EVIDENCE TO THE INDEPENDENT HUMAN RIGHTS ACT REVIEW 2021

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1. This paper responds to the call of evidence of the Independent Human Rights Act Review. It represents my own personal views.

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

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 If yes, should section 3 be amended (or repealed)?

2. I begin by emphasising some aspects of the framework established by s.3 and s.4 of the Human Rights Act 1998 ("HRA") before turning to address these first questions directly. This is because several of the questions appear premised on the assumption that s.3 and s.4 are alternative remedies and that diminishing the scope of s.3 correspondingly expands the scope of s.4 (and visa versa). This however would be to misunderstand the framework created by the HRA.

3. Thus:

(1) Section 4 is applicable in respect of Acts of Parliament (and a few other forms of legislation that are treated as equivalent to Acts of Parliament for the purposes of the HRA[1]) to ensure that there is some form of remedy for a violation of Convention rights without contravening parliamentary sovereignty.

(2) Section 3 by contrast, applies to all forms of legislation as well as Acts of the devolved legislatures. The application of s.3 to Acts of Parliament is only one element of s.3's scope of application.

[1] Measures of the Church Assembly and of the General Synod of the Church of England, and certain Orders in Council, which are treated as Acts of Parliament: HRA s.21(1).

(3) Delegated legislation represents the will of the executive and not of Parliament (this is the case even in relation to statutory instruments subject to affirmative resolution procedure):

> "…a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that." [2]

Therefore, where courts use s.3 to interpret delegated legislation to ensure compliance with the Convention rights there is no tension with the intentions of the UK Parliament and hence no tension with parliamentary sovereignty. In addition, s.3 applies to legislation other that statutory instruments, made by a wide variety of public bodies.

(4) In relation to Acts of the Senedd, the Northern Ireland Assembly and the Scottish Parliament, these bodies have limited competence which has been defined by Parliament *inter alia* by reference to compliance with Convention rights. There is thus also no tension with parliamentary sovereignty when s.3 is used to interpret Acts of these bodies.

(5) Therefore, much of the work done by s.3 does not involve any tension with the intentions of the UK Parliament.

(6) Furthermore, where delegated legislation or Acts of the devolved legislatures cannot be read or given effect compatibly with Convention rights, the consequence is not—as in the case of Acts of Parliament—that the legislation continues in force and effect but that the legislation is ultra vires. The alternative to a Convention rights compatible interpretation of subordinate legislation is, in other words, that the legislation is invalid or of no effect.[3] The operation of s.3 in such contexts is thus very different from its role when applied to Acts of Parliament. Its effect is not to limit or restrict such measures but to <u>save</u> them.

(7) It is therefore a mistake to consider that s.4 applies if the firepower of s.3 fails to render legislation compatible with the Convention rights. This is only the case in the context of Acts of Parliament. Section 3 also operates to save measures that would otherwise be invalid as contrary to s.6 HRA or the

[2] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39, [2014] AC 700 at [43] per Lord Sumption.

[3] See *RR v Secretary of State for Work and Pensions* at [20]-[22].

statutory provisions which make the competence of the devolved institutions subject to compliance with the Convention rights.

4. A second reason why it is mistaken to think of s.3 and s.4 as alternatives is that s. 3 affects the interpretation of legislation generally. It is applicable to any court or tribunal as well as to any person who applies legislation. It is integral to the meaning and effect of legislation in the same way that the Interpretation Act 1978 controls the meaning of legislation. It is, in other words, not a remedy but a rule of law.

5. By contrast, s.4 is a specific remedy that a limited number of higher courts can grant in their discretion. Sections 3 and 4 are therefore different in both their scope of application and their very nature.

6. A connected point is that there are an increasing number of examples of situations in which tribunals are unable to read legislation compatibly with Convention rights but cannot grant a remedy under s.4:

   (1) In *Percival v Revenue and Customs Commissioners* [2013] UKFTT240 (TC) a retired civil servant acting in person challenged the application of Double Taxation Convention 1976 that was incorporated into UK law. The First-Tier Tribunal ("FTT") ruled that,

   > "we think it impossible to construe or give effect to the DTC in a manner compatible with Mr Percival's human rights (assuming for the moment that there has been some breach of his human rights). The DTC unambiguously allocates the sole taxing rights in respect of this element of Mr and Mrs Percival's pension income to the UK and Ireland respectively. On the basis that the DTC is compatible with Community law (as we have concluded), the most that we could do, would be to issue a declaration of incompatibility under section 4 of the Human Rights Act 1998 but, as HMRC point out, this Tribunal has not been invested with the power to make such a declaration." (at [66])

