INDEPENDENT HUMAN RIGHTS ACT REVIEW
CALL FOR EVIDENCE

Doughty Street Chambers

Public Law Team Response

3 March 2021

Background

1. The Terms of Reference for a Review of the Human Rights Act 1998 were announced on 7 December 2020. The Review will be conducted by a Panel appointed by the Lord Chancellor ("the Panel") and chaired by Sir Peter Gross. The Review published a Call for Evidence on 13 January closing on 3 March 2021.

2. This Response is prepared on behalf of Doughty Street Chambers Public Law Team. The Response has been prepared by a small team led by Martin Westgate QC, the Head of the Public Law Team.

3. Doughty Street Chambers is a set of internationally renowned barristers with a reputation for excellence. All members of Doughty Street Chambers have a commitment to human rights and civil liberties which they bring to their cases. Members of Doughty Street Chambers act in a diverse range of legal matters touching on the protection of individual human rights, from criminal law and immigration to media law and freedom of information. It has long been recognised as a leading set in civil liberties and human rights and in administrative and public law by both Chambers and Partners and the Legal 500.

4. For further information on this Response, please contact civilclerks@doughystreet.co.uk.

Executive Summary

5. It should be beyond a doubt that Doughty Street Chambers considers the contribution made by the Human Rights Act 1998 to the constitutional settlement of the UK and the protection of individual rights has been invaluable. While the Act has been subject to consistent political criticism from some quarters, there is no evidence that it is not operating as Parliament intended: bringing rights home and respecting Parliamentary sovereignty.

6. There is nothing in the requirement in to "*take into account*" the case-law of the European Court of Human Rights which requires our courts to slavishly follow Strasbourg. To the contrary, there is strong evidence that over the past 20 years the ability of UK courts to consider first how Convention rights apply at home has reduced the number of adverse judgments against the UK, has helped shape the approach of the European Court of Human Rights to its own jurisprudence.

7. UK Courts understand the significance of the margin of appreciation as an international law concept and are acutely sensitive to the boundaries of their own constitutional and institutional competence under the Act.

8. The interpretative obligation in the Act, together with the discretion to make a declaration of incompatibility provide a remedy for the protection of individual rights which simply did not exist before the Act came into force. There is no evidence, in our view, that each of these tools – and the more rarely used tools in the Act, including Designated Derogation Orders and Remedial Orders - are not operating as Parliament intended.

9. For the reasons outlined in our detailed responses to the questions posed by the Review Panel, below, we consider there is no pressing evidence of any need for reform.

10. While we welcome the opportunity to respond to the Review Call for Evidence we question whether the Review is necessary.

Introduction

1. In the short time the Human Rights Act 1998 has been in force, it has been subject to political criticism from some quarters. Since October 2000, successive Governments have committed to review or reform, often in the face of an unpopular decision impacting on an aspect of Executive policy. Yet, in that same short time, the Act has also worked to help secure the rights of many of the most vulnerable and ostracised in our society within our own unique constitutional settlement. These many cases, beyond the spotlight, should not be ignored.

2. We welcome the statement in the Terms of Reference for this Review reaffirming the commitment of the United Kingdom to the European Convention on Human Rights. This is a significant commitment and one which binds the UK to give effect to the Convention rights subject to the supervision of the European Court of Human Rights and the political bodies of the Council of Europe in Strasbourg, including the Committee of Ministers. So, the UK has a choice to bring those rights home or leave it to the Court in Strasbourg to identify when our law falls short.

3. From women seeking to protect their right to reproductive autonomy free from discrimination to bereaved families seeking the truth about the deaths of their loved ones following failures by the State; from the protection of the right to protest and the right to fair trial and from the rights of children and adults with disabilities to the rights of those accused of the most serious of crimes, the impact of the Act on the protection of individual rights in the UK is undeniable. Any Review of the Human Rights Act cannot and should not be detached entirely from the human face of its implementation nor from its significant constitutional contribution. While beyond the scope of this consultation, the role which the public duty to act compatibly with Convention rights has made on respecting rights in public decision making – and resolving disputes without recourse to the Courts – should not be ignored.

4. It should not be overlooked that the Act makes an important contribution to the constitutional settlement for the whole of the United Kingdom. Doughty Street Members practice across all three legal jurisdictions and the Review Panel is encouraged to seek and to consider evidence from practice beyond England and Wales. Any question about the impact and the operation of the Human Rights Act cannot and should not be detached from the role the Act plays in the devolution settlement and in the obligations arising from the Good Friday Agreement.

5. It should be beyond a doubt that this Doughty Street Chambers Response supports the contribution which the Human Rights Act has made to the protection of individual rights with the UK as a whole. Our members have worked over the past 20 years to secure remedies for clients which simply would not have been available before the introduction of the Act.[1]

[1] In the short time available for consultation, this Response is necessarily brief. Members of Doughty Street Chambers have contributed over the past 20 years to many projects on the impact of the Human Rights Act 1998. It would be impossible to repeat these in full, not least in the interests of brevity. Many examples of the impact of the Human Rights Act 1998 are provided in the work of Act for the Act (a project led by Caoilfhionn Gallagher QC, Martha Spurrier and Fiona Bawdon), by EachOther (formerly RightsInfo) (a project founded by Adam Wagner) and in the work of Just Fair (a project co-founded by Jamie Burton).

