THE AIRE CENTRE

Advice on Individual Rights in Europe

Independent Human Rights Act Review

Response from the AIRE Centre to the public Call for Evidence

03 March 2021

Introduction

1. The AIRE Centre is a London-based NGO/Charity which uses the power of European Law to protect individual rights. We do this though providing legal advice, direct legal representation to individuals, other advisers and lawyers and submitting third party interventions in national and European Courts. Founded in 1993, the AIRE Centre experienced first-hand the impact of the entry into force of the Human Rights Act 1998 (the HRA), particularly on the relationship between domestic courts and the European Court of Human Rights (ECtHR) and the relationship between the judiciary, executive and legislature.

2. The driving force behind the introduction of the HRA was to "bring rights home".[1] This was not an empty slogan but instead had two main strands. Firstly, and most importantly, the HRA enabled individuals to enforce their European Convention on Human Rights (Convention or ECHR) rights in the domestic courts instead of being forced to go through the costly and time-consuming process of taking a case to the ECtHR. Secondly, by enabling UK courts to rule on the application of the Convention, our national courts are able to influence the development of Strasbourg case law[2]. Consequently, the HRA has led to a significant decrease in the number of cases brought against the United Kingdom and in the number of violations found.[3]

3. Prior to the introduction of the HRA, the Convention right most commonly violated in UK cases was Article 6 (the right to a fair trial and length of proceedings), followed by Article 8 (the right to a private and family life) and the Article 5 (the right to liberty and security). A sizeable number of judgments also involved a violation of the right to an effective remedy (9 per cent).

4. These data suggest, as Lord Bingham has stated,[4] that before the HRA, while statutory and common law rules gave a level of protection to person and property, for example freedom from arbitrary arrest, the individual enjoyed no rights which could not be curtailed or removed by an unambiguously drafted statutory enactment or subordinate order. In important areas, such as freedom of expression and assembly, the individual's right was no more than to do whatever was not prohibited, and the right would shrink if the prohibition were enlarged.

5. In times of perceived emergency, few traditional rights and liberties could be regarded as free from the risk of invasion. The number of Strasbourg cases involving basic civil liberties

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[1] The Home Department (1997) *"Rights Brought Home: The Human Rights Bill",* para 1.18, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

[2] See for example: *Evans v UK* (Application No. 6339/05, 10 April 2007) concerning the domestic law relating to in-vitro fertilisation (IVF) (the Human Fertilisation and Embryology Act 1990)

[3] See paragraphs 26- 31 below.

[4] 'The Human Rights Act: View from the Bench', European Human Rights Law Review, 6: 568-75. (2010: 568)

bears out the observation by Bates[5] that from the late 1960s onwards, the traditional bastion of British liberty, the common law, had been increasingly exposed as an imperfect safeguard of individual rights.

6. The HRA was part of a package of carefully balanced constitutional reforms. This included the decentralisation of power and in particular the devolution statutes.[6] It was explicitly written into the Scotland Act 1998 and the Northern Ireland Act 1998 that the Scottish Parliament and the Northern Irish Assembly respectively have no power to legislate in a way that is incompatible with Convention rights and any incompatible legislation is not law.[7] This goes further than the HRA which only allows courts to make declarations of incompatibility in relation to Acts of the UK Parliament which do not affect their validity.[8] The protection of human rights is a central feature of the devolution arrangements. It is worth noting that this "strike down" power created by the Scotland Act 1998 and the Northern Ireland Act 1998 has not resulted in the regular voiding of Acts of these institutions and has only been used a handful of times.[9]

7. Decisions of public authorities that are legally prohibited from acting in a way that contravenes Convention rights cover all areas of policy, reserved and devolved.[10] Human rights do not exist in a vacuum and any alteration to the HRA would have an undeniable impact upon the devolution arrangements. The Sewel Convention dictates that the Westminster Parliament should not normally legislate on matters that are within the devolved competences without the express consent of the relevant devolved institution.[11] The AIRE Centre therefore submits that the wider constitutional implications of amending the HRA should be taken into account in the course of this review.

