Evidence to the Independent Human Rights Act Review

Paul Harvey

Between 2005 and 2016 I spent ten years working as a UK lawyer in the Registry of the European Court of Human Rights. It was my privilege to work principally on cases brought against the United Kingdom, but also to work on cases brought against many other Contracting States, including Cyprus and Ireland. I left the Court in 2016 to return to private practice. I am practising member of both the Scottish Bar and the Bar of England and Wales.

Theme 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?

i. Phases in the UK courts' approach to section 2

I would distinguish broadly three phases in the UK courts' approach to section 2 of the Act.

The first phase began with the entry into force of the Act, when, for the first time, the UK courts had to assimilate the vast corpus of ECHR jurisprudence into UK law. That inevitably led the UK courts to rely heavily on the jurisprudence of the Strasbourg Court and to follow that jurisprudence closely.

The second phase is a more assertive phase in which the UK courts, in particular the House of Lords and subsequently the Supreme Court, felt able to express reservations on the consistency of the Strasbourg Court's jurisprudence (and to suggest that the Strasbourg Court might consider clarifying its jurisprudence) or, more radically, to decline to follow it: see, for instance, the seminal example of *R v Horncastle*, declining to apply the ECtHR Chamber judgment in *Al-Khawaja and Tahery v the United Kingdom*; *Attorney General's Reference (No. 69 of 2013)* [2014] EWCA Crim 188, [2014] 1 WLR 3964, declining to follow

Vinter v United Kingdom (2016) 63 EHRR 1; *R v Hanif and Khan (No. 2)* [2014] EWCA Crim 1678, declining to follow part of *Hanif and Khan v the United Kingdom* (2012) 55 EHRR 16; and *R v Abdurahman* [2019] EWCA Crim 2239; [2020] 4 WLR 6, declining to follow *Ibrahim and others v the United Kingdom* [GC], no. 50541/08 and others, 13 September 2016.

That more assertive phase has, none the less, led to a constructive (if at times acute) dialogue between the Strasbourg Court and the UK courts. Indeed, in most cases where the UK courts have declined to follow Strasbourg jurisprudence, the Strasbourg Court has modified its jurisprudence accordingly: see the Grand Chamber judgments in *Al-Khawaja and Tahery v the United Kingdom* (2012) 54 EHRR 23 and *Hutchinson v the United Kingdom* [GC], no. 57592/08, responding respectively to *Horncastle* and *Attorney General's Reference (No. 69 of 2013)* above. When the UK courts have expressed reservations about the consistency of Strasbourg jurisprudence, this has provided the impetus for the Strasbourg Court to attempt to rationalise that jurisprudence and bring some consistency to it: see, for instance, *Al-Skeini v the United Kingdom* (2013) 53 EHRR 18 and *Allen v the United Kingdom* (2016) 63 EHRR 10.

The third and current phase is where the domestic courts, having built up a considerable body of jurisprudence under the HRA over the last twenty years, have principally applied their own jurisprudence. Only if the answer to the question before them cannot be decided by that domestic body of jurisprudence, will they then look to Strasbourg jurisprudence.

In these latter two phases the domestic courts have rejuvenated many fundamental rights at common law, by expressing the largely uncontroversial sentiment that the common law (or a developed version of it) can supply many of the answers that human rights law supplies.

From this case-law, seven principles have evolved:

(1) UK courts should first apply the common law or domestic legislation. Only if the common law or domestic statutes do not provide a remedy, should the courts turn

to the Human Rights Act and the ECHR: *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455; *R (Osborn) v Parole Board* [2013] UKSC 62, [2014] AC 1115.

(2) The UK courts should apply the doctrine of precedent, no less when deciding HRA cases than other cases. Hence, lower courts should follow the binding jurisprudence of higher courts rather that apply directly any conflicting principles that arise from Strasbourg jurisprudence (*Kay & Anor v London Borough of Lambeth and others* [2006] UKHL 10, [2006] 2 AC 465).