   (2) In *Wilkes v Revenue and Customs Commissioners* [2020] UKFTT 256 (TC) the FTT dismissed an appeal against an assessment of liability to pay high income child benefit, stating,

   > "It would be impossible, even if we accepted that the "plain meaning" of the legislation was incompatible with Convention rights, to come up with an alternative reading (that did not breach the bounds of interpretation, as

opposed to re-writing) that was more compatible. Furthermore, the Tribunal does not have power to make a declaration of incompatibility with Convention rights…" (at [43]).

(3) The Upper Tribunal ("UT") in *AR v Secretary of State for Work and Pensions* [2020] UKUT (AAC) dismissed a claim by a litigant in person who claimed bereavement benefit following the death of their partner whom they had married in a religious marriage ceremony, the Nikah. The tribunal held that it would cut across the policy and grain of s.39A of the Social Security Contributions Benefit Act 1992 for "spouse" to include a marriage that had not complied with the formalities of the Marriage Act 1949. The Tribunal noted that,

> "The remedy which Parliament has provided is in these circumstances a declaration of incompatibility which the appellant has not sought, and could not seek, from this tribunal." (at [47])

(4) In *Steer v Stormsure Ltd* UKEAT/0216/20/AAT the Employment Appeal Tribunal ("EAT") ruled that by precluding interim relief for discrimination/victimisation cases the Equality Act 2020 breached the ECHR but no remedy could be granted. Mr Justice Cavanagh stated:

> "72. There is a short answer to the Appellant's challenge in reliance upon the HRA and the ECHR. This is that the only remedy which I would be able to grant is a confirming interpretation. The EAT does not have the power to make a declaration of incompatibility under the HRA, section 4 (see *Benkharbouche*, Court of Appeal, paragraph 5, and EAT, paragraph 7). I have already dealt extensively in this judgment with the question whether a conforming interpretation is possible. Exactly the same approach applies to ECHR issues as to claims based on EU law. I have concluded that a conforming interpretation is not possible. This means that, whatever is my view on whether there has been a breach of the ECHR , I cannot grant any relief."

7. These examples—and there are others[4]—illustrate contexts in which s.3 and s.4 do not operate as alternatives even when applied to primary legislation.

[4] E.g. *Dean v Mitchell* [2020] UKUT 306 (LC), at [58]; *Banks v Revenue and Customs Commissioners* [2018] UKFTT 617 (TC), and [2020] UKIT 100 (TCC); *Javis v Revenue and Customs Commissioner*s [2012] UKFTT 483 (TC); see also *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430 at [19].

8. The situation will also arise in County Court proceedings in England and equivalent proceedings in Northern Ireland and Scotland as well as in other types of tribunal and arbitral process. Indeed, there are a very wide variety of situations in which judicial bodies adjudicating individual rights will have to have regard to s.3 but if the legislation cannot be interpreted compatibility with Convention rights no declaration of incompatibility can or will be made. One of the consequences of this is that it tends to conceal just how commonly s.3 does not enable legislation to be read compatibly with Convention rights.

9. In the UT and EAT, there is the possibility that the matter could be appealed to the Court of Appeal which has power to make a declaration of incompatibility. Permission to appeal was granted by the UT in the ***Steer*** case on this basis. However, (a) it is not obviously the case that the criteria for permission to appeal would always be satisfied where a tribunal had correctly concluded that the appeal should be dismissed, and (b) the costs and adverse cost risk associated with an appeal to the Court of Appeal will very often be prohibitive or not justify the limited remedy provided by a section 4 declaration.

10. In the County Court, claims can be transferred to the High Court if a declaration of incompatibility is sought (CPR 30.3). However, given that such a declaration will not affect the legal rights of the parties, there will be few instances in which litigants wish to shoulder the costs associated with seeking a s.4 declaration, transferring the case to the High Court and joining the Secretary for State. In the Country Court, if s.3 cannot be used to ensure that Convention rights are complied with, in practice that is the end of the matter.

