Independent Human Rights Review Questionnaire

1. How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?
The ECHR jurisprudence has been faithfully applied by the Courts in cases such as CI (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ. 2027 and by Parliament and the Government in framing the Immigration Rules and statutes such as the Immigration Act 2014. No amendment to section 2 is necessary.
2. 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?
Domestic courts and tribunals tend to look to the decisions of the ECtHR for guidance, for example, on the level of compensation to be awarded to complainants. See Re H A Child Breach of Convention Rights [2014] EWFC 38.
3. 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 public cannot know about this as it does not seem anything is published about it unless it means simply judicial comments in judgments about ECtHR decisions and their comments in judgments about UK court decisions. The public would welcome the opportunity to comment on ECtHR judgments, such as those in which murderers are awarded compensation for delays in the hearing of their appeals e. g. O'Neill and Lauchlan v The UK [2016] ECHR 583.
4. What are you general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA?
Parliament and the Government are clear that they support human rights in theory at least, and they have set up the system whereby the Courts act as independent arbiters of human rights; this is because it is recognised that the Government and Parliament need the Courts to assist them in ensuring that human rights are respected. However, when the Government doggedly appeals against any decisions of the Courts giving effect to human rights, whether they are right or wrong, this brings the genuineness of the Government's commitment to human rights into question.
5. Have Courts have been drawn unduly into matters of policy?
An example of a policy that the Courts duly challenge is the policy of rationing criminal justice, in order to slow the demand for prison places which leads to longer waiting times for trials. Such delays are the basis of complaints to the ECtHR and states have frequently been ordered to pay compensation to defendants for such delays, irrespective of whether they are guilty of the offences with which they are charged. The Courts need to be more active in bringing home to the Government through the meetings of the Lord Chief Justice with the Lord Chancellor that the policy of causing or tolerating delays in the criminal justice system is totally unacceptable, as it infringes human rights in a really serious way for victims and witnesses as well as for defendants. Cases should be heard when memories are fresh, and victims and witnesses are available; it is intolerable that dangerous criminals are at large on bail or in custody awaiting trial for many months.

The Courts have not been drawn unduly into matters of policy. Where the Courts decide that the Government's policy is incompatible with human rights the duty of the Courts is to make this clear.
6. What are the strengths and weakness of the current approach and any recommendations for change?
The current approach recognises the independence of the judiciary which must be respected by all in Government. It is vital that the quality of the judiciary is improved by better training and more careful selection of candidates for promotion to and within the judiciary so that appointees are fully committed to the right to a fair trial. Also, that adequate provision is made for the appointment of suitable numbers of professional court staff who can assist them in ensuring there are no avoidable delays in the justice system. Underfunding of the system in in particular cut-backs in legal aid and access to justice have severely impacted upon the quality of our system of justice leading to advice deserts and the appointment of judges who do not provide the quality of justice that is necessary in a free and fair society.
7. Should any change be made to the framework established by sections 3 and 4 of the HRA?
Yes, it is right that judges have the right to interpret legislation in a manner compatible with human rights and that if the legislation is not capable of interpretation in that way, the higher courts have the right to make a declaration of incompatibility. But if the lower courts find incompatibility there should be a simple system for judges of the lower courts to refer the case to the High Court in order that a declaration of incompatibility can be made. It should not be necessary for an appeal to be made before the High Court can consider these issues. It may not be possible for the aggrieved litigant to appeal.
8. 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?
I am not aware of any such instances. It would not be right to equate the "intention of Parliament" with the views of individual Members of Parliament or of the House of Lords. The intention of Parliament is that human rights should be respected and so if individual members criticise judges for making decisions with which they disagree, this should not trouble the Judges if they are doing the right thing in making the decisions that they make.
9. If yes, should section 3 be amended (or repealed)?
No.
10. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect?
Not applicable
11. If yes, what should be done about previous section 3 interpretations adopted by the courts?
Not applicable
12.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, it is right that the Judges consider first if the legislation can be interpreted in a manner compatible with human rights.

13. What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?
As such an order is delegated legislation the courts have the right to strike it down on an application for judicial review if it is Wednesbury unreasonable. However, this power will of course be exercised sparingly, as it is very rare for a derogation to be made and it would not be done lightly. The Act could be amended to state that any derogation from the convention can only be made by an Act of Parliament, and if that was done the courts would have to accept that they could only make a declaration of incompatibility. It may be that the primary legislation prevents the removal of the incompatibility by the quashing of the delegated legislation. If so, the court can make a declaration of incompatibility (section 4(4).
14. 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?
The courts have quashed delegated legislation e.g. in SSHD v Javed [2001] EWCA Civ 789 the Court of Appeal confirmed the decision of the High Court quashing the delegated legislation.
15. 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?
This might apply for example in the case of acts of Crown forces outside the UK. No change is necessary.
16. 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?
No, if MPs consider that Parliament needs to act, they have the right to introduce legislation to provide for this. It is for Parliament to revise its own procedure if it needs revision.
17. Are there any other provisions that should be considered for amendment?
Sections 7 and 9 should be considered for amendment. It cannot be right that litigants who have not received a fair trial are not permitted to claim compensation in the domestic courts and must apply to the ECtHR. Often the complaint might be about delay in the process of the court which caused injustice, which may not be the fault of the individual judges but is the result of the underfunding of the Courts Service. Having make an application to the ECtHR is not practical for most people who may have suffered injustice through delay – for example when the witnesses who would have been available if there had been no delay are not available or cannot be contacted or have forgotten the facts.

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Michael Hall
(a retired Solicitor of England and Wales)
110 Charterhouse Road Orpington Kent BR6 9ER