1. Theme One: The relationship between domestic courts and the European Court of Human Rights (ECtHR).

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?

"Take into account"

1.1. The purpose of the Human Rights Act 1998 ("HRA") was to "*bring rights home*". Although the Act operates to incorporate many of the substantive rights of the European Convention on Human Rights ("ECHR") into domestic law, it was the intent of Parliament that the Act should essentially operate as a bill of rights for the UK, providing a uniquely domestic approach to the protection of constitutional rights.[2] The Act is a product of our constitutional tradition and founded squarely on the sovereignty of the Westminster Parliament.

1.2. It is for this reason that nothing in the HRA binds UK Courts to the jurisprudence of the European Court of Human Rights ("ECtHR"). Instead, in recognition that the UK would not wish to purposefully act in a way which disregards its international obligations, UK Courts are required by s.2 HRA only to "*take into account*" Strasbourg case-law.

1.3. While historically understood that there is a presumption that UK judges will mirror Strasbourg (e.g. *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323, at [20]), it has been long established that the domestic Courts can and will depart from that position when warranted. Domestic Courts have refused to follow Strasbourg in a range of circumstances, including:

[2] Described on its introduction as a "bill of rights" for the UK by Ministers. See Jack Straw, Institute for Public Policy Research, 13 January 2000.

1.3.1. Where there is no coherent answer offered in the Strasbourg case law which is directly analogous (e.g. *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, at [90]; *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32, at [40]).

1.3.2. Where the issue is governed by the common law and the common law points in a different direction to the Strasbourg authorities (*Rabone v Pennine Care Foundation NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, at [113]);

1.3.3. Where the Strasbourg case law may be antiquated or overtaken by events (*R (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 48; [2012] 1 AC 621, at [43]);

1.3.4. Where the legislative framework points in a different direction (*R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, at [33]); or

1.3.5. Where it is determined Strasbourg would consider the matter one the State is better able to determine locally (i.e. it would be within the State's margin of appreciation) (*In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, at [31]. See also *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, at [70])).[3]

1.4. Further, in considering whether or not to follow a line of Strasbourg jurisprudence, the Courts are invited to consider whether that case law is inconsistent with a fundamental aspect of domestic law or appears to be based on a misunderstanding or misconception of domestic law (see e.g. *R v Abdurahman (Ismail)* [2020] 4 WLR 6 at [110]).

1.5. We consider that this approach strikes a balance which respects the international obligations of the UK in the Convention and the intent of Parliament that the domestic Courts interpret the Convention rights in the HRA 1998 guaranteed first as rights in domestic law.

The Margin of Appreciation

1.6. The margin of appreciation is an international law concept which recognises States enjoy a discretion over the application of some Convention rights at a domestic level, with which an international court should not interfere.

[3] These categories are helpfully summarised in the evidence of Helen Fenwick and Roger Masterman of Durham University Law School to the Joint Committee on Human Rights Inquiry on the Independent Human Rights Act Review, HRA0007, at [9].

1.7. While the margin of appreciation may determine the scope of the ECtHR jurisdiction over an issue; it is not similarly determinative of UK Courts' protection of Convention rights in the domestic constitutional settlement. As outlined above, the domestic Courts will take into account whether or not the ECtHR would consider a matter within the margin of appreciation. While domestic Courts recognise limits to their own institutional and constitutional competence; this does not necessarily mirror the margin of appreciation afforded in international law by the Strasbourg Court.

1.8. Domestic Courts are well-conscious both of the limits of the jurisprudence of the ECtHR (shaped by the margin of appreciation) and their own institutional and constitutional competence. Indeed, there is a case that an unduly deferential approach by the domestic Courts may see some cases ultimately resolved only in Strasbourg (see, e.g. *Othman v United Kingdom*, App. No. 8139/09).

1.9. In any event, there is no question in our view that the domestic Courts, including the Supreme Court, are acutely sensitive to the limits of the institutional and constitutional role which they play in protecting Convention rights (see, e.g. *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38).[4] In the vast majority of cases considered in the last 20 years, the ability of UK Courts to act as Parliament intended has been unquestioned.

Judicial Dialogue

1.10. Judges from the ECtHR consistently stress the value of the dialogue between the UK Courts and the Strasbourg Court. It increases the likelihood that UK cases will not result in the finding of a violation and it increases the influence of the UK on the interpretation of the ECHR more widely.[5] President Robert Spano and Judge Tim Eicke have recently said:

> "*The fact that there are so few violations found against the UK would also argue in favour of the fact that the UK courts are successfully applying the Convention at the domestic level. One may see this reflected in the statistics (see below). Firstly, the number of applications brought to Strasbourg against the UK is exceptionally low (for the last four years the lowest per head of all of the 47 Member States). Secondly, the percentage of cases resulting in a judgment finding a violation is also extremely low (two cases finding a violation out of 284 cases decided against the United Kingdom in 2020).*"

1.11. The capacity for UK Courts to depart from Strasbourg case law has created a lively dialogue where the UK Supreme Court has informed the application of the Convention both in the UK and other States:

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4 The Review Panel will be familiar with the range of academic writing on the margin of appreciation and the institutional and constitutional competence of domestic Courts.