11. It is perhaps worth saying a little more about the limited nature of the remedy under s.4 of the HRA to explain why litigants will often not wish to raise it. A declaration under that section will not affect the parties' legal rights. Even where the law is subsequently changed in response to a declaration of incompatibility this can take a reasonably long time to occur and the law is not always changed retrospectively so as to apply to the facts or dispute out of which the declaration has arisen. On the other hand, a direct challenge to primary legislation seeking a s.4 declaration will inevitably increase the scope and cost of the litigation and require the Secretary of State to be joined. There is therefore often little or no incentive for a litigant to seek a declaration of incompatibility unless they are motivated by wider public interest considerations; indeed, the balance of considerations will usually point strongly against seeking this

remedy. If the legislation cannot be interpreted compatibility with Convention rights, the litigant will be resigned to their fate.[5]

12. A case which helps to illustrate this is *Wilson v First County Trust Ltd (No. 2)* [2003] UKHL 40, [2004] 1 AC 816. The case arose out of a dispute over the enforceability of a pawnbroker contract with a value of £5,000 which was determined by the Kingston-Upon-Thames Country Court. On appeal to the Court of Appeal, the Court ruled the contract was unenforceable allowing the claimant to keep the £5,000 and obtain the return of the property pawned (a car). The Court of Appeal raised of its own motion the issue of whether the legislation was incompatible with the ECHR. The Secretary of State was joined and a declaration of incompatibility was made. The matter was then appealed by the Secretary of State to the House of Lords, but by this stage the original parties to the claim—who had never had any interest in claiming a declaration of incompatibility—dropped out of the litigation and left the point of wider public interest to be argued out by the Government and numerous intervening commercial parties. Appealing a decision to a level where a declaration of incompatibility can be granted risks transforming a straightforward low-value case into a costly jamboree.

13. Against this background, I turn to the questions posed, which is whether there are examples of legislation being interpreted by reference to s.3 in a manner which is inconsistent with the intention of the UK Parliament and if so whether s.3 should be repealed or amended. These questions relate only to the application of s.3 to Acts of Parliament.

14. First, there appears to be little controversy over the guidance that the House of Lords articulated to determine what is and is not "possible" under s.3 in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. In short: it is not possible to interpret legislation compatibility with Convention rights where this will go against the "grain" or "thrust" of the legislation or where it would require the courts to exercise a legislative functions by choosing between different policy options. If the *Ghaidan v Godin-Mendoza* guidance is sensible and generally accepted, this is a strong consideration against any legislative amendment to s.3. Of course, the courts might occasionally misapply that guidance, but misapplication is a ground for appeal not the basis for reform.

15. Second, a search of cases that have referred to this guidance reveals many cases where it has been taken to be restrictive of the approach required by s.3, rather than permissive. The tribunal cases cited in paragraphs 6 and 7 above provide a number

[5] For fuller discussion see Hickman, "Bill of Rights Reform and the Case for Going beyond the Declaration of Incompatibility Model" [2015] *New Zealand Law Review* 35-71.

of recent examples where, applying this guidance, it has been held that legislation cannot be interpreted compatibly with Convention rights.

16. Third, it is impossible to have a firm grasp of how section 3 is being used in the absence of systematic analysis of cases considering its application. There appears to be no comprehensive analysis of the cases.[6] Moreover, one cannot safely infer from the relatively few cases in which a s.4 declaration has been made that s.3 is widely used to interpret legislation compatibly with Convention rights for several reasons: (a) as explained above, many courts and tribunals are not able to make s.4 declarations even if legislation cannot be read compatibility with Convention rights, the absence of such a declaration does not therefore imply that s.3 has allowed a Convention-compatible interpretation of legislation; (b) courts and tribunals sometimes consider s.3 and find that legislation could not be interpreted in a manner contended for by a claimant even if they have found that there is no violation of Convention rights, and (c) many litigants have no incentive to seek a s.4 declaration and do not do so in order to avoid the cost, expense and delay involved.

17. Fourth, there are a few relatively early cases that have been controversial for the robust approach that the courts have taken which has changed the ordinary linguistic meaning of the legislation, apparently turning the provision in question inside out. It can certainly be argued that such cases went too far in interpreting the "possible" under s.3, and that it undermines legal certainty for statutes to be interpreted in a manner that changes the meaning of the legislation in this way. Nonetheless, a close look at some of these cases reveals a more complex picture.

18. Thus, several of the early cases interpreted statutes that imposed mandatory requirements to do/not do X as subject to the proviso that X must/must not be done "unless inconsistent with Article 6 of the Convention":

    (1) The first of these cases, *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, concerned s.41(3)(c) of the Youth Justice and Criminal Evidence Act 1999, which precludes evidence being adduced in trials for sexual offences about prior sexual behaviour of the complainant, save for behaviour at or about the same time as the event in question. This prohibition was read subject to the implied proviso that evidence "required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible".

