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Bail for Immigration Detainees

BID RESPONSE TO THE CALL FOR EVIDENCE

FROM THE INDEPENDENT HUMAN RIGHTS ACT REVIEW PANEL

INTRODUCTION

1. This is the response of Bail for Immigration Detainees (**"BID"**) to the Call for Evidence from the Independent Human Rights Act Review Panel.

2. BID is an independent charity established in 1999 to promote access to justice for those detained under the Immigration Acts. Our work includes:

   2.1. Conducting field research and large-sample analyses of our own casework as the basis for our publications. BID's publications include '*The Liberty Deficit: long term detention and bail decision-making*' (November 2012); '*Denial of Justice: the hidden use of UK prisons for immigration detention*' (September 2014); '*No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation*' (September 2014); '*Rough Justice - children and families affected by the 2013 legal aid cuts*' – (September 2015); '*Mind the Gap: Immigration Advice for Detainees in Prisons*' (February 2017); '*Adults at Risk: the ongoing struggle for vulnerable adults in detention*' (July 2018); '*Nothing good comes from detention: Voices from Detention* (April 2019); '*Risky Business: Immigration Detention decision-making during the COVID-19 pandemic*' (May 2020) and its biannual surveys into legal representation in detention (last published in February 2020).

   2.2. Giving evidence to and engaging with government agencies, Parliament, international human rights bodies and the judiciary concerning the position of immigration detainees in the UK. BID gave oral evidence to the Joint Committee on Human Rights and the Home Affairs Committee in the course of their investigations into immigration detention. BID recently provided evidence to the Independent Review of Administrative Law and to the Parliamentary Justice Committee's review into the future of Legal Aid.

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2.3. Preparing and presenting bail applications in the First-tier Tribunals for the most vulnerable detainees, with the assistance of barristers acting pro bono, as well as producing written materials, running legal advice sessions and providing telephone support to assist detainees in representing themselves at bail hearings. During the period from 1 August 2019 to 31 July 2020, BID assisted 2861 people, and it prepared 442 bail applications of which 339 were heard and 264 individuals were consequently released on bail.

2.4. Outreach to those detained in the prison estate under immigration powers, with a view to providing advice, assistance and potential representation in relation to bail. During the period from 1 August 2019 to 31 July 2020, BID assisted 412 FNOs detained under immigration powers in prisons following their custodial sentence through one-off advice, representation, and legal advice sessions in five prisons: HMP Leicester, HMP Wormwood Scrubs, HMP Wandsworth, HMP Pentonville, and HMP High Down. 63 bail applications were prepared, of which 56 were heard and 37 were granted.

2.5. Providing advice, assistance, and potential representation to individuals seeking to resist deportation on Article 8 grounds, through BID's Article 8 Deportation Appeals Project. During the period 1 August 2019 to 31 July 2020 the project provided assistance to 103 people.

2.6. Intervening in key domestic and international cases relevant to our work, including before the Supreme Court and the European Court of Human Rights. In particular, BID has acted as an intervener in almost every appeal the Supreme Court has heard concerning the powers of detention and bail under the Immigration Acts, including *R (Lumba) v SSHD* [2012] 1 AC 245 (in which Lord Dyson at [36] expressly cited an important point made by BID in oral submissions); *R (Kambadzi) v SSHD* [2011] 1 WLR 1299; *R (O) v SSHD* [2016] 1 WLR 1717; *B (Algeria) v Secretary of State for the Home Department* [2018] AC 418; and *R (DN (Rwanda)) v SSHD* [2020] AC 698.

Beyond its interventions in the Supreme Court:

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(1) BID has intervened in the ECtHR in cases concerning the Convention compatibility of individual detention and of the UK's detention regime – *Abdi v United Kingdom* (2013) 57 EHRR 16, *JN v United Kingdom* (32789/12, 19 May 2016) and *Draga v United Kingdom* (33341/13, 25 April 2017); and

(2) BID has intervened in the Court of Appeal in the immigration detention cases of *D v Home Office* [2006] 1 WLR 1003 (where BID's arguments were expressly accepted as valid, at [120]); *R (ex p K) v SSHD* [2009] UKHRR 973; *BA v Home Office* [2012] EWCA Civ 944 (where BID's intervention was described at [25] as very helpful); and *R (Francis) v SSHD* [2015] 1 WLR 567.

