Police Action Lawyers Group (PALG)

Response to the Independent Human Rights Act Review (IHRAR) call for evidence March 2021

The Police Action Lawyers Group (PALG) is a national organisation comprised of lawyers who represent complainants against the police throughout England and Wales. PALG was formed in 1991 and its members are concerned first and foremost with the principal objectives of the complainants we represent: to ensure that the police are held accountable for their conduct through all available avenues, including: the police complaints system, judicial review, tortious and HRA compensation claims and the criminal justice system. Although, historically, our primary focus has been on police malpractice, PALG members also represent clients in respect of misconduct by other state authorities, particularly those with the power to detain and use force, including the prison service and immigration service.

Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of victims of misconduct by police officers from virtually every force in England and Wales. All of our work as an organisation is voluntary and we receive no funding of any kind. The group is motivated by a desire to achieve the best possible outcome for our clients, many of whom have suffered the most serious abuse at the hands of the police. More information can be found on our website (http://www.palg.org.uk/).

Introduction

1. In our experience the criminal justice system in the UK is a key staging ground in the realisation of the rights protected by the European Convention on Human Rights ('ECHR' or 'the Convention') and, by extension, the Human Rights Act 1998 ('HRA') in the UK.

2. For the majority of our clients, interactions with the police and other state bodies are problematic, and our case work has been instrumental in improving systems of accountability and transparency within those bodies and driving positive change following hard fought legal claims.

3. Holding the police to account in tort for violations of individuals' rights caused by third parties or for police failures in the investigative process has been historically complex, particularly as the development of the law of negligence in this area has been conservative. Thus the enactment of the HRA has been crucial in providing our clients with a system of

redress. It has also required the police to improve their investigation practices and secure justice for victims of serious crimes, as well as behaving more efficiently towards those wrongly accused of crime. This has meant that there has been an inevitable improvement in the service provided to the public.

4. By way of example, in *DSD v Commissioner of Police* [2018],[1] the police were held liable to victims of the"black cab" serial rapist, John Worboys. The Supreme Court agreed with the Court of Appeal that the positive obligation to investigate allegations of ill-treatment is not solely confined to cases where allegations have been made against state agents. Article 3 ECHR places a positive duty upon the police to investigate crimes committed by non-state persons in order to ensure that individuals are protected against ill-treatment of the seriousness envisaged by Article 3. This is a duty owed to individual victims.

5. Article 3 requirements also led to the police being liable for the suffering of a boy with autism and epilepsy who was forcibly removed from a swimming pool by the police. The High Court and Court of Appeal found that the police were liable for his suffering: see *ZH v Commissioner of Police* [2013].[2]

6. In relation to the police duties to act properly and fairly, in the case of *Zenati v Commissioner of Police* [2015],[3] an innocent man remained detained in custody after evidence had emerged which showed that there were no grounds for continuing to suspect him of the commission of an offence. The Court of Appeal held that the requirements of Article 5 ECHR prevented people being detained if material information was not brought to the attention of the court.

7. Our members are therefore heartened by the Review's support for the UK's continued membership of the Convention. Before setting out our response to the specific questions posed by the Review, it is important to recognise that the HRA was, at its inception, a compromise between the important goals of allowing individuals to rely on their Convention rights in the UK courts and allowing the UK's leading voice in the formulation and protection of Convention rights to continue, whilst protecting the fundamental principles of parliamentary sovereignty and the separation of powers.

[1] *DSD v Commissioner of Police* [2018] UKSC 11, [2019] AC 196.
[2] *ZH v Commissioner of Police* [2013] EWCA Civ 69, [2013] 1 WLR 3021.
[3] *Zenati v Commissioner of Police* [2015] EWCA Civ 80 [2015] QB 758.

8. The structure of the HRA, whilst by no means perfect, has respected this difficult balance remarkably well and remains a central and fundamental means through which individuals' rights are protected both in the UK and in other Convention states. In the words of Lady Hale, Former President of the Supreme Court, "*there is indeed a point to the Human Rights Act"*.[4]

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

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?

9. Section 2(1) of the HRA requires UK courts or tribunals determining questions of Convention rights to "*take into account"* ECtHR jurisprudence. As is well known, UK courts are not bound by decisions of the Strasbourg courts and can disagree with, depart from or go further than ECtHR decisions when interpreting and applying Convention rights in cases before the UK courts, leaving our judiciary in the driving seat.

10. The wording of section 2(1) is deliberate and a hard-fought compromise. During the debates on Section 2, the government expressly rejected an amendment by Lord Kingsland that the domestic courts be 'bound' by Strasbourg decisions.[5] That UK courts must only "*take into account"* Strasbourg jurisprudence was "*chosen with care"*.[6] Lord Irvine, the then Lord Chancellor, emphasised that s.2 *"allows the courts to use their discretion where appropriate in applying Strasbourg jurisprudence generally to cases before them"*.[7] Speaking in 2012, Lord Irvine paraphrased the requirement as an obligation to "*have regard to"*, "*consider"*, "*treat as relevant"* or "*bear in mind"*, emphasising that UK judges are not required to follow Strasbourg and, indeed, must "*decide…[cases] for themselves"*.[8]

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[4] 'What's the point of Human Rights', Warwick Law Lecture, by Lady Hale (2013). See: https://www.supremecourt.uk/docs/speech-131128.pdf.
[5] HL Deb 29 January 1998 vol 585 cc 379-422, at 378.
[6] Former Home Secretary, Jack Straw in 'The Human Rights Act and Europe', Second Hamlyn Lecture, published in Aspects of Law Reform: An Insider's Perspective (Cambridge, Cambridge University Press; 2013), at page 32.
See:https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/hamlyntrust/Jack_Straw_Hamlyn.pdf.
[7] HL Deb 29 January 1998 vol 585 cc 379-422, at 388.
[8] 'A British Interpretation of Convention Rights', Lord Irvine of Lairg (2012). See: https://www.biicl.org/files/5786_lord_irvine_convention_rights.pdf.

How the duty to "take into account" has been applied in practice

11. The approach taken by UK courts to s.2(1) has evolved over time. In the case of *Ullah,*[9] Lord Bingham set out that, absent special circumstances, the courts should follow "*clear and constant jurisprudence of the Strasbourg court"*. In what has been referred to as the 'Mirror Principle', Lord Bingham suggested that "*the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less"*. In the case of *Amin*, Lord Slynn described ECtHR case law as laying down a "*minimum threshold"*.[10]

12. However, the Supreme Court has made clear that there are limits to the extent to which it will follow Strasbourg case law when taking it into account under s.2, and that it is willing to depart from it where necessary. Thus, in *Horncastle*,[11] a case concerning reliance on hearsay evidence and the right to a fair trial, the Supreme Court endorsed the decision of the Court of Appeal and expressly rejected the decision of the Chamber of the ECtHR in *Al-Khawaja and Tahery v UK*,[12] which they considered had misunderstood English law.