8. Moreover, the HRA has a specific historical, political and legal role in Northern Ireland as a result of the Good Friday Agreement 1998 (the Agreement) and is a cornerstone of maintaining the Peace Process, the fragility of which has been disclosed by Brexit. The Agreement is express in its commitment to human rights.[12] The Agreement includes safeguards to ensure that all sections of the community can participate and work together successfully in the operation of the institutions and that all sections of the community are protected by the Convention which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission.[13]

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[5] Bates, E. (2010) The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights. Oxford: Oxford University Press
[6] The Scotland Act 1998 (SA), the Government of Wales Act 1998 (GWA) and the Northern Ireland Act 1998 (NIA)
[7] S29 SA, S6 NIA
[8] S4 Human Rights Act 1998
[9] E.g. *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland)* [2016] UKSC 51 in relation to the "Named Person Service" in Part 4 of the Children and Young People (Scotland) Act 2014
[10] S6 Human Rights Act 1998
[11] Sewel Convention HL Deb 21 Jul 1998 Vol 592 c 791
[12] Belfast Agreement 1998, Rights, Safeguards and Equality of Opportunity, para 1
[13] Belfast Agreement 1998, Democratic Institutions in Northern Ireland, para 5(b)

9. The HRA was regarded as so important that the Agreement also committed the Irish Government to incorporate the ECHR under the "equivalence" provisions.[14] The Agreement, in addition to being overwhelmingly approved by referendum, in Ireland North and South, was also incorporated as a treaty between the UK and Ireland and lodged with the United Nations. Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement which correspond to its competency. Indeed, paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of the Agreement states: "The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency." This commitment was given domestic legislative effect through the HRA even although the term "incorporate" does not apply in other parts of the UK, a purposive reading of the Good Friday Agreement requires this.

10. Any tinkering with the scope and provisions of the HRA would require consultation with the Irish Government because of the "equivalence" provisions of the Agreement. Once the equivalence issue had been resolved through international diplomatic negotiations, any amendment to the legislation would still need to reference both the text and jurisprudence of the ECHR and provide for UK, and a fortiori Northern Ireland. Courts to be able to take account of, and contribute to that jurisprudence or risk breaching the Good Friday Agreement and its supporting Treaty. The Agreement also commits to safeguards to ensure the Northern Ireland Assembly or public authorities cannot infringe the ECHR.[15] The HRA is a significant pillar of the human rights architecture both of the Agreement and society in the North of Ireland and tampering with it risks threatening the whole basis of trust in the new institutions that has been developed since 1998.

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

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?

11. During the parliamentary debate on section 2 of the HRA, the then Labour Government expressly rejected an amendment by the Conservative peer, Lord Kingsland, in the House of Lords to make the domestic courts 'bound by' the jurisprudence of the Strasbourg court. The then Lord Chancellor, Lord Irvine of Lairg, argued that it would be 'strange' to require domestic courts to be bound by all the decisions of the ECtHR when the UK is not bound

[14] Belfast Agreement 1998, Rights, Safeguards and Equality of Opportunity, para 9
[15] Belfast Agreement 1998, Democratic Institutions in Northern Ireland, para 26 (a)

in international law to follow the Court's judgments in non-UK cases. The intention was to allow the courts what Lord Irvine described as 'flexibility and discretion'.[16]

12. According to the then President of the ECtHR, Sir Nicolas Bratza '… a survey of the most significant decisions and judgments of the Court in cases against the United Kingdom in the past three years reveals … [that] in the great majority of cases our Court followed the conclusions reached by the appeal courts in the three United Kingdom jurisdictions [England and Wales, Scotland and Northern Ireland]'[17]. Baroness Hale suggests that the impact of the HRA cannot be over-estimated in such cases where the ECtHR endorses the decisions of the domestic courts: "*I think Strasbourg would say that they have enormously welcomed the fact that human rights issues can now be addressed directly by the UK courts. It means that when a case comes to them, they have the benefit of our views about whether or not there's been a breach*"[18].

13. The way the duty to "take into account" ECtHR jurisprudence has been applied in practice has developed over time and has varied according to the subject matter and potential ramifications of a case. The domestic and ECtHR caselaw on the extraterritorial application of the ECHR exemplifies this. The AIRE Centre has considerable expertise on the extraterritorial application of the ECtHR, having acted as an expert third party intervener in the key domestic case *Al-Skeini v SSHD*[19], supported the Chagos Islanders[20] to try asserting their rights before the ECtHR, and advised the applicant's lawyers in the ECtHR case *Jaloud v the Netherlands*[21]. We will therefore reference the case law on extraterritoriality to exemplify how the "duty to take account" of ECtHR jurisprudence operates in practice.

14. In the context of the extraterritorial application of the ECHR domestic courts have found: "*Article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach.*"[22] The UKSC has found there is a particular "*need*

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[16] Klug, F. and Wildbore, H. (2010) 'Follow or Lead? The Human Rights Act and the European Court of Human Rights', European Human Rights Law Review, 6: 621-30. This statement of principle has subsequently been affirmed, and more carefully nuanced by Lord Neuberger in *Pinnock v Manchester City Council* [2010] 3 WLR 1441, para. 48 who suggests: "This court [the Supreme Court] is not bound to follow every decision of the European court… Of course, we should usually follow a clear and constant line of decisions by the European Court … But we are not actually bound to do so".

