Response from the Child Poverty Action Group to the call for evidence issued by the Independent Human Rights Act Review

March 2021

Introduction

About Child Poverty Action Group

1. Child Poverty Action Group ("**CPAG**") is a medium-sized charity which works across England, Wales and Scotland on behalf of the more than one in four children in the UK growing up in poverty. We use our understanding of what causes poverty and the impact it has on children's lives to campaign for policies that will prevent and solve poverty – for good. In addition to our policy work, CPAG has specific and highly regarded expertise in social security law and practice and provides training, advice and information in this area. We also carry out high-profile legal work to establish and protect families' rights. Our small legal team engages in test case litigation on social security issues primarily affecting children and their parents, predominantly through both judicial review and statutory appeals in England & Wales. Our test cases seek to ensure that ordinary families who are going through difficult periods in their lives where they need to claim welfare benefits (e.g. because of bereavement or because, often despite working, they are unable to provide fully for their family) have their benefit entitlement determined by legislation which complies with basic public law requirements, including being in accordance with the Human Rights Act 1998 ("**HRA**").

2. Key recent examples of test cases brought by CPAG on behalf of individuals who have been found to have suffered violations of their human rights under the HRA include:

    - *R (Jackson and others) v SSWP* [2020] EWHC 183 Admin: a successful challenge on HRA non-discrimination grounds to the marriage requirement to be entitled to bereavement support payment even at the higher rate where children are involved. This followed from a similar successful challenge which had come up through the Northern Ireland courts to the precursor to higher rate bereavement support, namely widowed parent's allowance: *in the matter of an application for judicial review by Siobhan McLaughlin* [2018] UKSC 48 (in which CPAG intervened). The Secretary of State for Work and Pensions ("**SSWP**") attempted to argue in *Jackson* that the two benefits were serving fundamentally different purposes and so *McLaughlin* could not be read across. The claimants were successful in the High Court and the SSWP chose not to appeal further. Following the declarations of incompatibility in relation to the primary legislation containing the discriminatory provisions, a remedial order was announced to Parliament in July 2020 in relation to both widowed parents' allowance and higher rate bereavement support payment but at the time of writing a proposed draft has not yet been forthcoming. Up to 2,000 families per year are currently not entitled to bereavement benefit (a contribution-based benefit rather than means-tested benefit) purely because they were not married to their long-term partner and parent of the couple's children.

    - *R (TD, AD and Reynolds) v SSWP* [2020] EWCA Civ 618: a successful challenge (on appeal) on HRA non-discrimination grounds concerning the situation in which claimants with severe disabilities are forced to make a claim for universal credit because their original benefits are incorrectly stopped by the SSWP (as subsequently established on revision or

on appeal) and as a result are worse off on universal credit than on the 'legacy' benefits they were previously in receipt of. Under existing legal provisions, they are prevented from returning to their original benefits once the wrongful decision ending their entitlement to their original benefits is identified and do not receive any transitional element in universal credit to make up for the shortfall which is nothing of their own doing. The Court of Appeal granted a declaration that the claimants' Convention rights had been violated. The SSWP's application for permission to appeal was refused by the Supreme Court.

- *TS (by TS) v SSWP (DLA); EK (by MK) v SSWP (DLA)* [2020] UKUT 284 (AAC): a successful challenge in the Upper Tribunal on HRA non-discrimination grounds to the requirement for children to have been in the UK for 104 of the previous 156 weeks before claiming disability living allowance. The refusals of this benefit had also had knock-on effects on the families' abilities to claim carers' allowance and additional elements of child tax credit, which would have assisted with the additional costs incurred due to the disabilities of the children. The tribunal found that the 2-year requirement (contained in secondary legislation) must be disapplied to avoid a breach of the children's human rights. The SSWP accepted the decision and did not appeal.