5 See, for example, *Sir Nicolas Bratza, The relationship between the UK Courts and Strasbourg,* EHRLRev, 5 (2011) 505-512*; Written Evidence to the Joint Committee on Human Rights Inquiry on the Independent Review of the HRA, President Robert Spano and Judge Tim Eicke*, 24 February 2021.

1.11.1. The well-known examples of the handling of hearsay evidence and the treatment of whole life sentences are well-trodden and will be familiar to the Review Panel (see, *Al-Khawaja and Tahery v the United Kingdom*, App. Nos. 26766/05 and 22228/06; *Hutchinson v. the United Kingdom* [GC], App. No. 57592/08);

1.11.2. Where UK Courts have carefully examined the facts, applied the relevant human rights standards consistently with the ECHR and its case-law, the ECtHR will be slow to depart from that analysis (see, for example, *Ndidi v United Kingdom*, App. No. 41215/14).

1.11.3. The interpretation of the Convention adopted in the UK has helped inform the approach of the ECtHR to the application of the ECHR in other countries. For example, in the case of *S. V and A v Denmark*, App. No. 35553/12 (and 2 others), the Grand Chamber considered its case law on the preventative detention of individuals and drew upon the Supreme Court's analysis in *R (Hicks) v The Commissioner of Police for the Metropolis* [2017] 1 AC 25, on the detention of protestors prior to the wedding of Prince William. There was no violation of the Article 5 right to liberty identified by the Supreme Court in that case; and the European Court of Human Rights adopted a similar analysis to find no violation in the detention of Danish football supporters.

1.12. Whatever your view of the interpretation of the Convention adopted in these cases any dialogue between the ECtHR and the UK Courts is a 2 way conversation. In our view, there is simply no evidence of any need to disturb the status quo.

1.13. Distancing UK Courts further from the jurisprudence of the ECtHR or seeking to entrench the existing relationship between the two jurisdictions would be unnecessary and could be counter-productive. It could again increase the number of people who would have to travel to Strasbourg to secure a remedy for a violation of their individual rights.

1.14. Further, it would increase the risk that the UK would be found in violation of its international obligation to protect Convention rights at a time when, post-Brexit, our Government is seeking actively to bolster its reputation for fair dealing on the international stage.

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

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?

Interpretation

2.1. The legislative purpose of the interpretative obligation under section 3, HRA ("the interpretative obligation") was to permit domestic Courts to respect the intention of Parliament whilst ensuring that legislative powers were exercised in a manner consistent with the Convention, thus maintaining a balance which respected the UK's constitutional system and the supremacy of Parliament. The interpretative obligation

thus gives "*full weight to the countervailing will of Parliament as expressed in the 1998 Act*".[6]

2.2. It is important to emphasise that s.3 rests on the presumption that Parliament does not (without express, clear and unambiguous wording to that effect) intend to act in a manner contrary to the Convention. In that respect the ECHR is no different to the UK's other international law obligations. There is a 'strong presumption' in favour of the courts interpreting legislation in a way which is compatible with the UK's international obligations,[7] and the interpretative principle in *Pepper v Hart*, which requires explicit consideration of the policy intentions of Parliament, is also well-established.

2.3. The statement of compatibility procedure in s19 HRA permits a Minister to indicate, during the passage of draft legislation, that Parliament is asked to proceed with legislation notwithstanding that it is considered to be incompatible with Convention rights. Where that has not been done (and absent express intention in the legislation to the contrary), then Parliament must be taken to have intended that the legislation should be applied in in a manner compatible with Convention rights.

2.4. It is also important to emphasise that the interpretative principle of 'reading down' a legislative provision so as to preserve the purpose of the legislative scheme or Parliament's presumed intention, is neither new nor confined to s.3 HRA. Domestic Courts use a similar approach when considering the validity of subordinate legislation ('reading down' to ensure an interpretation consistent with the enabling statute); when interpreting domestic legislation in light of international legal obligations (e.g. applying Article 3 of the UN Convention on Rights of the Child in *ZH (Tanzania) v SSHD* [2011] UKSC 4); when considering whether a policy or procedure is lawful and consistent with statute (*Padfield v Minister of Agriculture* [1968] UKHL 1); and/or when considering the compatibility of a legislative provision with fundamental common law rights (e.g. construing statutory detention powers restrictively to preserve the common law right to liberty: *Khawaja v SSHD* [1983] 1 All ER 765).

2.5. The interpretative obligation is self-limiting. The Courts may only interpret primary and subordinate legislation so far as is necessary to make the legislation Convention-compliant and only "[s]*o far as it is possible to do so*". The HRA does not permit Courts to 're-draft' legislation or to stretch its meaning beyond recognition or the stated intention of Parliament. Again, the interpretative obligation is consistent with the approach to interpretation taken by domestic courts in other contexts, particularly those involving international legal obligations.

2.6. Two important principles, which limit the interpretative power in s3, emanate from *Ghaidan v Godin-Mendoza* [2004] 2 AC 557:

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6 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Steyn, [39].

7 *R v Lyons* [2003] 1 AC 976 per Lord Hoffmann at [27]. Parliament remains entitled to intentionally legislate contrary to its international law, but to do so requires clear and unambiguous wording. The interpretative obligation in s3 only arises in cases of potential ambiguity.

