snatch Land Rover vehicle in Iraq. His inquest, which was only three hours long, took place in 2007. Despite his mother, Sue Smith's, concerns about the safety of the vehicle the Coroner indicated that it was outwith the scope of the inquest to investigate the use of Snatch. The inquest looked only at the specific circumstances of the IED explosion which killed Phillip.

87. Sue Smith approached us after the inquest as she was concerned about the continued use of Snatch in Iraq and Afghanistan and the failure to learn obvious lessons from her son's death. She instructed us to consider if there was a legal obligation on the Government to investigate Snatch under Article 2 HRA. We wrote and asked the Secretary of State for Defence to hold a public inquiry into the use of Snatch but on 16 December 2008 he refused to do so. Simultaneously the MoD defended the use of Snatch claiming it played an important role amongst a panoply of other armoured vehicles in theatre. It was not until 2010 that Snatch were removed from theatre.

88. A judicial review was issued *R (Susan Smith) v SSD* (2009), relying on Article 2 HRA as requiring an inquiry. This case was settled between the parties after the permission stage when the SSD agreed that an investigation into Snatch could form part of the Iraq Inquiry which had just been established. It was recognised that this inquiry would take years.

89. Sue Smith was concerned by the ongoing failure by the MoD to recognise that Snatch were unsafe. She issued a civil claim in 2008 which the MoD sought to strike out and this would ultimately lead to the Supreme Court's 2013 decision in Smith v MoD which examined and decided upon the applicability of the HRA to UK soldiers who died overseas.

90. Sue felt it important that her son's sacrifice should be met by a sense of responsibility on the part of the MoD to take reasonable steps to protect soldiers from known risks. The MoD took a striking, and we would say reprehensible, approach to the case. They claimed it would not be 'fair and reasonable' to impose upon them a duty to protect soldiers in combat, they said that soldiers voluntarily put themselves at risk of harm and that the courts are not equipped to resolve military issues relating to combat. It claimed that to owe any duty would place a 'wholly disproportionate burden on the state'. It even claimed that imposing such a duty would devalue what soldiers do.

91. It is important to recognise that whilst the MoD defended its use of Snatch Land Rovers, these vehicles were commonly described by soldiers on the ground as 'mobile coffins'. During the course of the case it became more commonly acknowledged that these vehicles provided insufficient protection from the IEDs used by insurgents against soldiers in Iraq and Afghanistan. After the Supreme Court judgment in Smith we heard former military chiefs describing the Snatch land rover as wholly inadequate and even "*a scandal*". None of this would have emerged had Sue Smith and the other families not litigated to seek justice.

92. The Smith litigation – brought under the HRA - gave rise to a wider understanding of the problems with Snatch land rovers.

93. In the later 2016 Chilcot Inquiry report it was found that delays in replacing Snatch Land Rover vehicles should not have been tolerated. The then Defence Secretary acknowledged the findings of the report including that "*aspects of our military operations in Iraq were not planned well enough*". He also acknowledged that Sir John's findings "*throw a harsh light on the circumstances in which deaths and injuries are sustained on the battlefield*".

94. Sue Smith and other families continued to seek recognition from the MoD that Snatch land rovers were unsafe and almost a decade after litigation began the Secretary of State, the Rt Hon Sir Michael Fallon KCB finally apologised for the delay in replacing Snatch with alternative protected vehicles "*which could have saved lives*". Without the litigation this would not have happened.

95. On 8 September 2016 Stephen Lovegrove, Permanent Secretary, Ministry of Defence, in a civil service blog commented upon the Iraq Inquiry Report stating where the MoD fall short they will be taking action to make sure they do it better in future. He states "*we will be transparent about what we are doing*. *Of course, there is a certain amount in the national security sphere that has to be done in confidence, but there is also a lot that doesn't need to be, and we want to encourage a really open dialogue about what needs to change*". He also referred to creating a "*culture that does not stifle debate and challenge*".

96. Contrary to this sentiment, since this point the MoD has made a number of attempts to restrict challenge, starting in 2016 with a proposal to derogate from ECHR in times of conflict.

