Submission to the Independent Human Rights Act Review 2021

3 March 2021

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1. Introduction

Thank you for the opportunity to give evidence to the Review. In drafting our submission we have noted that the Review is not considering the UK's membership of the European Convention on Human Rights (ECHR) and is not considering the substantive rights set out in the ECHR and given further effect by the Human Rights Act 1998 (HRA).

For ease of reference we have included below a short summary of our conclusions. This is followed by a more detailed response to each of the questions.

2. Summary

- As drafted and interpreted by UK courts, there is no need for any amendment of section 2 of the Human Rights Act 1998 (HRA). It ensures compliance by courts with the UK's obligations in international law but also permits flexibility where a different approach is appropriate.

- A margin of appreciation exception where UK courts are free to interpret and apply Convention rights in accordance with local standards is well established in HRA jurisprudence. No change is required.

- There is clear evidence of judicial dialogue taking place between domestic courts and the European Court of Human Rights (ECtHR), which is welcomed and endorsed by both levels of court. In 2015, the ECtHR established the Superior Courts Network in order to enhance dialogue with national courts and promote mutual exchange. The dialogue which currently takes place permits domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK. There is no need for legislative change to strengthen and preserve such dialogue. The HRA enables UK judges to interpret and apply the Convention rights in the same way as the ECtHR; any change to this ability would reduce opportunities for dialogue and also the chance for UK courts to exert influence on ECtHR jurisprudence.
- There are no instances where, in utilising section 3 HRA, courts have interpreted legislation in a manner inconsistent with the intention of the UK Parliament in enacting it. Section 3 should not be amended or repealed.

- Section 4 HRA declarations of incompatibility should not be considered as part of the initial process of interpretation rather than as a matter of last resort. The role of Parliament in human rights issues could be enhanced via other mechanisms without disturbing the carefully crafted relationship between sections 3 and 4 of the HRA. These sections must remain in place to ensure effective remedies for violations of human rights, and to enable the UK to fulfil its international commitments whilst respecting the sovereignty of Parliament.

- In a recent judgment, the Supreme Court has clarified the remedies that can be afforded by courts and tribunals considering subordinate legislation that is incompatible with the Convention rights. This reflects core principles of UK constitutional law and no change is necessary.

- The HRA applies to acts of public authorities taking place outside of UK territory in a limited range of circumstances, carefully developed by UK courts in dialogue with the ECtHR. Maintenance of the current position is crucial to the UK complying with its obligations in international law and maintaining the authority and reputation of its armed forces and other public authorities operating abroad. There is no case for change.

- The remedial order process as set out in section 10 of and Schedule 2 to the HRA already makes Parliament paramount in the process. There are alternative mechanisms available to ensure that Parliament plays a far greater role in scrutinising laws for human rights compliance.

3. The relationship between domestic courts and the European Court of Human Rights (ECtHR)

3.1 How has the duty to 'take into account' ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

As drafted and interpreted by UK courts, there is no need for any amendment of section 2. It ensures compliance by courts with the UK's obligations in international law but also permits flexibility where a different approach is appropriate.

Section 2 of the HRA only imposes a duty on courts determining Convention rights questions to take into account but not follow ECtHR jurisprudence. In his judgment in *Hallam,*[1] Lord Mance held that section 2 'sharpens' what would be the natural approach when construing provisions designed to

[1] *R. (Hallam) v Secretary of State for Justice* [2019] UKSC 2 at [35].

incorporate domestically the provisions of an international convention interpreted by an international court.

Although there is no duty to follow this jurisprudence imposed by section 2, or any other domestic law, conscious of the obligations of the UK in international law, and subject to some exceptions, UK courts usually do follow this jurisprudence. In his judgment in *Ullah,*[2] Lord Bingham held that it was the duty of national courts to 'keep pace with the Strasbourg jurisprudence as it evolves over time'. Furthermore, most of the Convention rights would have little meaning without the backing of this jurisprudence.

Whilst following the jurisprudence of the ECtHR is the usual approach, over time a number of exceptions, where the jurisprudence of the ECtHR is not followed by domestic courts, have developed. This has allowed domestic courts the best of both worlds, encompassing the abilities to draw on a rich corpus of human rights case law; respect the obligations of the UK in international law; and have some flexibility where a different approach is required. These exceptions can be divided into four types: conflict with primary legislation; judgment of the ECtHR considered to be 'wrong'; an absence of 'clear and constant jurisprudence'; and a margin of appreciation exception.

3.1.1 Conflict with primary legislation

A judgment of the ECtHR may not be followed if it conflicts with a fundamental feature of an Act of Parliament. All that is possible in such instances is for the court to exercise its discretion under section 4 of the HRA and issue a declaration of incompatibility. This remedy is discussed in more detail in the following section. It is important to note that Parliament retains ultimate control over whether or not a judgment of the ECtHR is followed.

3.1.2 Disagreements with judgments of the ECtHR

Secondly, a judgment of the ECtHR may not be followed if a domestic court disagrees with it. Lord Hoffmann in his judgment in *R v Lyons*[3] held that if a UK court considered that the ECtHR had misunderstood or been misinformed about some aspect of domestic law, it could invite the ECtHR to reconsider the question as there was 'room for dialogue' on such matters. In his judgment in *Hallam,*[4] Lord Reed also referred to the importance of 'constructive dialogue' where courts were confident that the ECtHR will respond 'to the reasoned and courteous expression of a diverging national viewpoint by reviewing its position.'

[2] *R. (Ullah) v Special Adjudicator* [2004] UKHL 26 at [20].
[3] *R v Lyons* [2002] UKHL 44 at [46].
[4] *R. (Hallam) v Secretary of State for Justice* [2019] UKSC 2 at [172].

