Independent Human Rights Act Review

Response by Frances Webber (retired barrister specialising in immigration and asylum cases including national security deportations)

1. The European Convention on Human Rights, in whose drafting the UK played a large part, seeks to give legal force to some of the fundamental rights set out in the 1948 Universal Declaration of Human Rights. The fact that it took nearly half a century for the British government to provide a scheme of domestic recourse for human rights violations, through the Human Rights Act, demonstrates the ambivalent attitude of politicians to the Convention – an ambivalence which is not surprising given that the purpose of the Convention is not merely declaratory, but practical: to ensure states' accountability through the provision of an effective remedy to all those affected by breaches of human rights for which they could be held responsible.

2. The UK did not recognise the right of individual petition or the compulsory jurisdiction of the court - the mechanisms which have ensured the practical utility and success of the Convention – until 1966. Ministers were often asked what was the point of ratifying a Convention and then refusing to allow its effective use. They cited fears of 'mischief-making propaganda' by political agitators in the colonies, where allegations of indefinite detention in 'oubliettes' and atrocities including massacres were regularly made during colonial wars (Hansard HC, 25 June 1959, Vol. 607, 25 June 1959, Robert Allan), and they did not want British codes of common and statute law reviewed by an international court. (Hansard HC, 29 July 1957, Vol. 574, cols 867-8)

3. Although we are assured that the government has no intention of renouncing the Convention or leaving the Council of Europe, similar arguments are heard today, both the 'sovereignty' argument and that of 'abuse' of the Convention, particularly in relation to its overseas application in theatres of war, and its application in national security and deportation cases.

4. Much of the political (and judicial) resistance to the Human Rights Act comes from the increasingly outmoded and dangerous reliance on the idea of 'national sovereignty'. In an age of global interdependence, sovereignty cannot any longer mean that states are free to do entirely as they please without regard to the consequences - and there is a vast and largely uncontroversial body of international law regulating states' conduct, including in armed conflict. Yet in relation in particular to the admission, treatment and expulsion of migrants and refugees, the old ideas die hard – that controlling borders is paramount, taking precedence even over rights to life, to human dignity, to family and private life, to access to justice and livelihood. Immigration and race are inextricably intertwined in Britain's post-war history, and there have been too many scandals – not just Windrush, but regular exposés of institutionalised racism and brutality in police stations and immigration removal centres, demonstrating a careless contempt for certain groups defined by race and class. These attitudes underlie 'hostile environment' policies whose avowed aim is to make life impossible for those without permission to be here. Although the stated aim of the policies is to persuade undocumented migrants and refused asylum seekers to leave the country,

the policies were not lifted or suspended when international borders were closed during the first lockdown. Similarly, the rule requiring those with limited leave to have 'no recourse to public funds' has not been lifted or suspended despite the desperate hardship faced by those subject to it who have lost their jobs during the pandemic. These issues engage many of the rights protected by the Human Rights Act.

5. It is not just migrants and refugees whose human rights need protection. The Joint Committee on Human Rights recently reported on the continuing discriminatory denial of the human rights to life, liberty, fair trial and respect for family and private life of black people in the UK, in the fields of health, criminal justice, immigration policy, 20 years after the coming into force of the Human Rights Act. (*Black people, racism and human rights*, November 2020).

6. Arguably the Convention's most important role is the protection of the most powerless, marginalised and unpopular minorities, whether asylum seekers, migrants, members of black and minority ethnic communities, gypsies and travellers, criminal suspects, prisoners or foreign combatants. These are the groups whose entitlement to supposedly universal human rights is constantly challenged by hostile voices in the media and politics. They are in fact the groups needing Convention protection the most, as without power or voice, they are most likely to suffer abuses of their human rights, both at the hands of state agents and of third parties against which the state fails to provide protection.

7. It is clear that, despite the HRA, the situation has not improved for these marginalised groups, who have come under sustained attack by successive governments. Rights of appeal against immigration decisions have been curtailed and legal aid withdrawn, leaving those denied family reunion or facing deportation, frequently having to argue their case without legal assistance. Criminal and civil legal aid has been drastically cut, curtailing access to justice for victims of police misconduct and their families. But the Act at least provides a framework against which the conduct of public authorities can be measured, and a scheme of domestic redress, albeit a somewhat threadbare one. It is vital that access to effective remedies for these groups is not further diluted or obstructed as a result of this Review.

The relationship between the domestic courts and the European Court of Human Rights

8. The Human Rights Act s 2 requires the UK's domestic courts merely to 'take into account' the jurisprudence of the European Court of Human Rights. This is a very weak obligation. It does not bind domestic courts to follow the ECtHR's judgments, not even those delivered by the Grand Chamber. In this, the relationship with the Court and its jurisprudence is much looser than that with the European Court of Justice, whose judgments were binding, when the UK was a member of the EU.

9. While such a loose relationship may allay fears of a 'takeover' or loss of sovereignty, it also creates inconsistency and uncertainty for those seeking to assert their rights. Perhaps for this reason, senior judges until recently took the view that they should 'in the absence of special circumstances, follow any clear and constant jurisprudence' of the ECtHR (*Alconbury Developments* [2003] 2 AC 295 per Lord Slynn). However, in the last decade the UK courts have disagreed with the Strasbourg court on many more occasions. To some extent and in

certain fields, this may be inevitable; for example in cases dealing with fair trial rights, where the ECtHR oversees states with very different legal systems, there is clearly room for debate about the content of such rights. But given that, as Lord Hoffmann pointed out in the *Al Skeini* case ([2007] UKHL 26), the UK 'is bound by the Convention as a matter of international law to accept the of the ECtHR', the UK courts cannot stray too far. It is reasonable that the relationship between the UK courts and the Strasbourg court should be flexible enough to allow for a dialogue about the content and development of human rights. But the UK courts should be required to follow the 'clear and constant jurisprudence' of the ECtHR where not to do so would risk violation of rights as interpreted by that Court; in other words any departure should be a development of rights, not a curtailment.