About this submission

3. We note that the focus of the Review is on the operation of the framework of the HRA and the Panel is not considering the substantive rights set out in the Convention. Our response therefore focuses on the narrow and highly technical questions raised under the two key themes as requested in the call for evidence. However, we consider it is helpful first to set out the importance of the HRA to CPAG's work, as it provides relevant context for our comments on the two themes of interest to the Review.

4. We would also add that the "structural framework" of the HRA – which this review seeks to focus on – is absolutely essential to the enforcement of rights. Without the mechanisms discussed below, the rights listed in the HRA and the European Convention on Human Rights (the "Convention") would be rendered meaningless. To reduce the ability of individuals, public bodies and courts to use the existing mechanisms in the HRA would be nothing less than a direct attack on the rights themselves.

5. We wish to note that it is also important for the Review to obtain evidence on the use of the HRA in practice on the ground and its operation outside of the courts, including from those whose rights have been afforded protection by use of the HRA.

The importance of the HRA to CPAG's work

6. It is essential for the protection and well-being of children living in poverty in the UK that the rights, duties and mechanisms of the HRA are not diluted or weakened. The UK's history as a founding member of the Council of Europe and a world leader in the rule of law and human rights must be built upon to ensure that the rights we currently have are respected, protected and fulfilled.

7. The HRA is vital to the protection of rights here in the UK, and its significant positive impact cannot be measured in legal cases alone. In CPAG's experience, including through its projects focusing on

access to justice,[1] the HRA does not operate only in the confines of the courts: it has an essential role in front-line decision making by public bodies. In addition to local authorities and central government departments[2] having regard to their duty under section 6 of the HRA to act in accordance with Convention rights in first instance decision-making, the ability for individuals to enforce their rights under the HRA through pre-action judicial review correspondence and via the First-tier Tribunal (Social Security and Child Support) tribunal is crucial. The obligation for public authorities and tribunals to disapply or read down subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary to comply with the HRA, is an important part of securing rights.[3] This role of the HRA outside the courts – and often without the involvement of lawyers - can only be fulfilled in a society which ensures there is proper investment, and the centering of human rights, in the training of civil servants and front-line administrators; the use of appropriate language that demonstrates respect for human rights by politicians and public servants; and the availability of genuine access to justice to individuals whose rights are threatened, through the adequate provision of legal aid, advice services and public-facing information.

8. As an organisation that is familiar with using the law to afford children their social security rights, CPAG can point to numerous examples of cases that simply would not have been possible without the HRA. The examples set out in paragraph 2 above are but a few examples (all with judgments given within the last year) of cases in which CPAG has been involved and the outcome of which turned on the HRA. In particular, enforcement by the courts of the right to non-discrimination in the enjoyment of other rights under the Convention has proved essential in preventing discriminatory treatment of children and families which would not otherwise be protected under domestic equality law. The cases which CPAG brings on behalf of children and families concern social security provision which has been found to fall within the ambit of Article 1 to Protocol 1 ("A1P1") (right to peaceful enjoyment of property) and, more recently, Article 8 (right to private and family life).[4] However, it is important to be clear that in the absence of any directly incorporated right to social security, reliance on non-discrimination arguments, with their high justification

[1] CPAG's two main access to justice projects are its Judicial Review project and Upper Tribunal assistance project, both of which assist first-tier welfare rights advisers to use the law to assist their clients, including through use of the HRA where appropriate. The Upper Tribunal assistance project supports advisers to challenge First-tier Tribunal decisions in welfare benefit and tax credit cases. Whilst accessibility to the First-tier Tribunal is not generally any issue for claimants acting in person or supported by a welfare adviser, taking appeals to the Upper Tribunal is more problematic. Welfare benefits advisers who are comfortable running appeals to the first level where issues are often more factual do not always feel equipped to identify and argue errors of law in the Upper Tribunal and changes to legal aid have resulted in few organisations holding welfare rights contracts for this area of work. The Judicial Review project upskills welfare rights advisers to use the judicial review pre-action protocol to secure lawful decisions for their clients, where a tribunal appeal route is not available or cannot provide an appropriate remedy.