(3) By virtue of Article 32 of the European Convention of Human Rights, the Strasbourg Court's jurisdiction extends to all matters concerning the interpretation and application of the Convention's protocols.

(4) When exercising that jurisdiction, the Strasbourg Court rarely disagrees with the UK Supreme Court on the interpretation and application of the Convention. (The vast majority of applications against the UK are declared admissible or struck out by the Court: the figures inevitably vary but on average 97-99% of applications do not even make it to a judgment.[1]) When the Strasbourg Court does disagree, it is usually because the point is novel, or there is a conflict of views between the UK Supreme Court and the courts below, and the Strasbourg Court has preferred the views of the courts below: see, for instance, *Othman (abu Qatada) v the United Kingdom* (2012) 55 EHRR 1.

(5) Under section 2(1) of the Human Rights Act, the duty of the domestic courts is to take account of Strasbourg case law. But that case law is not binding on them in any strict sense of the word (*Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 WLR 220).

[1] The statistics can be found in the Court's annual analyses of statistics, available here: https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{"sort":["createdAsDate%20Descending"],"Title":["\"analysis%20of%20statistics\""],"contentlanguage":["ENG"]} . Rounding to the nearest whole number, percentages for 2017-2020 are respectively, 99%, 99%, 97%, and 99%. Of course, in the remaining 1-3%, will be judgments were the Court finds no violation the Convention, meaning that the percentage of cases in which the Court disagrees with the UK courts is even lower. There were just two findings of a violation against the United Kingdom in 2020, out of some 282 applications: https://www.echr.coe.int/Documents/Stats_violation_2020_ENG.pdf

(6) Absent special circumstances, the UK courts should follow any clear and constant jurisprudence of the Strasbourg court (ibid. and *R (Chester) v Secretary of State for Justice* [2014] UKSC 25, [2014] AC 271).

(7) Special circumstances for not following a decision of the Strasbourg court include: the rare occasion when the UK court has concerns about whether the decision of the Strasbourg court sufficiently appreciates and accommodates the special circumstances of our domestic process; when it is inconsistent with some fundamental substantive or procedural aspect of our law; or when its reasoning appears to overlook or misunderstand some argument or point of principle (*Pinnock, Horncastle*; *Hanif and Khan (no. 2)*; and *Abdurahman*, above). These are, however, guidelines and the degree of constraint imposed or freedom allowed by the phrase *"must take into account"* is context-specific: *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344 and *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279.

Those seven principles define both this country's relationship with the Strasbourg court and the proper application of section 2 of the Human Rights Act. They have done so for quite some time. There is now a settled approach to section 2 of the HRA and it is one that works well.

ii. The influence of the UK courts on Strasbourg through section 2

I would add a further point that often escapes attention in domestic, UK debates about the operation of the HRA and our relationship with the Strasbourg Court: the settled approach I have set out is one with which the Strasbourg Court appears to be wholly satisfied. The Strasbourg Court appears to take no issue with the fact that its jurisprudence is not binding on the UK courts; if anything, the Court appears to welcome it for the critical perspective it sometimes brings. So it is the non-binding nature of section 2 which gives the UK courts, in

particular Supreme Court, a great deal of influence over the direction of Strasbourg jurisprudence: not only does section 2 institute a duty on the UK courts to take account of ECHR jurisprudence but also, by implication, it creates a duty on the Strasbourg Court to take account of the jurisprudence of the UK courts.

That is no more so than when the UK courts decline to follow Strasbourg jurisprudence or express reservations about its consistency. It is precisely because the UK courts have a duty to take account of Strasbourg jurisprudence but not follow it that they can express reservations about it: if there were no section 2 duty to take account of that jurisprudence, there would be no need to express reservations about it. And the Strasbourg Court, for its part, appears to regard itself as bound to pay close heed to those reservations. It would be irresponsible of it not to: any failure on its part to take account of the views of the UK courts would risk the Court's authority and legitimacy, both of which depend on it retaining the confidence of national courts. Section 2 is the linchpin for that constructive (if sometimes robust) dialogue between the Strasbourg Court and the UK courts.