3. Through all this work, BID has acquired extensive experience of and expertise in the operation of the Human Rights Act 1998 (**"the HRA"**), particularly in the areas of administrative detention, removal/deportation, and prisons. The responses below are directly informed by this experience and expertise. Where the Panel's questions fall outside the current scope of BID's work, we have said so.

4. In summary, BID sees the framework established by the HRA working well and properly, ensuring that fundamental rights are protected in a way that is (both in principle and in practice) appropriate to and respectful of the complementary roles of the domestic authorities and the European Court of Human Rights (**"the ECtHR"**) on the one hand, and of Parliament, the executive and the judiciary on the other. Any changes to the existing framework would, in our view, risk upsetting this delicate balance.

RESPONSES TO CONSULTATION QUESTIONS

THEME 1: THE RELATIONSHIP BETWEEN DOMESTIC COURTS AND THE ECtHR

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

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5. For the reasons given below, BID's view is that the relationship between domestic courts and the ECtHR is – in the areas of law relevant to our work – a mutually respectful and productive one. The key strength of the current approach lies in the balance, equally familiar at common law, between broad general principles and context-sensitive application. This balance allows domestic courts to draw on and (where appropriate) be guided by Strasbourg jurisprudence without being unduly constrained by it; in turn, the ECtHR is able to exercise its supervisory jurisdiction while paying careful regard to the specificities of the UK legal context.

1(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?

6. Domestic courts have taken a balanced and sensible approach to the duty to "take into account" the jurisprudence of the ECtHR. In particular:

   6.1. The lower courts have consistently recognised that, where domestic authority which is formally binding on them conflicts with Strasbourg authority, they must follow the former: see e.g. *Kay v Lambeth LBC* [2006] 2 AC 465, [43]. Accordingly, the domestic doctrine of precedent remains undisturbed by the operation of the HRA, and the Supreme Court remains the final arbiter of its interpretation and application in the UK.

   6.2. The Supreme Court has been equally clear that it is not bound by Strasbourg authority: see e.g. *Manchester City Council v Pinnock* [2011] 2 AC 104, [48]. Rather, it proceeds on the basis that:

      6.2.1. It should "follow any clear and constant jurisprudence of the [ECtHR]": *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [20] *per* Lord Bingham.

      6.2.2. It "will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber": *R (Anderson) v SSHD* [2003] 1 AC 837, [18] *per* Lord Bingham.

6.2.3. Ultimately, "the degree of constraint imposed or freedom allowed by the phrase 'must take into account' is context specific": *R (Kaiyam) v SSJ* [2015] AC 1344, [21] *per* Lords Mance and Hughes (and see the discussion in *R (Hallam) v SSJ* [2020] AC 279[1]).

7. BID has seen this approach applied in many cases within its areas of expertise, with appropriately measured results.

8. One example is the series of cases comprising *James v United Kingdom* (2012) 56 EHRR 399, *Kaiyam v SSJ*, *Kaiyam v United Kingdom* (2016) 62 EHRR SE13, and *Brown v Parole Board for Scotland* [2018] AC 1.

8.1. In *James* the ECtHR held that, where a prisoner is detained on the basis of the risk they would pose on release, Article 5(1) ECHR requires the State to afford them access to rehabilitative courses designed to reduce that risk.

8.2. In *Kaiyam*, the Supreme Court reminded itself that it was not bound by the jurisprudence of the ECtHR: [18]-[21]. On careful review of the authorities, it agreed with the ECtHR that the State (and hence, in that case, the Secretary of State for Justice) was required to afford access to opportunities for rehabilitation, but did not agree that this obligation arose from Article 5(1). Rather, the Court held that it was an "ancillary" obligation inherent in Article 5 as a whole: see [24]-[39]. One of the Court's key concerns about Strasbourg's approach was that it would mean prisoners who could not be offered appropriate opportunities for rehabilitation (for example due to funding constraints) would be automatically entitled to release – which would have been contrary to the domestic statutory scheme and potentially dangerous to the public: see [23], [30], [34]. This risk was avoided by the Court's preferred approach, which was "more satisfactory in result": [39]-[40]. On the facts, the Court found that

[1] In which the majority of the Court declined to follow the relevant Strasbourg jurisprudence, which included a judgment of the Grand Chamber, on the basis that it was unclear and incoherent: see e.g. [73] *per* Lord Mance (Lord Lloyd-Jones agreeing); [76] *per* Lady Hale; [90] *per* Lord Wilson; [126] *per* Lord Hughes.

in two of the four cases before it there had been breaches of the "ancillary" obligation which sounded in modest awards of damages: [50], [60], [69].