[2] In CPAG's social security work this is predominantly the Department for Work and Pensions and HMRC.

[3] As confirmed by the Supreme Court in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. The tribunals' interpretative obligation under section 3 HRA is discussed in more detail in the responses to the specific call for evidence questions below.

[4] For the vast majority of welfare benefits in the UK, entitlement to specific social security provision does not attach to children directly but instead via their parents. It is only since late 2016, and developments in case law which have recognised certain social security provision as coming within the ambit of Article 8, that children and their rights and interests have featured directly in an Article 14 non-discrimination assessment in respect of child related benefits to which children themselves do not have formal legal entitlement.

threshold of 'manifestly without reasonable foundation', sets a suitably high threshold for protection of children's rights in this area through the HRA.

9. The HRA is the only UK-wide legislation which directly incorporates widely recognised international human rights into domestic law. The UK has ratified the Convention on the Rights of the Child ("UNCRC") but has not directly incorporated it into UK law[5]. In the absence of this UK-wide direct route of protection of children's social security rights, it is essential that the mechanisms of the HRA provide effective protection for children in the areas to which they pertain. Without direct incorporation, the UNCRC provides some necessary, but insufficient, protection for children's rights through the application of Article 14 as incorporated into domestic law by the HRA. It is a relevant consideration when assessing whether discriminatory treatment of children is justified and imposes a procedural and substantive obligation on policy-makers to treat the best interests of the child as a primary consideration.[6] In CPAG's experience, compliance with this obligation is not always evident in the area of social security, education, and other aspects of children's lives. In Scotland, steps have been taken towards the incorporation of the UNCRC into domestic legislation through the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, which was introduced to the Scottish Parliament on 1 September 2020. In Wales, the Rights of Children and Young Persons (Wales) Measure 2011 affords some protection in the devolved policy areas, though not in the area of social security. Whilst CPAG has welcomed these moves in Scotland and Wales, we are concerned that the UK as a whole and England in particular are being left behind by failing to take steps to rectify recognised deficiencies in the protection afforded to children's rights. Any weakening of the HRA would add a further blow to the protection of children's rights in the UK, and call into question the commitment of the UK government to fulfilling our obligations as a signatory of the UNCRC.

10. Further, the right to social security is a widely recognised socio-economic right within international human rights law[7] but is not afforded any direct protection through domestic UK-wide legislation. Section 1 of the Scotland Social Security (Scotland) Act 2018 includes an overarching principle that access to social security is itself a human right and is also essential to the realisation of other human

[5] Article 3 (best interests of the child), Article 26 (social security), Article 27 (adequate standard of living) and Article 28 and 29 (education) are of particular relevance to CPAG's work.

[6] In *R (SG and Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16 (in which CPAG intervened) a divided Supreme Court found that the regulations introducing the benefit cap did not contravene Article 14 ECHR on the grounds of sex discrimination. In doing so, one majority of the Court found that the cap had been introduced without considering the best interests of the affected children (as required by Article 3(1) UNCRC, but an alternative majority found that this was irrelevant to the issue of justification when assessing the discriminatory effects against women. Subsequently, in *R (DA and DS and Ors) v Secretary of State for Work and Pensions* [2019] UKSC 21 (the challenge to the lowered benefit cap in which CPAG acted on behalf of a number of the claimants), it was established that the UNCRC is relevant to the consideration of whether discriminatory treatment of certain groups of children is justified (in that instance, the similarity of treatment by failing to exempt lone parents with young children from the lower cap). *DA and DS* also established that Article 3 UNCRC imposes a procedural and substantive obligation on policy-makers to treat the best interests of the child as a primary consideration when introducing new polices. The challenge to the 'two child limit' brought by CPAG was heard by the Supreme Court in October 2020 and also engages obligations under the UNCRC - a decision is currently awaited (*SC and Ors v SSWP* UKSC 2019/0135).