[17] Bratza, N. (2011) 'The Relationship between the UK Courts and Strasbourg', European Human Rights Law Review, 5: 507, 505-12.)

[18] Baroness Hale, Interview, 11 January 2012. For example, in the case of Abu Hamza (*Babar Ahmad and Others v the United Kingdom* (application nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 10.04.2012), the ECtHR rejected radical preacher Abu Hamza's claim that his trial, at which he was convicted of soliciting to murder, inciting racial hatred and terrorism charges, was unfair. He claimed that a virulent media campaign against him and the events of 9/11 made it impossible for the jury to be impartial. The Strasbourg Court endorsed the conclusions of the Court of Appeal and rejected the case as inadmissible on the ground that it was manifestly ill founded.

[19] *Al-Skeini and others (Respondents) v Secretary of State for Defence (Appellant) Al-Skeini and others (Appellants) v Secretary of State for Defence (Respondent)* (Consolidated Appeals) [2007] UKHL 26

[20] *Chagos Islanders v UK* (Application No. 35622/04, 20 December 2012)

[21] Application No. 47708/08, 20 November 2014

[22] *Al-Skeini* [2007] UKHL 26 para 107

for care" in this context as: "*the question* of *jurisdiction is so fundamental to the extent of the obligations that must be assumed to have been undertaken by the contracting states.*"[23]

15. Where the question before domestic courts involves a potentially widescale expansion of the scope of applicability of ECHR rights, the "duty to take account" of ECtHR jurisprudence has therefore been applied cautiously. Domestic courts remain unwilling to extend the scope of the ECHR's territorial application beyond what had been unequivocally endorsed by the ECtHR.

16. This is reflected in the domestic courts' approach to the extraterritorial application of the ECHR in UK overseas territories. For example, the Court of Appeal in *Hoareau v Secretary of State for Foreign & Commonwealth Affairs*[24] relied heavily on the inadmissibility decisions of the ECtHR in *Chagos Islanders v United Kingdom*[25] and *Quark Fishing Ltd v United Kingdom*[26] in concluding that the jurisdiction of the ECHR did not apply to the Chagos Islands.

17. In *Al Skeini v SSHD*[27] (*Al-Skeini (HL))* the AIRE Centre's argument was that a more expansive interpretation of the extraterritorial application of the ECtHR was in line with prior ECtHR case law and other international norms. The UKHL did not however find that the ECtHR had taken a clear position on the extraterritorial application of the ECHR and adopted an approach that was narrower that that previously taken by the ECtHR.[28]

18. In *Al-Skeini v United Kingdom*[29] *(Al-Skeini (ECtHR))* the ECtHR established general principles on the question of when the ECHR applies extra-territorially, in the context of military action abroad, in order to bring the ECtHR approach in line with international human rights norms[30] and ensure States were not permitted to act with impunity during the occupation of a foreign territory. This meant domestic courts were then able to apply those principles independently, in cases whose factual patterns had not yet been considered by the ECtHR, and in the UK to case law specific to a UK context. An example of this is *Smith, Ellis & Albutt v MOD*[31], where the UKSC, referring to the *Al-Skeini (ECtHR)* judgment, found:

"*The whole structure of the judgment is designed to identify* ***general principles*** *with reference to which* ***the national courts may exercise their own judgment*** *as to whether or*

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[23] *Smith, Ellis & Albutt v MOD* [2013] UKSC 41 para 44
[24] *R on app of Hoareau & Anr v The Sec. of State for Foreign & Commonwealth Affairs* [2020] EWCA Civ 1010)
[25] Application No. 35622/04, 20 December 2012
[26] *Quark Fishing Ltd v United Kingdom* (Admissibility) (Application No. 15305/06) [2006] 9 WLUK 253
[27] [2007] UKHL 26
[28] For example the HL's interpretation of the 'espace juridique' concept, and its finding that the imposition of the ECHR in Iraq would amount to 'human rights imperialism' because the ECHR is a regional instrument (paras 78-79).
[29] Application no. 55721/07, 7 July 2011
[30] See for example the AIRE Centre and others' intervention before the UKHL which argued that "*control over the individual is the key factor in determining jurisdiction under other international human rights instruments*."
[31] [2013] UKSC 41

not, in a case whose facts are not identical to those which have already been held by Strasbourg to justify such a finding, the state was exercising jurisdiction within the meaning of article 1 extra-territorially."

19. The "duty to take account" meant that in the context of extra-territoriality, the UKSC utilised the ECtHR's judgment as "*guidance*".[32] The ECtHR's principles provided a framework within which domestic courts could make a decision on a new set of facts, taking into account the particularities of the case. The UKSC found that the ECtHR's list of examples of circumstances which could require and justify a finding that a state was exercising jurisdiction extraterritorially was not exhaustive. They were therefore able to exercise their "*own judgment*" regarding whether or not the principles applied to a new situation and to take a more expansive approach on the facts before them.

20. In the AIRE Centre's view, this approach as set out above, currently works well because:

    i) it facilitates the independent development of domestic case law, in UK specific contexts; and
    ii) it ensures that this development is rooted in clear guiding principles, established by the ECtHR, to ensure that the UK's case law on questions of international importance is part of a wider, coherent and consistent approach across ECtHR members states to the development of international norms.

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?

21. For similar reasons as set out above, the AIRE Centre will focus on the case law on extraterritorial application of the ECtHR to inform our response to this question.

22. The ECtHR offers a wide margin of appreciation to domestic state authorities[33] actively engaged in armed conflict, in so far as the military and technical aspects of a conflict situation are concerned.[34] In light of this, domestic courts tend to apply a case-by-case analysis of the facts of a particular situation to determine whether obligations under the Convention apply to the UK authorities in situations of armed conflict abroad.

23. Given the wide margin of appreciation afforded to state authorities on this issue, the domestic courts' approach is to avoid imposing unrealistic or disproportionate positive

[32] *Smith, Ellis & Albutt v MOD* [2013] UKSC 41 para 55
[33] An example of a UK case where the Court has allowed a wide margin of appreciation is *Friend and others v UK* App. Nos. 16072/06 and 27809/08, 24 November 2009. In that case, the ECtHR concurred with domestic court judgments that the ban on hunting with hounds was not in breach of anyone's right to private life, association or peaceful assembly, and that any interference with property rights was justified on grounds of public morals. The ECtHR agreed that it was a matter for the UK Parliament to decide.
[34] See: *Finogenov v Russi*a, app nos. 18299/03 and 27311/03), 20 December 2011, para 213

obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict.[35] So domestic courts will not impose obligations under Article 2, for example, in relation to decisions that were or ought to have been taken about training, procurement or the conduct of operations at a high level of command, which are closely linked to the exercise of political judgment and issues of policy.

24. The margin of appreciation does not equate to a total ouster of the court's jurisdiction in situations of armed conflicts abroad. As intimated above, it limits the courts to imposing obligations on state authorities abroad where it would be 'reasonable to expect the individual to be afforded the protection of the article'.[36] Domestic courts analyse the facts of each case, in light of the relevant principles established by the ECtHR to assess whether it would be reasonable in the particular circumstances to impose obligations on UK authorities acting abroad. For example, domestic courts could impose investigative obligations under Article 2 where an individual is killed in a training situation which could have been precisely planned for by the UK authorities, in contrast to a situation where an individual is killed during contact with the enemy, and where clearly such situations cannot necessarily be predicted / planned for.[37]

25. As such, in the AIRE Centre's view, no change is required in this context, as the operation of the margin of appreciation in this respect means that courts do not impose unrealistic or impracticable obligations on state authorities which would impinge on areas of policy making or political judgment. The current operation of the margin of appreciation facilitates a flexible, case sensitive application of Convention rights, to ensure the protection of human rights *in so far as reasonably practicable* in the context of armed conflict abroad.[38]

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?

26. The UK has among the lowest number of applications per year lodged against it amongst our comparator states. It has among the lower rates for the number of applications against it that are declared admissible (i.e. the number of cases declared admissible as a percentage of the number of applications allocated for a decision) and the average number of adverse judgments each year relating to the UK is low.

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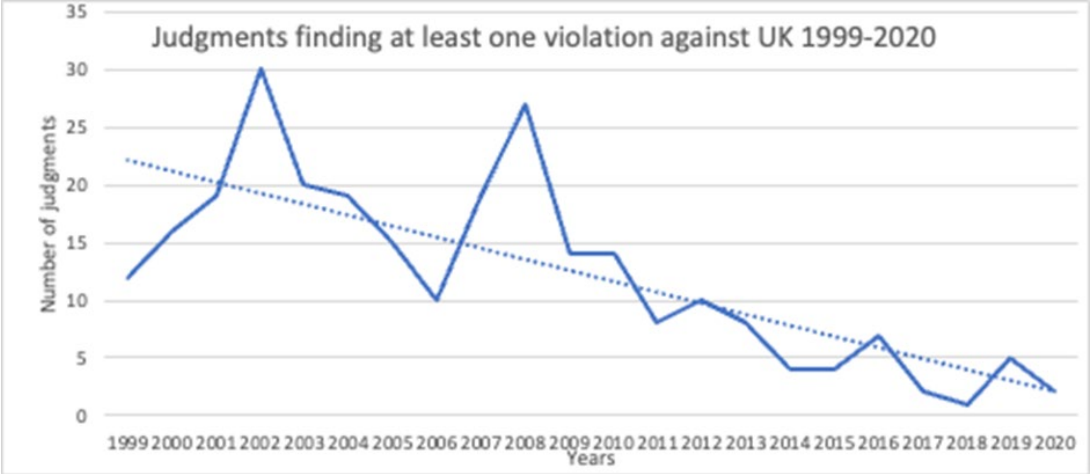
[35] *Smith, Ellis and others v The Ministry of Defence*, [2013] UKSC 41, para 76
[36] Ibid
[37] Ibid, para 75
[38] See also *MGN Limited v UK* Application no. 39401/04, 18 January 2011, which concerned the particular role of the press in a democratic society and, more especially, the protection to be accorded to journalists and the importance of publishing matters of public interest for another example of the way the Strasbourg Court applied a wide margin of appreciation.

27. The ECtHR each year makes available reports and statistical documents, which can inform the discussion about the impact of the HRA on the cases going to Strasbourg[39]. The chart below has been elaborated based on those data.



Source: From 2001 to 2020 Annual Report ECHR available at https://www.echr.coe.int/sites/search_eng/pages/search.aspx#%20 . For the years 1999 and 2000 Survey of activities available at https://www.echr.coe.int/Pages/home.aspx?p=library&c=. A single judgment may concern numerous applications, for instance *McHugh and Others v United Kingdom* no. 51987/08 and 1,014 others. The figures do not include non-violation, striking out and other judgments (e.g. just satisfaction).

28. It can be observed that there is a significant reduction in the number of judgments at the ECtHR finding a violation against the UK[40]. The downward trend may be inferred since 2005, if we take into account the influence of repetitive cases on fluctuations and allow for a lag of several years from the enactment of the HRA to produce any effects as cases navigate through the domestic and Strasbourg systems.[41] It appears that the figures are also supported, at least from 2010, by a 2020 report of the Ministry of Justice to the Joint

[39] Analysis of statistics and Annual Reports are available at the ECtHR website. A document explaining how to read the Court's statistics ("Understanding the Court's statistics") is available at https://www.echr.coe.int/Pages/home.aspx?p=reports&c=

[40] Joint Committee on Human Rights, 20 years of the Human Rights Act inquiry, 2017, Written evidence from the Bingham Centre for the Rule of Law (HRA0026), (2018), available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/twenty-years-of-the-human-rights-act/written/90241.html

[41] In 2007, 2008 and 2009 the numbers of judgments finding at least a violation against UK had been influenced several cases on benefits provisions for widows (see Equality and Human Rights Commission Research report 83, The UK and the European Court of Human Rights, (2012), page 32, available at https://www.equalityhumanrights.com/en/publication-download/research-report-83-uk-and-european-court-human-rights). Merris Amos has suggested that 2005 is the year that the effect of the HRA would be expected to have 'kicked in'; see Equality and Human Rights Commission Research report 83, cited above, page 36.

Committee on Human Rights, which has emphasised that the numbers of adverse judgments remain low.[42]

29. In comparison with the overall judgments, in 2020 only 0.2%, 2 out of all 871 judgments given by the ECtHR, found at least one violation by the UK of the European Convention of Human Rights (ECHR). In 2017 only 0.2%, 2 out of all 1,068 judgments given by the ECtHR found at least one violation by the UK. In 2014 only 0.4%, 4 out of all 891 judgments given by the ECtHR found at least one violation by the UK. In 2011 only 0.6%, 8 out of all 1,157 judgments given by the ECtHR found at least one violation by the UK. Unlike those figures, the percentage related to the years 1999 and 2004 are 6.8% and 2.6% respectively[43].

30. Already back in 2007, research 'indicated that the HRA can be seen to have had a positive effect in addressing concerns over the frequency with which the UK was found to have breached the ECHR, highlighting a "definite reduction in the number of applications declared admissible and the number of judgments where at least one violation of the ECHR has been found.''[44] The research seems to be reinforced by subsequent distinguished comments and views on the likely correlation between drop in the number of UK violations and the entrance into force of the HRA.[45]

31. The AIRE Centre submits that it can be inferred from this downward trend that the judicial dialogue between UK courts and Strasbourg has been considerably strengthened by the introduction of the HRA. This is perhaps unsurprising. Through the HRA, the UK courts are provided with an important opportunity to influence the ECtHR judges and the development of Strasbourg case law given that the UK courts are able to directly apply the principles and legal tests of the ECtHR. The ECtHR seems to recognize and be respectful of this when considering appeals from the UK courts, because of the high quality of the judgments, which have greatly facilitated the ECtHR's task of adjudication.

