Leigh Day

The Independent Human Rights Act Review

Call for Evidence – Response

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For further information contact:

Jamie Beagent or Tessa Gregory

[redacted]

Priory House, 25 St. John's Lane, Farringdon, London EC1M 4LB
Tel: 020 7650 1200

fax: 020 7329 5055 email: info@leighday.co.uk
website: www.leighday.co.uk

INTRODUCTION

Leigh Day was founded in 1987 with the ethos of ensuring that ordinary people who have suffered harm have access to the same quality of legal advice as those against whom they seek redress, whether they be state bodies, insurers, or multinational companies. The firm is ranked in the top tier of Chambers and Partners and the Legal 500 in administrative and public law and civil liberties and human rights. It has had a dedicated Human Rights department since 2001 and is known for taking on complex and novel cases.

Against this backdrop it is perhaps striking that we have identified relatively few cases where Leigh Day has acted which have invoked the provisions of the Human Rights Act 1998 ('HRA 1998') under scrutiny by the IHRAR. We would submit that this serves to illustrate that the evidence does not bear out the perception that the HRA 1998 has inappropriately skewed the balance of power between the three arms of state. In particular, the assertion that the HRA 1998 has eroded the principle of parliamentary sovereignty is simply not made out. On the contrary, and as detailed below, the approach the Court has taken to invoking the duties and powers conferred on it by Parliament when Parliament passed the HRA 1998 can best be characterised as one of "judicial restraint". This restraint applies even in cases where the Court has been tasked with considering the lawfulness of delegated legislation (where there is often very limited scope for proper scrutiny by Parliament). The Courts have shown deference to the executive when considering the lawfulness of secondary legislation and have made clear that the executive has discretion over how to remedy any identified unlawfulness.

The firm does have experience of acting for individuals in claims under the HRA 1998 arising from acts by public bodies which occurred outside UK territory. It is submitted that those cases offer compelling justification for the continued extraterritorial application of the HRA 1998. As detailed below, the cases in which the firm has acted have allowed individuals to seek redress for proven violations of Articles 3 and 5 of the Convention.[1] The extra-territorial scope of the HRA 1998 is also allowing an individual to seek redress in a case[2] where MoD internal emails show a possible "*deliberate policy*" by British Special Forces, of which numerous MoD officials (including senior

[1] Alseran and others v MoD [2017] EWHC 3289 – the Court also found a violation of the 1949 Geneva Convention
[2] Saifullah v SSD (CO/4200/2019)

officials within the special forces) were aware, of executing unarmed Afghan males and using false cover stories to suppress the true circumstances of those "*massacres.*"

We have not sought to review all case law or comprehensively address all the questions raised by the Terms of Reference as we are aware that other expert organisations and NGOs are doing that exercise, instead in the below we have sought to illustrate, through some of the key cases in which we have acted, our view as to how the HRA is currently operating in respect of the questions raised.

THEME 1

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

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?

Leigh Day were instructed for the Claimants in *Al-Waheed and Mohammed v Ministry of Defence* [2017] UKSC 2 where the Supreme Court considered the legality of the UK detention regime in post-occupation Iraq and Afghanistan in light of recent ECtHR jurisprudence. Specifically, the Supreme Court was asked to consider:

> i. Whether the relevant UN Security Council Resolutions in Iraq and Afghanistan *obliged* the UK to intern and thereby *displaced* Article 5(1) ECHR (as per *Al-Jedda v SSD* in the House of Lords) or merely *authorised* the UK to intern for imperative reasons of security, thus creating no conflict with Article 5(1) ECHR (as per *Al-Jedda v UK*); OR ii. Whether Article 5 ECHR was capable of being *modified* (rather than disapplied) by the relevant UN Security Council Resolutions in Iraq and Afghanistan (as per *Hassan v UK* applied by analogy), so as to render the Claimants' internments lawful.

Although there was no explicit judicial dialogue between the Supreme Court and the ECtHR, the domestic court carefully considered the jurisprudence of the ECtHR in relation to article 5, in order to reach a reasoned decision on the relationship between the ECHR and other branches of international law (see paras 45 – 68).