If, on the other hand, the section 2 duty were to be removed, cases would still end up in Strasbourg, but they would do without the UK courts expressing any view on the correctness of the Strasbourg jurisprudence, and the Strasbourg Court would not have the benefit of those views. Thus, any amendment to section 2 carries the real risk that it would weaken the influence that the UK courts currently have on the Strasbourg Court and its jurisprudence.

I know of no other Human Rights Act or similar incorporating legislation in the other ECHR Contracting States which gives that country's courts the same influence over the Strasbourg Court as the Human Rights Act 1998 gives the UK courts. I base that on my time at the Court working on cases across the Contracting States. Other countries will, of course, legitimately choose models of incorporation that best fit their constitutional traditions. But no model has been more effective in giving a country such influence over the Strasbourg Court's jurisprudence. It is section 2 in its current form, when taken with the conscientious, but

rightly assertive, approach of the UK courts, that gives us that influence. For that reason alone, I would counsel against changing the HRA to another model.

iii. The discerning approach the UK courts take under section 2

There is a further argument for keeping section 2 as it is: section 2 trusts the UK courts when deciding what Strasbourg jurisprudence to take account of. I say that because it is, I think, uncontroversial that there is something of a hierarchy in the Strasbourg Court's own jurisprudence, and so UK courts are justified in the discerning approach they take to it. For UK cases, that hierarchy broadly runs as follows:

(1) Any Grand Chamber judgment of the ECHR in a case against the UK, particularly one in which there might have been a previous Chamber judgment upon which the UK domestic courts have expressed a view: see, for instance, *Al-Khawaja and Tahery v the United Kingdom*.

(2) Any Chamber judgment in a case against the UK where that has been preceded by a dialogue between the UK courts and the Strasbourg Court: see, for example, the *Pinnock* line of cases involving extensive dialogue between the UK courts and Strasbourg on the requirements of Article 8 in eviction cases, and the *Kaiyam* line of cases on the requirements of Article 5 in extended or indeterminate sentence cases.

(3) Any decisions or judgments of the Grand Chamber in cases brought against other countries, if such judgments represent clear and constant jurisprudence of the Strasbourg court or a clear and considered departure from it. This would include, in particular, any Grand Chamber cases where the UK as intervened as a third-party.[2]

(4) All other judgments against other Contracting States.

[2] See, for instance, *M.N. and others v Belgium* [GC] (dec.), 3599/18, 5 March 2020.

(5) Decisions on admissibility when such decisions have been taken after communicating the case to the respondent government and receiving written submissions from both parties.

(6) So called "*de plano*" decisions on admissibility. (Decisions on admissibility taken by Chambers of the Court based only on the information submitted by the applicant and without the benefit of the written submissions by the respondent government.)

(7) Finally, since they are included in section 2(1)(b) and (c) of the HRA, opinions and decisions of the defunct European Commission on Human Rights.

It is plain from that rough hierarchy that not all Strasbourg judgments and decisions speak with the same weight nor indeed with the same voice. A Court rendering many thousands of judgments and decisions against 47 contracting states is unlikely to produce jurisprudence speaking with entirely the same voice or with entirely the same weight. That is to a degree inevitable, though much can still be done by the Court to improve the quality and consistency of its jurisprudence.

The additional strength of section 2(1) is that it allows the UK courts prudently to take account of that jurisprudence and to exercise discernment in doing so. Section 2(1) as it currently stands allows domestic courts to look at that Strasbourg jurisprudence and to decide the weight that should be placed upon it, having broad regard to the hierarchy that I have set out.