There are a number of examples concerning Article 6 ECHR, the right to a fair trial. The first is the judgment of the House of Lords in *Boyd.*[5] In determining whether the appointment of junior officer members to courts martial and the role of the reviewing authority were compatible with Article 6, the House of Lords did not follow the judgment of the ECtHR in *Morris*[6] where the ECtHR had found a violation on the same issue. Lord Bingham explained that there were a large number of points at issue in *Morris* and that, on this particular aspect, the ECtHR did not receive all the help which was needed to form a conclusion.[7]

The second example is the judgment of the Supreme Court in *Horncastle*.[8] It was argued that it was in breach of Article 6 to place before the jury the statement of a witness who had not been called to give evidence. The claim was based on the Chamber judgment of the ECtHR in *Al-Khawaja*[9] where a breach of Article 6 had been found when statements had been admitted in evidence of a witness who was not called in a criminal trial. The Supreme Court accepted that the requirement to 'take into account' would normally result in the court applying the principles that were clearly established by the ECtHR. However, it concluded that in this case, *Al-Khawaja* would not be followed as this was a 'rare occasion' where it had concerns as to 'whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process.'

> In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.[10]

This judgment was later endorsed by the Grand Chamber of the ECtHR in its judgment in *Al-Khawaja and Tahery v UK*.[11]

The third example is the judgment of the majority of the Supreme Court in *Hallam.*[12] Lord Mance observed that the 'vagueness' about general principles in the relevant jurisprudence was indicative of

[5] *Boyd v The Army Prosecuting Authority* [2002] UKHL 31, [2003] 1 AC 734.
[6] *Morris v UK* (2002) 34 EHRR 1253.
[7] [12]–[13].
[8] *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.
[9] *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.
[10] [11].
[11] Application no. 26766/05, 15 December 2011.
[12] *R. (Hallam) v Secretary of State for Justice* [2019] UKSC 2.

the 'uncertain and shifting ground' onto which the ECtHR's expansion of the meaning and application of Article 6(2) had led.[13] He discussed how a particular line of authority from the ECtHR was 'unfortunate' and pointed out how it caused difficulties.[14] He did not regard the current state of ECtHR case law as 'coherent or settled' on the important points. He also questioned whether uniformity of approach was critical in this area of law.[15] He confirmed that he would not depart from domestic authority on the question, or follow the case law of the ECtHR, including a Grand Chamber judgment.[16] Lord Wilson also observed that on the question, the ECtHR had allowed its analysis to be 'swept into hopeless and probably irretrievable confusion'.[17] He stated that the line of jurisprudence from the ECtHR was 'not just wrong but incoherent'[18] and concluded that the Supreme Court should not adopt the meaning ascribed to Article 6(2) by the ECtHR.[19]

Finally, in its judgment in *Poshteh,*[20] the Supreme Court held that a Chamber judgment of the ECtHR was not a 'sufficient reason to depart from the fully considered and unanimous conclusion' of the Supreme Court. It held that it was appropriate to wait for a full consideration by the Grand Chamber before considering modification of its own position.[21]

A similar dynamic was evident when, in *R v Newell*; *R v McLoughlin,*[22] the Court of Appeal rejected a Grand Chamber judgment—*Vinter v UK*[23]—which had found that whole life prison terms constituted inhuman or degrading treatment or punishment under Article 3 of the Convention. This was because prisoners jailed for life had no real prospect of ever being released due to 'highly restrictive conditions' which permitted exceptional release, at the discretion of the Secretary of State, only on 'compassionate grounds' due to terminal illness or a serious incapacity. The Grand Chamber concluded that the lack of certainty meant that the law did not provide an appropriate and adequate avenue of redress in the event that an offender sought to show that his continued imprisonment was not justified.

[13] [46].
[14] [49].
[15] [73].
[16] [53].
[17] [85].
[18] [90].
[19] [93]-[94].
[20] *Poshteh v Kensington & Chelsea Royal London Borough Council* [2017] UKSC 36.
[21] [37].
[22] [2014] EWCA Crim 188.
[23] Application no. 66069/09, 9 July 2013.

At the Court of Appeal, the Lord Chief Justice suggested that the Grand Chamber ruling proceeded from a misunderstanding of what the relevant legislative scheme entailed; the law was, in fact, clear as to the possible exceptional release of whole life prisoners, which was wider than the Grand Chamber supposed, and there was no incompatibility with the Convention since the Secretary of State was bound to exercise the relevant power 'in a manner compatible with principles of domestic administrative law and with Article 3.' The existence of a so-called 'Lifer Manual', a guidance document which was outdated in not reflecting the requirement to act compatibly with Article 3, was inconsequential since it expressed policy rather than law.

When the issue came back to Strasbourg in the case of *Hutchinson,*[24] first a Chamber (by 6-1) and later the Grand Chamber (by 14-3) deferred to the Court of Appeal; the *McLoughlin* decision had dispelled the lack of clarity identified in *Vinter* and whole life sentences could now be regarded as reducible, in keeping with Article 3. Moreover, the Grand Chamber recalled that 'the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities.'

3.1.3 An absence of clear and constant jurisprudence

The third exception is that a judgment of the ECtHR need not be followed if it is not in keeping with the ECtHR's 'clear and constant jurisprudence'. For example, in its judgment in *Quila*[25] the Supreme Court declined to follow a judgment of the ECtHR given in 1985 as it was an old decision, there was dissent from it at the time and more recent decisions of the ECtHR were inconsistent with it. It found no 'clear and constant' jurisprudence to follow.