2.6.1. First, the courts will only interpret legislation in a way that "*will go with the grain of the legislation*".[8] Lord Nicholls specifically warned against using Convention rights to "*read in words that are inconsistent with the scheme of the legislation or with its essential principles*".[9]

2.6.2. Second, the courts will not enter into the arena of social policy, "*especially so where the departure has important practical repercussions which the court is not equipped to evaluate*".[10] Such matters must be left to Parliament.

2.7. Consistent with those principles, the courts may refuse to use s.3 in cases where 'reading down' legislation is unnecessary to achieve a just result or where the remedy is sensitive to the facts of the individual case. In *R (Mathieson) v SSWP* [2015] UKSC 47 (a challenge to the suspension of disability payments to children), for example, the Supreme Court declined to 'read down' social security legislation, choosing instead to grant specific relief to the claimant and thereby to leave it to the discretion of the Secretary of State as to how the statutory power could be adjusted to avoid injustice in future cases. It was not 'necessary' to read down the legislation to achieve a just result.

2.8. Those principles inform the courts' approach to s3, enabling them to give effect to Parliament's presumed intention (to act compatibly with Convention rights) without impermissibly undermining the intention or scheme of the legislation. For example:

2.8.1. In *R v A* [2001] UKHL 25 [2002] 1 AC 245 s3 was used to "read down" the preclusion of evidence or questioning about a complainant's sexual history in sexual offences proceedings in order to ensure compatibility with a defendant's Article 6 right to a fair trial. That was consistent with Parliament's presumed intention (in the absence of express words to the contrary) not to preclude or remove fundamental rights of the individual;[11]

2.8.2. In *Re A (A Child) (Adoption Time Limits)* [2020] EWHC 3296 (Fam), the High Court held that Parliament could not have intended that an adoption application made outside a two year time limit would be disbarred, which would be incompatible with the positive obligations of Article 8 ECHR, and accordingly applied s3 so as to enable an adoption application made outside the time limit to proceed;

2.8.3. By contrast, in *Sheldrake v DPP* [2005] 1 AC 264, the House of Lords held that s3 could not be used to 'read down' reverse burdens of proof in s5(2) Road Traffic Act 1988 and s11(2) Terrorism Act 2000, as that would be contrary to Parliament's clear legislative intention;

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8 *Ghaidan,* [121].
9 *Ghaidan,* [121].
10 *Re S,* [40]; see also, *Ghaidan*, [19].
11 *Ex parte Simms*, 131F-G per Lord Hoffman.

2.8.4. In *R (Anderson) v SSHD* [2003] 1 AC 837, the House of Lords held that it was 'not possible' under s3 to interpret s29 Crime (Sentences) Act 1997 compatibly with Article 6 of the Convention, and accordingly a declaration of incompatibility was made instead; and

2.8.5. In *WB v W DC* [2018] EWCA Civ 928, the Court of Appeal refused to use s3 in circumstances where Parliament had passed subsequent legislation which retained and built upon the provision, making the legislative intention clear. It held that to interpret the earlier provision afresh would be "*contrary to that which Parliament intended*". The Court emphasised the limits of the interpretative obligation, in particular, citing *Ghaidan*, above, that the duty did not "*empower the courts to adopt an interpretation which goes against the 'grain of the legislation'*".[12]

2.9. As Lord Steyn stated in *Re S*, "*the reach of this tool is not unlimited*".[13] It is always open to Parliament, if there is concern that the courts' interpretation of a legislative provision is contrary to Parliament's intention, to amend the legislative provision so as to make its intention clear. That Parliament has not chosen to do so is indicative that the interpretative obligation operates as intended.

2.10. Another important safeguard is the declaration of incompatibility procedure in section 4 of the Act. Where it is not possible to 'read down' a legislative provision under s3, section 4 ensures that the courts retain the option of returning the provision to Parliament, for Parliament to determine how to resolve the incompatibility. It is of course open to Parliament not to do so.

2.11. Amendment or repeal of section 3 is therefore unnecessary. s3 was intended to permit domestic courts to respect the intention of Parliament whilst ensuring that legislative powers were exercised in a manner consistent with the Convention; and that is how it has worked in practice. Domestic courts have respected Parliament's role and sought to give effect to the intention and purpose of legislation. The limits of section 3 are well-established and ensure that the courts do not veer into amendment; where Parliament has legislated to restate its intention, the courts will be reluctant to interfere (see, e.g. *WB v W DC* [2018] EWCA Civ 928).

Declarations of Incompatibility

2.12. The interpretative obligation applies to all courts. By contrast, the declaration of incompatibility in s4 is exercisable only by senior Courts (the Supreme Court, the Judicial Committee of the Privy Council, the Court Martial Appeal Court, the High Court, the Court of Appeal and the Court of Protection).

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12 *WB*, [23].
13 *Re S* [2002] 2 AC 291, [38].

2.13. This is a discretionary power; the Courts can refuse to make a declaration, and are likely to do so where compatibility with the Convention could be achieved by application of another statute or common law powers: *Kennedy v Charity Commission* [2014] UKSC 20. Similarly, a declaration of incompatibility is unlikely to be granted where it is hypothetical or unnecessary in the particular case: *Rushbridger v HM Attorney-General* [2003] UKHL 38.