There is little case for amendment of section 2(1) when the UK courts have proven capable of applying just that discernment and, indeed, when the Strasbourg Court is apparently happy enough for them to do so. There is then in my respectful view no need for any amendment to section 2.

iv. Opinions and decisions of the European Commission on Human Rights

Before leaving this question, it occurs that one possible minor amendment might be to repeal section 2(1)(b) and (c), the duty to take account of opinions and decisions of the European Commission on Human Rights. As the Review will know, the Commission was abolished on the creation of the permanent, full-time European Court of Human Rights in 1998. In its time, the European Commission made an enormous and valuable contribution to the development of international human rights law. However, its opinions and decisions have inevitably diminished in their importance and value as time has gone on. The most valuable jurisprudence of the Commission has all but been incorporated into the jurisprudence of the permanent Strasbourg Court, and so any that has not is now of dubious precedential value.

For that reason, the time may have come simply to delete the references to the Commission from section 2. This, though, would be a very minor change and there is no reason why a discerning approach by the UK courts to Strasbourg jurisprudence should not be able to decide what, if any, weight should now be given to opinions and decisions of the defunct Commission. One might then think that removing the reference to Commission opinions and decisions from section 2 is not worth the candle.

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?

Care has to be taken when discussing the margin of appreciation in the context of section 2 The margin of appreciation applies to Contracting States as a whole, not just the courts of a Contracting State. When it is considering issues falling with the margin of appreciation, the Strasbourg Court is deciding first, the width or narrowness of that margin of appreciation and secondly, whether the State as a whole has exceeded its margin of appreciation. Subject to the requirements of Article 13 of the Convention (and to other Convention rights where the Court has said that decisions affecting human rights must be taken by independent

judges), the Strasbourg Court generally leaves it to the State to decide which domestic institutions should be responsible for which decisions because that is normally a matter for the State's own constitutional arrangements. The margin of appreciation says very little about the appropriate relationship between a Contracting State's courts and its legislature and executive. It is, then, slightly inapposite to speak of the margin of appreciation in the context of section 2.

I also say that because, in areas which fall within the UK's margin of appreciation, the UK courts are rarely the primary decision-makers, but rather they apply laws enacted by Parliament and they review decisions taken by the executive. When enacting those laws or taking those decisions, Parliament and the executive are also acting within the exercise of the margin of appreciation. So in the UK context, any debate about the approach that the domestic courts and tribunals should take to the margin of appreciation under section 2 is not only slightly inapposite, but also indissociable from broader debates about what, if any, deference the UK courts should show to Parliament and the executive, particularly in applications for judicial review. It is also indissociable from the broader debate as to the proper division of function in protecting human rights between Parliament and the executive.

I would say, though, that when the Strasbourg Court's jurisprudence generally requires a judicial remedy for breaches of Convention rights by the executive but does not go as far as to require a right to challenge primary legislation, then the system of judicial remedies created by sections 2, 3 and 4 of the HRA is itself well within the margin of appreciation afforded to Contracting States.

Finally, if these questions are directed at how the UK courts should approach questions of proportionality under sections 2-4 and 6 of the Act, then I would find it difficult to give any general answer. As the Review will know, the breadth of the margin of appreciation afforded to States as a whole when deciding on questions of proportionality varies

enormously depending on the nature of the right, the sensitivity of the issue, and the degree, if any, of consensus across the Contracting States.

Equally, and for similar reasons, the degree of deference the UK courts ought to show to the executive and Parliament when considering questions of proportionality will vary enormously. It is not then possible to say that, as a generality, change is required nor to reach that conclusion outside of a general debate about the role of the UK courts in our public life. Even if it were, then for the reasons I have given, it is not easy to see how questions of the margin of appreciation and proportionality bear directly on section 2, or how section 2 could be amended to bring about that change.

