Submission to the Independent Review of the Human Rights Act Call for Evidence

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1. Introduction

1.1 This submission deals with the question posed in the call for evidence on the case for repealing or amending section 2 of the Human Rights Act (HRA). This submission draws on research from the 2017 book *Critically Examining the Case Against the Human Rights Act* of which I was the editor and contributing author. A strong case has been made for clarification of the way that the requirement under section 2 of the HRA to 'take into account' decisions of the European Court of Human Rights has been interpreted, particularly in relation to the 'mirror principle'. As this submission points out this case needs to be contextualised within broader criticism of the HRA.

1.2 It is to be welcomed that this review is proceeding on the basis that Britain will remain a party to the European Convention on Human Rights (ECHR) and that it is the stated position of the government not to withdraw from the Convention. The ECHR has considerably enriched the UK, provides an important safeguard against rights erosion and were the UK to withdraw from the ECHR it would irreparably weaken the Convention system and the Council of Europe.[1] Section 2 of the HRA plays a crucial functional role in ensuring compliance with the ECHR and encouraging judicial dialogue with the European Court of Human Rights. That does not mean however, that there is not scope for reflection on its operation and whether it is facilitating the development of domestic human rights jurisprudence in UK law.

2. Criticism of section 2 and the case against the HRA

2.1 Criticism of the HRA has a number of different dimensions to it and has come from a variety of sources. Public concern about the HRA and other issues relating to human rights protection in the United Kingdom have demonstrated themselves in a number

[1] For pieces of research substantiating these points see; Meris Amos, 'The value of the European court of human rights to the United Kingdom.' (2017) 28 European Journal of International Law 763; Alice Donald, Jane Gordon and Philip Leach 'The UK and the European Court of Human Rights.' Equality and Human Rights Commission Research report 83 (2012); Steven Greer, 'The Legal and Constitutional Impact of the European Convention on Human Rights in the United Kingdom.' In Rainer Arnold (eds.) *The Universalism of Human Rights* (Springer, 2012).

of different ways. Equally the capacity of elite and expert opinion on what is often a highly technical subject matter needs to be taken into account in relation to the shaping of overall public opinion on the HRA.[2] In that respect it makes sense to consider the wider concerns in relation to section 2 of the Act by briefly looking at elite criticism on constitutional grounds, as it relates to section 2 and then at public opinion on the HRA and how that relates to section 2.

2.2 Tracking the overall criticism against section 2 in the wider context of the of criticism of the HRA requires separating it out from other wider philosophical criticisms of the Act. In its first few years there was a variety of academic commentary about what section 2 involved and what position it put UK court's in but there was perhaps more attention in the literature to the impact of sections 3 and 4 of the Act.[3] Criticism from the judiciary of what section 2 entailed often cautioned about what its obligations would involve for domestic human rights jurisprudence. Shortly before the Act came into force Lord Hoffman warned of UK traditions of human rights being 'submerged under a pan-European jurisprudence of human rights.'[4] Later in 2009 Lord Hoffman engaged in a wider ranging critique of human rights law, and whilst not directly singling out section 2 obligations was critical of jurisprudence from the European Court of Human Rights.[5] In 2011 Lord Irvine one of the architects of the original legislation criticised 'the false premise that [the UK Courts are bound (or as good as bound) to follow any clear decision' of the European Court of Human Rights.[6] Jonathan Sumption's (later to become Lord Sumption) 2011 FA Mann lecture whilst not directly criticising section 2 did criticise the way that courts were treating the decision of the Strasbourg Court as binding.[7]

2.3 These relatively high profile of these criticisms from judges added authority to general criticisms of the HRA in the media and wider public sphere. Deciphering public opinion on the HRA poses two problems for understanding views on section 2; firstly, it is difficult to identify specific concerns about various issues with the Act itself as opposed to any individual case which is driving concern.[8] Secondly the media framing of the Act and human rights in general has done a lot to generate an understanding of the Act and the rights it protects which makes it difficult to discern findings which

[2] See Frederick Cowell In Cowell (eds.) Critically Examining the Case Against the 1998 Human Rights Act (Routledge, 2017)

[3] For a general sample of literature representing a mixed picture of the Act in first few years see Alison Young 'Judicial Sovereignty and the Human Rights Act 1998.' (2002) 61 The Cambridge Law Journal 53; David Bonner, Helen Fenwick and Sonia Harris-Short, 'Judicial Approaches to the Human Rights Act.' (2003) 52 The International and Comparative Law Quarterly 549; Keith Ewing, 'The futility of the Human Rights Act.' (2004) Public Law 829.