Where ECtHR jurisprudence is not clear and constant, it is up to the domestic court to reach a decision on the applicable law. For example, in its judgment in *Hicks,*[26] the Supreme Court held that the Strasbourg case law on the interpretation and application of an aspect of Article 5 was not clear and settled, therefore it had a 'judicial choice' to make. As Lady Hale has held, judges do not have to wait until a case reaches Strasbourg before deciding what the answer should be. 'We have to do our best to work it out for ourselves as a matter of principle.'[27]

It is also possible for there to be no relevant ECtHR jurisprudence for a UK court to follow. In such instances, UK courts interpret and apply the Convention right for themselves. Lady Hale has described this process as follows:

[24] Application no. 57592/08, 17 January 2017.
[25] *Quila v Secretary of State for the Home Department* [2011] UKSC 45 at [46].
[26] *R. (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9, [2017] AC 256 at [32].
[27] *Keyu* v Secretary of State for Foreign & Commonwealth Affairs [2015] UKSC 69 at [291].

> There may be other situations in which the courts of this country have to try to work out for themselves where the answer lies, taking into account, not only the principles developed in Strasbourg, but also the legal, social and cultural traditions of the United Kingdom.[28]

For example, in its judgment in *Austin,*[29] the House of Lords observed that the application of Article 5(1) to measures of crowd control was something the ECtHR had not considered. There was no direct guidance as to whether Article 5(1) was engaged when police imposed restrictions on movement for the sole purpose of protecting people from injury or avoiding serious damage to property.

The House of Lords' conclusion that the police cordon restricting the claimant's liberty was not the kind of arbitrary deprivation of liberty proscribed by the Convention was eventually approved by the ECtHR itself, demonstrating the contribution which can be made by UK judges to the jurisprudence of the Court.[30]

3.1.4 Subject matter engages the UK's margin of appreciation

The fourth and final exception is that it is possible for a court not to follow a judgment of the ECtHR if the subject matter of the claim engages the UK's margin of appreciation. As this is the subject of a specific consultation question, this exception is considered in more detail in the following part.

3.2 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?

A margin of appreciation exception where UK courts are free to interpret and apply Convention rights in accordance with local standards is well established in HRA jurisprudence. No change is required.

As noted above it is possible for a domestic court to not follow a judgment of the ECtHR if it concludes that the subject matter of the claim engages the UK's 'margin of appreciation'. This is the principle employed by the ECtHR to allow a degree of latitude to states as to how they protect the rights set

[28] Ibid.
[29] *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 AC 564.
[30] *Austin v United Kingdom* ECtHR Grand Chamber 15 March 2012.

out in the Convention and it is important in areas where there is an absence of consensus or common practice across member states. A margin of appreciation is accorded to a member state because 'Strasbourg acknowledges that the issue in question can be answered in a variety of Convention-compatible ways, tailored to local circumstances.'[31]

An example is the judgment of the Supreme Court in *Nicklinson.*[32] Here the court was unanimous in its view that the subject matter of the claim, the lawfulness of the ban on assisted suicide, engaged the UK's margin of appreciation. From this, a majority concluded that it was therefore appropriate for UK judges to form their own view as to whether or not there was a breach of Convention rights. Lord Neuberger commented as follows:

> In a case such as this, the national courts therefore must decide the issue for themselves, with relatively unconstraining guidance from the Strasbourg court, albeit bearing in mind the constitutional proprieties and such guidance from the Strasbourg jurisprudence, and indeed our own jurisprudence, as seems appropriate.[33]

An earlier example is the judgment of the House of Lords in *In re P.*[34] The question was whether or not it was compatible with Articles 8 and 14 for a couple to be excluded from consideration as the adoptive parents of a child on the ground only that they were not married to each other. Having considered the judgments of the ECtHR, Lord Hoffmann found support for the conclusion that there was a violation of Article 14, although he was concerned that such a conclusion went further than the ECtHR. As the ECtHR had declared the question to be within the national margin of appreciation, in his view this meant that the question was one for the national authorities to decide for themselves and different states may well give different answers.[35]

The House of Lords concluded that the question was within the national margin of appreciation and it could reach its own judgment:

> [I]t is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears

[31] *In the Matter of an Application by Gaughran for Judicial Review* [2015] UKSC 29, [2016] AC 345, Lord Kerr, [101].
[32] *R. (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.
[33] [70]. See also the comments of Lord Mance at [162]-[163], Lady Hale at [299], Lord Kerr at [342]. See also *R. (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431, [2018] 3 WLR 925.
[34] *In re P* [2008] UKHL 38, [2008] 3 WLR 76.
[35] Ibid, [31].

> appropriate for the United Kingdom . . . It follows that the House is free to give, in the interpretation of the 1998 Act, what it considers to be a principled and rational interpretation to the concept of discrimination on the ground of marital status.[36]

A further example is *Gaughran*.[37] Here, the Supreme Court determined the lawfulness of the Police Service of Northern Ireland retaining personal information and data obtained from a convicted person. There was a judgment of the ECtHR relevant to the question, *S and Marper v UK*, and it was noted by the majority that in its judgment, the ECtHR had left a margin of appreciation to competent national authorities.[38] It was also noted that the ECtHR was not considering in this judgment the position of convicted people.[39] The majority concluded as follows:

> Taking account of all relevant factors . . . the balance struck by the Northern Irish authorities, and indeed in England and Wales, is proportionate and justified. It is within the margin of appreciation which the ECtHR accepts is an important factor. There is in my opinion nothing in the Strasbourg jurisprudence which leads to a different conclusion.[40]

3.3 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?

There is clear evidence of judicial dialogue taking place between domestic courts and the ECtHR which is welcomed and endorsed by both levels of court. In 2015, the ECtHR established the Superior Courts Network in order to enhance dialogue with national courts and promote mutual exchange. The dialogue which currently takes place permits domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK. There is no need for legislative change to strengthen and preserve such dialogue. The HRA enables UK judges to interpret and apply the Convention rights in the same way as the ECtHR, any change to this ability would reduce opportunities for dialogue and also the chance for UK courts to exert influence on ECtHR jurisprudence.