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 current approach takes too long. That is not just because of the time it takes for cases to be decided in Strasbourg but because of the structure of the current dialogue. Dialogue in this context usually means that the senior UK courts express reservations about the clarity or consistency of Strasbourg case-law and invite the Strasbourg Court to reconsider its case-law. If it is the Supreme Court which invites the Strasbourg Court to think again then, even after the Strasbourg Court responds, it may take years for a similar case to work its way up to the Supreme Court so that the Supreme Court can decide whether it is happy with the answer the Strasbourg Court has given. If the Supreme Court requires further clarification from the Strasbourg Court, the whole process has to be repeated. The dialogue over the Article 8 eviction case ran for six years, and the dialogue over Article 5 and IPPs and other extended sentences for eight.[3]

[3] This obviously depends on where one considers dialogue to begin and end, but eviction cases arguably began in 2006 with *Kay v London Borough of Lambeth and others* [2006] UKHL 10, [2006] 2 AC 465 and resolved in 2012 with *Buckland v United Kingdom*, no. 40060/08, 18 September 2012. The IPP/extended sentences cases arguably began in

One way that the dialogue could be quickened is if the UK were to sign and ratify Protocol No. 16 to the Convention, which allows domestic courts to request advisory opinions of the Strasbourg Court. The reason usually given for the UK not to ratify it are the difficulties that this might cause in our adversarial system, which is based on our courts themselves not giving advisory opinions,. But of course, a similar system was in place when the UK courts were able to seek preliminary rulings from the CJEU. Also, for those leading Contracting States who have ratified Protocol No. 16, it has given their courts the ability to request advisory opinions from the Strasbourg Court. Certain countries such as France have had no hesitation in making such requests. The Strasbourg Court has been willing to decide those requests for advisory opinions much more speedily than it decides applications brought by individuals under Article 34 of the Convention, the normal process or vehicle through which judicial dialogue takes place. (The first French reference was made by the Court of Cassation on 12 October 2018, the Strasbourg Court formally accepted the request on 3 December 2018, and the Court gave its advisory opinion on 20 March 2019.)

Not ratifying Protocol No 16 in effect puts our courts to the back of the queue. I appreciate that the Review may feel that considering whether to ratify Protocol No. 16 falls outside its remit, but the Protocol is related to reviewing the HRA in two ways. First, if Protocol No. 16 were to be ratified, it would require domestic legislation to given it effect, and the obvious and perhaps only way to do that would be by amending the HRA. Second, the HRA establishes a dialogue between the UK courts and the Strasbourg Court. Ratifying the Protocol is an obvious way to improve that dialogue because that is what Protocol No. 16 was designed to do for domestic courts generally.

2009 with *R (Walker) v Secretary of State for Justice* in [2009] UKHL 22, [2010] 1 AC 553 and finally ended in 2017 with *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1.

Theme 2

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

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)?

If the intention of Parliament in enacting legislation has found its way into the legislation itself then plainly the domestic court must not read and give effect to that legislation in a way that is contrary to Parliament's intention. I see little evidence that the UK courts have applied section 3(1) to give legislation a meaning that is inconsistent with the intention of Parliament, *as that intention appears in the statute*. The courts are, by and large, astute to recognise the powers that they have in section 3(1) but also the limits of section 3(1).

I do not then see the case for amendment of section 3, still less its repeal. It is also worth noting that if Parliament feels that the courts interpreted that legislation in a manner which is inconsistent with its intention, then Parliament remains free to legislate to make its intentions clear. At that point, section 3 no longer applies, and the only role for the courts is to make a declaration of incompatibility under section 4. That balance between section 3 and section 4 is an elegant constitutional compromise between the role of the courts in enforcing Convention rights and the legislative supremacy of Parliament.

It is also, for the reasons that I have given in answer to question 1 above, one that gives the UK a considerable influence over the Strasbourg Court's jurisprudence.

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?

I would see all sorts of difficulties in making any change to section 3 in a manner suggested. There would be enormous difficulties in having, in effect, two categories of legislation: legislation enacted before the amendment of section 3 and legislation enacted after the amendment of section 3, particularly when human rights cases do not always concern a single piece of legislation and when they made amend or supplement existing legislation. That is even before one turns to the difficulties that would arise in how to approach legislation of the devolved legislatures.

Your sub-question in para A2 anticipates the further difficulty of what would then have to be done about previous section 3 interpretations. In short, when I see little case for amendment of section 3, the difficulties that would arise in amending it are unnecessary and undesirable.