[4] Opp Cite Douglas W. Vick 'Deontological Dicta.' (2002) 65 The Modern Law Review 279, 287.

[5] Lord Hoffman 'The Universality of Human Rights.' JSB Annual Lecture 19 March 2009 text available at < https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/ >

[6] Lord Irvine of Lairg, 'A British Interpretation of Convention Rights.' British Institute of International and Comparative Law 14 December 2011 text available at < https://www.biicl.org/files/5786_lord_irvine_convention_rights.pdf >.

[7] Jonathan Sumption QC 'Judicial and Political Decision-Making: The Uncertain Boundary.' Judicial and Political Decision-Making: The Uncertain Boundary.' The F.A. Mann Lecture 2011, full text available at < http://ukhumanrightsblog.com/wp-content/uploads/2011/11/jsumption-jr-talk.docx >

[8] Cowell (n. 2)

would be relevant given the terms of this enquiry.[9] Initial polling on the Human Rights Act in the first five-ten years after it came into force followed this general trend with either responses to cases that were receiving a lot of prominence at the time or a general scepticism of the HRA as a whole, closely mirroring the themes and representations of the Act in the media, which were often quite negative.[10] However, research undertaken by the Equality and Human Rights Commission in 2009 showed that the more people found out about the HRA the more sympathetic they became to it and that 'low levels of awareness and understanding may be contributing to negative perceptions' of the HRA.[11]

2.4 Two issues which are relevant for section 2 can be identified in the data from the 2010s. Firstly, there was a strong sense, identified both in polls in 2011 and 2014 that the Human Rights Act was being used to create rights which the Act was never intended to protect.[12] This had already been commented on in a House of Lords Constitution Committee Report in 2007 but in the Committee's conclusions was blamed on 'irresponsible coverage of the judiciary'.[13] Some of this was directly driven by partisan political prompting in response to plans published by the Conservative party to reform the Human Rights Act in 2014.[14] It also needs to be seen in context of a wider rise in populist politics in the mid-2010s which was sceptical of the judiciary more generally.[15] Secondly the extent to which section 2 binds UK courts was potentially of relevance to the ongoing ways in which public concern over immigration intersected with claims brought under the Act. There was a perception that European case law on Article 8 was providing opportunities to use Act to resist deportation, and that judges were facilitating this by following Strasbourg caselaw on Article 8. This was an indirect criticism of section 2 and to an extent has been addressed through successive changes to immigration law.[16]

2.5 This needs to be set in the broader context of broad increasing public support for the HRA in principle; research in 2018 found that 58% of the UK public agree with the statement that human rights laws 'make a positive difference to their lives' with only

[9] Nash's work on how the media constructs framings of rights shows how this creates a mediated social field of rights Kate Nash *The Cultural Politics of Human Rights: Comparing the US and UK* (Cambridge University Press, 2009) chp.2.

[10] Cowell (n. 2); On the media portrayal See Lieve Gies *Mediating human rights: media, culture and human rights law* (Routledge, 2015) 18-33.

[11] Alice Donald et al. 'Human Rights in Britain since the Human Rights Act 1998: a critical review' Equality and Human Rights Commission Research Report 28 (2009) 183.

[12] Cowell (n. 2).

[13] House of Lords Constitution Committee, Session 2006-07 Sixth Committee Report available at < https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15106.htm#a33 >.

[14] William Jordan 'Support for Tory human rights plans falls along party lines.' YouGov 8 October 2014 < https://yougov.co.uk/topics/politics/articles-reports/2014/10/08/support-tory-human-rights-plans-falls-along-party- >

[15]Joel Rogers de Waal 'Mind the gap between authoritarian politics and democratic populism.' YouGov 10 March 2017 < https://yougov.co.uk/topics/politics/articles-reports/2017/03/10/mind-gap-between-authoritarian-politics-and-democr >

[16] See Siobhan Lloyd 'Deportation and the 1998 Human Rights Act: Debunking the Myths.' In Cowell (n. 2).

a small minority saying that human rights laws had a negative impact on their lives.[17] Equally there is only limited public support for repeal of the HRA and relatively strong public support for the idea of universal human rights and human rights protection in the UK in general.[18] Given these findings it is therefore realistic to conclude that the idea of rights protection and mainstreaming human rights, despite some negative reactions to high-profile and unpopular cases, remains very strong and in some ways can be seen as an achievement of the HRA in helping cement this wider human rights culture. Where public concerns specifically link to section 2 is in relation to the capacity of the rights expansion or the way in which judges potentially are using rights. Even though there are reasons to doubt the veracity of this criticism given the media portrayals of the Act, it is nevertheless a common theme criticism of the HRA and is frequently cited in work trying to understand public perceptions of it, therefore it is appropriate to look specifically at what section 2 was intended to do and at then at criticism of its application to see how this can be reconciled with this public sentiment.