[7] For example, in Article 22 of the Universal Declaration of Human Rights (UDHR) and the provisions in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by the UK but not incorporated into domestic law.

rights.[8] Additionally, in Wales, Part 1, Section 1 of the Equality Act 2010 which contains the socio-economic duty requiring specified public bodies, including Welsh Ministers and Local Authorities, to consider how their strategic decisions might help to reduce the inequalities associated with socio-economic disadvantage, will come into force on 31 March 2021.[9] Again, CPAG has welcomed these commitments from the Welsh and Scottish governments but is concerned that the UK government is not keeping pace with these developments. It seems perverse that rather than seek to expand rights protection in the UK, the government is considering reducing the protections available.

[8] It also contains a number of other statements of values and principles that are expected to govern public authority decision-making in this context, including putting respect for the dignity of individuals to be at the heart of the Scottish social security system and that that opportunity to advance equality and non-discrimination are to be continuing sought to improve the system.

[9] https://gov.wales/socio-economic-duty-overview

Response to call for evidence questions

Theme 1: The relationship between domestic courts and the European Court of Human Rights

"*The first theme deals with the* ***relationship between domestic courts and the European Court of Human Rights (ECtHR).*** *As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.*

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

a) *How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?*
b) *When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?*
c) *Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?*"

11. In CPAG's view, the duty to "take into account" jurisprudence of the European Court of Human Rights ("**ECtHR**") as set out in section 2 HRA has been applied appropriately by courts and tribunals in the UK and does not need any amendment. Although, in principle, the duty allows Strasbourg jurisprudence to set a 'minimum standard' and the domestic courts to 'go beyond' in areas in which Strasbourg has not expressly spoken, in CPAG's experience the domestic courts have not generally taken a more expansive approach to Convention rights. On the other hand, the courts have, as the duty permits, interpreted ECtHR case law for the specific context within the UK and, in certain circumstances, have found that relevant decisions of the ECtHR were not determinative in the domestic setting.[10] When courts and tribunals are faced with ECtHR jurisprudence which is inconsistent with binding authority of a domestic court, they follow the binding domestic precedent in accordance with the hierarchy of the courts in the national legal order.[11]

12. Within social security, the area on which CPAG's legal work focuses, it is generally understood that a wide margin of appreciation or discretion is afforded to states. It is also prominent within the assessment of Article 14 and, in particular, when assessing a state's justification for differential treatment. The test in this area had previously been understood to be that the ECtHR (and the domestic courts in applying its jurisprudence) will respect the judgement of the national legislature as to what is in the public interest unless the approach by the state is 'manifestly without reasonable foundation', also articulated as "*the measure employed is manifestly disproportionate*

[10] For example, in *R v Horncastle and others* [2009] UKSC 14 regarding Article 6 rights, the 7-judge Supreme Court's concerns that the *Al-Khawaja v United Kingdom* (2009) 49 EHRR 1 judgment of the ECtHR did not sufficiently appreciate or accommodate particular aspects of the UK criminal trial process led to it departing from *Al-Khawaja*.

[11] For example, *JD and A v UK* [2019] ECHR 753 (ECHR) represented an apparent development in ECtHR jurisprudence which conflicted with earlier Supreme Court authority. The lower courts have followed the domestic standard until the Supreme Court opines on *JD and A*.

to the legitimate aim pursued".[12] More recently, in *JD and A v UK* [2019] ECHR 753 (ECHR) any discrimination arising from the introduction of economic or social measures has been described as requiring "*very weighty reasons*" if it is to be justified by the state.[13] Irrespective of the exact formulation of the test, in CPAG's view this sets an extremely high threshold for individuals to establish breaches of their Convention rights in these areas and the deference of the courts to policy-makers is high. By way of example, a 5:2 majority of the Supreme Court in *DA and DS* upheld the lowered benefit cap[14] and its application to lone parents with young children on the basis that the discriminatory treatment of this group was justified in the context of its aim of incentivising parents to obtain work on the basis that "*an ethic of work within a family inculcated better outcomes for its children*". This was the case despite recognition (by Lady Hale in the minority) that there was *"little or no evidence that proper account has been taken of the risks of psychological harm to very young children if they are separated from their primary carers, or the multiple risks to the health, development and life chances of children living in poverty in their early years.*" ([156]) Nonetheless, it was recognised that the claims were "*rightly brought*" and that the arguments raised in them had attracted the court's "*most careful and sympathetic consideration*" ([91]).