<u>Case law on extraterritoriality as an example of this trend</u>

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[42] MOJ, Responding to human rights judgments, Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020_pdf.pdf.

[43] Joint Committee on Human Rights, 20 years of the Human Rights Act inquiry, 2017, Written evidence from the Bingham Centre for the Rule of Law (HRA0026), (2018), available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/twenty-years-of-the-human-rights-act/written/90241.html

[44] R. Masterman, 'Supreme, submissive or symbiotic? United Kingdom courts and the European Court of Human Rights', The Constitution Unit, [2015], page 27 available at www.ucl.ac.uk/constitution-unit .

[45] See comments of Sir Nicolas Bratza, a former president of the ECtHR, in 2012 Nicolas Bratza: 'Britain should be defending European justice, not attacking it', (24 January 2012) available at https://www.independent.co.uk/voices/commentators/nicolas-bratza-britain-should-be-defending-european-justice-not-attacking-it-6293689.html ; and personal views of Paul Harvey and Pamela McCormick, at that time UK lawyers at the Registry of the ECtHR, 'Only 1 in 200 European Court Of Human Rights Case Are From The UK'. Here's Why That Matters, By Natasha Holcroft-Emmess, Associate Editor at EachOther, (24 May 2016), available at https://eachother.org.uk/0-4-european-court-cases-uk-heres-matters/.

32. The development of both the UK courts' and the ECtHR's approach to the extraterritorial application of the ECHR demonstrates this effective judicial dialogue between the courts. Domestic courts have been able to raise concerns about the application of ECtHR jurisprudence and have been able to develop and distinguish ECtHR jurisprudence in circumstances particular to the UK, which have not previously been considered by the ECtHR.

33. In the context of the application of the ECHR in former UK colonies, the judicial dialogue between the courts has seen the ECtHR accept and defer to UK domestic courts' concerns about the applicability of ECHR rights in a UK context. In doing so, the ECtHR has on numerous occasions rejected requests to extend the extraterritorial application of the ECHR to former colonies or overseas territories in respect of which the UK has not made a declaration under Article 56 to extend the applicability of the ECHR.[46]

34. The ECtHR has, in particular, been deferential to how the UK deals with residents or former residents of overseas territories. For example, in the *Chagos Islanders v United Kingdom*[47] admissibility decision, the ECtHR decision largely relied upon the conclusions of the House of Lords in relation to the possibility of further legal recourse in the UK for the Chagos Islanders, their possibility of establishing a right of abode on the islands[48], and in finding that "*as held by the House of Lords"* their case was "*part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention*."[49]

35. In *Al-Skeini (HL)*[50]*,* the HL's judgment refers to the problem faced by the Lords that the judgments and decisions of the ECtHR on this issue did not 'speak with one voice' to establish clear principles on the extraterritoriality of the Convention.

36. The Grand Chamber judgment in *Al-Skeini v United Kingdom (ECtHR)*[51] addressed the confusion in *Al-Skeini (HL)*[52] and established guiding principles for domestic courts to apply when considering the extraterritorial application of the ECtHR.[53] *AL-Skeini (ECtHR)*[54] encouraged judicial dialogue by setting out the relevant general test to be applied by domestic courts when considering the extraterritorial application of the ECHR,

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[46] *E.g. Gillow v United Kingdom* (Application No. 9063/80, 24 November 1986)*, Chagos Islanders v United Kingdom* (App. No. 35622/04, 20 December 2012)*, Quark Fishing v United Kingdom* (Application No. 15305/06) [2006]
[47] App. No. 356/04, 20 December 2012
[48] Ibid, Para 82
[49] Ibid, Para 83
[50] [2007] UKHL 26
[51] Application no. 55721/07, 7 July 2011
[52] Ibid, [46]
[53] For example, the ECtHR established that the Convention could apply in relation to actions committed in countries which were not members of the Convention. The judgment also clarified that the extraterritorial application of the Convention should be determined by reference to the extent of the authority and control exercised over an individual (the 'personal' concept) as well as the extant of control over an area / territory.
[54] Ibid, [47]

but leaving the exact application of the test to be determined by the domestic courts, on a case-by-case basis, taking into account the relevant domestic context.