3. What was the intention of section 2 of the HRA

3.1 Section 2's drafting was as a result of the need for a UK bill of rights to operate as a judicial mechanism for securing rights. As Keith Ewing noted in a 1999 account of the HRA's drafting, ideas about a bill of rights had focused on the role of parliament in safeguarding rights but from the late 1980s onwards there was as a renewed emphasis on the judiciary's role in protecting rights, culminating in Labour's policy document in advance of the 1997 General Election.[19] From 1987 onwards it had been a manifesto commitment of the Labour party to introduce a bill of rights which would in some way incorporate the European Convention on Human Rights and Lord Lester's two attempts to introduce the a bill of rights in the House of Lords in the mid-1990s focused on the role of the judiciary in protecting human rights.[20] Another objective behind the drafting of section 2 was the perceived need for a tidying up exercise of the relationship between the European Court of Human Rights and UK courts as to their respective roles, which had increasingly come into tension with one another in the 1990s.[21] Finally, there was a further dimension, which although understated at the time of the HRA's drafting was significant; the overall findings against the UK by the European Court of Human Rights had been rising during the 1990s, but after the HRA came into force began declining.[22] Section 2 contributed to this by ensuring that domestic decisions were compatible with obligations under the ECHR as well as

[17] Kully Kaur-Ballagan 'Britons split on whether human rights abuse in the UK is a problem.' Ipsos Mori 26 July 2018 < https://www.ipsos.com/ipsos-mori/en-uk/britons-split-whether-human-rights-abuse-uk-problem >
[18] Aaron Walawalkar, '88% Of UK Public Thinks 'Effective' Human Rights Should Protect Everyone, Poll Finds' Each Other News 10 Dec 2019 < https://eachother.org.uk/poll-effective-human-rights-should-protect-everyone/ >;
[19] Ewing, 'The Human Rights Act and Parliamentary Democracy.' (1999) 62 Modern Law Review 79, 81.
[20] Anthony Lester QC, 'Parliamentary scrutiny of legislation under the Human Rights Act 1998.' (2002) 33 Victoria University of Wellington Law Review 1.
[21] Francesca Klug 'The Human Rights Act: Origins and Intentions.' In Nicholas Kang-Riou, Jo Milner and Suryia Nayak (eds.) *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge, 2013)
[22] See Donald *et al.*(n.1) ; For further data see MOJ 'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020.' Ministry of Justice CP 347, December 2020.

enabling a judicial dialogue between the Strasbourg court and UK courts, leading Kanstantsin Dzehtsiarou to conclude that the as if the UK were to remain party to the ECHR it would require something along the lines of section 2 to ensure compliance.[23]

3.2 There is not room here to fully analyse the HRA's passage through parliament, but from accounts about its drafting two key principles were established about the role of section 2. Firstly, the Lord Chancellor, Lord Irvine made it clear that European Court of Human Rights judgments were to be considered a 'floor' rather than a 'ceiling' on rights and that UK courts should be prepared to go further than the court where they considered that the Strasbourg jurisprudence was 'outdated or where higher standards could be set'.[24] Secondly as various explorations of the HRA's passage through parliament have established there was a clear direction that the UK courts were not to be bound by Strasbourg, an amendment in the Lords to insert the words 'shall be bound by' into the Act failed.[25] Other accounts have also noted a clear intention in both the Commons and the Lords to avoid UK courts being bound by decisions of the European Court of Human Rights.[26]

3.3 Cases from 2000 both shortly before and after the Act came into force seem to indicate the UK court's constructing a careful position in respect of what section 2 involved. In *Clancy* the Court of Session made it clear that section 2 was did not mean that cases from the Strasbourg Court should 'be treated in the same way as precedents in our own law' and that where 'principles can be extracted from these decisions those are the principles which will have to be applied'.[27] The Court of Appeal in *Davies* made it clear that the 'the obligation is to 'take into account' under section 2 of the HRA 'would seem to be something less than an obligation "to adopt" or "to apply"' but were careful to note that it would be difficult to diverge from a decision with the same factual background at European Court of Human Rights without 'doing serious injury to the intent and purpose of the Act.'[28]