[36] See also Lord Hope at [50], Baroness Hale at [120], Lord Mance at [129].
[37] *In the Matter of an Application by Gaughran for Judicial Review* [2015] UKSC 29.
[38] [27].
[39] [29].
[40] [38].

The dialogue which takes place between domestic courts and the ECtHR has a number of important impacts. First, it allows domestic courts to exert a strong influence on the jurisprudence of the ECtHR.

An example is *Jones v UK*.[41] In the UK the claimants had issued proceedings against the Kingdom of Saudi Arabia and servants and agents of the Kingdom, for various torts and torture which had occurred in the Kingdom. The House of Lords had held that the State Immunity Act 1978 conferred immunity on all of the respondents and that this was not incompatible with the right of access to court conferred by Article 6.[42] It was for the ECtHR to determine whether or not the grant of immunity here was in breach of Article 6, in particularly whether the immunity was proportionate to the legitimate aim pursued. This was an important case for all Contracting States given the ECtHR was considering whether or not an exception should be created to state immunity where civil claims for torture were made against foreign State officials.

The judgment of the House of Lords prevailed and the ECtHR concluded that there was no violation of Article 6 by affording state immunity to both States and servants and agents of the State. The strength of the influence of the judgment of the House of Lords is indicated by the following paragraph from the judgment of the ECtHR:

> . . it is clear that the House of Lords fully engaged with all of the relevant arguments concerning the existence, in relation to civil claims of infliction of torture, of a possible exception to the general rule of State immunity . . . In a lengthy and comprehensive judgment . . . it concluded that customary international law did not admit of any exception – regarding allegations of conduct amounting to torture – to the general rule of immunity *ratione materiae* for State officials in the sphere of civil claims where immunity is enjoyed by the State itself. The findings of the House of Lords were neither manifestly erroneous nor arbitrary but were based on extensive references to international law materials and consideration of the applicants' legal arguments and the judgment of the Court of Appeal, which had found in the applicants' favour. Other national courts have examined in detail the findings of the House of Lords in the present case and have considered those findings to be highly persuasive.[43]

[41] Application nos 34356/06 and 40528/06, 14 January 2014.
[42] *Jones v Saudi Arabia* [2006] UKHL 26.
[43] At [214].

Another example, from the immigration context, is *N v UK*.[44] Under the HRA, the House of Lords had decided that it was compatible with Article 3 to return the applicant, who was HIV positive with an AIDS defining illness, to Uganda. It held that the question which must be asked in such claims is whether the present state of the claimant's health is such that, on humanitarian grounds, he or she ought not to be expelled unless it can be shown that the medical and social facilities needed are actually available to him or her in the receiving state.[45] The ECtHR adopted the same test,[46] utilising almost the same wording, and has continued to apply this test in a number of subsequent judgments. The House of Lords has also influenced the impact of human rights law on modern methods for policing protest. In *Austin v UK*[47] the ECtHR adopted the same principles as the House of Lords[48] to conclude that police "kettling" or containing demonstrators as a means of controlling a demonstration was not a deprivation of liberty therefore Article 5 was not engaged.[49]

The dialogue which takes place between domestic courts and the ECtHR can be instrumental in securing a margin of appreciation for the UK. An example is the judgment of the Grand Chamber of the ECtHR in *Animal Defenders International v UK*.[50]

The applicant complained to the ECtHR about the prohibition on paid political advertising imposed by section 321(2) of the Communications Act 2003. Its claim under Article 10 had been heard by both the High Court and the House of Lords and both had refused a declaration of incompatibility. When the application was made to the ECtHR, many commentators assumed, based on its preceding jurisprudence, that it would find a violation of Article 10, due to its finding in the case of *VgT Verein gegen Tierfabriken v Switzerland*.[51]

At the outset of its judgment, the ECtHR held that the margin of appreciation was narrow given that the NGO was attempting to draw attention to matters of public interest and "exercising a public watchdog role of similar importance to that of the press".[52] It noted that in determining the proportionality of the interference, the "quality of the parliamentary and judicial review of the necessity of the measure" was of particular importance[53] as the legislative and judicial authorities were "best placed to assess the particular difficulties in safeguarding the democratic order in their

[44] Application no. 26565/05, 27 May 2008.
[45] *N v Secretary of State for the Home Department* [2005] UKHL 31.
[46] At [42].
[47] Application nos.39692/09, 40713/09 and 41008/09, 15 March 2012.
[48] *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5 at [17] and [34] per Lord Hope.
[49] At [59].
[50] Application no.48876/08, 22 April 2013.
[51] Application no.24699/94, 28 June 2001.
[52] [103]-[105].
[53] [108]. See also the observations made at [110].

State"[54]. It then carefully considered all the reviews of the prohibition which had taken place at the national level including that of the Parliament, the Parliamentary Joint Committee on Human Rights and the Electoral Commission.[55] Added to this were the judgments of the High Court and House of Lords:

> The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords. Both courts analysed the relevant Convention case-law and principles, addressed the relevance of the above-cited *VgT* judgment and carefully applied that jurisprudence to the prohibition. Each judge at both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary and proportionate interference with the applicant's rights under Article 10 of the Convention . . . The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.[56]

The Grand Chamber concluded that the UK's broadcasting ban was not in violation of Article 10. The role played by the courts in securing this outcome for the UK was invaluable especially as the margin of appreciation was actually held to be narrow. In areas where the margin of appreciation is usually found to be wide, the scope for British courts to influence outcomes before the ECtHR is considerable.

Finally, it is important to note that in 2015 the European Court of Human Rights established the Superior Courts Network[57] (SCN) in order to enhance dialogue with national courts and to act as a point of mutual exchange. The UK Supreme Court, the Supreme Courts of Scotland (the Court of Session and High Court of Justiciary), the Court of Appeal in Northern Ireland and the Court of Appeal of England and Wales are all members of the SCN.