In its 2017 judgment, the Supreme Court, applying *Hassan* by analogy, held that UK armed forces had the power to detain the Claimants pursuant to the relevant UN Security Council Resolutions, provided this was "necessary for imperative reasons of security"; and that Article 5(1) ECHR should be read so as to accommodate, as permissible grounds, detention pursuant to that power.

This case is a good example of the Supreme Court taking into account ECtHR jurisprudence to achieve a result that was compatible with Article 5 and consistent with the international legal position.

Leigh Day were also instructed for the Claimants in *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2 and *Smith v Ministry of Defence* [2013] UKSC 41, which are other examples of the domestic courts successfully applying section 2 of the HRA 1998. We would also defer to the expertise of organisations such as the Public Law Project.

We would, however, like to note, that it is by no means our understanding that the domestic courts are (or consider themselves to be) bound by ECtHR jurisprudence. In fact, it appears that a line of authority has emerged where the domestic courts have departed from Strasbourg where: they consider the authorities are not clear or consistent; where there has been a misunderstanding of domestic law or practice; where the outcome Strasbourg arrived at was incorrect; or where adopting Strasbourg's position would have significant adverse consequences domestically (see for example *R v Horncastle* [2009] UKSC 14 and *Manchester City Council v Pinnock* [2011] UKSC 6).

Therefore, while it is entirely right that domestic courts should take into account ECtHR jurisprudence given the HRA was implemented to remedy breaches of ECHR rights at a domestic level, the reality is that the courts adopt a flexible approach and only do so where Strasbourg has adopted a reasoned position and it is proper to do so with regard to the domestic position.

We are therefore of the view that section 2 is working appropriately and that no amendments are needed.

We also understand that the current approach to judicial dialogue is operating well (see for example *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66), and that it can be preserved by both courts being open and receptive to new arguments and being able to adapt their positions where it is right to do so.

THEME TWO

a) Should any change be made to the framework established under section 3 and 4 of the HRA? In particular:

i. **Are there instances where, as a consequence of domestic courts and tribunal 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)?**

Section 3 (1) states the following:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

We would submit that the Courts are cautious in their use of section 3 and are very alive to the fact that they should not step outside their remit. The Court's role is not to interpret legislation inconsistently with the intention of Parliament. Parliament enacted the HRA with the intention that legislation should not be incompatible with the HRA. Therefore, contrary to what is implied in this question, there is no inherent contradiction between the dual interpretative exercises the Court is performing under section 3 of the HRA.

Leigh Day are instructed in the matter of *A & B v CICA [2018] EWCA Civ 1534.* The case turns on whether excluding A and B, who are victims of human trafficking, from compensation under the Criminal Injuries Compensation Scheme (CICA) unjustifiably discriminates against A and B, in breach of Article 14 taken with Article 4 of the European Convention on Human Rights.

The relevant provisions within the CICA scheme are as follows:

"Grounds for withholding or reducing an award

……

26. Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.

Annex D: Previous convictions

2. Paragraphs 3 to 6 do not apply to a spent conviction……

3. An award will not be made to an applicant who on the date of their application has a conviction for an offence which resulted in:

(b) a custodial sentence;

(e) a community order;

(g) a sentence equivalent to a sentence under sub-paragraphs (a) to (f) imposed under the law of Northern Ireland or a member state of the European Union, or such a sentence properly imposed in a country outside the European Union …"

The Appellants are twin brothers and Lithuanian nationals. A was convicted in Lithuania of burglary on the 6th June, 2010 and was sentenced to 3 years' imprisonment. B was convicted in Lithuania of theft on the 11th December, 2011 and was sentenced to 11 months' imprisonment. In 2013 the Appellants were trafficked from Lithuania to the United Kingdom. The Appellants applied to the CICA for compensation under the Scheme in 2016.

The CICA wrote to each of the Appellants, refusing to make an award of compensation for their criminal injuries, in the following terms:

> *" I am sorry to tell you that I have decided not to make any award because, under paragraph 26 of the Scheme, Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant, to whom an award would otherwise be made, has unspent convictions."*

The Appellants contended that the relevant provisions of the Scheme are unlawful on the basis that they contravened Article 17 of the European Directive 2011/36/EU, which directed member states to afford special protection to victims of trafficking and for discrimination against the Appellants (on the ground of their "other status" of having unspent convictions for offences which resulted in a custodial or community sentence) contrary to Article 14 ECHR, read with Article 4.