2.14. It is unclear how a system in which a declaration of incompatibility was available to all Courts, and used in preference to the more flexible interpretative process in s3, would work in practice, and indeed whether such a system would be workable at all. In practice, permitting Courts at all levels to issue a declaration of incompatibility as a 'first resort', thereby returning the legislative provision to Parliament for consideration of how the incompatibility should be addressed, would be likely to result in significant additional burdens on Parliamentary time and resources, and thereby to impede the executive from pursuing its legislative programme. It would also be likely to result in considerable uncertainty about the status of a particular legislative provision, and thereby to diminish consistency in decision making in lower Courts. It would, of course mean more people waiting longer to secure an effective remedy in respect of an identified violation of their rights. In cases where just satisfaction may be appropriate, this could mean new cases and new violations accruing while the Government and Parliament waits to act, with an associated cost to the public purse.

Designated Derogation Orders

2.15. The existing remedies available to domestic courts are appropriate. A designated derogation order made under section 14(1) is subject to judicial review and an order which is held to be unlawful may be quashed.

2.16. A derogation is a limited power to opt-out of the international law obligations which otherwise bind the UK and it is subject to supervision. Article 15 ECHR provides:

> 1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
>
> 2. *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.*
>
> 3. *Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*

2.17. This makes clear the limits on derogations: the requirements that they are "*strictly necessary*", compliant with other international legal obligations, and are not used in relation to certain provisions of the Convention. In addition, there is political supervision by the Council of Europe, and legal supervision by the ECtHR. The European Court's approach entails a "*self-denying light touch*".[14]

2.18. A further limit exists in relation to designated derogation orders. Section 16(1) HRA provides that such an order ceases to have effect five years after it is first made (if it has not already been withdrawn). Supervision at national level is done by Parliament and the Courts. Section 16(3) HRA provides that a designated derogation order ceases to have effect after 40 days unless it is approved by a resolution of both Houses of Parliament. The order is then subject to judicial review, including by reference to section 6 HRA, which makes it unlawful for a public authority to act in a way which is incompatible with the Convention.

2.19. This political oversight and judicial review and remedies ensure that any problems with a designated derogation order may be resolved in the domestic legal system without resort to international legal procedures such as an application to the Strasbourg Court.

2.20. In the time of the HRA's operation the Government has only used the section 14(1) power once. Parliament adopted the Anti-Terrorism, Crime and Security Act 2001 ("ATCSA") in the aftermath of the 11 September 2001 terrorist attacks in the US. Part IV of the Act allowed the Government to detain a foreign national under suspicion of terrorism if the individual could not be deported. In practice the individuals were interned in Belmarsh prison. Such detention would ordinarily violate the right to personal liberty in Article 5 ECHR. The Secretary of State issued the Human Rights Act 1998 (Designated Derogation) Order 2001 and the Government notified the Council of Europe of its derogation.

2.21. The House of Lords, in *Belmarsh*, held that the 2001 Order was unlawful.[15] A majority of the court accepted the Government's argument that there was a public emergency threatening the life of the nation. However, they held ATCSA Part IV, and the Order, to be contrary to the Article 14 ECHR prohibition on discrimination, because it only applied to individuals who were not British nationals. The court quashed the Order and made a declaration of incompatibility in relation to ATSCA Part IV.

2.22. The 2001 Order is the only time section 14(1) has been used. In consequence, *Belmarsh* is the only time the remedy in question has been used. It is appropriate to have this remedy available. Derogations are not *carte blanche* opt-outs and review by Courts upholds the rule of law. Indeed, the value of domestic Courts' review function was made even clearer when the *Belmarsh* case made its way to Strasbourg.

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14 CA Gearty, *Principles of Human Rights Adjudication*, (OUP 2005), p. 12.

15 *A v Secretary of State for the Home Department* [2004] UKHL 56.

2.23. In *A v United Kingdom*, the Belmarsh detainees brought claims about their detention before the Strasbourg court.[16] As part of their response the Government argued that the House of Lords decision on the lawfulness of the derogation was incorrect. The Strasbourg court, however, declined to reverse that decision:

> *"… the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable."*[17]

2.24. The "*margin of appreciation*" shown to the national authorities renders the domestic Courts' role in review of designated derogation orders vital to ensure compliance with the Convention. If domestic Courts did not perform this role the ECtHR could take the view that its scrutiny would need to be more intensive, and therefore subject the national legal system to heightened external review. This is consistent with the latest view from Strasbourg reflected in the evidence provided to the JCHR by President Spano and Judge Eicke, outlined above. The current system functions well to retain both the Government's power to derogate and the Courts' role to review.

Delegated Legislation

2.25. This question raises issues of substance and procedure. In neither case do we consider that any change is needed. Far from evidencing some kind of judicial overreach, challenges to subordinate legislation have been met with considerable judicial reserve and with the Government being put, in some respects, in a more favourable position than they would be in other comparable litigation. Those who take the view that it is too easy to secure a finding that subordinate legislation is incompatible have clearly never attempted to bring such a claim and have never encountered the formidable obstacles that are already in place.

2.26. Where secondary legislation has been found to be incompatible with Convention Rights then it does not necessarily follow that it will be quashed and the Court retains a discretion. Even where subordinate legislation is quashed it remains for the decision-maker to formulate any replacement.

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16 *A v United Kingdom* (2009) 49 EHRR 65.
17 Ibid, [174].

2.27. All of this is in keeping with ordinary principles and practice in administrative law and there is no reason to treat human rights cases differently. Subordinate legislation is subject to judicial review on conventional grounds and is liable to be quashed, even where it has been subject to the positive resolution procedure (*R (Javed) v SSHD* [2001] EWCA Civ 789).

Establishing incompatibility

2.28. Cases that involve challenges to delegated legislation provide a useful set of examples to test the extent to which judges feel able to step into the political arena and to substitute their judgment for that of the Executive. In short there is no evidence that this is what they are doing.

2.29. UK Courts continue to give great respect to the judgement formed by the Executive and to views expressed in Parliament, particularly where the decision maker has addressed the very point in issue (e.g. *R (Tigere) v SSBIS* [2015] 1 WLR 3820, [32]). Where a measure involves welfare benefits then the level of deference is greater and the test to be applied is whether the measure is "*manifestly without reasonable foundation*" ("MWRF") (See *R. (on the application of DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289). The Court of Appeal has accepted that approach is also likely to apply more generally in other areas of economic and social policy (*R (JCWI) v SSHD*[2020] HLR 30; *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271) and it has held to this general approach despite the fact that the ECtHR has limited MWRF in this context to a specific class of transitional cases address to correcting past discrimination. In practice, the MWRF threshold is such that claims that succeed under the ECHR are also likely to succeed if the claim is framed as one of irrationality at common law.[18]

2.30. In practice, the Courts will only intervene in an extremely clear case where the impact is closely defined. An example is the "*bedroom tax*" litigation leading to *R (Carmichael) v SSWP* [2016] 1WLR 4550 and which confirmed that the MWRF test applied to benefits cases. The Supreme Court held that the Regulations in question breached Art 14 (taken together with A1 P1) for some limited cases where there was a "*transparent medical need for an additional bedroom*" but rejected a broader case that there ought to be an exception for those who had other disability related needs for larger accommodation than allowed to them because, for example, they had to occupy adapted housing that had an "*extra*" bedroom. In doing so, the Court deferred to the judgment of the Secretary of State that such cases ought to be dealt with by discretionary housing payments.

[18] An example of a case succeeding on both bases is *R(W) v SSHD* [2020] EWHC 1299 (Admin) - imposition of a requirement to have no recourse to public funds despite evidence showing imminent destitution for the applicant and her child. A counter-example of a claim failing on both bases is *R (Moore) v SSWP* [2020] EWHC 2827 (Admin).

2.31. *Tigere* (above) has been cited as an example of judicial overreach but in fact it shows a similarly nuanced approach. The majority in that case upheld a requirement that applicants for student loans show 3 years ordinary and lawful residence but held that a further requirement to show settled status was disproportionate because of its impact on students who were settled in practical terms and who would otherwise suffer serious disruption to their studies. However, the Court was then careful not to dictate to the Secretary of State what form any amended rule should take. The Order made (see [48]-[49]) was limited to a declaration that there had been a breach in the Appellant's case "*while leaving it open to the Secretary of State to devise a more carefully tailored criterion which will avoid breaching the Convention rights of other applicants, now and in the future*".

Subordinate legislation enjoys a significant level of protection from any adverse finding.

2.32. Subordinate legislation will only be unlawful if it is incapable of being operated compatibly with Convention rights in all or nearly all cases (see *R(W) v SSHD* [2020] EWHC 1299 (Admin), at [56] citing Hickinbottom LJ in *R (JCWI) v SSHD*)). This is a difficult test to satisfy. The effect is that successful challenges may succeed by reference to the guidance or practice adopted pursuant to subordinate legislation rather than to the legislation itself. The effect is often to leave the legislation intact but to require the executive to change the overlying practice or guidance. This is what happened in *W* (above) and in *R (Bibi) v SSHD* [2015] 1 WLR 5055. This does not intrude in any way on the intention of the legislature in allowing subordinate legislation to take effect. If the legislature authorised wording that can be applied lawfully and compatibly with Convention rights then it must have expected that that statutory language would be so applied.[19]

2.33. The Executive also benefits from a more favourable use of Parliamentary materials where HRA challenges are concerned, a point recently emphasised by the Court of Appeal in *R (Project for the Registration of Children as British Citizens & O v SSHD* [2021] EWCA Civ 193). There the issue was whether the Minister had had "*due regard*" to the need to safeguard and promote the welfare of children, a duty imposed by domestic law in s. 55 of the UKBA. The Secretary of State sought to rely on Parliamentary debates to show that the *"regime as a whole, and its effect on the best interests of children in particular, was subject to detailed and robust Parliamentary debate*" [80]. The reference was held to be impermissible because of Parliamentary privilege [101]. However, the outcome would have been different if the challenge had been under the HRA. As the court explained at [99]-[101]:

> *"[99]. First, the limited exception to the generality of Article 9 and parliamentary privilege introduced by these authorities is, by necessary implication, mandated by the Human Rights Act, as Lord Nicholls explained in Wilson v First County*

[19] Most, but not all subordinate legislation within the definition in s. 22 HRA, will either be laid before Parliament or will go through the positive or negative resolution procedure before it takes effect.

Trust. It follows that, but for the effect of that Act, the use made by the courts in accordance with Wilson v First County Trust of Parliamentary debates in cases dealing with human rights challenges would not be permissible. Were that not the case, it would have been unnecessary for Lord Nicholls to explain the basis on which reference could be made in such cases, the explanation being repeated by Lord Reed and Lord Wilson in the subsequent cases.