4. The impact of the HRA on the relationship between the judiciary, the executive and the legislature

[54] [111].
[55] [114].
[56] [115]-[116].
[57] For further information see https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c=

4.1 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)?

No, there are no instances where utilising section 3, courts have interpreted legislation in a manner inconsistent with the intention of the UK Parliament in enacting it. Section 3 should not be amended or repealed.

Section 3 does not entitle judges to act as legislators.[58]

> Section 3 is concerned with interpretation. … In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes and the amendment of statutes, are matters for Parliament.[59]

It is not possible to use section 3 if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible, or provisions which do so by necessary implication.[60] Furthermore, it is not possible to do 'violence' to the language or to the objective of the provision[61] so as to make it unintelligible or unworkable,[62] or to commit 'judicial vandalism' by giving the provision an effect quite different from that which Parliament intended.[63] In short, it is not possible to use section 3 if it would involve adopting a meaning which was inconsistent with a fundamental feature of the legislation.[64] It does not allow courts to change the substance of a provision completely.[65]

> That would be to cross the constitutional boundary s 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must … 'go with the grain of the legislation'.[66]

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[58] *R v A* [2001] UKHL 25 per Lord Hope at [108].
[59] *Re S* [2002] UKHL 10, per Lord Nicholls at [39].
[60] *R v A* [2001] UKHL 25 per Lord Hope at [108].
[61] *R v Lambert* [2001] UKHL 37 per Lord Slynn at [17].
[62] Ibid, per Lord Hope at [80].
[63] *R v Secretary of State for the Home Department, ex p Anderson* [2002] UKHL 46, per Lord Bingham at [70].
[64] *Re S* [2002] UKHL 10 per Lord Nicholls at [40].
[65] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 per Lord Rodger at [110].
[66] Ibid, per Lord Nicholls at [33].

In his judgment in *Ghaidan*[67] Lord Rodger held that the key lay in a careful consideration of the essential principles and scope of the legislation being interpreted.

> If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by s 3(1).[68]

It has also been held that courts should not use section 3 to make decisions for which they are not equipped. 'There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.'[69] Even if the proposed interpretation does not run counter to any underlying principle of the legislation, it may involve reading into the statute powers or duties with far-reaching practical repercussions of that kind.

It is important to note, that section 3 affords claimants who have established a breach of Convention rights a remedy whilst a declaration of incompatibility does not. Finally, should Parliament consider that its intention has been thwarted by the use of section 3, it is open to Parliament to clarify its intention by amending the legislation. This has not happened to date.

Section 3 is employed very rarely by courts – many of the judgments in the following paragraphs are from more than 10 years ago. Nevertheless, to illustrate the nature of section 3, it is useful to consider some examples. In most instances the legislation is dated, and therefore the human rights issue was not something Parliament may have thought of at the appropriate time. Courts are simply doing the legislative will of Parliament, as expressed in the Human Rights Act 1998, and tidying up the statute book. There is clearly no agenda on the part of Parliament to override human rights guarantees which the courts have disturbed through the use of section 3.

- In *Middleton*[70] the House of Lords held that the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984 (SI 1984/553) did not meet the requirements of the Convention under Article 2. It concluded that one change was needed using section 3. 'How' in section 11(5)(b)(ii) of the Act and rule 36(1)(b) of the Rules was to be interpreted in the broader sense to mean not simply by what means someone died but to include also 'by what means and

[67] Ibid.
[68] Ibid, [122].
[69] Ibid, [33].
[70] *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10, [2004] 2 AC 182.

in what circumstances'.[71]

- In *Principal Reporter v K*[72] the Supreme Court utilised section 3 to read into section 93(2)(b)(c) of the Children (Scotland) Act 1995 a provision so that those who had established family life with a child, and would be affected by a children's hearing in relation to that child, would be able to participate in the children's hearing as a relevant person. It was held that this went with, rather than against, the grain of the legislation: 'This is simply widening the range of such people who have an established relationship with the child and thus something important to contribute to the hearing. Mostly, these will be unmarried fathers, but occasionally it might include others.'[73]

- In *Ghaidan*[74] the question before the House of Lords was whether section 3 could be applied to paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977 so that it embraced couples living together in a close and stable homosexual relationship as much as couples living together in a close and stable heterosexual relationship so that the surviving spouse of a homosexual couple could succeed to the statutory tenancy. A majority concluded that section 3 could be so applied, finding that the provisions construed without reference to section 3 violated Article 14 taken together with Article 8.

- In *Cachia v Faluyi*[75] the Court of Appeal used section 3 to interpret the word 'action' in section 2(3) of the Fatal Accidents Act 1976 as meaning 'served process' in order to give effect to rights under Article 6 of the children whose mother had died.[76] The Act provided that no more than one action shall lie for and in respect of the same subject matter of complaint. The problem was that a writ had been issued but never served—it was argued that this precluded the bringing of a new action.

The following are also examples of the application of section 3, although considered in less detail:

- Section 10 of the Contempt of Court Act 1981—disclosure of a journalist's source must meet a pressing social need, must be the only practical way of doing so, must be accompanied by safeguards against abuse and must not be such as to destroy the essence of the primary right;[77]

[71] Ibid, per Lord Bingham at [35].
[72] *Principal Reporter v K* [2010] UKSC 56, [2011] 1 WLR 18.
[73] Ibid, [69].
[74] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[75] *Cachia v Faluyi* [2001] EWCA Civ 998, [2001] 1 WLR 1966.
[76] Ibid, [20].
[77] *Financial Times Ltd v Interbrew SA* [2002] EWCA Civ 274, [2002] EMLR 24.