13. Similarly, in *Hicks*[13] the Court of Appeal decided not to follow a recent Strasbourg case, *Ostendorf v Germany*,[14] even though the facts of the two cases were similar. The case concerned the interpretation and application of the right to liberty under Article 5 ECHR as it related to the detention of protesters prior to the wedding of the Duke and Duchess of Cambridge on the grounds of preventing anticipated breaches of the peace. Considering the judgment in *Ostendorf,*[15] the Court of Appeal noted that, being as it was not *bound* to

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[9] *R (Ullah) v Special Adjudicator/ Do (FC) v Secretary of State for the Home Department* [2004] UKHL 26, at 20.
[10] *R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51, at [44]
[11] *R v Horncastle and others (appellants)* [2009] UKSC 14. See also *Manchester City Council v Pinnock* [2010] UKSC 45 in which Lord Neuberger states (at 48) that the Court was not bound to follow every decision of the European Court, and it would sometimes be inappropriate to do so, for example where "*inconsistent with some fundamental substantive or procedural aspect of our law*".
[12] Al-Khawaja and Tahery v UK Nos. 26766/05 and 22228/06, 20.1.2009.
[13] *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 3.
[14] *Ostendorf v. Germany* (no. 15598/08, 7 March 2013), see Ostendorf v Germany (2013) 34 BHRC 738.
[15] *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 3, [2014] 1 W.L.R 2152, at 2177. The case was appealed to the Supreme Court and dismissed, with the Supreme Court similarly considering *Ostendorf v Germany*. See *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9.

follow the ECtHR: it would "*adopt the interpretation of the wording of article 5.1(c) that [they had] reached without regard to the Strasbourg case law"*.

14. In *R (Kaiyam) v the Secretary of State for Justice,*[16] a case concerning prisoners sentenced to indeterminate prison sentences and the application of the right to liberty under Article 5, the Supreme Court was faced with conflicting domestic and ECtHR jurisprudence. The Court declined to follow what it referred to as the "*over-expanded and inappropriate reading"* in the Strasbourg authorities, preferring the approach taken in domestic cases.

15. In *R (Hallam) v Secretary of State for Justice*,[17] the Supreme Court considered the differing approaches by the UK and Strasbourg courts to the application of the right to a fair trial under Article 6 in the context of compensation for miscarriages of justice. The Court declined to follow the ECtHR case law, which Lord Wilson described as "*not just wrong but incoherent"*.[18] Lord Hughes noted the Court's obligation to take into account Strasbourg jurisprudence under s.2 but noted that "*its ultimate responsibility is to arrive at its own decision on those Convention rights which are given domestic legal effect"* under the HRA.[19] See also *R v Abdurahman (Ismail) [2019]*,[20] an application of Article 6(3), in which the Court of Appeal effectively ignored the Grand Chamber.

16. Rather than being led by the ECtHR, the UK Courts have not just rejected its thinking, but have also been willing to go beyond the ECtHR's jurisprudence. For example, in *Rabone v Pennine Care NHS Foundation Trust*,[21] the Supreme Court decided that the State's operational duty under Article 2 (the right to life), extended to a voluntary psychiatric patient at risk of self-harm but who was not detained under a section, acknowledging that this went beyond existing ECtHR jurisprudence on the application of Article 2.

17. Additionally, the ECtHR has frequently agreed with the UK courts' interpretation and application of the rights under the Convention.[22] Sir Nicholas Bratza, former President of the ECtHR, commented in 2011 that the ECtHR was "*particularly respectful of decisions*

[16] *R (Kaiyam) v the Secretary of State for Justice* [2014] UKSC 66, at 35.
[17] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2
[18] Lord Wilson in *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, at 90.
[19] Lord Hughes in *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, at 125.
[20] *R v Abdurahman (Ismail)* [2019] EWCA Crim 2239, [2020] 4 W.L.R. 6.
[21] *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2.
[22] See for example *Mustafa (Abu Hamza) v UK (No.1)*, No. 31411/07, 18.1.2011, *Donaldson v UK*, No. 5675/09, 25.1.2011 and *Ali v UK*, No. 40385/06 11.1.2011.

emanating from courts in the United Kingdom" and that in many cases analysis by national courts had "*formed the basis of the Strasbourg judgment"*.[23]

18. Notably, the Equality and Human Rights Commission has calculated that between 1966 and 2010, just 3% of cases lodged against the UK at the ECtHR were declared admissible.[24]

Is there a need for any amendment of section 2?

19. Against that background, it is clear that no change to s.2 is necessary.

20. The Convention has been recognised to be a 'living instrument', which is an acknowledgment of the inevitable evolution of societal norms and standards, and our domestic courts interpret and apply Convention rights in recognition of all the circumstances and their practical application to society of the day.

21. In requiring UK courts and tribunals to "*take into account"* ECtHR case law, the HRA allows the UK courts to interpret and apply the UK's obligations under the Convention in accordance with UK law and UK society, whilst also allowing the UK to benefit from ECtHR jurisprudence where it improves accountability and strengthens the rule of law. Lord Bingham noted when the HRA was being debated that it is "*highly desirable that we in the United Kingdom should help mould the law by which we are governed in this area"*[25] and that is effectively what s.2 has allowed us to do. Lady Hale, former President of the Supreme Court, has rightly described the HRA as an "*ingenious solution"* to combining enforceable Convention rights with parliamentary sovereignty.[26]

22. In *Ambrose v Harris*, Lord Kerr said that "*it is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg"*.[27] Section 2, as currently drafted, ensures just that. Amendment to s.2, to somehow reduce the weight to be attached to ECtHR jurisprudence, could only have a negative impact both in the UK and other Convention states. It would inevitably reduce the currently powerful

[23] N Bratza, 'The relationship between UK Courts and Strasbourg' (2011) EHRLR 505, at 507, as cited by Lady Hale in 'What's the point of Human Rights', Warwick Law Lecture 2013.
[24]Equality and Human Rights Commission Research Report 83, 'The UK and the European Court of Human Rights', by Donald, Gordon and Leach, (2012), at 115.
[25] HL Vol. 582. Col. 1245 3 November 1997.
[26] 'What's the point of Human Rights', Warwick Law Lecture, by Lady Hale (2013).
[27] *Ambrose v Harris (Procurator Fiscal, Oban)*, *Her Majesty's Advocate v G (Scotland); Her Majesty's Advocate v M (Scotland*) [2011] UKSC 43, at 129.

voice the UK has, diminish recourse to the Convention in the UK, and increase the frequency of referrals to the ECtHR and judgments against the UK.

b) <u>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?</u>

23. A further limit to the extent to which the ECtHR influences the interpretation and application of Convention rights in the UK is the doctrine of the 'margin of appreciation', which recognises that Convention states are in the main best placed to decide how human rights should be applied.

24. *Handyside v UK* was the case[28] in which the margin of appreciation was first defined. The margin of appreciation was, it said, the concept of acknowledging that national authorities are in principle in a better position than the ECtHR to assess public sentiment and the necessity of a restriction *"[b]y reason of their direct and continuous contact with the vital forces of their countries*". It established that it is not the ECtHR's task to take the place of the domestic courts of the nation states, but rather to review the decisions they deliver in the exercise of their domestic authority.

25. Whilst some commentators have contended that the ECtHR has been over-reaching in its authority by interfering with established domestic laws and practices in order to impose uniform standards and laws on Convention states, an analysis of the ECtHR's jurisprudence does not support this contention. Rather, it shows a recognition that policies, customs and practices vary considerably between states and that the ECtHR will not attempt to impose uniformity or specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required on a particular subject.[29]

26. The breadth of the state's margin of appreciation will vary depending upon the context. For example, states have a wide margin of appreciation in relation to contentious social issues on which there is no European consensus.[30] UK cases where the ECtHR has allowed a wide margin of appreciation include cases concerning cruelty to animals in the

[28] *Handyside v UK*, No. 5493/72, 7.12.1976, at 48.
[29] Equality and Human Rights Commission Research Report 83, 'The UK and the European Court of Human Rights', by Donald, Gordon and Leach, (2012).
[30] Equality and Human Rights Commission Research Report 83, 'The UK and the European Court of Human Rights', by Donald, Gordon and Leach, (2012), at page 17.

pursuit of sport,[31] the protection of public morals,[32] and fertility law.[33] The Court has also allowed states considerable discretion in cases of public emergency[34] or where the 'economic interests' of the state are at stake.[35]

27. It is common for UK courts, when approaching issues falling within margin of appreciation, to agree with relevant ECtHR jurisprudence. However, UK Courts are not afraid to go against the jurisprudence, as noted above in response to question 1)a).

28. In the High Court's quantum decision in *DSD*[36] (not interfered with by the Supreme Court), Green J (as he then was), considered HRA damages in the context of the margin of appreciation. He noted some of the reasons why the ECtHR has not articulated clear principles for damages, including the multiple and divergent approaches of the ECHR's 47 member states to awarding damages.

29. The judgment is a prime example of the UK courts approaching issues falling within the margin of appreciation pragmatically. Green J held that a domestic court should look to the ECtHR as best it can but that, in time, domestic courts will evolve their own case law on damages and so any dependence on the ECtHR may dwindle. Furthermore, the judgment recognised that the ECtHR takes account of the purchasing power of its awards. For example, an Azerbaijani case may give little guidance to a UK court, although it can be adjusted to reflect differences in the cost of living.

Is any change required?

30. The doctrine of the margin of appreciation is, in many respects, one to which the ECtHR, rather than the UK Courts, must have greater regard. It is a recognition, as set out in the ECHR, that it is the Convention States' obligation to respect human rights for those in their jurisdiction. The UK courts and the ECtHR have, on the whole, approached issues falling within the margin of appreciation coherently and we do not consider that there is any necessity or justification for change.

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[31] *Friend and Countryside Alliance and others v UK*, Nos. 16072/06 and 27809/08, 24.11.2009.
[32] *Handyside v UK*, No. 5493/72, 7.12.1976.
[33] *Evans v UK*, No. 6339/05 [GC], 10.4.2007.
[34] *Brannigan and McBride v UK*, Nos. 14553/89 and 14554/89, 26.5.1993.
[35] *Hatton and others v UK*, No. 36022/1997 [GC], 8.7.2003.
[36] *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB). See also *Commissioner of Police of the Metropolis v DSD & Anor* [2018] UKSC 11.

c) <u>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?</u>

31. The (increasingly common) practice of UK courts and the ECtHR engaging in 'judicial dialogue' is a further means through which the UK Courts, via the HRA, can play an integral role in the interpretation and application of Convention rights.

32. Lord Neuberger expressed this principle in *Manchester City Council v Pinnock*:[37]

> "*This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law.*"

33. The case of *Hicks*,[38] discussed in answer to question 1)a) above, provides a clear example of such judicial dialogue. Before the Supreme Court, the appellants argued that there had been a breach of Article 5(1)(c) ECHR, the right to liberty, relying on ECtHR jurisprudence. The Supreme Court, in dismissing the appeal, declined to follow the recent and similar case of *Ostendorf v Germany*[39] and instead concluded that the detention complained of did not constitute a breach of Article 5(1)(c), in circumstances where detention was used for preventative purposes followed by early release, and the lawfulness of the detention could subsequently be challenged and decided by a court.

34. The appellants filed applications with the ECtHR, but before their applications were heard, the Grand Chamber of the ECtHR dealt with the same issue in *S, V and A v. Denmark*,[40] in which the ECtHR referred to the UK Supreme Court's decision in *Hicks*. The Supreme Court's analysis in *Hicks* clearly informed the ECtHR's decision that preventative detention could be compatible with Article 5 in certain circumstances. Accordingly, the appellants' applications in *Hicks* were declared inadmissible on the basis that there was no convincing reason for it to depart from the domestic court's decisions.[41]

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[37] *Manchester City Council v Pinnock* [2010] UKSC 45, at 48.
[38] *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9.
[39] *Ostendorf v. Germany* (no. 15598/08, 7 March 2013), see Ostendorf v Germany (2013) 34 BHRC 738.
[40] *S, V and A v. Denmark* [GC](no. 3553/12) (2018).
[41] *Eiseman-Renyard v. the United Kingdom* - 57884/17 [2019] ECHR 237 (28 March 2019).

35. As set out above, although our domestic courts will generally follow a "*clear and constant line"* of ECtHR jurisprudence, they have repeatedly demonstrated an unwillingness to be strait jacketed by its jurisprudence. Lord Lester of Herne Hill QC highlighted this in a House of Lords debate in 2015:

> "*Our Supreme Court has been robust in recent years in subjecting Strasbourg reasoning to critical scrutiny, and explaining where it begs to differ. A valuable dialogue now takes place, and the judgments of our courts are influential in Strasbourg*."[42]

36. In the case of *Animal Defenders International v the United Kingdom*,[43] the ECtHR agreed with the then House of Lords that a ban on political advertising was compatible with the requirements of Article 10 ECHR, an area where the ECtHR would normally afford only a very small margin of appreciation, noting that:

> "*The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom, and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process."*[44]

37. The ECtHR has also shown a willingness to reconsider its earlier position through judicial dialogue with domestic courts. As noted in response to question 1)a) above, in *Horncastle,*[45] concerning the right to a fair trial under Article 6 ECHR, the Supreme Court declined to follow the decision of the Grand Chamber of the ECtHR in *Al-Khawaja and Tahery v. the United Kingdom*.[46] The then President of the Court, Lord Phillips, noted:

> *"…I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case."*[47]

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[42] L Debs, Vol.762, Col.2186, 2 July 2015 (Lord Lester of Herne Hill QC).
[43] *Animal Defenders International v the United Kingdom* (2013) 57 EHRR 21.
[44] *Animal Defenders International v the United Kingdom* (2013) 57 EHRR 21.
[45] *R v Horncastle and others (appellants)* [2009] UKSC 14.
[46] *Al-Khawaja and Tahery v UK* Nos. 26766/05 and 22228/06, 20.1.2009.
[47] *R v Horncastle and others* [2009] UKSC 14, at 108.

38. *Horncastle* was subsequently heard by the ECtHR, who in turn agreed with the Supreme Court's reasoning and found no violation of Article 6 – a clear realisation of the hope expressed by Lord Phillips.[48]

How can such dialogue best be strengthened and preserved?

