Independent Human Rights Act Review evidence.

Theme 1

a) **Section2 .**UK courts in particular the Supreme Court have accepted that in exceptional circumstances Strasbourg jurisprudence will not be followed. Consider *Horncastle* [2009] UKSC 14 where the Supreme Court refused to follow the ECtHR decision in *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1 that trials would not be able to continue where the only or principal evidence is that of a witness who is unavailable as that evidence could not be tested in court and to continue would be a violation of article 6 (1). The Supreme Court found that the decision was not fully reasoned and held that there could be a fair trial even where a conviction was based solely or decisively on hearsay evidence. In *Pinnock v Manchester CC* [2011] UKSC 6 the Supreme Court set out when Strasbourg jurisprudence would be followed: 'where there is a clear and consistent line of decisions whose effect is not inconsistent with some fundamental substance or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line' at [48]. However, Strasbourg jurisprudence lays down general principles so where the ECtHR is not fully appraised of the facts before a UK court it does not need to be followed so long as the principles are applied. See *R (Brooke) v Parole Board* [2008] EWCA Civ 29 where the Court of Appeal disagreed with the view of the ECtHR that the Parole Board was an independent and impartial body for the purposes of article 5(4). There is no need for any amendment to section 2.

b) The margin of appreciation is relevant only to an international court. It is not directly applied by domestic courts. But note judicial deference which means that there are some choices of the executive or Parliament which the courts will accept as within a range of proportionate outcomes i.e., that on some issues a court cannot distinguish on proportionality grounds between a number of different options available to a public authority to make. 'Deference' applies only in domestic law and should not be equated with 'margin of appreciation' which is a principle relevant to international

law. However, a wide margin of appreciation may offer a domestic court a degree of flexibility in terms of the meaning of a Convention right, but it does not require (though may permit) domestic courts to accept the proportionality judgement of the legislature or the executive. No change required.

In *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23 the ECtHR Grand Chamber took into account the decision of *Horncastle* and held that the 'solely or decisively' rule was not an absolute rule and did not have to be followed where there are sufficient safeguards in the trial process. This is an example of how section 2 allows for 'dialogue' between the Supreme Court and the ECtHR over challenging human rights issues. This dialogue enables the Supreme Court to make the statement in *Pinnock* that even clear and consistent Strasbourg jurisprudence (even of the Grand Chamber) does not always have to be followed. Thus, the dialogue does satisfactorily permit domestic courts to raise concerns as to the application of Strasbourg jurisprudence in the UK. However, it should be noted that the UK has not ratified article 1 of Protocol 16 which allows the highest courts and tribunals of a High Contracting Party to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols. Ratification would improve the dialogue between higher domestic courts and the ECtHR.

Theme 2

a) **Section 3** has extensive consequences for the courts' interpretation of legislation, permitting them to do much more when the application of normal canons of statutory interpretation cannot achieve compatibility with the Convention. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30 Lord Rodger stated at [124]:

'Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases, the easiest solution may be to put the offending part of the provision into

different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result'.

It could be argued this statement indicates that as a result of Parliament enacting section 3 (1) it has shared sovereignty with the higher courts because section 3(1) is a powerful tool of interpretation and in the early days it sometimes went to the judges' heads for example see, *R v A (No 2)* [2001] UKHL 25 where Lord Steyn used section 3 to interpret section 41 of the Youth Justice and Criminal Evidence Act 1999 (the rape shield which forbids complainants being cross examined about their previous sexual history) so as to include an implied exception to section 41 where past history was so relevant to the issue of consent that to exclude it would be violation of article 6(1) - the right to a fair trial. That was interpretation inconsistent with the intention of Parliament. However, more recently the judges have been more controlled in their use of section 3(1) for example, in *WB v W District Council* [2018] EWCA Civ 928, the Court of Appeal decided that the interpretative duty imposed on courts by section 3(1) can yield to other principles of statutory construction. The majority held that it is not the function of section 3(1) to require the courts to apply a Convention compliant interpretation if other principles of statutory interpretation prevented it from doing so.

So, whilst the interpretative duty in section 3 (1) is a 'very strong and far reaching' because its purpose is to be 'the primary remedial measure' for correcting Convention incompatible statutory provisions, it is limited by what is 'possible': *Sheldrake v DPP* UKHL 43 per Lord Bingham at [28].

There is also a distinction between the UK's negative obligations and positive obligations under the Convention and the use of section 3(1). In *Bates van Winkelhof v Clyde & Co LLP* [2014] Lady Hale stated at [44]:

'Under section 3(1) of the Human Rights Act 1998, we have a duty to read and give effect to legislation in a way which is compatible with the convention rights (and this means that it may have a different meaning in this context from the meaning it has in

others). While it is comparatively easy to see how this may be done in order to prevent the state from acting incompatibly with a person's convention rights, in other words, to respect the negative obligations of the state, it is a little more difficult to assess whether and when this is necessary in order to give effect to the positive obligations of the state and thus to afford one person a remedy against another person which she would not otherwise have had'.