- Section 132 of the Mental Health Act 1983—the patient must be informed of the reasons for treatment without consent in order to ensure compatibility with Article 8;[78]
- Bail Act 1976—a court was not entitled to deny a defendant bail simply on the basis that he has been arrested under section 7(3) of the Act;[79]
- Data Protection Act 1998—it was not possible for the Security Service to benefit from a blanket exemption relieving it of any obligation to give a considered answer to individual requests;[80]
- Section 21 National Assistance Act 1948 and section 17 of the Children Act 1989—to enable a local authority to provide financial assistance compatibly with Article 8;[81]
- Sections 141 and 142 of the Law of Property Act 1925—to ensure compatibly with Article 1 Protocol No 1 and thereby enable a landlord, under a head tenancy which had been determined by a break notice, to enforce the lessee's covenants as contained in the subtenancy;[82]
- Section 335A of the Insolvency Act 1986—to ensure that the immediate sale of a property would not violate a family's rights under Article 8;[83]
- Section 115(7)(b) of the Police Act 1997—so that information which ought to be included on an enhanced criminal record certificate was read and given effect in a way which was compatible with Article 8;[84]
- Section 127(2) of the Housing Act 1996—so a tenant was permitted to raise his Article 8 right by way of a defence to the proceedings in the county court and enable the judge to address the issue of proportionality;[85]
- Part I of the Land Compensation Act 1973—to give effect to the intention that those adversely affected by noise from new roads should be adequately compensated in accordance with Article 1 of Protocol No 1.[86]
- Regulations 6 and 30 of the Immigration Nationality (Fees) Regulations 2010—made subject to the qualification that no fee was due for an application for an extension of discretionary leave to remain where to require it to be paid would be incompatible with a person's Convention rights.[87]
- Section 280 of the Trade Union and Labour Relations (Consolidation) Act 1992 – interpreted so that it did not exclude parks police from the protections afforded by sections 188-192 of the Act

[78] *R (Wooder) v Feggetter* [2002] EWCA Civ 554, [2002] 3 WLR 591.
[79] *R (Director of Public Prosecutions) v Havering Magistrates' Court* [2001] 1 WLR 805.
[80] *Baker v Secretary of State for the Home Department* [2001] UKHRR 1275.
[81] *R (J) v Enfield London Borough Council* [2002] EWHC (Admin) 432, [2002] 2 FLR 1.
[82] *PW & Co v Milton Gate Investments Ltd* [2003] EWHC (Ch) 1994, [2004] 2 WLR 443, [130].
[83] *Barca v Mears* [2004] EWHC (Ch) 2170, [2005] 2 FLR 1.
[84] *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 1 AC 410.
[85] *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2 WLR 287. See also *R v Holding* [2005] EWCA Crim 3185, [2006] 1 WLR 1040.
[86] *Thomas v Bridgend County Borough Council* [2011] EWCA Civ 862, [2012] 2 WLR 624.
[87] *R (Omar) v Secretary of State for the Home Department* [2012] EWHC 3348 (Admin), [2013] Imm AR 601.

as this would be incompatible with their Article 11 ECHR right to bargain collectively with their employer.[88]

- Section 11(4) of the Mental Health Act 1983 – read and given effect so that the obligation to consult the nearest relative was compatible with Article 8.[89]
- Adoption Act 1976 Schedule 2 para 6 – read down to remove the discriminatory interpretative provision in the Adoption of Children Act 1926 and make it compatible with Article 14 read with Article 8.[90]
- Regulation 25A(6)(a) of the Value Added Tax Regulations 1995 – interpreted so that the claimants came within the terms of the exemption and their Article 9 rights were upheld.[91]

4.2 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?

Section 4 declarations of incompatibility should not be considered as part of the initial process of interpretation rather than as a matter of last resort. The role of Parliament in human rights issues could be enhanced via other mechanisms without disturbing the carefully crafted relationship between sections 3 and 4 of the HRA. These sections must remain in place to ensure effective remedies for violations of human rights, and to enable the UK to fulfil its international commitments whilst respecting the sovereignty of Parliament.

Together, sections 3 and 4 are part of a scheme designed to ensure that the UK can comply with its obligations in international law under the ECHR whilst also respecting the sovereignty of Parliament. As noted above, when applying section 3, courts clearly respect the limits of their role. Where it is not possible to use section 3, a section 4 declaration of incompatibility is considered.[92] Were the section 4 consideration to come first, it is difficult to see what role would be left for section 3. In short, presumptive priority could not be given to section 4 without repealing section 3.

If the declaration of incompatibility were the only remedy available to victims of a breach of Convention rights as a result of an Act of Parliament, this would not be a satisfactory situation. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the

[88] *Wandsworth London Borough Council v MC Vining* (n 88).
[89] *TW v Enfield London Borough Council* [2014] EWCA Civ 362, [2014] 1 WLR 3665.
[90] *Hand v George* [2017] EWHC 533 (Ch); [2017] Ch 449.
[91] *Blackburn v Revenue & Customs Commissioners* [2013] UKFTT 525 (TCC)
[92] It is also important to note that over the lifetime of the HRA, very few declarations of incompatibility have been made. The latest figures are available at page 37 of this report from the Ministry of Justice https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842553/responding-human-rights-judgments-2019.pdf

provision in respect of which it is given, and it is not binding on the parties to the proceedings in which it is made. It remains for a government minister, if he or she considers there are compelling reasons, to make by order such amendments to the legislation as are considered necessary to remove the incompatibility.