39. We consider that it is only through the HRA itself that domestic courts can play an active role in the development of Convention rights. The ECtHR and domestic courts have shown that they are willing to disagree, to agree to disagree, and to consider each other's conclusions and change course appropriately, engaging in a dialogue to the benefit of not just the UK but all Convention states.

40. We consider that the UK should be proud of the role that UK judges have played in the evolution of the Convention, and that this Review should note that the ECtHR has been particularly respectful of domestic courts' decisions because, in the words of former President of the ECtHR, Sir Nicholas Bratza, of "*the very high quality of those judgments"*.[49]

41. We note that the UK has not signed up to the Optional Protocol 16 of the Convention, which would allow for the Supreme Court to ask the ECtHR for advisory opinions in respect of cases pending before them, and that this could allow for further dialogue between domestic and Strasbourg courts before cases are referred to/reach the ECtHR.

42. At the time of writing, only 23 member states of the Council of Europe are so far signatories to Optional Protocol 16 and 15 have ratified it.[50]

43. Protocol 16 and Protocol 15 arose out of the Brighton Conference and the resulting declaration, adding a direct reference to the concepts of subsidiarity and the margin of appreciation to the preamble to the Convention, and introducing reforms of the Convention system aimed at reducing the ECtHR's backlog.[51] We note that the UK has not signed up

[48] *Horncastle and Others v UK* (application no. 4184/10) (2015).
[49] Sir Nicholas Bratza in 'Nicholas Bratza: Britain should be defending European justice, not attacking it', The Independent (24 January 2012).
See https://www.independent.co.uk/voices/commentators/nicolas-bratza-britain-should-be-defending-european-justice-not-attacking-it-6293689.html 24.01.2012.
[50]'Chart of Signatures and Ratifications of Treaty 214', Council of Europe (as of 1 March 2021). See: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures.
[51] 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', Judge Robert Spano, Human Rights Law Review, Volume 14, Issue 3, September 2014, pages 487–502. See:

despite these same reforms and aims having being advocated by the UK government during their Chairmanship of the Committee of Ministers in the Council of Europe.[52]

44. We understand that the ECtHR has only provided two advisory opinions to date. We recognise that the procedure is in its early days. However, in our view, this Protocol could empower judges to initiate dialogue at the domestic level. Further, given the standing of the opinions of UK judges in Strasbourg, the UK could play an integral part in the development of this procedure and practice.

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

a) Should Any Change be made to the framework established by sections 3 and 4 of the HRA?

42. The ability to rely on individual rights established by the ECtHR in domestic courts is of central importance to the work we undertake on behalf of the individuals we represent. When Parliament enacted the HRA, it did so to *"bring rights home"*[53] from the ECtHR so that they might be determined in the UK courts. The remedial provisions of the HRA, namely s.3 and s.4, are critical to this purpose.

43. We do not consider that the current approach risks "over-judicialising" public administration or drawing domestic courts unduly into questions of policy. Human rights do not exist in an abstract sense. When the courts deal with human rights issues in the context of actions or omissions by state bodies or those exercising public functions, it is inevitable they will have to consider the government 'policy' behind those acts or omissions if they are to give effect to an individual's rights. However, as already expressed above, the general scheme of the HRA preserves, and does not diminish, parliamentary sovereignty. Use of the remedial provisions of the HRA by a court does not bind or fetter Parliament in any way; Parliament is free to legislate to reverse the effect of any court decision or ignore any declaration of incompatibility.

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https://doi.org/10.1093/hrlr/ngu021. See also the CETS 21 Explanatory Report to Report No. 16 to the Convention, at para 3.

[52] 'Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe' (7 November 2011 – 14 May 2012), Council of Europe Website. See: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cbe42.

[53] See: Rights Brought Home: The Human Rights Bill (1997) (cm 3782), para 2.7.

Section 3

44. In our experience, domestic courts and tribunals are not interpreting legislation in a manner inconsistent with the intention of Parliament as a result of the obligation in s.3. It is often our experience that courts are extremely cautious if using s.3 because of the perceived risk of being unduly drawn into questions of policy. Given space constraints, we cannot provide a comprehensive consideration of the application of s.3 since the coming into force of the HRA, but we do set out below a brief consideration, including non-exhaustive examples of its application in cases relevant to our practices.

45. The position prior to the coming into force of the HRA, was expressed in *R (Simms) v Secretary of State for the Home Department.*[54] The House of Lords held that the Home Secretary's policy of preventing prisoners from having oral interviews with journalists was unlawful; the policy was ultra vires because it conflicted with the fundamental and basic rights of prisoners, namely their right to freedom of expression, protected by Article 10 ECHR. In coming to this decision, Lord Hoffman considered the duty of courts in upholding fundamental rights, finding that:

> *"Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual".*

46. It is clear from this judgment that even before the HRA came into force, courts were already giving effect to the law in a manner consistent with fundamental rights. Although the HRA refers to rights contained in the ECHR rather than fundamental rights established by the common law, Lord Hoffman recognised that *"much of the Convention reflects the common law"* and stated that *"the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights"*. This purposive approach originated in the common law; the effect of s.3 was simply to make this approach explicit.

[54] *R (Simms) v Secretary of State for the Home Department* [1999] UKHL 33.

47. The limits of the obligation in s.3 were first considered in *Ghaidan v Godin-Mendoza,*[55] which concerned the interpretation of the Rent Act 1977 ('the 1977 act') and the right of a same-sex partner to succeed to a statutory tenancy as a 'spouse' following the death of their partner. The House of Lords had previously ruled, prior to the HRA coming into force, that a person living with a tenant in a stable and monogamous same-sex relationship was not to be regarded as a 'surviving spouse' entitled to succeed to a statutory tenancy.[56] However, in *Ghaidan* it was held that, through s.3, Parliament had intended to impose a broad duty on the courts to do everything possible to achieve compatibility through interpretation. Therefore, it was possible for the court to use s.3 to read and give effect to the 1977 Act in a manner which would remove the discrimination against same-sex couples and ensure compatibility with Article 14 ECHR.

48. In coming to this decision, the Court imposed two limits on the use of s.3:

    (a) First, compatible interpretation will not be possible where to do so would be inconsistent with a fundamental feature of the legislation in question.[57]

    (b) Second, compatible interpretation will not be possible where to do so would have wide ramifications that raise policy issues that are not suitable for determination by the courts.[58]

    In other words, courts cannot use s.3 to impose an interpretation compatible with the ECHR where to do so would be inconsistent with the clear intention of Parliament or would draw the courts unduly into questions of policy.

49. The safeguards on the use of s.3 confirmed in *Ghaidan* follow the reasoning of the House of Lords in *Simms*: Parliament is free to enact legislation that is incompatible with fundamental rights, however if it is to do so, it must do so explicitly. Where Parliament's intention is not explicit, the courts must presume that the law was intended to be subject to fundamental rights. However, where Parliament has made its intentions explicit, the courts cannot interfere, even if those intentions are incompatible with fundamental rights.

[55] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[56] *Fitzpatrick v Sterling Housing Association LTD* [2001] 1 AC 27.
[57] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at 572.
[58] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at 572.