[100]. Second, and this follows from the first, the consideration in R(DA) v Secretary of State for Work and Pensions of proceedings in Parliament, when determining whether the Government and indeed Parliament has taken proper account of the best interests of children, was permissible because the challenge was made under the Human Rights Act, as Lord Wilson explained.

[101]. The present case involves no challenge on human rights grounds, and reference to and reliance on Parliamentary debates cannot be justified by reference to these authorities".

2.34. This is highly significant because a key consideration in assessing the proportionality of a measure is the extent to which the decision maker has addressed the relevant issues. If they have, then the Court is very reluctant to take a different view and *vice versa*.

2.35. However, since it is not permissible to criticise the substance of what was said in Parliament the effect is that the Courts will defer on the basis that there has been adequate consideration of the issues when this may consist of little more than the matter being mentioned in Parliament. This is what happened in *R (DA) v SSWP* (the second benefit cap case). In that case the Supreme Court had to consider whether the finding in the first benefit cap case (*R (SG) v SSWP*) that there had been a breach of Art 3 of the UNCRC (which, it was argued would then entail a breach of Art 14 ECHR) still held good. Lord Wilson concluded that there had been no breach of Art 3. However, the evidence recited by him at [79]-[87] did not show any attempt by the Government to evaluate what actually was the impact on children and concerns raised by knowledgeable commentators were met simply by the assertion that it was in children's best interests not to grow up in workless households.

The consequences of a finding of incompatibility

2.36. A finding of incompatibility does not necessarily mean that the delegated legislation in issue will be quashed. In *Carmichael* the court declared the partial exclusion from housing benefit to be unlawful but the Regulations remained in force (see *SSWP v Carmichael* [2018] 1 WLR 3429), so giving rise to the further claim in *RR (see below).* Even where there is a quashing order then the Executive retains a wide margin in re-framing any new Regulations.

2.37. In *RR v SSWP* [2019] 1 WLR 6430 the appellant applied for housing benefit but was subjected to a "*bedroom tax*" reduction of 14% despite being in a class of people in respect of whom the Supreme Court had held the reduction was unlawful because it

was a breach of Art 14. The Supreme Court held that "*a public authority, court or tribunal [must disapply] 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*" [27]. This followed because each of those bodies had a duty not to act incompatibly except where acting in compliance with a provision of primary legislation that could not be read or given effect to compatibly with Convention Rights (s. 6). The limitation to this approach is that it must be possible to apply the subordinate legislation without the offending provision [30]. (There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision.)

2.38. We consider that the approach in *RR* is a principled one that does not require adjustment. It is always open to Parliament to provide by primary legislation that particular delegated provisions can be exercised incompatibly but unless it does so the clear scheme of the Act is that unlawful acts cannot be authorised by subordinate legislation. The approach taken in *RR* leaves the subordinate legislation intact for other purposes and avoids the knock on or "*domino*" effects that sometimes follow from a finding of invalidity. So, in *RR* itself the 14% benefit reduction could still be applied in other cases.

Jurisdiction

2.39. Although there has been some considerable publicity over the application of the Act overseas, the HRA, for the most part, only applies to acts of public authorities within the territory of the UK. However, it has long been understood that this is because the Convention applies to States within their territories (the territorial principle), and there are limited exceptions which allowed extra-territorial effect.[20] In recent years the European and domestic Courts have clarified the basis of the territorial principle and the rational for exceptions to it, principally by reference to cases first decided in the UK Supreme Court.

2.40. The jurisdictional provision is found in Article 1 ECHR:

> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*[21].

2.41. Historically, certain exceptional circumstances when States are responsible for acts outside their territory have been accepted by the Strasbourg Court.[22] These included the occupation of northern Cyprus by Turkey and the NATO intervention in the former

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20 *Banković and Others v Belgium and 16 Other Contracting States* (2001) 11 B.H.R.C. 435

21 Although Article 1 is not, itself, incorporated into domestic law by the HRA, it is accepted that the territorial scope of the HRA matches that of the ECHR itself. See *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 (*Al-Skeini* (HL)).

22 For an illustrative list see "*Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights*", Factsheet July 2018, European Court of Human Rights Press Unit.

Yugoslavia, cases involving diplomatic premises, acts of state security services, and acts on the high seas.

2.42. The Strasbourg Court has sought to clarify the law, beginning with its decision in *Al-Skeini* itself.[23]

2.43. *Al-Skeini* was followed by the Supreme Court in the leading domestic authority of *Smith v Ministry of Defence*.[24] *Smith* related to the protection of the human rights of British soldiers serving in Iraq. The Supreme Court drew on *Al-Skeini* to set out the general principles relevant to jurisdiction. There are three categories: state agent authority and control; effective control over an area; and the Convention legal space.[25] The overall approach across the three categories is that:

> *"whenever the state through its agents exercise control and authority over an individual, and thus jurisdiction, the state is under an obligation under article 1 to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'*".[26]

2.44. The Supreme Court's decision reversed its earlier rulings on jurisdiction and territory. It held that it is possible, in relation to public authorities' acts outside the territory of the UK, to tailor the applicability of Convention rights to the circumstances. In terms of the case before it, the Court held that the soldiers were within the scope of the UK's jurisdiction for the purposes of Article 2 ECHR, and that the question of whether the soldiers' right to life had been violated required examination at trial.