13. From our perspective there has not been a significant need for 'judicial dialogue' between the UK courts and the ECtHR in the context of CPAG's work, which we suggest is in part due to the wide margin of appreciation afforded to states in the area in which we work. That is not to say that it is not an important feature of the already carefully balanced framework of the HRA in other areas and should be preserved in its current form.

[12] *Stec v United Kingdom* (2006) 43 EHRR 47; *Blecic v Croatia* (2005) 41 EHRR 13.

[13] The latter formulation of the test was put forward by Strasbourg after the Supreme Court decisions in *R (DA and DS and Ors) v Secretary of State for Work and Pensions* [2019] UKSC 21 and therefore has not yet been engaged with by the Supreme Court. The case concerning the 'two child limit' (*SC and Ors v SSWP* UKSC 2019/0135) brought by CPAG, in which a judgment is currently awaited, provides an opportunity for it to do so.

[14] A cap on the total amount of benefits that a household can receive irrespective of household size.

Theme 2: The impact of the HRA on the relationship between the judiciary, the executive and the legislature

"The second theme considers the ***impact of the HRA on the relationship between the judiciary, the executive and the legislature.***
The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy.
We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.
Specifically, we would welcome views on the detailed questions in our ToR:
a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i)Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

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?

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?

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?
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?
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?
e) *Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of parliament?"*

14. In CPAG's view the framework of the HRA is carefully constructed to balance and afford proper respect to the roles of the judiciary, the executive and the legislature and does not need revision in this regard. As a general comment on Theme 2 of the Review, language which creates an artificial distinction between legislation which concerns 'matters of policy' and that which does not is an unhelpful lens through which to view the courts role in reviewing compatibility of the law with fundamental rights. In *re G (Adoption: Unmarried Couple)* [2008] UKHL 38, Lord Hope captured the point succinctly:

> "*The fact that the issue is a political issue too adds weight to the argument that, because it lies in the area of social policy, it is best left to the judgment of the legislature. But …[C]ases about discrimination in an area of social policy will always be appropriate for judicial scrutiny. The*

constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests." [48]

15. The requirement in section 3 of the HRA is for legislation (primary and secondary) to be read and applied in a way which is compatible with Convention rights in so far as it is possible to do so. This is not an unbounded power of Convention rights to influence interpretation, and in our experience the courts and tribunals are appropriately restrained in their exercise of this power and in doing so are, where relevant, careful to ensure that any interpretation is consistent with primary legislation other than the HRA. For example, in *AR v SSWP [2020] UKUT 165 (AAC)*, the Supreme Court in *McLaughlin* had already found the primary legislation which underpinned the decision under appeal was incompatible with the Article 14 rights of unmarried couples. The Upper Tribunal was asked to use its interpretive duty under section 3 in relation to an appellant who had been through a religious, but legally unrecognised in the UK, marriage ceremony at the time of her partner's death, to conclude that the reference to 'spouse' in legislation applied to the appellant. Having clear and full regard to the intentions of Parliament, the 3-judge Upper Tribunal panel considered that it was unable to use its interpretation powers in this way and could not read the legislation in any way other than referring to those who are married as a matter of English law. The only remedy was a declaration of incompatibility which the Tribunal had no power to make.

16. The effective operation of section 3 HRA is essential to individuals seeking to enforce their rights in practice and in CPAG's view the meaning of section 3 as intended by Parliament is clear. The clear distinction between primary and subordinate legislation in sections 3 and 6 is an important part of ensuring that Parliament's intentions are upheld. In our experience, section 3 working in conjunction with section 6 in relation to secondary legislation in particular is essential to ensuring that the HRA is not just a tool used by lawyers but can in practice be used to uphold the rights of individuals. In CPAG's view, any repeal or restriction on section 3 would be detrimental to the ability of individuals to enforce their Convention rights under the HRA.