50. *Khan v Commissioner of Police for the Metropolis*[59] concerned the interpretation of s.18(1) of the Police and Criminal Evidence Act 1984 ('PACE'). Section 18(1) PACE governs the lawful search of a "*premises occupied or controlled by a person who is under arrest"*. The Defendant argued that s.18(1) should be interpreted so as to make a search lawful in situations where a police officer had a 'reasonable belief' that the premises searched had been owned or occupied by the arrested person. The Court of Appeal decided in favour of the Claimant, finding that both the intention of Parliament and the court's obligation under s.3 did not allow for the interpretation suggested by the Defendant.

51. The court in *Khan* first considered the intentions of Parliament, finding that the test of reasonable belief had been included for other powers of search and, therefore, its omission from s.18(1) was not accidental. It was also relevant that Parliament had revised the operation of powers under PACE and made amendments through the Serious Organised Crime and Police Act 2005, but had not taken that opportunity to qualify the requirements of occupation and control in s.18(1). Therefore, the intention of Parliament to omit from s.18(1) any test of reasonable belief was clear. The court then considered their obligation under s.3 to read and give effect to s.18(1) in a manner compatible with Article 8 ECHR. It held that giving the words their ordinary meaning asserted the right to respect for private and family life provided by Article 8 and, therefore, the Defendant's suggestion that a wider interpretation should be used would not be possible.

52. The compatible interpretation of s.18(1) served to support the intentions of Parliament and strengthened the court's refusal to interpret the provision in a manner inconsistent with those intentions.

53. The case of *WB v W District Council*[60] is an example of the Court of Appeal refusing to interpret legislation compatibly with ECHR rights where to do so would be in conflict with the clear intentions of Parliament. The case concerned the right of a woman lacking capacity due to mental illness to apply for priority housing under the Housing Act 1996 ('the 1996 Act'). The Claimant argued that the 1996 Act should be read and given effect to in a manner compatible with ECHR rights, namely Article 14 and Article 8, pursuant to s.3 of the HRA.

[59] *Khan v Commissioner of Police for the Metropolis* [2008] EWCA Civ 723.
[60] *WB v W District Council* [2018] EWCA Civ 928.

54. The Court of Appeal held that although there is an obligation to interpret legislation compatibly with ECHR rights, it had no power to interpret statutes against the *"grain of…legislation".*[61] The *Barras*[62] principle of legislative interpretation presumes that where a term has been interpreted by the courts and Parliament has made further legislation using the same term, Parliament had intended for the same meaning to apply. Following the *Barras* principle, the court in *WB* held that s.3 could not be used where a *"Convention-compliant interpretation has been rejected by Parliament by express words or other inconsistent legislative action".*[63] Parliament had retained and built on the concept of 'priority need' in later legislation such as the Homelessness Act 2002 and the Homelessness Reduction Act 2017 and had not opted to make amendments to include provision for individuals who lacked mental capacity.

55. Although the HRA specifies that s.3 should be used "so far as possible", the court in *WB* held that *"it is not the function of section 3 to require the courts to apply a Convention-compliant interpretation if other principles of interpretation prevent it from doing so".*[64] It follows that, where the intention of Parliament is clear from its express words or action, courts are under no obligation to read and give effect to legislation in a manner compatible with ECHR rights if to do so would be inconsistent with Parliament's clear intention. The court acknowledged that this approach is in accordance with the *"general scheme of the HRA, namely that it should not diminish Parliamentary sovereignty".*[65]

56. It is evident from the examples above that the courts have remained consistently cautious of the risks inherent in the use of s.3 interpretation and have established safeguards setting out when it is, and is not, appropriate to impose an ECHR compatible interpretation on legislation. We consider that the courts have struck a balance which has successfully prevented them from becoming unduly drawn into questions of policy. The obligation in s.3 simply makes explicit an approach already established by the courts. Consequently, we do not consider there to be any reason to amend or repeal s.3 of the HRA.

Section 4

57. It follows that we do not believe that there is a need for s.4 to be considered as part of the initial process of interpretation rather than as a matter of last resort. To ensure that the

[61] *WB v W District Council* [2018] EWCA Civ 928 [2019] Q.B. 625, at 640, quoting *Gaidan v Godin-Mendoza* [2004] UKHL 30.
[62] *Barras v Aberdeen Steam Trawling & Fishing Co Ltd* [1933] UKHL 3.
[63] *WB v W District Council* [2018] EWCA Civ 928 [2019] Q.B. 625, at 643.
[64] *WB v W District Council* [2018] EWCA Civ 928 [2019] Q.B. 625, at 644.
[65] *WB v W District Council* [2018] EWCA Civ 928 [2019] Q.B. 625, at 644.

HRA is capable of achieving its intended purpose to "bring rights home", it is critical that s.4 is used only when a compatible interpretation under s.3 is not possible. This point was underlined by the court in *Ghaidan*.[66]

58. The ability to effectively rely on rights protected by the ECHR in domestic courts is of vital importance to our client base. A declaration of incompatibility under s.4 does not resolve the matter before the court and does not afford the individual concerned a remedy for any breach of their rights. Increasing the use of s.4 at the interpretive stage would risk diminishing the ability to enforce individual rights protected by the ECHR and the HRA in domestic courts and, therefore, would risk those rights becoming illusory.

59. It is not clear to us how consideration of s.4 as part of the initial process of interpretation would operate in practice. The framework established by s.3 and s.4 depends upon s.3 being used where possible and s.4 being used only as a matter of last resort. Currently s.4 cannot be used by inferior domestic courts as per s.4(5) HRA. If s.4 was to be considered during the interpretive process then the prohibition on lower courts making declarations of incompatibility will have to be lifted. In light of the constitutional nature of s.4 it is not desirable to have inferior courts exercising this power.

60. If the use of s.3 was to be restricted and s.4 was to be used at the interpretive stage, issues that would currently be resolved by a court using s.3 in a manner consistent with the intentions of Parliament would be replaced by waiting for some kind of action from Parliament. If that were to be the case, a victim of a violation would be left with no remedy. This would not only be wholly inefficient, it would diminish the effectiveness and accessibility of rights established by the ECHR.

61. We would wish emphasise that a declaration under s.4 does not currently impose any obligation on Parliament to remedy the incompatibility and therefore, if s.4 was the primary remedial provision, individuals would have no indication if, or when, incompatible legislation would be remedied. If Parliament was to be overburdened with such declarations, the delay before individual rights were realised or resolved would be very substantial.

62. In conclusion, it is clear to us that s.3 HRA is being used by the courts cautiously and safeguards have been established to ensure that legislation is interpreted in a manner

[66] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at 577.

consistent with the intentions of Parliament. Therefore, s.3 should not be amended or repealed. It follows that we also do not consider there to be any reason to consider declarations of incompatibility as part of the initial process of interpretation rather than as a matter of last resort.

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

63. The opportunity for judicial scrutiny of designated derogation orders is limited and uncertain. The HRA itself does not make any express provision for judicial control of derogations and the preconditions which must be satisfied for a derogation to be lawful under Article 15 ECHR are not expressly incorporated by the HRA. This means that the precise legal basis for any challenge to the lawfulness of a derogation is uncertain under the HRA.