3.4 Other cases reiterated that courts were not bound by decisions at the European Court of Human Rights and that the UK courts did have freedom to depart from Strasbourg jurisprudence even if there was scant detail about where this would be done.[29] This was well within keeping with what parliament had broadly speaking intended when passing the Act. Three years after the HRA came into force the House of Lords in *Amin* were still using similar formulations saying that UK courts 'are only to take account of

[23] Kanstantsin Dzehtsiarou, 'Dialogue or diktat? The nature of the interaction between national courts and the European Court on Human Rights and how it influences criticism of the Human Rights Act.' In Cowell (eds.) (n.2).

[24] Lord Chancellor, HL Debs, cols. 1268-72 19 January 1998.

[25] Jane Wright 'Interpreting section2 of the Human rights Act 1998: towards an indigenous jurisprudence of human rights' (2009) Public Law 595, 601.

[26] Francesca Klug and Helen Wildbore 'Follow or Lead the Human Rights Act and the European Court of Human Rights.' (2010) 6 European Human Rights Law Review 621.

[27] *Clancy v Caird* [2000] UKHRR 509, 513.

[28] *R v Davis, Rowe and Johnson* [2000] EWCA Crim 109.

[29] For literature analysing this general point see Dominic McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice.' (2001) 50 The International and Comparative Law Quarterly 901; Roger Masterman, 'Taking the Strasbourg Jurisprudence into account: developing a 'municipal law of human rights' under the Human Rights Act." (2005) 54 The International and Comparative Law Quarterly 907.

the Strasbourg Court decisions and are not strictly bound by them.'[30] It is however noteworthy, as Jane Wright observes, that there was no reference to a culture of rights or a domestic bill of rights in the white paper preceding the HRA.[31] Lord Bingham's statement in *Begum* that the purpose of the HRA was not to 'enlarge the rights or remedies of those in the United Kingdom' but to reduce 'recourse to Strasbourg' again seems to support the idea of a narrow function for section 2.[32]

4. Criticism of the 'Mirror Principle' and what it entails

4.1 The Mirror principle is the prevailing approach the interpretation of section 2 and it usually taken to mean that the jurisprudence on the European Court of Human Rights ought to be followed by domestic courts.[33] There are two different, but ultimately related, critiques of the principle; firstly, that it has resulted in the UK becoming too deferential to the European Court of Human Rights. Lord Slynn's judgment in *Alconbury* which held that section 2 entailed that 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' has come in for some criticism for seemingly constructing section 2 in a way that locks UK courts into a deferential relationship with the Strasbourg court.[34] Secondly there is the criticism that the courts have been unwilling to go beyond the European Court of Human Rights decisions to properly develop a domestic law of human rights in the United Kingdom.[35] This was suggested by Laws LJ in the *Children's Rights Alliance* where he argued that 'great deal to be gained from the development of a municipal jurisprudence of the Convention rights' going onto conclude that the 'the law of human rights should be, and be seen to be, as sure a part of our domestic law as the law of negligence.'[36]

4.2 It is however noteworthy that Laws LJ was careful to note that the development of such a jurisprudence 'would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases'. This appears to indicate that the main issue was not so much the structure of the statutory provision but the system of interpretation namely the *Ullah* test where Lord Bingham stated that under section 2 it was the 'duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[37] Many of the other leading cases interpreting section 2 have taken *Ullah* as the starting point in their consideration of the meaning

[30] *R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51, at [44].
[31] Wright (n.25) 596.
[32] *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [29].
[33] Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law.' In Helen Fenwick, Gavin Phillipson and Roger Masterman, (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007).
[34] *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment and the Regions* [2003] 2 AC 295 [313]; For a summary see Ciju Puthuppally, 'The Human Rights Act Section 2(1) Taken into Account.' (2013) 1 UK Law Students Review 23, 24.
[35] Both lines of criticism are explored in Richard Bellamy 'Political constitutionalism and the Human Rights Act.' (2011) 9 International Journal of Constitutional Law 86.
[36] *R (on the application of the Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34 [64].
[37] *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26 [20].

of section 2 and it has shaped subsequent application of the act.[38] Depending on what measure one uses it also has been the test that the appellate courts have used when considering how to construct section 2; in reported cases at the Court of Appeal the Supreme Court nearly 170 have cited *Ullah* in the context of section 2. It is not clear that other interpretations of section 2 have been cited as frequently as the Ullah test for determining the scope section 2 obligations.

