Lord Carlile of Berriew – Call for Evidence Response

Theme One

The first theme deals with the **relationship between domestic courts and the European Court of Human Rights (ECtHR).**

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

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

1. 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?

It has been applied in practice. However, the quality of the application is uneven. For example, the interest and knowledge of judges of the ECHR and ECtHR jurisprudence varies a good deal, and can frustrate knowledgeable advocates. There is a need for the Judicial College to provide increased specific and focused training at all levels including tribunals.

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

I think this is a matter for the Higher Courts. Just as the CACD issues sentencing guideline cases from time to time to complement the product of the Sentencing Council, there is a good case for issues of real HR principle to be regarded and reported as guideline cases.

3. 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?

The dialogue is slow and the results patchy. Unfortunately this is a symptom of a large backlog at the ECtHR, and of very variable judicial quality there. The UK judges in all the major international courts should hold at least the status of a High Court judge, and should be able to return to the UK in such status (as happened with Adrian Fulford when he was appointed to the ICC). This is clearly what was anticipated by HRA section 18.

Theme Two

The second theme considers the **impact of the HRA on the relationship between the judiciary, the executive and the legislature.**

The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances

those roles, including whether the current approach risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy.

We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

The current architecture is what was intended and expected in 1998. It was always understood, and intended, that there would be roles for the Courts and the Executive respectively, and strictly within the separation of powers. Inevitable this leads to dynamic tension on occasion. However, the Act has been a remarkable and appropriate instrument for holding the Executive to account, and providing reassurance that our democratic principles, parliamentary Sovereignty and due process will be preserved.

Specifically, we would welcome views on the detailed questions in our ToR:

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

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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)?

I would counsel against change. Sometimes Parliament has been surprised by what it has done, but it remains Sovereign and always has the power to amend legislation or change policy within the framework guaranteed by the Convention.

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?

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?

This would be a useful change. The sooner incompatibility is determined, the sooner it is resolved, to the benefit of all.

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

This is a sensitive issue, as derogation clearly is the responsibility of the Government and Parliament. By definition a derogation is just that, rendering inapplicable certain parts of the Convention. I would favour as the remedy a Judicial review on the basis of *Wednesbury* type principles (irrationality) re-stated in statutory form for this specific matter.

3. 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?

They have tried hard, with varying results. See recommendation above re further Judicial College training.

4. 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?

I do not possess the specific expertise to answer this question.

5. 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?

No. Changing the procedure could provide opportunity for huge delay; and the matters raised are questions of Law.