64. The case of *A and others v Secretary of State for the Home Department*[67] concerned the indefinite detention of foreign national prisoners in Belmarsh prison. The prisoners were held without trial under section 23 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA). The ATCSA and HRA (Designated Derogation) Order 2001, which permitted the UK government to indefinitely detain foreign nationals suspected of having links with terrorist groups or organisations, was the government's response to a perceived state of public emergency justifying a derogation from Article 5 ECHR.

65. The prisoners challenged the lawfulness of the derogation order and the House of Lords held that the provisions under which the detainees were being held were incompatible with Article 5 ECHR. Whilst the court agreed with the government view that constant terrorism threats could in principle constitute an immediate danger and imminent threat to national security, and that such public emergency is a lawful basis to derogate from Article 5, it held that the measures taken were disproportionate and discriminatory in their effect as they only applied to foreign national suspects. A quashing order was made in respect of the HRA (Designated Derogation) Order 2001, and Section 23 ATCSA was declared incompatible with Articles 5 and 14 ECHR. Despite this ruling, the Home Secretary was *not* required to release the prisoners and the individuals remained detained.

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

66. The House of Lords held that it was the provision contained in ATSCA which expressly provided for a derogation matter to be questioned in legal proceedings before the Special Immigration Appeals Commission (and on appeal from the Commission) that enabled the court to entertain a challenge to the lawfulness of the derogation.

67. Judicial scrutiny presents an essential safeguard against the arbitrary assessments and implementation of disproportionate measures. The power to quash designated derogations orders and make declarations of incompatibility remain essential remedies.

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?

68. In the past 15 years, the UK courts and tribunals have dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights in a restrained but steadily progressive manner.

69. Section 6(2) of the HRA provides that a public authority will not be acting unlawfully (as per s6(1)) if:

    (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

    (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

70. In the 2005 case of *Hooper*,[68] Lord Hope provided guidance on how the statutory defence of s. 6(2)(b) applies to subordinate legislation:

    "The situation to which paragraph (b) is addressed on the other hand arises where the authority has a discretion, which it has the power to exercise or not to exercise as it chooses, to give effect to or enforce provisions of ***or made under*** *primary legislation which cannot be read or given effect to in a way which is compatible with the Convention rights."*

[68] *R v Secretary of State for Work and Pensions, ex parte Hooper* [2005] UKHL 29.

71. Lord Hope made clear that a declaration of incompatibility in relation to subordinate legislation will only be necessary if a provision of primary legislation renders it impossible to remedy the incompatibility of the subordinate legislation. If the primary legislation itself does not require the subordinate legislation to be incompatible, courts and tribunals are able to grant an appropriate remedy. This may take the form of quashing or disapplying the incompatible secondary legislation. This precedent operates to uphold the courts' role in ensuring that the executive only exercises powers through secondary legislation in accordance with the will of Parliament. This upholds the doctrine of the separation of powers, ensuring checks and balances on executive powers by acting as a protective mechanism for Parliamentary sovereignty: if primary legislation is not incompatible, subordinate legislation should not be permitted to be so.

72. This was re-stated in the 2017 judgment in *Brewster*,[69] in which the Supreme Court granted the application for judicial review, ruling that the subordinate legislation[70] in question should have been disapplied. In this case, the Court found that local authority pension regulations discriminated against unmarried couples, and allowed the claimant's appeal, ruling that the offending provision should have been disapplied. The court found that the "*requirement that [a] surviving cohabitant [but not spouse] must be nominated by the scheme member*" was neither justified nor further[ed] the objective of the Act in question.[71] Once again, the court prioritised the intentions of Parliament.

73. In the 2019 'bedroom tax' case of *RR v Secretary of State for Work and Pensions*,[72] the Supreme Court developed further the constitutional question of incompatible subordinate provisions, reconsidering the earlier case of *Carmichael*.[73] The Supreme Court held that a public authority, as well as a court or tribunal, can disapply a provision of subordinate legislation if to follow it would result in the body acting incompatibly. Lady Hale, giving the judgment of the court, found that there is:

> *"…nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting*

[69] *Brewster v Northern Ireland Local Government Officer's Superannuation Committee* [2017] UKSC 8.
[70] Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 (SI 2009/32).
[71] Inheritance (Provision for Family and Dependants) Act 1975.
[72] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52 .
[73] *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58.

incompatibly with a Convention right, where this is necessary in order to comply with the HRA."

74. This emphasises the extent to which the courts work to ensure that the will of Parliament in enacting primary legislation is not subverted by incompatible subordinate legislation. Moreover, in this case, the wider remedial action to rewrite the legislation in a compatible way was left to the Secretary of State for Work and Pensions and Parliament. This indicates that courts will intervene only to the limited extent of disapplying or quashing incompatible subordinate legislation and not enter into the realm of law-making.

Covid-19

75. During the Covid-19 pandemic, the government has enforced 'lockdowns' on the UK public by enacting the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, using powers delegated by the Public Health (Control of Disease) Act 1984.

76. The Joint Committee on Human Rights' review of the government's response to Covid-19 and human rights acknowledged that the Regulations may interfere with several Convention rights as protected by the HRA.[74] Despite this interference, the government did not attempt to exercise a derogation from the Convention under Article 15. Rather, it expressed the view that the legislation is proportionate, given the necessity to protect life.

77. On 28 September 2020, the Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020, introduced using powers under the Prosecution of Offences Act 1985, came into force, extending the standard custody time limit in the Crown Court by 56 days (8 weeks) to 238 days. This extension to the period without automatic judicial oversight made no distinction between children and adult prisoners awaiting trial.

78. Following a legal challenge from Just for Kids Law[75] on the basis of incompatibility with Article 5 and Article 14 ECHR the government capitulated and announced that children would be exempted from the extension to custody time limits. The case did not reach the court as the claim was stayed as the Ministry of Justice agreed to consult with the Children's Commissioner. On 14 January 2021, the government introduced a new

[74] https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26506.htm
[75]'Just for Kids Law welcomes Government U-turn to exempt children from extended custody time limits' (14 January 2021). See: https://justforkidslaw.org/news/just-kids-law-welcomes-government-u-turn-exempt-children-extended-custody-time-limits

statutory instrument to exclude children from the extended custody time limit. Whilst this came about without litigation, the concession was no doubt a recognition of the incompatible aspect of this subordinate legislation which would be susceptible to judicial striking down.

d) <u>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?</u>

79. This evidence is provided on the part of PALG, and as such, our work is primarily concerned with the domestic application of the HRA to the actions of the UK state. However, some members act in military claims, and all members have an interest in the reach of the HRA in relation to violations committed by the State, both in the UK and overseas.

In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK?

80. As set out above, s.6 of the HRA makes clear that it is "*unlawful for a public authority to act in a way that is incompatible with a Convention right*",[76] unless it is required to do so by an Act of Parliament. 'Public authority' is defined widely and includes both the Ministry of Defence ('MoD') and armed forces, as well as courts and tribunals. However, Parliament itself is exempted, as is any person exercising functions in connection with proceedings in Parliament.[77]

81. The question of whether the HRA was intended to apply extraterritorially was addressed in *Al-Skeini and Others v. the United Kingdom*.[78] The case concerned the extent to which the acts of public authorities performed outside of the UK's territory would be sufficient to engage the ECHR rights of local civilians who may have suffered violations as a result of those actions.