In respect of the first element, the Court held that the Appellants had access to the Scheme, that they were entitled to have their claims considered in accordance with the Scheme and this was not rendered practically impossible or excessively difficult by any factor connected to their trafficking.

The Court then considered whether a difference of treatment on the ground of a relevant “other status” was discriminatory.

The Appellants’ claim for discrimination was on two bases; first, that the exclusionary rule in the Scheme discriminates against those with relevant unspent criminal convictions; secondly, that it treats victims of trafficking in the same way as other applicants for compensation when their position is different.

The Court, adopting *Clift v The United Kingdom* (Application no 7205/07) Judgment 13 July 2010, found that the Appellants, by reason of their unspent convictions of the relevant kind, did have an “other status”, so that Article 14 was engaged. However, it held that the exclusionary rule within the Scheme was justified stating the following:

> *“…There is plainly a legitimate aim in limiting eligibility for compensation to those who are morally deserving of it, namely, “blameless victims of crimes of violence” (in the words of the 2012 Consultation). The measure adopted is rationally connected to that aim, not least as the unspent convictions which trigger the exclusionary rule are those where the offenders “have cost society money through their offending behaviour” (ibid) – in terms of custodial or community sentences.* ***The exclusionary rule operates in the realm of social policy and the Scheme has been reviewed and approved by Parliament; the matter cries out for judicial restraint. That the Scheme should contain a provision precluding compensation in certain cases of serious criminal offending for those with unspent relevant convictions, is unremarkable. On any view, the existence of some such provision cannot be said to be manifestly without reasonable foundation.*** *[92]* (our emphasis)

> *…Parliament approved the provisions of the exclusionary rule* ***and, in my judgment, the Court should not intervene****."* [97] (our emphasis)

The Court went further commenting on judicial restraint and reiterated Lord Sumption's observations in *Bank Mellat v HM Treasury (No 2) [2013] UKSC 38; [2013] UKSC 39; [2014] AC 700, at [44]*:

"….when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy." The Court found that:

> *"…Annex D read as a whole provides a graduated approach to withholding or reducing awards of compensation, hinging on the seriousness of the offending, the circumstances of the offender and applicable mitigation, all reflected in the sentence passed and the time which has elapsed since the offending in question. Given the legitimate aim of restricting eligibility for compensation to those morally deserving, the exclusionary rule plainly has a rational connection to it. Moreover, having regard to the nuanced nature of the exclusionary rule, it is difficult to see that the legitimate aim could have been achieved by a less intrusive measure, unless it is to be said that the existence of a discretion is a necessary condition for the policy to be justifiable. For reasons already given, that is not an argument I can accept. As it seems to me, having regard to the true nature of the exclusionary rule, it strikes a fair balance and, on no view, can be regarded as "manifestly without reasonable foundation". [99]*

Although the finding is not accepted by the Appellants, nonetheless the above case is a clear example of where the Court has sought to interpret rules consistently with what it considers to be the intention of Parliament. It clearly demonstrates that the Court is fully alive to issues surrounding the Court's role in interpreting legislation, and that it should not step outside those bounds, unless not doing so would result in a breach of the HRA. The Court has reached a view on Parliament's intention and has held that it should not intervene. The decision clearly demonstrates an exercise of "judicial restraint". There is a misconception that the Courts always find in favour of exercising their discretion under section 3 and go against Parliament's intention, this is frequently not the case as evidenced by this case.

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?

The case of *A & B* demonstrates that section 3 does not need to be amended or repealed. The Courts are aware of how to use their powers appropriately, and they do not give effect to legislation in a manner inconsistent with the intention of Parliament, given Parliament's intention must have been to legislate compatibly with the HRA. The Court can be trusted to exercise the power conferred by section 3 in a reasonable and considered manner. Section 3 is an important tool to ensure access to justice is available where needed, in our view it is not misused by the Court or misapplied regularly.