8.3. Three of the appellants then took their cases to Strasbourg. The ECtHR, while maintaining its view of the source of the obligation to provide opportunities for rehabilitation, found all three complaints to be "manifestly ill-founded" on the facts: *Kaiyam v UK*.

8.4. Several years later, the Supreme Court had occasion to reconsider the issue in the case of *Brown*. Following an extensive and detailed review of the judgments in *James* and *Kaiyam*, as well as subsequent Strasbourg jurisprudence (at [8]-[37]), the Court considered it appropriate to align its approach with that of the ECtHR by locating the obligation to provide opportunities for rehabilitation in Article 5(1): [44]. Importantly, the Court did not consider itself constrained to follow Strasbourg despite the concerns that had underpinned the decision in *Kaiyam*. To the contrary: the Court considered not only that these concerns had been misplaced (as a breach of Article 5(1) did not entail an automatic right to release), but that the approach in *Kaiyam* had actually resulted in the imposition on the Secretary of State of a duty which was "different from, and more demanding than" that recognised by the ECtHR: [42]-[45].

9. These cases illustrate how the obligation to take account of ECtHR jurisprudence is understood and applied in a way that is both analytically rigorous and sensitive to domestic context. Indeed, in these cases the Supreme Court ultimately considered that Strasbourg's approach produced results preferable to its own earlier decision.

10. This view is reinforced by the fact that, in some of the areas central to BID's work, the jurisprudence of the ECtHR has informed or tracked (rather than altering) the commonlaw position. This is particularly common in cases involving administrative detention. For example:

10.1. In *R (Lumba) v SSHD* (BID intervening), the Supreme Court considered the lawfulness of detention under a policy which had been kept secret from those it affected (as well

as from the general public). Lord Dyson drew on the jurisprudence of the ECtHR in considering a number of key issues, including the limits on the lawful exercise of powers of administrative detention (see [30]); the character of executive policy as part of the "law" governing the exercise of broad statutory powers (see [32]-[34]); and the lawfulness of a policy containing a presumption in favour of detention (see [45]-[54]). On each issue, however, his Lordship's conclusions were ultimately based on the requirements of the common law. As Lady Hale put it in her judgment, "[t]he common law is just as respectful of the liberty of the person, and just as distrustful of arbitrary and secret decision-making … as is the Convention": [206].

10.2. In *B (Algeria) v SIAC* (BID intervening), the Supreme Court considered whether a power to impose conditional bail where a person was "detained" related only to a person who was lawfully detained. The Court's conclusion that this was what Parliament intended was wholly driven by the common-law principles of interpretation which apply where fundamental rights are in issue. The Court did not consider that the Strasbourg jurisprudence on Article 5 added anything to its reasoning: see [56].

11. Again, these cases reflect a flexible and context-sensitive approach to s 2 HRA, to which (in BID's view) no amendment is required.

1(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?

12. In BID's experience, in the areas in which it works, the courts have given full effect to the concept of a "margin of appreciation" at the domestic level. A well known example is the line of cases beginning with *Hesham Ali v SSHD* [2016] 1 WLR 4799, which concerns the domestic regime governing the deportation of "foreign criminals" and its relationship with Article 8 ECHR.

13. In *Hesham Ali*, Lord Reed observed (at [35]) that:

> *While the European court has provided guidance as to the factors which should be taken into account [in Article 8 cases involving expulsion], it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The [ECHR] can thus accommodate, within limits, the judgments made by national legislatures and governments in this area.*

14. Accordingly, in the domestic context, Lord Reed considered it significant that Parliament had chosen – via the statutory provisions governing deportation – to attach particular weight to the public interest in the removal of "foreign criminals" who had been sentenced to more than one year's imprisonment; and to make specific provision for the circumstances in which this interest was likely to be outweighed. Appellate authorities were required to attach "considerable weight" to these assessments in conducting the Article 8 balancing exercise: [46] (see also [53]).