[6] For a review of the cases up to 2008 see S. Grosz, J. Beatson, T. Hickman, R. Singh and S. Palmer, *Human Rights Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) chapter 5. For a consideration of the cases up to 2013 see C. Crawford, "Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998" (2014) 25 KCLJ 34-59

(2) In *R (Hammond) v SSHD* [2005] UKHL 69, [2006] 1 AC 603, the Criminal Justice Act 2003, Sch. 22 para 11(1), which states that the minimum term for a prisoner given a life sentence is to be "determined by a single judge of the High Court without an oral hearing", was held to mean without an oral hearing, "unless the judge considers such a hearing is required in the interests of fairness".

(3) In *MB v SSHD* [2007] UKHL 46, [2008] 1 AC 440 the Prevention of Terrorism Act 2005, Sch. Para. 4(3)(d), which required rules of court to secure that material was "not to be disclosed contrary to the public interest", was read subject to the proviso, "except where to do so would be incompatible with the right of the controlled person to a fair trial".

19. These cases used s.3 to in effect stipulate that primary legislation had to be subject to the proviso that it was compatible with Convention rights. On one view, this method of interpretation made Convention rights almost supreme by subjecting primary legislation to such rights unless Parliament had expressly excluded or overridden them. If such an approach was deployed routinely, all legislation could in theory be made subject to the Convention rights unless Parliament had unequivocally stated that it intended the legislation to depart from such rights—which in practice of course would almost never occur since it would consciously place the UK in breach of its international obligations.

20. It is notable however that this line of cases concerned procedural rights and the protection of a fair hearing. What constitutes a fair hearing is quintessentially a matter within the competence of courts and does not involve choices between different policy options.

21. Moreover, the Government itself urged the Court in *Hammond* to read the legislation in the manner that the Court directed. And whilst the Government in *MB* contended that the Court would need to declare the Prevention of Terrorism Act 2005 incompatible with Article 6 if it considered that a fair trial required the disclosure of material contrary to the public interest, the Court's approach represented a "fix" that ensured that the control order regime was consistent with the Convention. This fix was expressly adopted by Parliament when the regime was replaced by the closely analogous TPIM regime in 2011. Schedule 4 of the Terrorism Prevention and Investigation Measures Act 2011 provides that "nothing" in the rules of court required to be made to prevent disclosure of material contrary to the public interest, "is to be read as requiring the relevant court to act in a manner inconsistent with Article 6" (para. 5(1)).

22. Therefore, whilst a superficial examination of the cases referred to above gives rise to concerns, a closer analysis suggests that the courts found appropriate solutions in the specific context of due process rights.

23. Another example is provided by the *Ghaidan* case itself. By interpreting the words "as his or her wife or husband…" as including unmarried spouses the Court arguably changed the meaning of the words beyond the limits of interpretation. But again, this is a less surprising conclusion when one has regard to the submission made by the Government, which urged the Court to adopt this course:[7]

> "*Philip Sales* for the First Secretary of State
>
> … The exercise of the section 3 power is subject only to the compatible interpretation being linguistically possible, consistently with the legislative scheme, and not crossing the boundary between judicial interpretation and the legislative function.
>
> The phrase "as his or her wife or husband" in paragraph 2(2) can legitimately be read so as to include same-sex couples. Although the words "wife" and "husband" are gender-specific in themselves, the phrase as a whole is not: see Crake v Supplementary Benefits Commission [1982] 1 All ER 498. The gender of each partner does not play an important role in the subject matter of the provisions. An interpretation of the phrase as including same-sex couples does not interfere with any of the fundamental provisions or the fundamental policy of the legislation. No declaration of incompatibility is required."

24. Therefore, whilst there is scope for disagreement about the approach to interpretation adopted by the Courts in some cases, a closer look at some of the more robust uses of section 3 demonstrates that the Court's approach has actually proved to be workable and effective and endorsed by the Government and Parliament.

25. Fifth, any amendment to s.3 could be hugely disruptive and give rise to a considerable amount of uncertainty and litigation. I consider this point in relation to the next question, below.

26. My conclusion overall is that concerns about some of the uses of s.3 do not justify amendment to the section or its repeal.

[7] The submission is recorded at [2004] 2 AC 557 at 563.

27. The fact that there may be a handful of cases that may or may not have been wrongly decided is hardly a basis for reform of a general provision such as s.3, particularly in the absence of any systematic review of the use of s.3 or evidence of any serious problem. Moreover, it is also important to bear in mind that it is always open to Parliament or the devolved legislatures to amend the legislation to adopt a different Convention compatible solution if it considers that specific s.3 interpretation adopted by courts is undesirable or wrong. It appears that Parliament has never done so.[8]

28. This analysis does however suggest one change that would be welcome to the framework of rights protection created by s.3 and s.4 of the HRA. This is that there should be a wider number of courts and tribunals that are able to issue declarations of incompatibility. In situations where courts or tribunals consider that legislation is not compatible with Convention rights, but they cannot read the legislation compatibly, the UK is in breach of its international obligations and it is not desirable for this fact not to be drawn to the attention of the Government by means of a declaration of incompatibility. However, any such change would need to consider ways of ensuring that the prospect of such a declaration being granted do not result in the costs and complexity of the proceedings expanding significantly, which would simply deter persons from relying on the HRA at all. At the very least, it is difficult to understand why tribunals such as the UT, the EAT, the Special Immigration Appeals Commission and the Investigatory Powers Tribunal, all of which are presided over by High Court Judges, cannot grant such declarations.

29. Such a change would continue to adhere to the compromise solution adopted by the HRA of preventing courts from invalidating or disapplying Acts of the UK Parliament. There is also, however, a strong case for giving courts the power to disapply or invalidate Acts of Parliament just as they can do in relation to Acts of the devolved legislatures and they have been able to do in relation to EU law. My view is that any such power should be made subject to the possibility of legislative override by Parliament, which would preserve Parliamentary sovereignty in a broadly similar way to the manner that Parliamentary sovereignty was preserved by the European Communities Act 1972, by allowing Parliament to act contrary to EU law if it did so expressly and by amendment to that Act.[9]

[8] C. Crawford, "Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998" (2014) 25 KCLJ 34-59. This review covers the period up to 2013. I am not aware of Parliament overruling a s.3 interpretation since then.

[9] This argument is developed in Hickman, "Bill of Rights Reform and the Case for Going beyond the Declaration of Incompatibility Model", above, also *Public Law After the Human Rights Act* (Hart, 2010), pp.7-8.

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?

30. If s.3 was amended or repealed and this applied to legislation already enacted, the meaning of that legislation would be changed. There are two scenarios that could arise, neither would be satisfactory.

31. The first scenario would be that the meaning of legislation would be changed retrospectively, i.e. as if the legislation had always had the new meaning afforded it by an amended s.3, when in fact previously it would have had a different meaning. Changing the law retrospectively in this way would be unwise and itself open to challenge under the HRA:

    a. It would potentially unravel legal relationships that had relied upon s.3 as originally enacted.

    b. It would mean that delegated legislation and Acts of the devolved legislatures that had been "saved" by a s.3 interpretation would be—and would always have been—ultra vires. [10]

    c. It would overturn a number of judicial decisions that had interpreted legislation using s.3. If s.3 was replaced by an amended interpretative obligation, each of these cases would need to be re-argued to establish whether the amended s.3 obligation affected the result.

32. The second scenario is that an amended s.3 would change the meaning of existing legislation prospectively. The implications of this are hardly less problematic. It would still cause serious disruption for persons, courts and tribunals that had relied upon s.3 to interpret legislation. Judicial decisions applying s.3 would be open to reconsideration to establish whether the meaning of the legislation that they interpreted had changed.

33. The need to reconsider judicial decisions could be avoided if all such decisions were identified and the interpretation adopted translated into amendments to the

[10] Note however a further complication. Each of the Acts governing devolution contains a section that requires acts of the devolved legislatures "*to be read narrowly as is required for it to be within competence or within the powers, if such a reading is possible, and is to have effect accordingly*" (Government of Wales Act 2006 s.154(2), Northern Ireland Act 1998 s.83 and the Scotland Act 1998 s.101). Therefore, any change to s.3 HRA might be negated in the context of the devolved legislatures by these provisions. In any event the relationship between these provisions and any amended s.3 would require consideration.

legislation in question. However, such an exercise would be difficult and could not hope to capture all the situations in which s.3 has been relied upon in courts and tribunals since 2000. At best, it could capture decisions of the higher courts of England and Wales, Northern Ireland and Scotland.

34. A solution such as this would not, however, address the fact that s.3 is not a power given to courts but is a general interpretative principle which has to be applied by everybody applying legislation to understand its true meaning and effect. Many people, businesses and public authorities will have relied upon s.3 in interpreting primary and delegated legislation and if an amended s.3 is applied to legislation already in existence such legal positions will have to be reviewed and revised.

35. Therefore if s.3 is to be amended, it should only apply to legislation enacted after the date of the amendment. That would, of course, create an undesirable and confusing twin-track approach, with legislation pre-dating the amendment subject to one interpretative obligation and that post-dating the amendment subject to another.

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?

36. This question appears to be premised on the assumption that s.3 and s.4 are both remedial provisions that provide alternative powers for courts where legislation breaches a Convention right. For the reasons that have been explained above, this is not the case.

37. Section 3 is part of the corpus of law that give meaning to legislative provisions. Unlike s.4, it is not directed at courts. It is a rule of law that has to be applied by everybody and every court and tribunal that applies the law. It also applies to all legislation and not only Acts of Parliament. The courts cannot therefore choose to make a declaration of incompatibility instead of interpreting legislation in the manner required by s.3, nor is it easy to see how s.4 could contribute to the interpretative obligation imposed by s.3.

38. Indeed, the question hints at an entirely different arrangement whereby s.3 is replaced by a discretionary legislative power that enables courts to amend legislation themselves or, in their discretion, to declare it incompatible with the Convention rights. That would be a rational system to adopt. However, the courts (and everybody else) would still need to interpret legislation and would still need an interpretative principle to do so. And amending the interpretative principle currently embodied in

s.3 would raise all of the problems that have been addressed in the previous two sections of this submission.

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

39. In the *Belmarsh case* the Appellate Committee of the House of Lords quashed the Human Rights Act 1998 (Designated Derogation) Order 2001. This meant that Article 5 of the Convention rights continued in effect. Since s.23 of the Anti-Terrorism, Crime and Security Act 2001 authorised indefinite immigration detention it was declared incompatible with Article 5 ECHR.

40. In the *Belmarsh case*, the Appellate Committee proceeded on the agreed premise that where a designated derogation order refers to a derogation that does not meet the requirements of Article 15 ECHR, the derogation order made under the HRA must be ultra vires. Despite this, it was noted[11] that the HRA makes no express provision for derogation orders to be tested by reference to Article 15 of the ECHR and that Article 15 is not one of those referred to in Schedule 1 of the HRA. It is, in other words, not one of the "Convention rights" having domestic effect.

41. There remains therefore a degree of uncertainty about whether domestic courts have power to quash a designation order for incompatibility with Article 15 ECHR.

42. However, the House of Lords was right to proceed on the agreed premise that a designation order that referred to a derogation contrary to Article 15 would be ultra vires:
    (1) Section 1(2) of the HRA makes the application of the Convention rights "subject to" "designated derogation".

    (2) Section 14(2) of the HRA provides that "designated derogation" means any "derogation by the United Kingdom form an Article of the Convention" which is designated by Order.

    (3) Where however the UK has not validity derogated from an Article of the Convention, because its purported derogation is not consistent with the requirements of Article 15 ECHR, the UK has not, in fact, derogated. Its purported derogation would not be recognised or applied by the ECHR. Therefore, the domestic courts must ask whether there is in fact a valid

[11] [2004] UKH 56, [2005] 2 AC 68, at [150] (Lord Scott)

derogation under international law in order for there to be a designated derogation within the meaning of s.14 of the HRA.[12]

43. It is also clearly desirable for domestic courts to be able to consider the legality of a derogation under Article 15 ECHR, for the following reasons:

    (1) A domestic court rather than an international court is the appropriate forum for assessing whether there is an emergency threatening the life of the nation and that derogation is strictly required:

        a. The domestic courts are closer to and more in tune with domestic conditions;

        b. They have fact finding functions and provision for considering closed evidence if necessary (Justice and Security Act 2013); and

        c. The judgments of domestic courts on issues of security and national emergency are more likely to be accepted by the public and Government.

    (2) Domestic courts will also be able to consider the issue far more quickly. That is critical because domestic rights under the HRA are expressly "subject to" designated derogation (s.1(2)). Therefore, if persons affected by emergency measures had first to challenge the derogation in Strasbourg their HRA rights, and the jurisdiction of domestic courts, would be effectively suspended until the determination of the Strasbourg application.

    (3) When the *Belmarsh case* reached the Strasbourg Court in *A v United Kingdom* (2009) 49 EHRR 29 that court gave considerable deference to the judgments of the domestic courts because they had considered compatibility with Article 15 fully. If the domestic courts had not done so, the margin of appreciation afforded to the United Kingdom would have been narrower.

44. For all these reasons, the HRA should be amended to put beyond any doubt that domestic courts must consider and determine the validity of derogations under Article 15, ECHR.

45. Finally, it is appropriate for designation Orders to be quashed if they are incompatible with Article 15. That ensures that the protections under the HRA are maintained when derogation is invalid.

[12] Hickman, *Public Law After the Human Rights Act* pp.338-339.

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?

46. The HRA s.6 stipulates that it is unlawful for public authorities to act incompatibly with the Convention rights. The effect is that subordinate legislation made by public bodies is ultra vires if it is not compatible with Convention rights.

47. Legislation that is ultra vires on this basis is subject to the ordinary remedies available in the case of ultra vires instruments, such as quashing or the granting of a declaration as to a person's rights.

48. It will often be administratively disruptive for delegated legislation to be found to be unlawful but in this respect there is no difference where legislation is found to be unlawful by reference to s.6 of the HRA with where it is found to be unlawful by reference to common law principles or by reference to another statutory provision (e.g. the enabling legislation under which the subordinate legislation is made or another statute that sets out general principles such as the Equality Act 2010).

49. Indeed, there will often be overlap between challenges to subordinate legislation under the HRA and challenges based on other grounds. This overlap will often be extensive where, for example, challenges are brought on the basis of common law rights or rights protected by the Equality Act 2010.

50. In addition, many enabling provisions, particularly in the context of regulatory action, are expressly qualified by requirements of proportionality. Therefore, the proportionality principle can be applicable via several different routes: under the HRA, under the Equality Act 2010 and under retained EU law.

51. It would be arbitrary and result in a high degree of uncertainty if the consequences of finding subordinate legislation to be unlawful differed depending on whether the illegality arose under the HRA or under some other rule of law. It would also be paradoxical if breach of constitutionally significant human rights protections had more restricted legal consequences than breaches of other statutory provisions or public law principles.

52. The courts should apply a consistent approach to the consequences of delegated legislation being unlawful that is not dependent on the ultimate source of the illegality. There is no justification for treating unlawfulness under the HRA differently and to establish a separate regime of legal consequences under the HRA would create significant legal uncertainty.

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?

53. The HRA applies to persons outside the United Kingdom in a manner that mirrors the exterritoriality of the ECHR itself, with one important exception. The exception is that whereas the United Kingdom has extended the ECHR to its overseas territories, the HRA does not apply to such territories (see *R (Quark Fishing Ltd) v SSFCA (No 2)* [2005] UKHL 57, [2006] 1 AC 529).

54. The ECHR applies extraterritorially in defined situations, such as in relation to embassies and territory occupied by a State abroad. More controversially, the ECHR applies where individuals are in the custody of State officials abroad or in relation to isolated and proximate uses of force by State officials. The principles have very recently been reconsidered by the Grand Chamber of the European Court of Human Rights in *Georgia v Russia* No 2 App. No. 38263/08. That case made clear that active military operations during an international armed conflict do not engage the ECHR.

55. Moreover, where the ECHR applies to detention, the principles of Article 5 are modified to reflect applicable principles of International Humanitarian Law: *Hassan v United Kingdom*, App. 29750/09.

56. Concerns have nonetheless been raised about the application of the HRA to actions of the military aboard. However, a distinction should be drawn between the application of human rights norms and the means of enforcement of such norms.

57. The British armed forces have long accepted that their actions must conform to human rights principles derived from international human rights treaties. Such principles are applied through standard operating instructions and other policies and procedures, which are replete with references to international human rights standards as well as domestic legal obligations. British military personnel have, in other words, long been expected to go abroad carrying the UK's international obligations in their backpacks.

58. Several concrete examples of this can be given. The first is the MOD policy that captured foreign fighters will not be transferred to non-UK personnel if,

> "there is a real risk at the time of transfer that the [captured persons] will suffer torture or cruel, inhuman or degrading treatment or punishment or be subjected to unlawful rendition or flagrant denial of justice. The test is whether there are, at the time of transfer, substantial grounds for believing that the [captured persons] faces such risk."[13]

These principles are derived from ECHR case law. The *Captured Persons* policy also addresses things such as conditions of detention and treatment of detainees, emphasising for example the prohibition on torture, inhuman or degrading treatment.