Smith v MoD – the legal parameters

97. Article 1 ECHR requires member states to secure to everyone within its jurisdiction the rights and freedoms of the ECHR. Jurisdiction is primarily territorial[39] although there are exceptions to this. This principle remains unchanged although the Iraq and Afghanistan conflicts have tested it. The exceptions were explored fall into two main categories, (i) jurisdiction based on the power or control that may be exercised by a member state over an individual and ii) jurisdiction based on control exercised by the member state over a foreign territory[40].

[39] Bankovic & Ors v Belgium & Ors, (admissibility) [GC] Application no. 52207/99 [2001] ECHR 890

[40] Al-Skeini v. United Kingdom, [GC] App. No. 55721/07 [2011]

98. The Supreme Court in *Smith* examined the application of the exceptions to territoriality in the context of UK soldiers. It overturned its earlier reasoning for extending Article 1 to UK soldiers deployed on active service (*R (Catherine Smith) v MoD*[41] - a case in which we were also instructed on behalf of the Claimant) and now held, unanimously, that soldiers were under the personal jurisdiction of the UK at all times when serving outside of the UK. Applying *Al-Skeini* the Supreme Court found soldiers came within the UK's jurisdiction for the purposes of Article 1 as a principle of state authority and control over them. They noted it would be anomalous for UK soldiers to bring Iraqi civilians, over whom they exercised control, through the UK's occupation and control of southern Iraq, within the UK's jurisdiction if they themselves remained outside it (which was a position they were asked to adopt by the MoD).

99. In our submission, and regardless of the earlier decision in *Al-Skeini*, this ruling was entirely logical (and as our client said "common sense"). As explained by Lord Hope: *"Servicemen and women relinquish almost total control over their lives to the state."* It was no more than stating the obvious that the Court held that troops remain within the UK's jurisdiction for the purpose of Article 1 while deployed overseas. It must surely be one of the most obvious exceptions to the *Bankovic* definition of jurisdiction. Soldiers remain under the authority and control of the UK state throughout their service.

100. The Court highlighted that in its extra-territorial application, the package of rights in the ECHR can be "*divided and tailored*" to the particular circumstances of the extra-territorial act in question. This meant that there would not be excessive demands placed upon the authorities and that they would only be obliged to secure the rights and freedoms that were relevant to the situation.

101. In relation to the positive obligation under Article 2 the Court further held, by a majority, that the question of whether a duty to protect life under Article 2 ECHR (or in negligence) was engaged required an assessment of the facts. Since these issues must be determined at trial, the Court found that the case should not be struck out.

102. The Supreme Court gave guidance to lower courts on where Article 2 was engaged. Lord Hope emphasised the careful balance that should be applied. He indicated for instance (para 72): '*the Court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the Convention*'

103. Whilst Lord Mance did raise concerns about judicialising conflict he was in a minority of two. The other judges recognised the need to find a fair balance between the rights of the individual and the State. The Supreme Court was extremely careful to make clear that the lower courts must avoid imposing obligations on the military which are unrealistic or disproportionate but give effect to obligations where reasonable to do so. Lord Hope who gave the majority judgment, was at pains to stress that nothing should hamper the ability of our military to defend our nation. The ruling sets out that high level political and military decisions are not to be

[41] *R (Catherine Smith) v MoD* [2011] 1 AC 1

interfered with, equally decisions taken on the ground by Commanders will be given the widest possible margin of appreciation. It is only the middle ground that the Courts will have a proper place in deciding whether reasonable steps were taken by the MoD to prevent avoidable harm to armed forces personnel. The Courts would be entirely guided by what is fair and reasonable in all the circumstances.

104. In short this is a careful judgment that has in mind a reasonable and proportionate role to be played by the courts, guided by long held precedent, in relation to military operations.

105. However, shortly after the Supreme Court decision there began what can only be described as a misinformation campaign against the case. For instance in Dominic Raab, MP's article "*Allowing British soldiers to sue could put troops at even greater risk*". This has continued unabated ever since.

Changing the extra -territorial application of the HRA

106. The Government has indicated a desire to derogate from the ECHR (under Article 15) during times of military conflict. In clause 12 of the Overseas Operations Bill, which is currently passing through Parliament, the Secretary of State is required to consider derogation. There have at times been calls for the UK to withdraw from the ECHR itself[42] although we note the Chair of this review has indicated that 'The review proceeds on the basis that the UK will remain a signatory to the convention.'