4.3 Commentary following the second line of critique has highlighted how the interpretation of *Ullah* has led to a restriction of the development of rights in domestic law. Rigid application of Ullah, has according to one scholar, led to restrictive readings of rights in connection with a wide array of different areas, ranging from planning law to the retention of fingerprints after arrest.[39] This is echoed in other scholarship noting that the test placed excessive emphasis on the 'more' part which both strained the legislative intentions of section 2 but was also inappropriate given the role of the Strasbourg Court which was not designed to operate as a higher court constructing a tight body of precedent, in the manner of a supreme court.[40] There has however, as Professor Roger Masterman argues, been increased judicial dialog between UK courts and the European Court of Human Rights facilitated by departing from the *Ullah* test. Modified versions of the principle have also been established in cases such as *Re P (A Child) (Adoption; Unmarried Couples)* [41] and different interpretations of the principle have demarcated where UK courts can and should diverge from the Strasbourg Court.[42]

4.4 Criticism following the first line of critique and arguing that the UK courts were too deferential to the European Court of Human Rights has changed over time. In the first decade after the HRA came into force concerns that the courts were following European jurisprudence to the letter or were behaving as though the Strasbourg Court was creating lines of binding authority were common.[43] The Supreme Court in *Manchester City Council v Pinnock* seemed to support this position when the said that where there is a 'clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law… it would be wrong for the Court [not] to follow that line.'[44] This has led some to describe this as a loss of autonomy for the UK Courts or to assign a role which would be inappropriate for the European Court of Human Rights to hold.[45] Yet, Lord Neuberger in 2015 argued

[38] Masterman 'Supreme, submissive or symbiotic? United Kingdom courts and the European Court of Human Rights.' The Constitution Unit UCL, October 2015 < https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/166.pdf >.
[39] Nuno Ferreira, 'The Supreme Court in a final push to go beyond Strasbourg.' (2015) Public Law 367.
[40] Alan Greene, 'A Floor or a Ceiling? Irish and UK Approaches to Strasbourg Jurisprudence.' (2016) 55 Irish Jurist 112.
[41] *Re P (A Child) (Adoption; Unmarried Couples)* [2008] UKHL 38; Lewis, 'In Re P and others: an exception to the "no more, certainly no less" rule.' Public Law (2009) 43.
[42] For literature on this point see David Pievsky, 'What Does Taking Into Account Strasbourg Jurisprudence Really Mean?' (2012) 17 Judicial Review 214; Eirik Bjorge, 'The Courts and the ECHR: A principled approach to the Strasbourg jurisprudence.' (2013) 72 Cambridge Law Journal 289.
[43] Jonathan Lewis, 'The European Ceiling on Human Rights.' [2007] Public Law 720.
[44] *Manchester City Council v Pinnock* [2010] UKSC 45 [48].
[45] For a summary of this argument see Merris Amos 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act.' (2013) 35 Human Rights Quarterly 386, 404-405.

that there was evidence that UK courts were moving away from 'marginalising' common law noting with approval decisions such as *Osborn v Parole Board* and *Kennedy v Charity Commission*, Supreme Court cases where the appellants had based their case on human rights law but ultimately succeeded in common law.[46] Equally as Philip Sales argued in 2012 in reply to Lord Irvine's criticism of section 2 there is good reason for it to operate in the way that it does as this reconciles a number of competing priorities, such as incorporating and adapting the caselaw produced by the operation of the living instrument doctrine of the European Court of Human Rights into UK law.[47]

4.5 Another school of thought utilising the first line of critique has focused on the way that the HRA may have contributed to judge's politicisation. This has been driven by misunderstandings about the HRA and general cultural, rather than legal, arguments about the increase of judicial power of the sort described by Lord Dyson in his analysis of the case against the HRA.[48] An example of this generalised critique can be seen in the Policy Exchange think-tank's submission to the Joint Committee on Human Rights enquiry into 20 years of the Human Rights Act which, although not directly referencing section 2 of the HRA, makes extensive criticism of the politicisation of judges arguing both that UK courts have been following the European Court of Human Rights too closely and have been encouraged to 'get ahead' of the court in novel interpretations of certain rights.[49] There are no specific suggestions for proposals for reform of section 2 in the Policy Exchange report of 2011 entitled Bringing Rights home although there are several references the politicisation of the judiciary.[50]