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?

A declaration of incompatibility is a blunt tool and one that should be used as a last resort. Section 3 allows for Courts to read and give effect to legislation so that is compatible with Convention rights. There may be instances, for example, where issues arise that have not been thought about, are not addressed within legislation or measures are ineffective, only in those circumstances should a declaration of incompatibility be considered. However, legislation is assumed to be working within the parameters of the HRA and, where this may not be the case, Section 3 is available to allow legislation to be interpreted so that it is compatible with Convention rights. That is a balancing exercise for the Court and not Parliament.

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?

Section 6(1) HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Under section 6(3) courts and tribunals are public authorities for the purpose of section 6(1). Those provisions and section 3, which as above makes clear that courts and tribunals must, in so far as possible, interpret subordinate legislation in a Convention compliant manner, are enshrined in primary legislation and make it plain that Parliament clearly intended for courts and tribunals to play a role in ensuring subordinate legislation is Convention compliant. Any curtailment of that role in circumstances where it is self-evidently desirable (and in line with Parliamentary intention) to ensure subordinate legislation and actions by public authorities on the basis of it are Convention compliant would be wrong.

As is demonstrated by the examples below, the way in which courts and tribunals have dealt with provisions of subordinate legislation that are incompatible with Convention rights is both necessary and limited to their proper constitutional role. There is no evidence to suggest that curtailment of that role is required. On the contrary, the failure of public authorities to effectively remedy breaches of Convention rights identified in secondary legislation when given significant latitude as to how to do so, suggests that perhaps the courts and tribunals should be given further powers to ensure continuing breaches of Convention rights necessitating further intervention by the judiciary are avoided.

We acted for RR in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. In that case the Supreme Court unanimously confirmed that it is unlawful for courts or tribunals to make or uphold a decision that is incompatible with an individual's Convention rights.

The case answered the important question whether subordinate legislation like the regulations which provide for the bedroom tax[3] could be disregarded where not doing so would result in a breach of Convention rights. In the context of RR's situation, the specific question was whether those making decisions on housing benefits, including local authorities and the First Tier Tribunal and Upper Tribunal, in claims relating to the period before the regulations were amended by the Supreme Court case brought by Jacqueline Carmichael in December 2016 (set out in further detail below), have to carry on applying the regulation in its original form or whether they could calculate housing benefit without making the percentage deduction in order to avoid breaching RR's human rights.

The unanimous ruling confirmed that the decision-makers must not make the bedroom tax deductions if the deductions would breach the benefits claimant's human rights. The Supreme Court reaffirmed that where it is possible to do so, a provision of subordinate legislation (like the regulations in this case) which results in a breach of a Convention right must be disregarded. In practical terms it meant that RR's housing benefit had to be recalculated without the 14% deduction from the bedroom tax because applying the deduction would breach his Convention rights.

It is clearly desirable and entirely in line with traditional separation of powers principles for the courts to play a role in ensuring compliance with Convention rights in this way. Doing so does not conflict with primary legislation and enables the protection of individual rights. In cases such as that brought on behalf of RR, this offers an immediate and obvious way to obtain an effective remedy that would otherwise not be available and assists public authorities in meeting their obligations of complying with Convention rights.

The case that gave rise to the issues considered in *RR* was the case of *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1

[3] Regulation B13 of the Housing Benefit Regulations 2006

WLR 4550. We acted for Jacqueline Carmichael in a judicial review of the 'bedroom tax' policy, or as described in the relevant regulations, the 'removal of the spare bedroom subsidy'. The relevant regulations were the Housing Benefit Regulations 2006. Regulation B13 introduced a percentage reduction in an individual's housing benefit entitlement if it was deemed that they under-occupied their property in relation to the number of bedrooms that property had. Mrs Carmichael challenged the validity of the regulations on the basis that it violated her right to nondiscrimination under Article 14 of the ECHR, in conjunction with Article 8 and/or Article 1 of the First Protocol (A1P1). Specifically, she argued that she required a second bedroom because of a medical/disability-related need (in her case, because she has spina bifada, as well as other conditions, and requires a special bed with an electronic mattress).