107. Whether or not it is possible to derogate (it is not in relation to Article 2 and 3 obligations) the fact remains that UK soldiers remain liable in international law for failings to protect the human rights of others. Whilst it may be superficially attractive to soldiers to restrict HRA scrutiny within UK courts it must surely be dangerous to encourage soldiers to believe that 'human rights' are suspended whilst they are deployed overseas. This will risk soldiers falling foul of internationally recognised human rights standards.

108. An illustration of this issue can be found in the treatment of detainees, where, the MoD said that the continued use of one of the five banned interrogation techniques should not be considered a violation of Article 3. In 2017 the High Court (Leggatt J) dealt with this argument (rightly) robustly:

> *Despite its unequivocal published policy, the MoD felt able to submit at the trial of MRE and KSU that the hooding of captured persons does not amount to inhuman and degrading treatment under article 3 of the European Convention where it is done for short periods of time during transit for reasons of operational security, and also to deny that the hooding of MRE and KSU for the duration of the journey from Umm Qasr port to Camp Bucca was a breach of article 3.*
>
> *…*
>
> *As the lessons of Northern Ireland, the Baha Mousa inquiry and the Al-Bazzouni case do not seem to have been fully absorbed by the MoD, I consider that the court should now*

[42] For instance Policy Exchange, 'Protecting Those Who Serve' 2019.

make it clear in unequivocal terms that putting sandbags (or other hoods) over the heads of prisoners at any time and for whatever purpose is a form of degrading treatment which insults human dignity and violates article 3 of the European Convention. It is also, in the context of an international armed conflict, a violation of article 13 of Geneva III, which requires prisoners to be humanely treated at all times.

An incantation of "operational security" cannot justify treating prisoners in a degrading manner.[43]

109. The interests of our soldiers are best served by retaining clearly defined rules regarding human rights. Whilst some of the legal action brought by Iraqi civilians against UK troops has been widely criticised others have been meritorious and therefore wrongly depicted. In our submission there have been significant benefits from exposing bad behaviour which should be recognised. The Systemic Issues Working Group was a MoD body tasked with identifying and addressing systemic problems arising from military operations overseas. It referenced 'judicial proceedings' and civil litigation in its reports, identifying practices that were of concern and what action was needed to address them. Without that litigation, those 'systemic issues' may well not have been identified.

110. The same applies to legal challenges brought by soldiers and their families against the MoD. These have exposed failings which have called to be rectified. In our experience the MoD has shown no aptitude for learning lessons from its own internal investigations – indeed in many cases (as with the Snatch land rover vehicles) unless they have been forced to confront the issue systemic failings have simply not been investigated but have been overlooked or denied.

111. Proposed extra-territorial restrictions to the application of the HRA come at a time the MoD is also seeking to extend the common law concept of 'combat immunity' to restrict common law claims arising out of deployment. In our view these changes are unhelpful and will not serve to protect soldiers. In our experience there is no clamour for the removal of human rights protections amongst the military.

112. It would be a retrograde step for the UK to fail to recognise the fundamental human rights of its own soldiers at precisely the point they are asked to put themselves most at risk in the national interest. The Government should be enhancing their rights if anything, not rendering them peculiarly disadvantaged in our society by removing rights held by everyone else. Armed forces personnel have been described as 'civilians in uniform'. In 2006 the Organisation for Security and Co-operation in Europe met to discuss the protection of human rights of our armed forces. The then Director of the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) said:

> "*As 'citizens in uniform', armed forces personnel, whether they be conscripts or volunteers, are entitled to the same human rights and fundamental freedoms as any*

[43] *Alseran, Al-Waheed, MRE, KSU v Ministry of Defence* [2017] EWHC 3289 (QB), paras 494-495

other citizen[44]*…And when the human rights of soldiers are protected within their own national armed forces they are more likely to respect the rights of others – soldiers and civilians – both during peacetime and armed conflict."*

113. The investigative obligation under Article 2 involves a requirement to learn lessons where risk to life is identified. If Coroner's inquests relating to deaths on deployment are not held under Article 2 there is less scope for scrutiny, not least because there is a strong chance that military families will not be granted legal aid funding to seek independent representation. We have been instructed in various military inquests and in our view, unless it is an Article 2 inquest there is a very real risk that failings that occur on deployment will not receive the scrutiny they require in order to learn lessons to prevent future deaths.