Whilst parliamentarians, members of the executive, courts and pragmatic commentators on the HRA have almost universally not questioned the declaration of incompatibility, the remedy has been the subject of comment by others. Particularly serious is the opinion of the ECtHR. In a number of applications, the Court has held that the declaration of incompatibility is not an effective remedy firstly 'because a declaration was not binding on the parties to the proceedings in which it was made'; and secondly, 'because a declaration provided the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention'.[93]

As the declaration of incompatibility is not considered to be an effective remedy, it is not a domestic remedy which must be exhausted in accordance with Article 35 of the ECHR prior to an application being brought to the ECtHR. Therefore, where the incompatibility lies in an Act of Parliament, and the only realistic remedy at the domestic level is a declaration of incompatibility, in the view of the ECtHR there is no need for the applicant to bring his or her complaint at the domestic level first, thereby defeating one of the main purposes of the HRA, to bring rights home.

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

Designated derogation orders made under section 14(1) are secondary legislation, not primary legislation. Courts should therefore have all of the remedies that are available when secondary legislation is found to be unlawful including the power to quash the order.

4.4 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?

In a recent judgment the Supreme Court has clarified the remedies that can be afforded by courts and tribunals considering subordinate legislation which is incompatible with the Convention rights. This is in line with core principles of UK constitutional law and no change is necessary.

[93] *Burden and Burden v United Kingdom* (dec), Application No 13378/05 (12 December 2006), [37].

In its recent judgment in *RR,*[94] the Supreme Court held that there was nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation 'which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA.'[95] It confirmed that subordinate legislation was subordinate to the requirements of an Act of Parliament such as the HRA.

> The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. Again, under section 3(2), primary legislation which cannot be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so.[96]

It confirmed that where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded although there 'may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision.'[97]

This approach had been adopted by the Court of Appeal in its earlier judgment in *JT.*[98] It found that the statutory scheme for compensating victims of crimes of violence was incompatible with Article 14 insofar as it excluded from compensation those who, at the time of the incident giving rise to the injury (applicant and assailant) were living together as members of the same family. The Court of Appeal held that in accordance with section 8 of the HRA, the just and appropriate remedy was to declare that the claimant was not prevented by para 19 of the Scheme from receiving an award.[99] It noted that primary legislation did not prevent the removal of the incompatibility so a declaration of incompatibility was not possible:

> Where, as here, a provision of subordinate legislation cannot be given effect in a way which is compatible with a Convention right and there is no primary legislation which prevents removal

[94] *RR v Secretary of State for Work & Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.
[95] [27].
[96] [29].
[97] [30].
[98] *JT v First-Tier Tribunal* [2018] EWCA Civ 1735, [2019] 1 WLR 1313.
[99] [121].

> of the incompatibility, the court's duty under section 6(1) is to treat the provision as having no effect, as to give effect to it would be unlawful.[100]

It was also found that pursuant to section 6 of the HRA, it would be unlawful to do otherwise.[101]

4.5 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 HRA applies to acts of public authorities taking place outside of UK territory in a limited range of circumstances carefully developed by UK courts in dialogue with the ECtHR. Maintenance of the current position is crucial to the UK complying with its obligations in international law and maintaining the authority and reputation of its armed forces and other public authorities operating abroad. There is no case for change.

Jurisdiction as Defined by the European Court of Human Rights

A majority of the House of Lords in *Al-Skeini*[102] held that the territorial scope of the obligations and rights created by sections 6 and 7 of the HRA was intended to be 'coextensive' with the territorial scope of the obligations of the United Kingdom and the rights of victims under the ECHR. Therefore, in order to identify the territorial scope of a Convention right, it was necessary to consider how the ECtHR would consider the territorial scope of that particular Convention right.[103] Lord Rodger observed as follows:

> [S]ection 6 should be interpreted as applying not only when a public authority acts within the United Kingdom but also when it acts within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention, but outside the territory of the United Kingdom.[104]

Exceptions to Territorial Jurisdiction

Although the House of Lords held in *Al-Skeini* that the jurisprudence of the ECtHR concerning extra-territorial effect had to be followed, at this time the jurisprudence of the ECtHR on the question was not clear. The majority held that the case law indicated that liability for acts taking effect or taking place outside the territory of a Contracting State was exceptional and required 'special justification'.[105] Basing its judgment on *Bankovic v Belgium*,[106] the majority held that Article 1 of the Convention

[100] [122].
[101] [128].
[102] *R. (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26.*
[103] Ibid, per Lord Rodger at [58].
[104] Ibid, [59]. It was also held in *Smith & Ors v Ministry of Defence* [2013] UKSC 41, [2013] 3 WLR 69 that the approach of the ECtHR to Art 1 jurisdiction was the approach which must be adopted under the HRA.
[105] *R. (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 per Lady Hale at [91].
[106] *Bankovic v Belgium* (2007) 44 EHRR SE5.

reflected an essentially territorial notion of jurisdiction, but there were other bases of jurisdiction which were exceptional.

These exceptional bases of jurisdiction were clarified by the Supreme Court in its judgment in *Smith v Ministry of Defence*,[107] where the judgment of the ECtHR in *Al-Skeini v UK* was adopted. The Supreme Court confirmed that the ECtHR had recognised extra-territorial jurisdiction where there was 'state agent authority and control' and where there was 'effective control over an area'. These exceptions were not limited to the legal space of the ECHR and the jurisdiction under Article 1 could exist outside the territory covered by the Council of Europe Member States.[108] In the following paragraphs, the meaning of these two exceptions is discussed.