15. This approach has been consistently applied in subsequent cases, including (notably) *Agyarko v SSHD* [2017] 1 WLR 823. In that case, Lord Reed observed (at [47]) that:

> *Immigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.*

16. His Lordship reiterated that, in considering individual cases, courts must take this policy into account "and attach considerable weight to it at a general level": [47].

17. Accordingly, in BID's view, no change to the key provisions of the HRA is required in order to secure the recognition and application of the "margin of appreciation".

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1(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?

18. In the course of its work, BID sees many examples of productive "judicial dialogue" between domestic courts and the ECtHR.

19. In some cases domestic courts raise, and indeed act on, concerns about the consequences of applying ECtHR jurisprudence in the domestic context: see, for example, the case of *Kaiyam* (discussed at 8.2 above). In others, their consideration of Strasbourg authority causes them to reconsider the appropriateness of the current domestic position: see, for example, the case of *Brown* (at 8.4 above).

20. In still other cases, we see the ECtHR paying close attention to the specificities of the UK legal system and the safeguards it entails. For example:

    20.1. In *JN v United Kingdom* (BID intervening), the ECtHR considered whether the UK's immigration detention regime was contrary to Article 5 because it entailed neither absolute time limits on detention nor automatic judicial review of detention. In rejecting these arguments, the Court paid close attention to the detail of the UK system, including the application of the *Hardial Singh* principles (which place implied limits on the lawful exercise of the Secretary of State's powers of immigration detention): [33], [35]-[36], [97]-[101].

    20.2. In the line of authority beginning with *Hesham Ali*, the domestic courts sought to harmonise the specificities of the UK regime governing the deportation of "foreign criminals" with Strasbourg's general guidance in Article 8 expulsion cases. As noted above, the courts emphasised the need to afford considerable weight to Parliament's or the executive's view of the public interest in the deportation of foreign offenders. They also stressed that this should be done in the context of a balancing exercise in

which courts and tribunals "heed the guidance contained in the Strasbourg authorities": see e.g. *MF (Nigeria)* [2014] 1 WLR 544; *NA (Pakistan) v SSHD* [2016] EWCA Civ 662. In the recent case of *Unuane v United Kingdom* (App. No. 80343/17, 24 November 2020), the ECtHR recognised and afforded respect to this approach – taking note of the judgments in *Hesham Ali*, *MF (Nigeria)* and *NA (Pakistan)* and concluding that, because of the balance they struck, the domestic regime did not preclude an approach which was consistent with Strasbourg's guidance: [78]-[83].

21. In BID's view, maintaining the framework established by the HRA will allow this kind of respectful and productive dialogue to continue.

THEME 2: IMPACT OF THE HRA ON THE RELATIONSHIP BETWEEN THE JUDICIARY, THE EXECUTIVE AND THE LEGISLATURE

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[es] of the current approach and any recommendations for change.

22. BID notes the importance of careful wording in consultation questions, and is concerned that the reference to courts being "unduly drawn into matters of policy" might have the very unfortunate result of eliciting a particular type of response. In any event, in our experience, the roles of the courts, the executive and Parliament are appropriately and effectively balanced in the operation of the HRA.

23. In addition to the specific responses provided below, we note that "matters of policy" are often inextricably bound up with potential breaches of fundamental rights. In these cases, courts are required to afford appropriate protection to the latter without overstepping their constitutional role. In our experience, courts are acutely conscious of both imperatives and are at pains to strike an appropriate balance.