114. Meaningful scrutiny of the MoD will be affected by the various suggested changes which are designed to prevent soldiers and their families from challenging MoD failings. The balance is already weighted in favour of the MoD and any further removal of protections to individual soldiers and their families is likely to make it less likely that the MoD will learn lessons from its mistakes. Therefore we would say that, contrary to the points made by critics of the HRA that soldiers' safety will be enhanced by restricting their access to the courts we would say, resoundingly, the opposite is true.

115. This review of the HRA, in terms of extra territorial application to UK soldiers deployed overseas should be recognised as self-serving on the part of the Government as it seeks to restrict scrutiny and challenge of its actions. The best interests of soldiers are served by them retaining their rights. Just as the UK's authority over its soldiers is unchanged wherever the soldiers are stationed, whether in the UK or overseas, so too should the obligations owed by the state to its troops. In summary, it is not in the interests of soldiers to change the territorial application of the HRA or to in any way restrict their right to seek remedies. This will make our soldiers less safe not more.

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?

116. We have no specific suggestions regarding this question.

Other comments and suggestions – The real case for change

117. We consider that there are some serious issues that need to be addressed in relation to the HRA, but not with s2, 3, 4 or any of the other provisions of the Act itself.

[44] Whilst recognising curtailments of the liberties of armed forces personnel in order to maintain discipline and train effectively for the hardships of military action - such curtailments should be '*of an exceptional nature, provided for by law, and applied consistently in a manner strictly proportionate to the aim of the law*.'

118. The UK was instrumental in drafting and promoting the Convention and the HRA was specifically enacted in order that Claimants could enforce their rights in the UK. However there is a fundamental issue with the rhetoric around both Convention rights and the HRA, with constant suggestions from the current Government, at times explicitly stated, that the laws are being imposed by Europe, not British and offensive to parliamentary sovereignty.

119. On 13 January 2014, Chris Grayling, then Minister for Justice under the Coalition Government, stated:

> "*We have to curtail the role of the court in the UK. We have to replace the Human Rights Act…which...is one of the key reasons why European Court of human rights seems to have such sway in the UK".*

120. These were not simply the words of one rogue Minister; indeed the Conservative Party Manifesto of 2015 (p.60) stated:

> "*The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British Courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK."*

121. Such assertions are dangerously misleading. Government and the media have an important role to pay in disabusing the public of the myths surrounding this. Convention rights are inherently British, co-authored by the British and intended by parliament to be enforceable in the UK. These rights are not foreign, "other", or being imposed by Europe.

122. While the current consultation claims not to be looking at the Convention rights themselves, at the crux of the Government's objection to the operation of the HRA, like previous Conservative governments, appears to be, unsurprisingly perhaps, a dislike of any challenge to its authority. It has been convenient to undermine confidence in the HRA by focusing on cases preserving human rights protections for marginalised or unpopular groups. Human rights are universal - an economic migrant or convicted serial offender does not forfeit their Convention rights as a result of their conduct. Convention rights are not contingent upon compliance with social responsibilities and sit uneasily with the "*rights and responsibilities"* arguments proposed by consecutive Conservative prime ministers and home secretaries. It is in these situations, when faced with needing to uphold the rights of unpopular minorities, that the government has frequently acted unlawfully before seeking to shift the blame to Strasbourg for having to enforce these rights. The ensuing government commentary and media coverage stokes and arguably is designed to stoke antipathy against the claimants and those in similar positions; Europe is scapegoated.

123. In the aftermath of the Nazi atrocities in the Second World War Britain helped craft, and British traditions heavily influenced, the EHCR. After the human rights abuses experienced it was recognised as a way to enforce high standards of rights across Europe and to help secure and promote peace and justice across the continent. It also reflected international standards which many countries have signed up to including the UK. It is an important act of cooperation which has benefitted many people, especially marginalised and vulnerable groups – with UK court

decisions being influential across the continent and beyond. The misleading rhetoric about the HRA, and any attempt to unpick it as this review implies, will only serve to diminish the UKs international reputation as a protector of human rights.

124. We suggest that what is in fact needed is a wholesale change of approach and a public information and myth-busting campaign; ss.2, 3 and 4 of the HRA are not the crux of the problem.

Please do not hesitate to contact us if you require any further information or wish to discuss any details within our response

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