82. The ECtHR determined that for the purposes of Article 1 ECHR, as a matter of both legal and practical reality, "*the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq*" and, therefore, enjoyed jurisdiction for the

[76] Section 6(1) HRA.
[77] Section 6(3) HRA.
[78] *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07 [2011] ECtHR.

purposes of the Convention. A jurisdictional link existed between the UK and individuals killed in the course of security operations carried out by British soldiers during the relevant period and the UK was therefore required to carry out an investigation into their deaths.

83. In *Smith and others v Ministry of Defence*,[79] the Supreme Court held that Article 2 ECHR *could in principle* apply to the soldiers' deaths. However, when delivering their ruling, the court was anxious to stress that the utmost regard should be had in relation to the effectiveness of military operations overseas, and the application of human rights standards should not be applied in such a way as to hinder the State's efficacy.[80]

84. Therefore, when our armed forces are engaged in military operations overseas there will be instances where they are both bound by and protected by the ECHR and the HRA.

What are the implications of the current position?

The 'Lawfare' debate

85. Criticism of the HRA has often been grounded in the assertion that our troops and the wider armed forces require protection from an 'industry' of 'vexatious' claims, at significant public cost, and that the judiciary have interpreted the HRA in such a way as to extend its application beyond the remit intended by Parliament.[81]

86. Our view is that litigation arising from the application of the HRA has been, and remains, essential to ensuring that the UK military is not permitted to act with impunity and disregard for the lives of both foreign nationals and UK service personnel.

87. It is clear that the judiciary is live to the important line to be drawn on issues where the courts consider the HRA to have application and intend to construe the position narrowly. In *Smith*, Lord Hope said:

> "*the sad fact is that, while members of the Armed Forces on active service can be given some measure of protection against death and injury, the nature of the job they do means this can never be complete. They deserve our respect because they are willing to face these risks in the national interest, and the law will always attach*

[79] *Smith & Anor v Ministry of Defence* [2013] UKSC 41.
[80] *Smith & Anor v Ministry of Defence* [2013] UKSC 41.
[81] The Ministry of Defence, 'Overseas Operations (Service Personnel and Veterans Bill, European convention on Human Rights, Memorandum by the Ministry of Defence'.

importance to the protection of life and physical safety. But it is of paramount importance that the work that the Armed Services do in the national interests should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong. The court must be especially careful, in their case, to have regard to the public interest, to the unpredictable nature of armed conflict and the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable."[82]

88. Lord Hope was at pains to set clear parameters of areas the court was and was not able to consider. High level political and military tactical decisions will not be interfered with by the courts. The judiciary does not traditionally trespass into the realms of politics or policy, and the court stressed that decisions taken on the ground by commanders will be given the widest possible margin of appreciation. It is only in the middle ground cases, usually involving decisions prior to deployment such as the suitability of equipment to be used, that the courts will have a proper place in deciding whether reasonable steps were taken by the MoD to prevent avoidable harm to armed forces personnel.

Damages claims

89. The HRA allows both civilians and the UK's own service personnel an avenue to obtain justice where there has been a breach of their Convention rights by the State, including for injury, abuse, torture, mistreatment and death. The HRA provides an important avenue for victims to enforce their rights where tortious claims do not, albeit HRA damages are generally very low.[83]

90. Compensation will only be awarded to claimants, be they soldiers or foreign nationals, where they are able to show that the UK State engaged in activity that infringed their fundamental human rights. As victims, they deserve restitution for that breach and any damage caused and, importantly, successful cases act as a mechanism to ensure accountability on the part of the State and act as a deterrent against the commission of further wrongs.

Article 2/3 investigations

i. Inquests

[82] *Smith & Anor v Ministry of Defence* [2013] UKSC 41, at 100.
[83] *Kamil Najim Abdullah Alseran and Others v Ministry of Defence* [2017] EWHC 3289 (QB).

91. In the case of *Smith*,[84] the Supreme Court considered the extent of the investigatory obligation under Article 2 ECHR in relation to a death of a soldier of heat injury on a base in Iraq. The court found that where there was reason to suspect a breach by the State, there should be an independent investigation which contained a sufficient element of public scrutiny and involved the deceased's relatives. An Article 2 compliant inquest is therefore required in cases where it is arguable that the MoD did not 'take reasonable steps' to protect the life in circumstances where there was a 'real and immediate risk to life' of which it was or should have been aware.

92. In *Smith*,[85] the inquest into the deceased's death was not Article 2 compliant and was concluded within three hours. It did not examine whether soldiers were being provided with unsafe and inadequate equipment - a primary concern of the deceased's family. Had an Article 2 compliant investigation been held, the opportunity to uncover systemic failings of this nature could have been realised much earlier, the family would not have been pushed to litigate on the matter, and the findings would have helped to prevent needless loss of life.

ii. Inquiries following abuse allegations

93. The ECtHR makes clear in its jurisprudence on Articles 2 and 3 that investigations by the State into allegations concerning ill-treatment, torture and wrongful deaths must be effective. Investigations of this nature are critical to allow any systemic failures to be identified so that lessons can be learned and changes implemented.

94. There have been a number of investigations following allegations that UK service personnel had been involved in the mistreatment and torture of foreign nationals during overseas operations. In some instances, these legal processes have sadly revealed serious human rights violations committed by some British soldiers. The Baha Mousa Inquiry revealed that British soldiers had been involved in torture, unlawful killing and the use of prohibited interrogation on detainees within their control. The Inquiry concerned the death of Baha Mousa, a hotel receptionist, who died in British custody in Basra following sustained and serious abuse. The Inquiry found that Mousa's death was caused by "*factors including lack of food and water, heat, exhaustion, fear, previous injuries and the hooding and stress positions used by British troops - and a final struggle with his guards*". The

[84] *R (on the application of Catherine Smith) v Secretary of State for Defence & Anor* [2010] UKSC 29.
[85] *Smith & Anor v Ministry of Defence* [2013] UKSC 41, at 100.

Inquiry heard that Mousa was hooded for almost 24 hours during his 36 hours of custody and that he suffered at least 93 injuries prior to his death. The Inquiry identified 'corporate failure' by the British Army to prevent the use of prohibited interrogation techniques and made several important recommendations, which can only improve army practices and its reputation abroad.[86]

Is there a case for change?

95. We note that change to the application of the HRA overseas is likely to be imminent, whether we contend in our evidence that there is a case for it or not. Parliament is already in the process of introducing legislation to curtail the HRA's current reach, seeking to stymie litigation arising from acts involving the UK armed forces.

96. At the time of writing, the Overseas Operations (Service Personnel and Veterans) Bill,[87] has passed through the House of Commons and is at the Committee stage of the House of Lords. The proposed law in its current format would amend the HRA in ways that impact on its human rights obligations. The Bill has been met with strong criticism and resistance from several institutions concerned with the protection of human rights and upholding the rule of law.[88]

97. Should the Bill be passed in its current form, it is our view that it would damage the standing of the armed forces, and by proxy the UK's position as a leader in the protection of human rights, by acting contrary to both established domestic and international legal norms.