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?

No. There are good practical reasons for proceeding first under section 3 and only if that is impossible under section 4.

It is important to bear in mind that section 3 itself is a remedy of last resort. It is first incumbent upon the courts to ask themselves whether any remedy can be provided either through the common law (if necessary through an evolving interpretation of the common law) or under any other domestic statute (see *Kennedy* and *Osborn*, above). If it is not, the court should then consider whether it is possible to give a remedy under section 6 of the HRA. It is only necessary to turn to section 3 if the court considers that the problem is really

with primary legislation and there is no other way of giving the person a remedy. If section 3 interpretation is not possible, the court can turn to section 4.

Seen in that light, section 4 really is a matter of absolute last resort. It would be an unnecessary complication for the separate process under section 4 to be folded into the previous processes.

It is not clear in any event why that would enhance the role of Parliament in determining how any compatibility should be addressed. If anything, when domestic courts turn to section 3 first, this enables the courts to identify the meaning and content of Convention rights and thus what legislation should look like in order to be compatible with those Convention rights. In other words, section 3 proceeds in two stages. It requires the courts to identify the content of the Convention rights and then to consider how primary and subordinate legislation should be read so that they are compatible with Convention rights. By going through that two-stage process in section 3 and thereafter, if necessary, turning to section 4, the courts can tell Parliament what the content of the Convention rights are, and how legislative compliance with those Convention rights can be achieved, with Parliament then able to choose the means to achieve that end.

The process now set out in sections 2, 3 and 4 HRA is not directive: Parliament can choose whether to remove any incompatibility as found by the courts under section 4. Similarly, it can choose to legislate if it feels that the courts have given a meaning to primary legislation under section 3 which Parliament considers is contrary to its own intention.

I do not see how this process could be improved by requiring declarations of incompatibility to be considered as part of the initial process of interpretation.

The current approach in sections 3 and 4 is also consistent with established constitutional practice around the world. In most common law countries with a written constitution the courts apply the principle or rule of constitutional avoidance — that is to say, the principle

they should decide cases and interpret statutes in a manner which avoids having to declare those statutes unconstitutional.[4] So like in human rights cases in the common law world we have, in effect, a similar approach to the interpretation of legislation as established in sections 3 and 4 of the HRA.

Sections 3 and 4 provide a good and workable structure in which UK courts can apply that established principle of adjudication and do so in a matter which is compatible with the British principle of the legislative supremacy of Parliament.

It bears recalling that the strength of sections 3 and 4 as currently enacted is that they remove the need for many applicants to go to Strasbourg to seek a remedy for a violation of their Convention rights. That remains the core purpose of the HRA. The decrease both in the number of applications to the Strasbourg Court since the passage of the HRA and the number of violations found by the Court since the passage of the Act prove that point.

Amending section 3 in a way that would allow declarations of incompatibility to be considered as part of the initial process of interpretation might jeopardise that process. At the risk of stating the obvious, the Strasbourg Court has no section 3 power. The section 3 power allows the UK courts to provide a remedy and remove the need for applicants to go to Strasbourg. Any change to section 3 so as to increase declarations of incompatibility and decrease the number of "reading downs" would run the risk of applicants going to Strasbourg and obtaining judgments finding an incompatibility between primary legislation and Convention rights. Such rulings would be binding on the UK as a matter of international law. That would undermine the legislative supremacy of Parliament rather than enhance it. For that reason, it is better to leave section 3 as it is rather than amend it.

[4] See, for instance, the rule/principle's application in Ireland in *Murphy v. Roche* [1987] IR 106; *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71.

Finally, it is again noteworthy that the Strasbourg Court appears to have no difficulty with sections 3 and 4 as currently enacted. To meet the admissibility criteria before applications can be considered in Strasbourg applicants must, among other matters, exhaust all domestic remedies (Article 35 ECHR). The Strasbourg Court has required applicants to seek to persuade the courts to apply section 3 and to give effect to primary legislation in a way that is compatible with Convention rights: see, for instance, *Peacock v the United Kingdom* (dec.), no. 52335/12, 5 January 2016.