State Agent Authority and Control

In its judgment in *Al-Skeini v UK,* the ECtHR held that state agent authority and control included the acts of diplomatic and consular agents who were present on foreign territory in accordance with provisions of international law.[109] There may also be state agent authority and control by a Contracting State where, 'through the consent, invitation or acquiescence of the Government of that territory', it exercises all or some of the public powers normally to be exercised by that government.[110] In certain circumstances, the use of force by a state's agents operating outside its territory may bring individuals under the control of state authorities and into that State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of state agents abroad.[111] The ECtHR explained as follows:

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'.[112]

What matters is the exercise of public powers as opposed to the legal basis of operations.[113] This is a question of fact in every case.[114] It can also apply where state agents purport to exercise powers not normally exercised by the occupied state such as kidnapping or killing.[115] The Grand Chamber accepted

[107] *Smith & Ors v Ministry of Defence* [2013] UKSC 41.
[108] Ibid, [142].
[109] *Al-Skeini* v UK (2011) 53 EHRR 18, [134].
[110] Ibid, [135].
[111] Ibid, [136].
[112] Ibid, [137].
[113] *R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811, [44].
[114] Ibid [54].
[115] Ibid [50].

in *Al-Skeini* that the extent of a State's obligation under Article 1 to secure rights and freedoms to an individual will depend on the situation of that individual and therefore, Convention rights can be 'divided and tailored'.[116] In any given situation, extra territorial jurisdiction may exist on the basis of state agent authority and control in respect of some Convention rights but not others.[117] Therefore, as the Court of Appeal confirmed in its judgment in *Al-Saadoon*[118] a state may be held liable for its extra-territorial conduct in circumstances where it is 'not able to secure to the individual concerned the full range of rights and freedoms under the Convention.'[119] The reach of the Convention varies depending on the Convention right invoked.

Effective Control over an Area

In its judgment in *Al-Skeini v UK* the ECtHR explained that extra-territorial jurisdiction under Article 1 also applied when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory:

> Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.[120]

The ECtHR confirmed that it was a question of fact whether effective control was exercised and reference would primarily be made to the strength of the state's military presence in the area. Other indicators included the extent to which the state's military, economic and political support for the local subordinate administration provided it with influence and control over the region.[121]

Finally, it is important to note that in its recent judgment in Georgia v Russia[122] the Grand Chamber of the ECtHR confirmed that there is no exercise of extra territorial jurisdiction by a state during the 'active phase of hostilities' in the context of an international armed conflict.

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[116] *Al-Skeini* v UK (2011) 53 EHRR 18, [137].
[117] *R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811, [39].
[118] Ibid.
[119] Ibid, [30].
[120] *Al-Skeini* v UK (2011) 53 EHRR 18, [138].
[121] Ibid, [139].
[122] Application no. 38263/08, 21 January 2021.

Espace Juridique

In its judgment in *Al-Saadoon*[123] the Court of Appeal considered the application of the Convention (and the HRA) where force was used against Iraqi civilians not in the custody of British forces. In contrast to previous judgments, a third exception to territorial jurisdiction was identified from the judgment of the Grand Chamber in *Al-Skeini*. This related to the Convention legal space (*espace juridique*) and applied where the territory of one Convention state was occupied by the armed forces of another Convention state:

> [w]here the territory of one Convention state is occupied by the armed forces of another, the occupying state should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would result in a vacuum of protection within the Convention legal space.[124]

4.5.1 Implications of the current position

The current position reflects and gives effect to the UK's obligations in international law and has been carefully developed by UK courts in dialogue with the ECtHR. It is important that violations of human rights occurring abroad, for which UK public authorities are responsible, are remedied. This protects not only the victims of such violations but also UK personnel, such as members of the armed forces, who may suffer a violation of their human rights whilst working abroad.

To remove the extra territorial reach of the HRA would unjustifiably discriminate against victims of human rights violations of UK public authorities abroad, and place UK personnel suffering from rights violations themselves during overseas service at a grave disadvantage.

4.5.2 Is there a case for change?

There is no case for change.

4.6 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?

The remedial order process as set out in section 10 of and Schedule 2 to the HRA already makes Parliament paramount in the process. There are alternative mechanisms available to ensure that

[123] *R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811.
[124] Ibid, [22].

Parliament plays a far greater role in scrutinising laws for human rights compliance.

The role of Parliament is already paramount in the remedial order procedure given that such orders are subject to the affirmative procedure and, unless urgent, must be approved by a resolution of each House of Parliament. Furthermore, the Joint Committee on Human Rights has within its formal remit an obligation to consider 'proposals for remedial orders, draft remedial orders and remedial orders made under section 10 and laid under Schedule 2. It is also important to note that remedial orders are used infrequently.[125]

It is possible to ensure that Parliament plays a far greater role in scrutinising laws for human rights compliance by writing this into the HRA. In determining compatibility, national courts and the ECtHR play close attention to how carefully Parliament has considered the human rights implications of a bill. The ECtHR is clearly open to altering the direction of its case law following consideration of the reasoning of national apex courts. This reflects what Judge Spano has termed 'a more robust concept of subsidiarity'[126] inspired by the Brighton Declaration of 2012. This has led the Court to defer more frequently not only to domestic judicial reasoning, but also to conscientious parliamentary decision-making on human rights matters.

It is by enhancing this process that Parliament's power could be increased without comprising the effectiveness of the HRA. Better use could be made of section 19 HRA statements of compatibility and explanatory human rights memoranda in facilitating parliamentary scrutiny of proposed legislation. Sales has argued for a more formal requirement for 'detailed human rights impact assessments' to be presented by government in relation to proposed legislation and for the dedication of a set amount of parliamentary time to debate the human rights implications of a bill.[127] This was also an important feature of the Joint Committee's 2008 Report which included recommendations on 'reasoned' statements of compatibility, making explicit the power of legislative override and the possibility of a timetable following a declaration of incompatibility.[128]

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[125] The latest figures are available in this report from the Ministry of Justice https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842553/responding-human-rights-judgments-2019.pdf.

[126] Robert Spano, 'The European Court of Human Rights: Anti-Democratic or Guardian of Fundamental Values?' 19 November 2014, https://ukhumanrightsblog.com/2014/11/19/the-european-court-of-human-rights-anti-democratic-or-guardian-of-fundamental-values-judge-robert-spano/.

[127] [2016] *Public Law* 456.

[128] Joint Committee on Human Rights *A Bill of Rights for the UK* (2008) https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf.