Independent Human Rights Act Review

Submission by Lord Pannick QC,

1 I set out below the points which I wish to make to the Review on the issues raised in its call for Evidence.

General

2 I am a strong supporter of the Human Rights Act 1998. In general it is working well.

3 But I recognise that there are concerns in Parliament about the functions it allocates to the judiciary. The concerns are that the judiciary is *both*

(a) given too little power in that it is constrained by the judgments of the European Court of Human Rights ("ECtHR"), and

(b) given too much power in that legislation inconsistent with Convention rights must be "read and given effect" consistently with such rights "so far as it is possible to do so" (section 3(1)).

Section 2

4 Section 2(1) states:

> "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account"

judgments and decisions of the ECtHR.

5 There is conflicting caselaw on the extent to which domestic courts may depart from a judgment of the ECtHR. The courts have also drawn attention to the difficulties posed

by the fact that there are thousands of ECtHR decisions, the vast majority of them admissibility decisions, which are often not fully reasoned and which are not always consistent with each other.

6 I think it would be helpful to clarify section 2 to make clear that the domestic court or tribunal is not bound by a judgment of the ECtHR. The Supreme Court has rightly recognised that there is a valuable common law jurisprudence relevant to the application of Convention rights and that there are occasions when a dialogue between domestic courts and the ECtHR assists.

7 I would therefore suggest that in section 2(1), after "must take into account", the words "but shall not be bound by" could usefully be inserted.

8 I would also suggest a new section 2(1A):

> "A court or tribunal determining such a question shall also take into account a common law decision, and may have regard to a decision of another international court or of a court of another jurisdiction, whenever made or given, so far as, in the opinion of the court or tribunal, such a decision is relevant to the proceedings in which that question has arisen."

Section 3

9 Section 3(1) states:

> "So far it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

10 Section 4 allows the court to make a declaration of incompatibility in those cases where

the court finds that legislation is incompatible with a Convention right because it is not "possible" under section 3(1) for the court to remedy the inconsistency.

11 It is well-established as a general principle of the common law that courts will seek to interpret legislation consistently with the international obligations of the United Kingdom. But section 3(1) (although headed "Interpretation of legislation") has been understood to go further and require the court to take action which would not be permissible under any normal process of interpretation - indeed well beyond modern principles of interpretation by which the court seeks to give effect to Parliament's purpose in enacting legislation. The courts have understood section 3(1) to require rewriting of a statutory provision to ensure consistency with Convention rights unless the amendment would go against the grain of the legislation.

12 In so understanding section 3(1), the courts have faithfully implemented what was intended. The White Paper, Rights Brought Home (Cm 3782, 1997) stated at paragraph 2.7:

> "This goes far beyond the present rule which enables the courts to take the Convention into account by resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so".

13 There is no other context in which our courts have performed such a role, other than under the Marleasing principle of EU law - no longer, of course, part of our law (save in transitional cases). The courts do not apply principles analogous to section 3 in relation to statutory provisions which affect other international obligations of the United Kingdom.

14 I am concerned that the expansive role conferred on the courts by section 3(1) - going well beyond any normal process of interpretation - is wrong in principle because it requires the judge to perform a remedial function when legislation does not, on its proper construction, conform to Convention rights. Such a remedial role is inappropriate under our constitution because rewriting legislation is the function of Parliament, not the courts. And it is unnecessary because section 4(1) provides an effective means by which Ministers and Parliament can and do amend legislation when an inconsistency with Convention rights is identified by the courts.

15 I therefore suggest that consideration should be given to amending section 3(1) so that it states:

> "Primary legislation and subordinate legislation shall be interpreted, so far as possible, in a way which is compatible with the Convention rights."

Replacing "read and given effect" with a reference to the concept of "interpretation" would address the concerns to which I refer at paragraph 14 above.

Section 10

16 The question has been raised as to whether section 10 - the power of Ministers to make remedial orders pursuant to a section 4 declaration of incompatibility (or after a judgment of the ECtHR) - should be amended to enhance the role of Parliament.

17 I understand, and share, the general concern about the conferral and use of Henry VIII powers which allow Ministers to amend primary legislation.

18 But this is not a context in which such a concern applies:

(1) The Minister's powers are confined to a case where a court has made a section 4 declaration of incompatibility (or there has been a judgment by the ECtHR).

(2) Section 10(2) - unlike most Henry VIII powers - restricts the Minister's powers: the Minister can only act where he or she "considers that there are compelling reasons for proceeding under this section" and then only to the extent that he or she "considers necessary to remove the incompatibility". By contrast with many other Henry VIII powers, the Minister may not act where he or she considers it "convenient" or "appropriate" to do so.

(3) A remedial order requires approval by a resolution of each House: Schedule 2, paragraph 2.

19 In my view, it would be very unfortunate if the remedial powers of Ministers were to be reduced. Ministers should retain broad powers to act where the court has made a declaration of incompatibility. The exercise of the powers is subject to control by Parliament, as an affirmative resolution of each House is required. There is no duty on the Minister to act, but a practice has developed of so doing, and rightly so. If, as I suggest in paragraphs 9-15 above, the duty of the court to rewrite legislation to accord with Convention rights is removed, then it is all the more important that the powers of Ministers under section 10 read with Schedule 2 are not diluted.

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