23.1. A recent example is the case of *SSHD v Joint Council for the Welfare of Immigrants* [2020] EWCA Civ 542, where the Court of Appeal considered the lawfulness under Article 14 ECHR of a scheme prohibiting landlords in the private sector from renting properties to irregular immigrants. The scheme was said to result in indirect discrimination against those without leave to enter or remain in the UK. The Court adopted a highly context-sensitive approach to the justification requirement, having regard (*inter alia*) to the fact that the scheme was enshrined in primary legislation; that the case involved issues of social and economic policy; that Parliament had been expressly conscious of the potential for indirect discrimination and had addressed its mind to mitigation measures; and that the discrimination to which it gave rise was committed by private actors and was not especially widespread or severe: see [132][151]. It stressed that "where there is a substantial degree of economic and/or social policy involved in a measure, the degree of deference to the assessment of the democratically elected or accountable body that enacts the measure must be accorded great weight because of the wide margin of judgment they have in such matters", though this margin may be somewhat reduced where the measure "involves adverse discriminatory effects" (particularly on the basis of characteristics such as sex or race): [140]. Having regard to these factors, the Court concluded that there was no breach of Article 14.

23.2. Another recent example is *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin) (BID intervening), where Mr Justice Swift considered the lawfulness under Article 14 of the differential treatment of immigration detainees in prisons and in immigration removal centres with respect to access to publicly funded legal advice. In considering the issue of justification, Swift J found that the Lord Chancellor's position would be justified unless shown to be "manifestly without reasonable foundation" because the subject-matter of the claim was "one of broad, or strategic, economic and/or social policy": [26]. Applying that test, Swift J adopted a context-sensitive approach which had regard to both the importance of access to legal advice for immigration detainees, and the relationship between the evidence relied by the Lord Chancellor and the difference in

treatment he was required to justify: [28]-[37]. On this basis, Swift J concluded that there had been a specific and limited breach of Article 14.

24. It is also important to recognise the role of the courts in giving effect to Parliament's intent where the executive strays unlawfully beyond it. One example is the Supreme Court's judgment in *Kiarie & Byndloss v SSHD* (BID intervening), where the Court considered challenges to decisions certifying that the appellants' removal from the UK pending the determination of their immigration appeals would not be unlawful. It upheld the claims on the basis that removal would (in the circumstances) render the appellants' appeal rights ineffective – a result Parliament did not intend the certification process to authorise: see [31]-[39].

25. As these examples illustrate, the HRA has enabled a balance to be struck which respects and protects the roles of all three branches of government.

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

26. For the reasons given below, BID does not consider that any change is required to the framework established by sections 3 and 4.

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 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)?

27. As the Panel is doubtless aware, Parliamentary "intent" is a term of art. As the Court observed in *R v Secretary of State for Transport, ex p Spath Holme* [2001] 2 AC 349, 396:

> *The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even a majority of individual members of either House.*

28. Thus, the "objective" intention of Parliament – ascertained by reference to the text of the legislation and any other relevant principles of interpretation – may well run contrary to what appears to have been Parliament's "subjective" intention. Section 3 is just one of the many interpretive principles which could yield such a result. Others are products of the common law. For example:

    28.1. In *R (Privacy International) v IPT* [2020] AC 491, the Supreme Court considered the meaning of a provision said to oust the courts' jurisdiction to review decisions of the Investigatory Powers Tribunal (**"the IPT"**). The case for the Secretary of State (and other interested parties) was that "[t]he special character and functions of the [IPT], combined with the references to decisions relating to 'jurisdiction', show[ed] a clear intention to protect [the IPT] from any form of review by the ordinary courts, even in cases to which the *Anisminic* principle would otherwise have applied": [106].

    28.2. Lord Carnwath (Lady Hale and Lord Kerr agreeing) identified the "main flaw" in this argument as being that it "treat[ed] the exercise as one of ordinary statutory interpretation, designed simply to discern 'the policy intention' of Parliament, so downgrading the critical importance of the common law presumption against ouster": [107]. One consequence of this presumption was that "[j]udicial review can

    be excluded only by 'the most clear and explicit words'": [111]. Accordingly, it mattered not whether the promoters of the legislation "thought that their formula would be enough" to effect an ouster: the question was whether, having regard to the governing presumption, it <u>was</u> enough.