The conclusion is the courts have now recognised 'there is a limit beyond which a Convention -compliant interpretation is not possible' (*Sheldrake v DPP* UKHL 43 per Lord Bingham at [28]) so the courts will not cross the line from interpretation to the amendment of legislation. Cases supporting this view are *R (Anderson) v Home Secretary* [2002] UKHL 46, *Bellinger v Bellinger* [2003] UKHL 21, *R (Wilkinson) v IRC* [2005] UKHL 30, *R (Wright) v Health Secretary* [2009] UKHL 3 and *McDonald v McDonald* [2016] UKSC 28.

Conclusion there is no need for section 3 to be amended or repealed.

Section 4 is only used in exceptional circumstances as section 3(1) usually can render a provision compatible with Convention rights. A declaration can be made even where the alleged violation is within the margin of appreciation afforded by the ECtHR. Section 4 gives the judges discretion whilst section 3(1) imposes a duty. However, the courts usually make a declaration where an incompatibility negatively affects one of the parties to the case. Consider *A & Others v Home Secretary* [2004] UKHL 56 (the 'Belmarsh' case) where the House of Lords quashed a derogation relating to article 5 -the right to liberty and made a declaration of incompatibility in respect of section 23 Anti-terrorism, Crime and Security Act 2001, (the UK's first response to 9/11 which provided for the indefinite detention without trial of suspected international terrorists who were not UK nationals) as it was incompatible with articles 5 and 14 (prohibition of discrimination) because first detention without trial was disproportionate response to the emergency and second it discriminated on the ground of nationality status.

Parliamentary sovereignty is preserved. Where primary legislation is clearly incompatible (and the use of section 3 (1) cannot fix the incompatibility) it continues to be valid in the courts. The higher courts have the discretion to make a declaration

of incompatibility, but that will not affect the outcome of the case in the court making the declaration (section 4). It may, however, trigger a fast-track procedure to create a remedial order to remedy the incompatibility (section 10). But in the normal course of events remedial action should be by way of primary legislation. There is now a constitutional convention that Parliament will change the law after a declaration.

Thus section 4 recognises and respects the particular functions of the legislature, executive and judiciary. It gives the courts the opportunity to point out to Parliament the issues that led to the incompatibility. If the theme question means that Parliament would decide whether a statute provision was incompatible or not with Convention rights then that could lead to serious consequences if the higher judiciary did not accept that decision. Suppose Parliament decided not to make a declaration and the higher courts disagreed but with no power to make a declaration? That could lead to a constitutional crisis as some senior members of the judiciary now believe that judicial review can be used to challenge the substantive validity of legislation itself which in their view is contrary to the rule of law. See the comments of Lord Steyn and Lord Hope in *Jackson v Attorney General* [2005] UKHL 56 at [102] and [104]. This means both Parliament and the higher courts would need a power to make a declaration and it is doubtful that that is any improvement of the current position. Also, section 19 HRA requires that ministers in charge of a bill make a statement, before second reading in either House, that the bill is Convention compatible. If a majority in Parliament disagrees the bill can be changed. Conclusion no change is needed to the current position.

b) The domestic courts can currently make a quashing order in respect of a Human Rights Act 1998 (Designated Derogation) Order. An order for costs can be made in favour of the victim for costs incurred in the Supreme Court and below. These are adequate remedies although there may cases where damages are also required.

c) In contrast to primary legislation subordinate legislation which cannot be interpreted as Convention compatible is invalid and must not be applied by the courts. That is the implication of HRA section 3(2)(c). However, subordinate legislation which is not Convention compatible continues to be valid if the enabling Act stops the removal of the incompatibility (HRA section 3 (2) (c)). In such circumstances a declaration of incompatibility in respect of the subordinate

legislation can be made. However, it is more likely that the courts will 'read down' the enabling Act so that incompatible subordinate legislation is excluded. No change required.

d) The Convention applies extra-territorially where a HCP has effective control of a foreign state or part and individuals are subject to the authority and control of the HCP. This means everyone within that area is protected by the Convention. That includes civilians but also the HCP's own soldiers: *Smith v Ministry of Defence* [2013] UKSC 41. The Supreme Court left open the question whether a HCP's positive obligation under article 2 to protect life can apply to its own soldiers in active operations against the enemy; the court decided not to strike out the claims that the UK had breached that obligation. That situation needs to be clarified.

e) The remedial order process gives ministers great power because:

'A remedial order may make such amendments to the incompatible legislation (and, where the legislation in question is subordinate legislation, to primary legislation which prevents removal of the incompatibility) as the Minister considers necessary to remove the incompatibility. An order may: amend any primary or subordinate legislation, repeal primary legislation and revoke subordinate legislation; contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate; have retrospective effect (save that nobody is to be guilty of an offence solely as a result of the retrospective effect); make provision for the delegation of specific functions; and make different provision for different cases, allowing (for example) parties to the litigation in which a declaration of incompatibility was made and to other similar litigation, but not other people, to be retrospectively relieved of the effects of the incompatibility'. Eskine May.

This power should only be used in exceptional urgent cases and section 10(2) should be so amended. The HRA should further be amended to make it clear that in the normal course of events remedial action should be by way of primary legislation. There is now a constitutional convention that Parliament will change the law after a declaration.

Simon Parsons Chartered Institute of Legal Executives (CILEx) Specialist Reference Group Advisor (simon.parsons7@hotmail.com) 7th February 2021.