<u>Key proposed amendments to the HRA in the Bill</u>

i. The "human rights longstop"

98. Clause 11 of the Bill amends the law on limitation for claims under s.7(1)(a) of the HRA against the MoD or the Secretary of State for Defence in relation to overseas operations. It provides that any court or tribunal in the UK, when considering exercising its discretion to extend the primary limitation period of one year, will be able to do so up to a maximum

[86] Baha Mousa Inquiry and the Rt Hon Sir William Gage (Chairman), 'The report of the Baha Mousa Inquiry', vol.1, HC 1452-1.
[87] (HC Bill 117).
[88] Equality and Human Rights Commission, 'Human Rights and the Military: Follow-up submission regarding the Concluding Observations adopted by the Human Rights Committee on the seventh periodic report of the UK', July 2016. Justice, 'Overseas Operations (Service Personnel and Veterans) Bill House of Commons Committee Stage', October 2020.

of six years after the act, or 12 months after the claimant became aware of the act and the role of the MoD or the Secretary of State for Defence; whichever is later.

99. Clause 11 also provides that, in deciding whether to exercise its discretion to extend limitation, the court must have particular regard to the effect of the delay with particular regard to the likely impact of the proceedings on the mental health of current or former Service Personnel who are called to give evidence. We note that police officers and medical and other professionals who are required to give evidence in domestic cases brought under the HRA are not afforded the same consideration.

100. The effect of this amendment is that both civilians and service personnel may be precluded from bringing otherwise meritorious claims where the new fixed limitation period is said to have expired. The current case law already provides robust limitations to bringing late claims (outside the one year limitation) or claims without merit. There is likely to be significant uncertainty as to when some claimants possess the requisite knowledge, or when exactly the relevant act is said to have concluded. This provision serves to markedly reduce the protections afforded to the UK's own soldiers, completely undermining the MoD's assertions that these amendments are sought on their behalf.

ii. Duty to consider Derogation

101. Part 2 of the Bill would impose a duty on the Secretary of State to consider derogating from the ECHR, via section 14 of the HRA, for overseas operations. Any derogation from treaties should be considered on a fact-specific basis, and in practice, should be an extremely rare and carefully considered process. This duty would indicate a blanket position that Parliament generally supports the principle of derogation from human rights protection, as opposed to taking a cautionary, case by case approach.

102. In our view, derogation from the ECHR for any future overseas operation would set a damaging precedent for an international treaty which relies on the cooperation and consent of its signatory states. Rather than protecting our serving personnel, should Parliament express an intention to derogate from their international human rights obligations, it will set a precedent for other states to do the same. This will put service personnel at greater risk of human rights abuses committed by other states. It will be difficult for the UK to insist on compliance with international laws that it does not intend to follow itself.

Is change warranted or desirable?

103. Rather than observing strict human rights frameworks in the rules of engagement and occupation of foreign territories, the government appears to want to diminish protection from torture, inhumane and degrading treatment and death. The Bill risks contravening the UK's obligations under the ECHR and other international legal instruments, many of which the UK helped to create.

104. In proposing a legal regime of asymmetrical application domestically and overseas, the government makes a concerning distinction in the value it ascribes to lives of both service personnel and foreign nationals. As a matter of moral principle, the value of all lives should be equal, irrespective of profession or locality. As a matter of constitutional principle, the rule of law should prescribe equal treatment of all before the law.

105. It is our view that the HRA and its current reach remains legitimate and appropriate to protect the rights of both UK service personnel, and foreign nationals who face injustice committed on the part of the State. It is imperative that the UK should not be able to act with impunity beyond its own borders and that there be appropriate mechanisms for ensuring transparency and accountability in regard to actions and decisions implemented by public authorities overseas. The HRA and common law interpretation already provide sufficient barriers to unmeritorious claims.

e) <u>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?</u>

106. Between 2 October 2000 and 31 July 2020, 8 remedial orders have been issued to deal with declarations of incompatibility made by the court. *R (on the application of H) v Mental Health Tribunal for the North and East London Region & The Secretary of State for Health*[89] concerned a man who was admitted to hospital under section 3 of the Mental Health Act 1983 ('MHA') and sought discharge from hospital. Sections 72 and 73 of the MHA were declared to be incompatible with Article 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention. Following the declaration of incompatibility, the legislation was amended by the MHA (Remedial) Order 2001 which came into force on 26 November 2001.

[89] *R (on the application of H) v Mental Health Tribunal for the North and East London Region & The Secretary of State for Health* [2001] EWCA Civ 415.

107. *R (on the application of Baiai and others) v Secretary of State for the Home Department*[90] concerned the procedures put in place to deal with sham marriages, which persons subject to immigration control are required to go through before they can marry in the UK. Except in relation to cases involving illegal immigrants, the court held that section 19(3) of the Asylum and Immigration Act (Treatment of Claimants, etc) 2004 was incompatible with Article 12 ECHR (in that it was disproportionate) and Article 14 ECHR (in that it discriminates unjustifiably on grounds of nationality and religion). Following the declaration of incompatibility, the legislation was amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Remedial) Order 2011 which came into force on 9 May 2011.

108. *R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department*[91] concerned a juvenile and adult who had been convicted of sexual offences. Under section 82 of the Sexual Offences Act 2003, the nature of the offences they committed, and the length of their sentences meant that they were subject to the notification requirements set out in Part 2 of that Act for an indefinite period. At the time, there was no statutory mechanism for reviewing indefinite notification requirements. The court held that section 82 of the Sexual Offences Act 2003 was incompatible with Article 8 ECHR in that it subjected certain sex offenders to notification requirements indefinitely without the opportunity for review.

109. To remedy the incompatibility, the draft Sexual Offences Act 2003 (Remedial) Order 2012 was laid before Parliament on 5 March 2012 and the Remedial Order was subsequently approved by Parliament and came into force on 30 July 2012. The Remedial Order amended the Sexual Offences Act 2003 to introduce a mechanism which enabled registered sex offenders who are subjected to indefinite notification requirements to apply for those requirements to be reviewed.

110. The above demonstrate that only very few of the Remedial Orders have been laid before and approved by Parliament since 2000. Declarations of incompatibility respect the constitutional roles of Parliament, the executive and the courts. As noted by Lord Bingham:

[90] *R (on the application of Baiai and others) v Secretary of State for the Home Department and another* [2006] EWHC 823 (Admin) and [2006] EWHC 1454 (Admin).
[91] *R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department* [2008] EWHC 3170 (Admin).

"The function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself…. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions."[92]

111. There is a fine balance between the role of Parliament, the executive and the courts. We do not consider that the role of Parliament requires enhancement. There is no evidence to suggest that the current system is flawed. We are of the view that the current process is in line with the fundamental principles of our democratic society and should not be amended.

112. However, we support the Joint Committee of Human Rights' recommendation that all statutory instruments which have a significant human rights implication, including draft remedial orders, should be drawn to its attention for scrutiny to ensure that Parliament receives the advice of its expert human rights committee about whether the instrument remedies the incompatibility identified by the courts.

[92] *A v Secretary of State for the Home Department* [2004] UKHL 56, at 29 & 42.