17. As indicated above, the operation of these sections in relation to subordinate legislation means that welfare rights advisers can use the HRA to uphold their client's Convention rights in statutory appeals before the tribunals, in circumstances where claimants are unlikely to obtain legal representation or access legal aid.[15] This operation of section 3 alongside section 6 in practice can be seen through the series of challenges which culminated in R *(Carmichael & Others) v SSWP)* [2016] UKSC 58 (the 'bedroom tax' case)[16] and subsequently *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, which considered the effect of the UKSC's decision in *Carmichael* upon front-line housing benefit decision-makers and the tribunals. The Upper Tribunal in *RR* recognised the limits of its own section 3 powers, in that it is not a power to 'rewrite' regulations. However, crucially, the Supreme Court went on to confirm that the section 6(1) duty to accord in accordance

[15] Claimants face similar challenges in relation to obtaining damages under section 8 HRA in that they require legal representation and costs protection through the form of legal aid to bring a HRA damages claim in the county court. Even for those who are able to access a solicitor and obtain legal aid, the statutory charge would apply to them and any damages obtained would be reduced.

[16] In *Carmichael* CPAG acted for the Rutherford family whose Article 14 rights (read with Article 8) were found to have been breached as a result of them being subject to the 'bedroom tax' in circumstances where their severely disabled grandson required an overnight carer.

with Convention rights (subject to the important exceptions for primary legislation in section 6(2)) means that,

> "*there is nothing unconstitutional about a public authority, court of 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. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear*" ([27]).

18. CPAG has been involved in a number of cases in which delegated legislation has been found to be unlawful on HRA grounds. However, compared to the huge number of administrative decisions and judicial reviews and viewed against the large number of statutory instruments introduced in the UK each year, the use of the HRA in this respect is not particularly widespread.[17]

19. In cases where delegated legislation is found to be unlawful, the courts take a careful approach to considering appropriate remedies: (i) there are circumstances where disapplication of part of the delegated legislation is possible in order to comply with Convention rights (as in *TS (by TS) v SSWP (DLA); EK (by MK) v SSWP (DLA)* [2020] UKUT 284 (AAC) referred to in paragraph 2 above); (ii) there are instances where unlawfulness can only be addressed by a declaration of incompatibility; and (iii) there are circumstances where the unlawfulness cannot be remedied by disapplication of a particular provision and the courts refrain from doing so. For example, in *R (TD, AD and Reynolds) v SSWP*) [2020] (see paragraph 2 above), the Court of Appeal found that the claimants' Article 14 rights (read with A1P1) had been breached by operation of regulations introduced under the Welfare Reform Act 2012. Despite this finding, the court did not use its discretionary power to quash the regulations, nor to disapply the relevant provisions for the individual claimants, but instead opted to make a declaration that the claimants rights had been violated, in addition to transferring the claimants' claim for damages under section 8 HRA to the County Court. In doing so the court was mindful that

> "*it will be a matter for the Secretary of State to decide how to respond to a declaration by this Court that there has been a violation of these Appellants' rights under Article 14. That may or may not lead to a scheme being designed which benefits other people, who are not before this Court, but the design of any such scheme will in the first instance be for the Secretary of State, although it must be done in a way which is lawful, including by reference to the Convention rights."* [94]

20. In respect of primary legislation, CPAG has been witness to the higher courts' use of declarations of incompatibility under section 4 of the HRA. For example, in both *Re: McLaughlin* and *Jackson* (see paragraph 2 above) declarations of incompatibility were made following the findings that requirements for surviving partners to be a spouse or civil partner of their deceased co-parent in order to be entitled to financial support on their death was discriminatory against the children of