Jacqueline Carmichael won her argument in the Supreme Court. The Supreme Court found that in light of her medical needs for the additional bedroom, Regulation 13 violated her Article 14 rights, when read with Article 8. As a result of her successful challenge, the Housing Benefit Regulations 2006 were amended, so as not to reduce the overall entitlement to housing benefit to adult couples who required an additional bedroom due to a medical need, but the amendments were made without retrospective effect, leaving those like RR whose housing benefit calculation was made before the Regulations were amended in 2017 without an effective remedy for the breach found. This means that without the ruling in *RR* a significant group of people would have been excluded from benefiting from that important decision protecting the rights of individuals with significant medical needs for an additional bedroom in circumstances where the executive branch had in fact recognised and remedied the breach identified.

In *R (TP, AR & SXC) v Secretary of State for Work and Pensions [2020] EWCA Civ 37*, the Court of Appeal dismissed appeals by the Secretary of State for Work and Pensions (SSWP) against two judgments of the Administrative Court concerning implementation arrangements for the Government's flagship benefits system, Universal Credit (UC). The Court confirmed that the arrangements discriminated against severely disabled individuals moved onto UC, contrary to Article 14 read with A1P1 to the ECHR.

The first case (*TP1*) was brought by Leigh Day on behalf of two severely disabled individuals (TP and AR), who lost approximately £180 per month in benefit payments when they relocated and were required to claim UC. Prior to moving, TP and AR received Legacy Benefits including the Severe Disability Premium (SDP) and Enhanced Disability Premium (EDP). They were required to claim UC (a unified benefit that replaces previous entitlements) as they moved into local authorities where the new benefit had been rolled out.

In June 2018, Lewis J (in *TP & AR v SSWP* [2018] EWHC 1474 (Admin)) found that there was differential treatment between severely disabled individuals like TP and AR, who moved across a local authority boundary and had to claim UC, and those who moved within their local authority and did not lose income because they remained on Legacy Benefits. He held that this differential treatment had not been objectively

justified and was manifestly without reasonable foundation (MWRF), contrary to Article 14 read with A1P1 ECHR.

In response (albeit whilst pursuing an appeal), the SSWP introduced new regulations. Regulation 4A of the Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019 prevented other severely disabled individuals whose circumstances changed after 16 January 2019 from moving onto UC whilst Regulations 3(7)-3(8) of the draft Universal Credit (Managed Migration Pilot and Miscellaneous Amendments) Regulations 2019 provided that those who had already moved onto UC (like TP and AR) would receive retrospective transitional payments of £80 per month; £100 a month less than they would have received on Legacy Benefits if they were protected by the SDP Gateway.

TP, AR (represented by Leigh Day), and a third claimant (SXC, represented by Central England Law Centre) mounted a second judicial review (*TP2*). In May 2019, Swift J found in that case *SXC, TP & AR v SSWP* [2019] EWHC 1116 (Admin) that the £100 a month difference was not objectively justified and was MWRF. The new regulations breached Article 14 read with A1P1 ECHR and Swift J therefore quashed the draft transitional payments provisions.

The SSWP appealed. The Court of Appeal dismissed the joined appeals on all grounds. Key findings included that the correct "MWRF" test had been applied and the burden was on the SSWP to provide sufficient evidence that there was a reasonable foundation for differential treatment. Considering whether Swift J was entitled in *TP2* to find that the MWRF test had been satisfied, the Court remarked that whilst questions of administrative difficulty could in theory justify differential treatment, the SSWP's evidence ultimately collapsed into budgetary considerations. The Court reiterated the well-established proposition that costs alone cannot justify discrimination.

The *TP* cases provide a further example of the way in which the courts have dealt with secondary legislation considered to be in breach of Convention rights. A breach of Convention rights in secondary legislation was identified and held to be unlawful and the Secretary of State had discretion over how to remedy that breach. Unfortunately, she chose to remedy the breach by way of draft secondary legislation that was again in breach of Convention rights. That breach was identified and the relevant draft regulations quashed. The Secretary of State again had discretion over how to remedy the relevant breach. The provisions she subsequently put forward still did not provide full compensation to those like the Claimants and are the subject of a further challenge by claimants TP and AR which is currently stayed.