28.3. In all the circumstances, the Court found that it was not.

29. Because only Parliament's objective intention is a reliable guide to the statutory interpretation, whether section 3 – or any other interpretive principle – is more or less likely to yield results consistent with Parliament's subjective intention cannot conceivably be a proper reason for seeking to change it. If this were the case, some of the strongest common-law presumptions – such as those considered in *Privacy International* – would be treated as suspect, rather than as important safeguards of fundamental rights recognised and valued by all three branches of government. Indeed section 3 might be thought to give rise to still less concern than similar common-law presumptions: as the courts have repeatedly confirmed, it reflects Parliament's command that legislation be read and given effect in way that is compatible with Convention rights: see e.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [59]. If Parliament no longer wishes its intention to be understood in this way, it can (of course) amend section 3 accordingly. In BID's view, any change to section 3 would represent a wholly undesirable erosion of the protection of fundamental rights in the UK. Critically, such an erosion cannot properly be justified by reference to an understanding of the nature and significance of Parliamentary intent which is fundamentally at odds with long-established common-law principles.

(ii) If section 3 should be amended or repealed, should that change be applied to the interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

30. For the reasons given above, BID does not consider there to be any good reason for amending or repealing section 3. In the event that amendment or repeal were contemplated, the effects of that change should not be applied to legislation enacted before the change took effect. The result would be widespread uncertainty as to the state of the law. This would be intrinsically prejudicial to good administration; would result in a potentially significant

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number of cases being re-litigated at significant public expense; and would create a real risk of unlawful interference with fundamental rights.[1]

(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?

31. BID has difficulty understanding this question. A declaration of incompatibility is necessarily a "last resort", in the sense that it flows from a conclusion that the relevant legislative provision(s) cannot be interpreted compatibly with Convention rights. The Panel may be asking, implicitly, whether the interpretive obligation in section 3 should be attenuated or removed – such that it becomes more likely that a court will interpret legislation in a way which it then concludes is incompatible with Convention rights. However, we do not understand how this would enhance the role of Parliament in determining how incompatibility should be addressed. No matter how or how often a declaration of incompatibility is made, Parliament's role and powers will be the same: it can vote on any remedial order and/or enact amending legislation. Where a declaration of incompatibility is avoided by the application of section 3, Parliament may also amend the relevant provisions to make it clear that an unjustified interference with fundamental rights was intended. In BID's view, this framework strikes a vitally important balance between preserving Parliamentary sovereignty, and requiring Parliament to be clear and transparent with the public about the balance it chooses to strike between fundamental rights and other interests.

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

[1] Where, for example, the executive took the view that the change rendered certain conduct lawful which would previously have been unlawful, only to have a court hold otherwise.

32. BID has not to date been involved in, or had its work significantly affected by, challenges to designated derogation orders under section 14(1). We do not wish to seek to answer questions which, at present, are outside our experience and expertise.

(c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with HRA Convention rights? Is any change required?

33. In BID's experience, in the areas in which it works, challenges to secondary legislation are overwhelmingly likely to be brought (and to succeed) on the conventional basis that the legislation in question is *ultra vires* the enabling statute. This was (for example) the basis of the challenges to the Detained Fast Track scheme for asylum appeals: see e.g. *R (Detention Action) v First-tier Tribunal* [2015] 1 WLR 5341. In that case, the Court of Appeal held that the Fast Track appeal regime was *ultra vires* s 22 of the Tribunals, Courts and Enforcement Act 2007, as that provision did not authorise the establishment of a system which was so unfair as to be unlawful. The Court emphasised that the threshold was a high one: it was necessary to show not just that the system gave rise to a risk of aberrant decisions or of unfairness in individual cases, but that unfairness was inherent in the system itself: [25][27]. In endorsing this standard, the Court was particularly influenced by the fact that it was "well equipped" to determine both the scope of the power conferred by s 22 and the associated questions of procedural fairness: [29]-[30].

34. The result is that BID does not often see cases where subordinate legislation is held to be unlawful on application of the HRA; rather, its experience is of the courts using the traditional tools of judicial review so as to give effect to Parliament's intention in enacting the relevant primary legislation. Accordingly, from our perspective, no change in approach is 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?

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35. BID has not to date been involved in cases raising this issue, and does not presently work with clients outside the UK. We do not wish to seek to answer questions which, at present, are outside our experience and expertise.

(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?

36. BID has not to date been involved in, or had its work significantly affected by, a case which resulted in the use of the remedial order process. We do not wish to seek to answer questions which, at present, are outside our experience and expertise.