5. Reconciling different criticisms of section 2 and the case against the HRA

5.1 The problem with section 2 Professor Helen Fenwick argues is with 'the interpretation that has been imposed' on it and how it is possible to depart from the mirror principle whilst remaining true to the meaning of section 2.[51] Both Fenwick and Masterman have proposed frameworks for understanding where section 2 allows UK courts to

[46] Lord Neuberger, 'Judge not, that ye be not judged'1: judging judicial decision-making' FA Mann Lecture 2015 < http://www.supremecourt.uk/docs/speech-150129.pdf > Para 50; *Osborn v The Parole Board* [2013] UKSC 61; *Kennedy v The Charity Commission[* 2014] UKSC 20.

[47] Philip Sales 'Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine Section 2 of the HRA: "take into account" and the mirror principle' (2012) Public Law 253.

[48] Rt.Hon. Lord Dyson, Master of the Rolls, 'Are the judges too powerful ?' UCL 12 Mar 2014 < https://www.ucl.ac.uk/laws/sites/laws/files/dyson_2014.pdf >

[49] Richard Ekins and Graham Gee, 'Policy Exchange's Judicial Power Project submits evidence to Joint Committee on Human Rights inquiry on the 20th anniversary of the Human Rights Act 1998' Policy Exchange 22 October 2018 < https://policyexchange.org.uk/news/policy-exchanges-judicial-power-project-submits-evidence-to-joint-committee-on-human-rights-inquiry-on-the-20th-anniversary-of-the-human-rights-act-1998/ >

[50] Michael Pinto-Duschinsky "Brining Rights Back Home: Making human rights compatible with parliamentary democracy in the UK.' Policy Exchange (2011)

[51] Helen Fenwick, 'What's Wrong With S.2 of the Human Rights Act? ' UK Constitutional Law Blog 9 October 2012 < https://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/ >

depart from and build on Strasbourg jurisprudence.[52] There are also examples of the courts departing from the rigidities of the Ullah principle in order to go further in protecting rights than the European Court of Human Rights as seen in Supreme Court cases such as *Re McLaughin* and *R (Hallam) v Secretary of State for Justice*.[53] This would point towards where an 'indigenous' human rights jurisprudence could be constructed within the confines of section 2.

5.2 Yet, bearing in mind the research on public opinion on the HRA outlined in part two of this submission the development of any such jurisprudence runs the risk of being seen as developing rights in manner which was not intended by the Act or as an example of the politicisation of the judiciary. Some of these claims are simply a representation of hostile media portrayals of the HRA or generalised critiques of the HRA and human rights. That being said having a much clearer framework for interpreting section 2 and detailing when judges can, and more importantly when they should, depart from Strasbourg authority would provide an answer both to those saying the HRA is too deferential and to those saying it constricts the development of human rights law in UK courts. Parliament has previously directed judges how to weigh up various rights under the ECHR, the Immigration Act 2014 directs judges about how to take into account particular issues in relation to the public interest when interpreting Article 8 rights.[54] A similar direction outlining how judges are to proceed in relation to section 2 and when is appropriate to diverge from Strasbourg authority would allow the beneficial elements of section 2 to be retained in terms of ensuring overall compliance with the European Court of Human Rights, but also safeguard judicial freedom. Developing this via judicial means or via the Supreme Court clarifying matters in a forthcoming judgment would not have the same impact in respect of public perception about the control of rights by UK courts.

[52] Ibid.; Masterman, 'The Mirror Crack'd' UK Constitutional Law Blog 13 February 2013 < https://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/ >

[53] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; *Re McLaughin* [2018] UKSC 48; See also commentary on these cases Anurag Deb 'Re McLaughlin: Normalising the Departure from Strasbourg?' UK Constitutional Law Blog 3 September 2018 < https://ukconstitutionallaw.org/2018/09/03/anurag-deb-re-mclaughlin-normalising-the-departure-from-strasbourg/ > ; Lewis Graham: Hallam v Secretary of State: Under What Circumstances Can the Supreme Court Depart from Strasbourg Authority? UK Constitutional Law Blog 4 February 2019 < https://ukconstitutionallaw.org/2019/02/04/lewis-graham-hallam-v-secretary-of-state-under-what-circumstances-can-the-supreme-court-depart-from-strasbourg-authority/ >

[54] Immigration Act 2014, s.19.