What is clear from the example is that the court played precisely the role Parliament intended for it to play – it checked if decisions taken by the executive branch and expressed in secondary legislation were Convention compliant and made a finding of unlawfulness because they were not. It was then left to the Secretary of State to decide

how to remedy that unlawfulness, the only proviso being that the change needed to be Convention compliant. Importantly, the basis for the finding of unlawfulness in *TP1* was that the discrimination complained of was an unintended consequence of the way in which Universal Credit was being rolled out and evidence showed that it was a consequence the Secretary of State had not considered. The Secretary of State (notably before an appeal was even heard) decided to amend the secondary legislation, yet unfortunately those changes were not Convention compliant either and so the amended draft regulations were quashed. The Secretary of State could then draft new secondary legislation or indeed had the option of legislating by way of primary legislation in a way that meant that court could no longer strike down secondary legislation in this regard but she chose not to take that step.

The examples set out above illustrate that courts and tribunals play an important, necessary and intended role in ensuring secondary legislation and the acts of public authorities under secondary legislation are Convention compliant. In light of the provisions of the HRA, and indeed with a broader view to traditional constitutional principles, it is inconceivable that Parliament did not intend for the courts to play that role and it would clearly be undesirable if they did not.

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?

The relevant domestic case law indicates that the HRA applies to acts of public authorities outside of UK territory where the UK exercises “authority and control” over individuals. We understand that submissions by other organisations set out the relevant case law in detail and as such our focus is on the second and third limb of the above questions.

As a result of the extraterritorial application of the HRA where “authority and control” over individuals is found, there will be circumstances where the deaths and treatment of individuals in the course of overseas military operations will be subject to the requirements of the Convention, including the procedural obligations to conduct effective investigations.

The extra territorial application of the HRA has thereby aided clients represented by Leigh Day in being able to bring important challenges against the Ministry for Defence in respect of military actions overseas and in seeking accountability for wrongdoing in that context.

In *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB) the four Claimants alleged that they were unlawfully detained and ill-treated by British armed forces during the UK’s military intervention in Iraq between 2003 and 2009. The claims were advanced on two legal bases—under the general law of tort and under the HRA

1998 for alleged violation of Articles 3 (prohibition of torture) and 5 (protection of liberty) ECHR.

Notably, it was common ground between the parties that any individual detained by British forces in Iraq was within the jurisdiction of the UK for the purpose of Article 1 ECHR, such that the UK was bound to secure to that individual rights under the Convention.

On 14 December 2017, Leggatt J held that the four Claimants were unlawfully detained and ill-treated by British soldiers, in violation of their rights under Articles 3 and 5 ECHR, as well as the 1949 Geneva Conventions. The Claimants were awarded damages under the HRA.

The case was important not only in that it enabled victims of the most serious breaches of human rights to obtain redress and compensation but also in establishing accountability in respect of those breaches.

Recognising the importance of this, the Judge allowed the claims under the HRA to proceed despite being commenced many years after the 12 month HRA deadline (the tort claims were time-barred), on the basis that "*a refusal to do so would prevent the claimants from obtaining any redress for proven violations of their fundamental human rights not to be subjected to inhuman or degrading treatment and not to be unlawfully and arbitrarily detained*." This in turn affected the majority of the Iraqi Civilian Litigation ('ICL') Claimant cohort, whose claims had been stayed pending determination of these 4 test claims, and would otherwise have been out of time, further to the judge's findings on limitation in Iraqi law.

We also acted for the family of Baha Mousa, a 26 year old Iraqi working in a hotel who was detained by British soldiers and tortured and murdered in custody. He was found to have suffered 93 separate injuries prior to his death. The resulting public inquiry, which identified significant failings in respect of policies and training regarding the treatment of detainees by UK armed forces underlines the importance of Article 2 investigations. The relevant report[4] produced 73 recommendations of which 72 were accepted[5] and the inquiry thus allowed key deficiencies in the preparation of military personnel to be identified and addressed.