[17] A recent study identified only 14 cases in the High Court, Court of Appeal and Supreme Court between 2014 and 2020 in which the lawfulness of delegated legislation was successfully challenged. 10 of the 14 turned on Article 14 (predominantly read with Article 8 and/or A1P1) and 4 of the 14 involved challenges to different regulations made under the Welfare Reform Act 2012. J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22 Feb 2021) (available at https://ukconstitutionallaw.org/)

unmarried couples. Section 4(6) HRA is not a strike down clause. Rather, it provides that a declaration of incompatibility does not affect the validity or operation of the legislation and the non-HRA compatible provisions therefore remain in force until Parliament amends the law, thereby balancing the role of the courts and respecting parliamentary sovereignty.

21. The remedial order procedure aims to strike a balance between remedying incompatibilities potentially more quickly and affording Parliament the opportunity to scrutinise the proposed measures. In CPAG's recent experience, these aims are undermined by the executive if there are substantial delays between the declaration of incompatibility and the laying of the remedial order to allow parliamentary scrutiny to commence. Despite the intention to introduce a remedial order to resolve the incompatibilities in the bereavement support legislation being announced to Parliament in July 2020 (in response to court judgments of August 2018 *McLaughlin* and February 2020 *Jackson*), at the time of writing no draft order has been laid and no proposed timeframe has been provided in response to repeated written questions posed in the Commons and the Lords by members of both Houses. This delay by the executive denies Parliament the opportunity to remedy the rights violation found by the court. In the meantime, applications by surviving partners in unmarried couples for financial support following the death of their partner continue to be refused, with no guarantee that any subsequent remedial order will retrospectively assist them. The establishment of a clear and transparent timetable running from when it becomes clear that there will be no appeal of the section 4 declaration would reduce the uncertainty faced by those affected by the incompatible legislation, which under the current arrangements is experienced even in circumstances where the government accepts that it needs to rectify the incompatibility.

22. The Upper Tribunal (Administrative Appeals Chamber) hears appeals of decisions from the First-tier Tribunal (Social Entitlement Chamber) on social security matters. Whilst the Upper Tribunal can consider whether a decision before it is compatible with Convention rights, interpret legislation in accordance with Convention rights under section 3 and disapply secondary legislation under section 6, it does not have the power to grant declarations of incompatibility under section 4 HRA. When a situation arises in which this is the only available remedy, the Upper Tribunal cannot assist and the appellant is left to consider whether to proceed to the Court of Appeal, although it is not clear that on a statutory appeal the Court of Appeal has the power to grant a declaration.[18] This arrangement means that an individual who has established that their rights have been breached through the appropriate statutory appeal route to the specialist tribunal, which does not carry costs risks, is faced with entering a jurisdiction which carries such risks in order to obtain their remedy. Their case may have proceeded to the Upper Tribunal with the support of an expert welfare rights adviser but without engaging a solicitor, due to the difficulties which many appellants face in obtaining legal aid and the small number of legal aid providers with a welfare rights contract, but in order to obtain a remedy, legal representation and legal aid would need to be sought.

[18] See section 12(4) and 14(4) of the Tribunals, Courts and Enforcement Act 2007, which are discussed in *RR v SSWP* [2019] UKSC 52 at paragraph 19. Related issues have been discussed in the Upper Tribunal in *SH v SSWP (JSA*) [2011] UKUT 428 (AAC) and *AB v SSWP (JSA)* [2013] UKUT 228 (AAC).

Conclusion

23. CPAG's view is that the HRA is a carefully crafted and well-balanced piece of legislation which successfully accommodates the inherently different roles of the ECtHR, domestic courts, Parliament and the executive. The existing mechanisms of the HRA are essential to ensure the rights of individuals are afforded protection in everyday decision-making by public bodies and before the tribunals and it is important that these are not lessened or weakened in any way, particularly in circumstances where children's social security rights are not otherwise protected on a UK-wide basis.

Child Poverty Action Group

3 March 2021