Impact of the HRA on the relationship between the judiciary, the executive and the legislature, including whether courts have been drawn unduly into matters of policy

10. The balance between the executive, legislative and judicial arms of government has in recent years tilted decisively in favour of the executive. The increasing length and complexity of legislation, the very short time given to debates, and the proliferation of regulations and ministerial orders has severely reduced parliamentary scrutiny of government bills and secondary legislation before it becomes law. The party and whipping system deters effective parliamentary challenge. The judicial arm of government is also subject to political overreach. Legislation telling judges how they must deal with cases is now common, from minimum sentences for crime to presumptions of adverse credibility for asylum seekers and detailed provisions on how judges must interpret Article 8 family life rights in immigration cases. In a spectacular executive interference with judicial independence, in April last year, the Home Office wrote to immigration judges asking why they were releasing so many immigration detainees on bail. The letter not only trespassed on the judicial domain, but also showed a worrying ignorance of human rights law, since Article 5 allows for the detention of migrants only for deportation – which was impossible at that time as borders were closed. Additionally, over the period for which the HRA has been in force, there have been several attempts by the executive to restrict access to the courts for migrants and asylum seekers and for victims of human rights violations by British state agents abroad.

11. Two Bills currently going through parliament drastically interfere with human rights including potentially the right to life and freedom from torture as well as the right to an effective remedy for human rights violations: the Covert Human Intelligence (Criminal Conduct) Bill and the Overseas Operations (Service Personnel and Veterans) Bills. The former permits officials to grant informants and agents blanket immunity for the commission of crimes including the most serious crimes. The latter creates a presumption against prosecution after five years for human rights abuses including torture and murder committed by British state agents abroad, and debars civil claims after six years, in defiance of humanitarian and human rights law. The forthcoming Sovereign Borders Bill will, it is rumoured, further restrict the interpretation and/ or application of Article 3 of the Convention, the absolute right to protection from torture or inhuman or degrading treatment or punishment – in the context of removal and deportation.

12. It is against this background of political attacks on human rights and interference in judicial competences that the review asks whether judges are interfering too much in political or policy matters.

13. In contrast to politicians, judges are a model of restraint. The senior judiciary tend towards conservatism, caution and deference to the executive. This applies particularly to judicial decisions in 'political' areas such as national security, immigration and other policy-rich areas. Clear evidence of illegality is required before they strike down ministerial decisions. See for example, in the field of national security, the recent Supreme Court decision on revocation of citizenship and the powers of the Special Immigration Appeals Commission (SIAC), *Shamima Begum*, in which the case of *Rehman* was approvingly cited for the large degree of deference to the Secretary of State required in national security cases.

14. Section 3 of the HRA requires the domestic courts to read and give effect to legislation compatibly with the Convention rights, so far as possible. It is an important obligation, akin to a presumption that parliament intends its legislation to comply with the human rights of those affected. Even without the ministerial statement of compatibility with human rights - which surely judges must take at face value - compliance with international obligations is a general presumption of statutory interpretation.

15. It is vital for the protection of the rights of vulnerable minorities in particular that judges are required to interpret legislation compatibly with the Convention, whatever parliament's intention. It would be absurd – and hypocritical – to require judges to ignore international human rights conventions ratified by the UK in interpreting legislation which engages rights. If it is impossible to construe legislation so as to give effect to rights - if the law is an obstacle to the realisation of human rights - the judges should be able to do more than merely declare its incompatibility. The current scheme for declarations of incompatibility leaves it to the executive and legislature to decide whether to remedy the situation or not. The justification for this drastic restriction on judicial powers is that the judges are not elected. However, if ministers (who are elected) have certified legislation to be human rights compliant which turns out not to be, why can judges not provide a remedy? Only the higher courts can make such declarations under the law as it stands, and they have done so only around 40 times in 20 years, demonstrating the restraint of the higher judiciary. However, they should at the very least have the power to order the executive to present a remedial order within a specified time, and powers to grant appropriate remedies to those affected for so long as their rights continue to be violated.

Jurisdiction over extra-territorial violations of human rights

16. Earlier I described the reluctance of successive governments, in the early years of the Convention, to allow the right of individual petition, or later, to accept the compulsory jurisdiction of the ECtHR, despite having agreed to extend the Convention to its overseas territories. It is reasonable to suppose that the real motive was fear of being held accountable for the gross violations of human rights being committed by its agents in the course of colonial wars. Now, there is a similar push to deny recourse in the UK courts for abuses conducted by British agents abroad. The Overseas Operations Bill was part of the

campaign against accountability for abuses by British soldiers in Iraq and Afghanistan, in the wake of findings by the High Court of inhuman and degrading treatment towards civilians in their custody, and the Al-Sweady inquiry which cleared soldiers of murdering civilians.

17. Ministers explained the exclusion from the Bill of sexual offences, on the grounds that these were never 'necessary'. The implicit admission that agents abroad sometimes find murder and torture 'necessary' demonstrates the urgent necessity of real and effective human rights accountability. Removing accountability for human rights abuses conducted by British state agents abroad would be an extremely retrograde step, taking Britain back to colonial times, as well as putting Britain at odds with the ECtHR.