37. *Al-Skeini (ECtHR)*[55] provides an example of where the UK courts have been able to develop a framework to consider and apply the ECtHR to a UK specific context. For example, in *Smith, Ellis & Albutt v MOD*[56] the UKSC applied the principles set out in *AL-Skeini (ECtHR)*[57] in a context which had not previously been considered by the ECtHR, to examine the extraterritorial application of the Convention in the context of the death and injuries of British soldiers serving in the British Army in Iraq. The UKSC extrapolated the principles from *Al-Skeini (ECtHR)*[58] to ensure that British soldiers who died whilst serving in the British army were not excluded from the protections within the Convention. The UKSC found that there was a positive obligation to effectively investigate the deaths of British soldiers abroad, *where it would be reasonable to do so*[59], despite the fact there had been no prior ECtHR jurisprudence addressing this issue.

38. More recently, the AIRE Centre advised the applicant's lawyers in *Jaloud v the Netherlands*[60], a case where the ECtHR established that acts carried out by national contingents engaged the extraterritorial application of the ECHR. The fact that a Dutch army contingent acted under the operational control of British officers did not divest the Netherlands of jurisdiction.[61] As an example of the ongoing and iterative nature of the judicial dialogue between the ECtHR and domestic courts, this case demonstrates that where new questions and situations arise, the ECtHR's guiding principles seek to clarify any guidance provided to domestic courts on such complex questions as extraterritoriality.

39. Further, in a number of cases, where the UK has raised concerns about the application of ECtHR case law or distinguished domestic cases from relevant ECtHR case law, the ECtHR has subsequently followed and incorporated the approach of the UK courts.

40. For example, *Al-Jedda v SSHD*[62] concerned the application of Article 5 ECHR to the acts of British soldiers in Iraq whose actions were arguably authorised by the UN Security Council under Resolution 1546. In the case of *Behrami and Saramati*[63], which concerned the actions of international forces in Kosovo acting under the authority in Security Council resolution 1244, the ECtHR had previously determined that Article 5 ECHR was not applicable given that the actions in question were attributable to the UN, rather than to the troops of individual contributing states. Despite the fact this case mirrored, in many ways,

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[55] Ibid
[56] [2013] UKSC 41
[57] Application no. 55721/07, 7 July 2011
[58] For example, that jurisdiction could be determined by the exercise of personal 'authority and control' and that rights protection could be divisible.
[59] *Smith, Ellis and others v The Ministry of Defence*, [2013] UKSC 41, para 76
[60] *Jaloud v The Netherlands*, App. No. 47708/08, 20 November 2014
[61] Ibid
[62] [2007] UKHL 58
[63] *Behrami and Saramati v France, Germany and Norway* App. Nos. 71412/01 and 78166/01. 2 May 2007

the facts of *Al-Jedda*[64], the HL distinguished the facts of *Behrami*[65] and chose not to follow the ECtHR's line of reasoning, by determining that in this context acts committed under the authority of the UN Security Council could be attributable to the UK.

41. In *Behrami*[66], the ECtHR had not considered the possibility that the same action or inaction could be attributable both to a member state or states and to an international organization. However, in *Al-Jedda v United Kingdom* (ECtHR)[67], the ECtHR followed the approach taken by the UK courts to find that acts committed under the authority of the UN Security Council could be attributable to the UK. Led by the reasoning of the UK court, the ECtHR in this case considered for the first time that acts could be attributable to dual or multiple agents and organisations.

42. In this context the judicial dialogue between the UK courts and the ECtHR led the ECtHR to establish a clear rule for interpreting actions carried out under the authority of a UN Security Council Resolution which provides a necessary guarantee on the human rights compliance of actions carried out under the authority or direction of the Security Council.

43. The dialogue between the courts in the context of extraterritoriality has, therefore helped to set various important standards and principles in terms of international human rights protections, for other states to follow, to bring human rights protection under the ECHR in line with international norms.

Asylum Law and Children's Rights

44. The AIRE Centre has significant expertise in relation to the interplay between the different international instruments regulating both asylum law and children's rights. Notably, we were intervenors in the case of *MA, BT and DA v SSHD*, which concerned unaccompanied minor children being returned to Italy under the Dublin Regulation.[68] We have been involved in either representing families or assisting their representatives in many cases taken to the ECtHR, where children were wrongly and negligently, taken from their parents or wrongly and negligently retained once it became clear that mistakes had been made.[69] We therefore believe it is important to draw the Committee's attention to the potential implications for these areas of law if the HRA were to be amended.