2.45. The current position affords potential victims of human rights abuses overseas – including British soldiers – a means by which they can hold public authorities to account. Lord Dyson, speaking extrajudicially, later described the approach as follows:

> *"The Convention constrains a state's freedom to act, regardless of where that individual is located because the rights and freedoms are those of individuals, not those of territories. The question that the Court should ask is whether it is in a relationship of effective and purportedly legitimate authority over the individual (which is a threshold question). If it is, jurisdiction is engaged because the state has constrained its freedom to act in the context of such relationships."*[27]

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23 *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.
24 *Smith v Ministry of Defence* [2013] UKSC 41.
25 Smith, [27]-[31].
26 *Smith*, [37] with reference to *Al-Skeini v United Kingdom*, [137].
27 Lord Dyson MR "The Extra-territorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is It a Sound One?", Essex University, 30 January 2014.

2.46. The domestic and European Courts are likely to continue to face novel scenarios which will require analysis and resolution.[28] With that in mind, any proposed change to the law, which could unsettle precedent and increase complexity, merits heightened scrutiny. A change could leave UK citizens, and all other persons, without protection while outside the territory. It could also leave the UK in violation of its obligations under the Convention if, for example, that change did not accord with the case law of the ECtHR.

2.47. A Bill currently before Parliament, the Overseas Operations (Service Personnel and Veterans) Bill, engages the question of the territorial application of the Convention. Part 1 of the Bill would restrict prosecutions in relation to overseas military operations. Part 2 limits the time in which to bring claims of human rights violations in such cases and also requires the Secretary of State to consider derogation from the Convention in relation to overseas operations.

2.48. The Bill carries a Declaration from the Secretary of State that it is compatible with the ECHR. This claim is necessarily likely to be tested, before domestic Courts and the ECtHR, if the Bill becomes law. The introduction of further complexity in the law on jurisdiction, and its imposition of an additional legal duty on the Secretary of State, produces rather than answers legal questions. These are questions which may ultimately be answered in Strasbourg.

Remedial Orders

2.49. The Remedial Order procedure in Section 10 and Schedule 2 of the HRA 1998 is rarely used. It can only be used where Ministers have identified "*compelling reasons*" to remedy a violation identified by either the domestic or the ECtHR.

2.50. It is only in the case of an urgent Remedial Order that the Government can act without the prior approval of Parliament. However, even in urgent cases, the new law will lapse without approval by Parliament within 120 days (Schedule 4(4)).

2.51. Remedial Orders may be one of the most closely scrutinised forms of secondary legislation. There will be at least one report produced for Parliament by the Joint Committee on Human Rights ("JCHR"). While the Act does not set out the role played by the JCHR; from the outset, the standing orders of Parliament allowed for the JCHR to examine and advise the House, including whether the Remedial Order procedure proposed is appropriate.[29]

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[28] After *Smith*, the domestic courts have considered jurisdictional scope in cases including *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; *R (Ismail) v SSHD* [2016] UKSC 37; *Lord Advocate v Dean* [2017] UKSC 44; and *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010. The European Court has most recently addressed the question of territorial scope in cases such as *Georgia v. Russia II* (application no. 38263/08), Judgment 21 January 2021 and *Hanan v. Germany* (application no. 4871/16) Judgment 16 February 2021.

[29] See, e.g. Standing Orders of the House of Commons, s.152B.

2.52. From time to time, there has been some academic criticism that the making of Remedial Orders is inherently improper or that some of the purposes for which s.10 has been used have been ultra vires. However, it remains that these Orders are extremely rare, always subject to close scrutiny and ultimately, only ever within the gift of Parliament.[30] Concerns about the vires of any individual Order can be raised with Parliament, whether in evidence to the JCHR or otherwise.

2.53. In terms of improvement, that the role of the JCHR is not reflected on the face of the Act does not rob that role of its constitutional significance. As no Parliament can bind its successors, whether in the Act or the standing orders, the nature of the Committee's role will remain dependent on the limits of our own constitutional arrangements whether preserved in statute or otherwise.

2.54. Other points of criticism which may made are those which are made of secondary legislation more generally. First, Parliament must wait for the Executive to act on any Remedial Order (this is in contrast, to primary legislation, where, for example, a private members' bill might start the legislative process). Second, there is no provision for the amendment of any Order during debate on its passage. (However, in the ordinary Remedial Order process, these Orders are first laid in draft, providing an important opportunity for amendments to be proposed (Schedule 2(2)(a)).)

2.55. However, the purpose of the Remedial Order procedure is to provide Government with an opportunity to address urgently violations identified in domestic law which might continue to adversely affect the rights of individuals without swift action. For that limited and important purpose, and given the very limited number of Orders made, it is perhaps unsurprising that the evidence given by the clerks of the House of Commons is that this process has not given rise to any significant cause for complaint by Parliamentarians.[31]

2.56. Again, we have seen no evidence that the provision for Remedial Orders requires substantive reform.

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30 The latest statistics published by the Government suggest that where a Declaration of Incompatibility has been made, it is very rare that a Remedial Order is considered. Between Oct 2000 and July 2020, there were 43 Declarations and only 8 had been remedied by Remedial Order: Ministry of Justice, *Responding to human rights judgments*, December 2020, CP 347, Annex A.

31 HC 1161, p7-8 (Eve Samson).