Equally, the Court has been content for applicants, while exhausting domestic remedies, to seek declarations of incompatibility. The time may well come when the Court considers that prospective applicants are under a duty to seek a declaration of incompatibility from the domestic courts before going to the Strasbourg Court simply because the practice amending primary legislation in response to declarations of incompatibility has become so established that it has become an effective remedy.[5] There would seem to be no case for disturbing that trend by amending section 3 in the manner suggested in this question.

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

I do not see any need to change current practices in relation to section 14(1). Any change that the Review contemplates should have proper regard to the fact that the Strasbourg Court appears to welcome the views of the UK courts before it considers any case brought under Article 15 which challenges a derogation the UK has made from the Convention: see *A and others v the United Kingdom* (2009) 49 EHRR 29 at paragraphs 180 and 181. The Strasbourg Court clearly benefits from UK courts' views on Article 15, perhaps more so given the seriousness of the issue than in any other issue it decides under the Convention.

[5] See, for instance, comments of Sir Nicolas Bratza, former UK judge and president of the Court, to that effect in *The Relationship Between the UK Courts and Strasbourg* 2011 European Human Rights Law Review 505.

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?

I cannot improve on the recent analysis of Joe Tomlinson, Lewis Graham and Alexandra Sinclair on whether a judicial review of delegated legislation under the HRA unduly interferes with executive law-making.[6] This is a substantial, evidence-based review of this question. They do not see any case for change and I respectfully adopt their views.

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?

The current position should not change: the territorial extent of the HRA should mirror, as far as possible, the jurisprudence of the Strasbourg Court on the territorial extent of the ECHR: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2008] 1 AC 153.

Indeed, it was the interpretation that the House of Lords gave to the HRA in *Al-Skeini* which allowed it to go on to express reservations about the consistency of the Strasbourg Court's jurisprudence under Article 1 ECHR. The Strasbourg Court in its subsequent judgment in *Al-Skeini v the United Kingdom* (2011) 53 EHRR 18 listened to those reservations and sought to restore some order to that jurisprudence. That proved the starting point of much more nuanced jurisprudence on Article 1 than when this issue first became controversial in the United Kingdom. That more nuanced approach can be seen, for example, in the Court's recent judgment in *Georgia v Russia (II)*, no. 38263/08, 21 January 2021, where the Court distinguished between an active phase of hostilities and a subsequent occupation phase,

[6] https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/

and found that the Convention only applied during the latter, with the former phase only being governed by international humanitarian law and not international human rights law.

That rationalisation and subsequent, more nuanced approach to Article 1 would not have happened if the House of Lords had simply found that the HRA did not apply. I see no case for change and indeed I would see any change to this as being problematic: any such extra-territorial cases would still go to Strasbourg, but a change to the territorial extent of the HRA would deprive the Strasbourg Court of the benefit of the prior views of the UK courts on one of the most far-reaching and sensitive issues that arises under the Convention.

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?

This really is a question for Parliament itself and I would be reluctant to express any concluded view on it. If Parliament does not feel that it has sufficient role under section 10 then it is for Parliament to amend section 10. I would simply say that the more Parliament is seen to be involved in devising solutions that balance the Convention rights against other social interests then the greater the margin for appreciation that the Strasbourg Court will accord to the United Kingdom: see, for instance, *Animal Defenders International v the United Kingdom* (2013) 57 EHRR 21 (the legislative prohibition on political advertising in section 321(2) Communications Act 2003) and *Kennedy v the United Kingdom* (2011) 52 EHRR 4 (the compatibility of the Regulation of Investigatory Powers Act 2000 with Articles 6, 8 and 13 ECHR).

Paul Harvey

Doughty Street Chambers

Arnot Manderson Advocates

3 March 2021