[4] https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report

[5] Oral Statement to Parliament by Dr Liam Fox, 'Statement on the report into the death of Mr Baha Mousa in Iraq in 2003' (8 September 2011) available at <https://www.gov.uk/government/speeches/2011-09-08-statement-on-the-report-into-the-death-of-mrbahamousa-in-iraq-in-2003>.

Leigh Day is currently bringing two judicial review actions against the Secretary of State for Defence (SSD) on behalf of three Afghan individuals in relation to allegations of unlawful killings of civilians by British Forces and subsequent alleged failures to properly investigate.

The first is the ongoing judicial review of *Saifullah -v- SSD (*CO/4200/2019). The client, based in Helmand Province, southern Afghanistan, alleges that during a 'night raid' in February 2011 British special forces shot dead four of his innocent civilian relatives and sought to cover up those wrongful killings by planting weapons and providing a false account of the circumstances in which the killings occurred. The Secretary of State for Defence opposed the granting of permission in this case, including on the basis of jurisdiction, but once permission was granted disclosure was provided to Saifullah which showed that the Court had been seriously and repeatedly misled by the Secretary of State and his legal representatives.

The material disclosed was a cache of emails which revealed that numerous MoD officials (including senior officers within the special forces) were aware at the time of a possible "*deliberate policy*" by British special forces of executing unarmed Afghan males and using false cover stories to cover up the true circumstances of those "*massacre[s]*". The materials indicate that at the time of the killings there had been at least 33 suspicious killings of Afghans by one British special forces unit over an 8 month period.[6] It is understood that this is evidence that was reviewed by the Royal Military Police in its investigation.[7] The substantive hearing in *Saifullah* is scheduled for later in 2021.

The second example is another judicial review challenge in the matter of *Noorzai -v- SSD (*CO/3665/2020). In analogous circumstances to *Saifullah*, the two clients allege the unlawful killing of three children and one adult civilian (relatives of the claimants) by UK Special Forces in Afghanistan in 2012 and its subsequent cover up by senior officers in the Special Forces. The clients also allege that military investigators failed to make basic inquiries after the four men, aged between 12 and 18, were killed. The Secretary of State for Defence continues to oppose the granting of permission in this case. Permission has yet to be decided.

The above claims arise out of matters of the utmost seriousness, including credible allegations of the unlawful killing of children and civilians by UK Special Forces with the potential for serious damage to the UK's international reputation and standing. The fact that Parliament, through the HRA, sanctions the UK Courts' investigation of such fundamental human rights breaches mitigates that damage and enhances the UK's

[6] https://www.thetimes.co.uk/article/rogue-sas-unit-accused-of-executing-civilians-in-afghanistanf2bqlc897; https://www.independent.co.uk/news/uk/home-news/sas-rogue-unit-afghan-deaths-emailshigh-court-a9650561.html

[7] For example, where soldiers claimed they acted in self-defence but the number of bodies was greater than the weapons recovered.

reputation as a bastion of the rule of law. Without the extra-judicial application of the HRA, such cases and documents uncovered as part of the proceedings (such as the *Saifullah* disclosure) would not have come to light despite the gravity of the information revealed and the importance of ensuring accountability in that context.

These examples demonstrate that the extra-territorial application of the HRA, whilst rare, offers crucial opportunities for accountability and redress in circumstances of the most serious human rights breaches. Furthermore, any move to limit the extraterritorial application of the HRA and the pursuant investigative duties could potentially expose the UK military to prosecution by the International Criminal Court (the ICC) who made plain in their recent examination of potential war crimes committed in Iraq that the only reason they were not prosecuting was because of the investigative mechanisms on foot in the UK. In those circumstances, any argument for changes further limiting the extra-territorial application of the HRA are clearly both untenable and unattractive. Indeed, recognising the gravity of breaches under consideration in this context and the importance of accountability for those breaches, recent jurisprudence from the European Court of Human Rights suggests that the extra-territorial application of the HRA should be extended[8], though it remains to be seen what domestic courts make of the Strasbourg case law in that respect.

[8] See *Hanan v. Germany* (application no. 4871/16)