45. Prior to Brexit, asylum was regulated in the UK by the applicable provisions of the EU acquis, particularly the Qualification Directive (now metamorphosing into a Regulation), the Asylum Procedures Directive, the Reception Conditions Directive and the Dublin Regulation (including the Dublin Regulations' all-important family reunification

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[64] Ibid, [58]
[65] Ibid, [59]
[66] Ibid
[67] Application No.27021/08, 7 July 2011
[68] *MA & Ors v Secretary of State for the Home Department* [2013] EUECJ C-648/11
[69] See e.g. *TP and KM v UK*, App. No. 28945/95, 10 May 2001, *RK and AK v UK*, App. No. 38000/05, 30 September 2008, *MAK and RAK v UK*, App. Nos. 45901/05 and 40146/06, 23 March 2010, *AD and OD v UK*, App. No. 28680/06, 16 March 2010, *B and P v UK,* App. No. 36337/97 and 35974/97, 24 April 2001

provisions) all in their various incarnations.[70] As EU law this acquis trumped any domestic provisions. The scope of the Qualification Directive was much broader than the very specific (and small) group of people who are technically "refugees" protected by Article 1 the 1951 Geneva Convention on the Status of Refugees, but it was still only applicable to a restricted group of beneficiaries of what is known as "subsidiary protection", a wider group than refugees under the GC but still incomplete in its scope.[71]

46. After Brexit, the only provision which now exists to prevent all people who are at risk of being expelled or excluded from the UK in situations where they are likely to be exposed to torture or inhuman or degrading treatment or punishment is the HRA and through it Article 3 ECHR and the large body of ECtHR jurisprudence in this field.

47. Any dilution of the protection now offered by the HRA will take the UK back to the situation which existed 25 years ago where practitioners, denied a remedy at home for their clients, would be forced to go back to burdening the Strasbourg Court with eleventh hour requests for interim measures to be ordered against the UK pending the resolution of the matter by the ECtHR. The duty owed to asylum seekers (including those arriving by sea) has been clearly set out by the ECtHR,[72] as has the duty to refrain from arbitrary detention[73] and to provide basic but dignified reception conditions for those whose claims for international protection are being considered and determined.[74] The HRA's protection in these matters must be sustained.

48. With regards to children's rights, the UK is a signatory to the UN Convention on the Rights of the Child (UNCRC) and as such is required to give effect to its provisions domestically. It has however not only never been incorporated into domestic law – a point often forcefully made by counsel for the Government in litigation - but the UK has also not accepted the right of individual petition to the UN Committee on the UNCRC under the 3rd Optional Protocol.

49. When discharging obligations under s1 of the Children Act 1989 (as amended) the child's welfare is paramount. S55 of the Borders Citizenship and Immigration Act 2009 promotes the best interests principle (but, again as counsel for the Government often point out) only in respect of children in the UK, not those who seek to assert that they have a right to come here.

50. After Brexit, children will have lost the protection of Article 24 of the EU Charter of Fundamental Rights and gained nothing to replace it. It therefore falls to the HRA (primarily in the context of decisions being taken within the scope of Article 8 ECHR) to provide children with the promotion and protection of their rights.[75] Unless and until the

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[70] Directive 2011/95/EU, Directive 2013/32/EU, Directive 2013/33/EU and EU Regulation No. 604/2013
[71] Article 2(f) Directive 2011/95/EU
[72] *Kebe and Others v. Ukraine*, App. No. 12552/12, 12 January 2017; *Hirsi Jamaa and Others v. Italy* [GC], App. No. 27765/09, 23 February 2012
[73] *Rusu v. Austria*, App. No. 34082/02, 2 October 2008
[74] *M.S.S. v. Belgium and Greece* [GC], App. No. 30696/09, 21 January 2011
[75] E.g. *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [23]

UNCRC is incorporated into domestic law it is thus vital that the protection offered to children by the HRA is not diluted by any amendment to the HRA.

Conclusion

51. The role of the ECtHR under Article 19 of the ECHR is to "ensure the observance of the engagements undertaken by the High Contracting Parties". It is crucial that if the UK courts deliver a judgement, which adversely affects one party, and that dissatisfied party subsequently takes his or her case to Strasbourg, the ECtHR is able to see that the UK has fully taken into account the relevant standards of the ECHR and applied them in good faith. The Court is then much less likely to find the UK in violation of the treaty obligations into which it freely entered. If on the other hand the national courts have failed to give effect to the ECHR standards as elaborated in the jurisprudence of the Court, the Court is more likely to incline towards a finding of a violation. Acting in violation of international treaty obligations is a serious matter and consciously acting in such a way is even more serious and damaging to the UK's international standing. It is therefore essential that, whatever conclusions and recommendations come out of this review exercise, those recommendations coincide teleologically with the UK's obligation under Article 1 of the ECHR to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.