59. Another example is provided by the policy relating to interviewing foreign detainees held by foreign States and intelligence sharing with foreign partners which might give rise to, or arise from, human rights violations. This policy provides a further example of human rights norms translated into instructions applicable to the armed forces in respect of matters occurring overseas.[14] Adherence to this policy is overseen by the Investigatory Powers Commissioner, Sir Brian Leveson.

60. In short, the application of human rights principles derived from the ECHR and other international obligations such as the ICCPR are thoroughly translated into applicable military standards and policies promulgated at the highest levels. These policies require military personnel to apply human rights principles irrespective of the application of the HRA.

61. Moreover, even if the HRA itself did not apply to military activities aboard, the ECHR would continue to apply line with the principles articulated in *Georgia v Russia*.

62. Therefore the extraterritorial application of the HRA does not itself determine the application of ECHR standards to military activities. Such norms are applied, have been applied and will continue to be applied irrespective of the HRA.

63. The real issue relates to whether it is appropriate for such norms to be enforced by domestic courts in ordinary HRA claims. There are justified concerns about the ordinary court process to determine complaints under the HRA concerning military activities abroad, but these concerns can be addressed:

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[13] Ministry of Defence, *Joint Doctrine Publication 1-10, Captured Persons,* Fourth Edition, September 2020, at [12.10]. This was crystallised into a single policy in 2010 issued by the Secretary of State for Defence: see *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) at [20]-[21].

[14] HM Government, The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees, July 2019. For judicial scrutiny of the previous policy and the human rights principles that underpin it, see R *(Equality and Human Rights Commission) v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389.

(1) First, it is important to bear in mind that UK military personnel abroad are in general subject to applicable civil and criminal law, which might be UK law or foreign law. The immunity from suit that public officials, including military personnel, characteristically enjoy in foreign courts is premised on them being subject to the jurisdiction of their own courts. The *Captured Persons* policy emphasises the importance of military personnel being subject to the law:

> "Legitimate conduct, including treatment of captured persons (CPERS), is an essential element of operational authority, which is itself a condition for long-term success. An early example of this was illustrated in the Peninsular Wars, when Wellington demanded that his soldiers respect the religion, customs and property of Portugal and Spain. His orders secured the cooperation of the civilian population because of the high standards of behaviour he set for his forces; his considerate policy was rewarded with freely given local intelligence." (p. v.)

(2) Second, the fact that being subject to the law has resource implications, such as the need to address, respond to and determine complaints or claims, is not a good reason for creating areas of de jure or de facto immunity.

(3) Third, if a claim could not be brought under the HRA to enforce the UK's international obligations under the ECHR, individuals would still be able to complaint to the Strasbourg Court. The purpose of the HRA was to avoid such applications by addressing the complaints domestically.[15] There remains value in that objective being realised.

(4) Fourth, it is nonetheless the case that military activities abroad give rise to special challenges in terms of evidence gathering and evidence evaluation. Domestic judges lack familiarity with military matters and domestic court processes are not well suited to addressing them. After all, the armed serves have a separate Service Judicial System that deals with criminal matters which includes trial by a jury of commissioned officers.

(5) There is therefore a case for establishing a separate tribunal to determine HRA complaints against the armed services and designating that tribunal as the appropriate tribunal for the purposes of s.7, HRA. Such tribunal could have a constitution that included commissioned officers (separate from the chain of command relevant to the dispute in question). It could also have bespoke procedures, including provision for considering confidential material, and an

[15] See *Rights Brought Home*, White Paper, CM 3782, October 1997.

inquisitorial role that might overcome some of the problems involved in obtaining evidence relating to overseas activities. Such a tribunal would be likely to be more effective than ordinary court procedures in evaluating complaints about non-compliance with the UK's obligations under the ECHR and is more likely to have the confidence of the services.

(6) There are precedents for such an approach. The Investigatory Powers Tribunal has exclusive jurisdiction to determine HRA complaints against the intelligence agencies, has bespoke procedures and an inquisitorial role. Most complaints are dealt with on the papers without hearings after making inquiries of the relevant agency; but it has also had open hearings in some cases and it has made important contributions to the law on interception of communications and surveillance. Similarly, the Special Immigration Appeals Commission considers HRA issues in immigration and nationality cases that have national security sensitivity and has as one of its members a former member of the intelligence services community.

64. For these reasons, there is in my view a case for change in the application of the HRA to events occurring overseas in a limited category of cases.

Tom Hickman
Blackstone Chambers
3 March 2021