The Bar Council's response to the Independent Human Rights Act Review (IHRAR) Call for Evidence

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Independent Human Rights Act Review (IHRAR) Call for Evidence.[1] The following Specialist Bar Associations have endorsed the response:

- Commercial Bar Association
- Professional Negligence Bar Association
- Chancery Bar Association

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

EXECUTIVE SUMMARY

- The Bar Council strongly supports the objective behind the HRA of bringing rights home.[2]

[1] Open from 13 January 2021 until 3 March 2021
[2] See paragraphs 4 - 11

- The central machinery of the HRA – sections 2,3 and 4 has operated well and stood the test of time.

- The drafting of section 2 is simple and straightforward. It has enabled the U.K. courts to develop a nuanced and principled approach to the Strasbourg caselaw.[3]

- The approach of the U.K. courts is still developing. It will continue to evolve to adapt to the times. The language of Section 2 leaves sufficient room for the courts to strike the right balance. The Bar Council does not regard any statutory intervention desirable in connection with section 2 insofar as it deals with ECtHR caselaw. It would be possible to have a statutory provision making it clear that U.K. courts could have regard to the caselaw of other constitutional courts.[4]

- Similarly, the Bar Council would resist any amendment to the relationship between section 3 and section 4. The strong interpretative duty created by section 3 is appropriate in the context of bringing rights home and the relationship between section 3 and section 4 respects the constitutional architecture of the U.K.[5]

- The Bar Council does not consider that the application of section 3 by the courts has illegitimately undermined the will of Parliament.[6]

- The enforcement of convention rights through the HRA has not replaced the ability of the common law to develop. The two systems are complementary.[7]

- Both systems, including the HRA, have required the courts to articulate and apply an appropriate degree of respect to social and economic policy decisions by government.[8]

- The approach to the provisions of subordinate legislation that are incompatible with convention rights is governed by s6 HRA. A public authority (including a court or tribunal) acts unlawfully if it gives effect to an incompatible regulation unless the incompatibility is required by the parent act. This distinction is appropriate.[9]

[3] See paragraphs 12-24
[4] See paragraphs 25 - 39
[5] See paragraph 84 - 86
[6] See paragraphs 84 - 86
[7] See paragraphs 59-63
[8] See paragraph 69
[9] See paragraphs 115 - 117

- It would be possible to make modest amendments to Schedule 2 to strengthen Parliamentary supervision of remedial orders.[10]

- The essential determinant as to whether a person falls under UK jurisdiction for the purposes of the Convention and the HRA when overseas is whether s/he is under UK authority and control, that is the international law concept of "state agency, authority and control". The present position is an aspect of the role of the HRA in bringing rights home.[11]

THEME 1: The relationship between domestic Courts and the European Court of Human Rights (ECHR)

4. Members of the Bar Council have experience of the working of the Human Rights Act ("HRA") from the widest possible perspective, because of their role in representing all parties to disputes in which human rights arguments are being asserted. They represent individual claimants who are asserting their convention rights against central or local government, or the other wide spectrum of bodies who are public authorities for the purposes of the HRA. They represent those public authorities themselves, appearing both for central and local government. They appear on both sides of cases involving the media – including those who assert convention rights against the press and for the organs of the media itself. They appear for businesses who go to court with the aim of demonstrating that certain aspects of government regulation and legislation are oppressive and a disproportionate interference with their convention rights, including those arising in relation to the ownership or regulation of property.

5. These observations reflect the obvious fact that barristers appear on both sides of disputes arising under the HRA. The legal profession, including the Bar Council, welcomed its enactment because of its obvious and fundamental role in "*Bringing Rights Home*". The UK had been closely involved in the drafting and instigation of the European Convention on Human Rights ("ECHR"); but the fact that its provisions were not incorporated into domestic law meant that domestic law was not necessarily aligned with the convention rights that the UK had signed up to as a matter of international law. The result was that anyone who asserted that their convention rights had been infringed, or that domestic law failed properly to give effect to those rights, had to go to the European Court of Human Rights ("ECtHR") in order to vindicate them. There were two obvious and substantial disadvantages to this situation – first the cumbersome and time-consuming nature of the process; and, second, the fact that domestic courts were not engaging directly with the underlying convention rights. The domestic courts were confronted by arguments necessarily articulated in terms of domestic law; the arguments in front of the ECtHR were in terms of the convention itself. The two court systems were not engaging with identical material.

[10] See paragraphs 97 - 101
[11] See paragraphs 118 - 137

6. The desirability of overcoming these drawbacks was the major objective behind the enactment of the HRA. The White Paper which preceded it was entitled "Rights Brought Home: The Human Rights Bill." Paragraph 1.14 explained: *"The effect of non-incorporation….is a very practical one. …. [Enforcing the rights] takes too long and costs too much……Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts – without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the jurisprudence of human rights in Europe."*

7. Some comments are made below on the importance of the involvement of domestic courts themselves in exploring the relationship between convention concepts and purely domestic law for the "dialogue" between those courts and ECtHR.

8. The Bar Council strongly supports these objectives. It accepts that it is sensible to take a look at the operation of the HRA after 20 years and accordingly welcomes the IHRAR. Some comments are made below on the central features of the HRA – s.2; s.3 and s.4. It considers that this central machinery has worked well and has stood the test of time. Whilst it has some suggestions for modest improvements to some provisions – s.2 and parliamentary scrutiny of certain remedial orders under s.10 and schedule 2 – it would resist any major revisions to the machinery. Anything which diminishes the direct involvement of domestic courts in providing remedies in respect of breaches of convention rights will inevitably recreate the problem which the HRA was designed to address and which it has successfully addressed.

The role of section 2 in bringing rights home

9. Section 2 is an essential part of mechanism of the HRA and plays a major role in delivering the task of "bringing rights home". Its drafting is simple and straightforward, and the Bar Council would not propose any changes to the drafting in respect of the central relationship between domestic and Strasbourg case-law. The formula in s.2 has enabled UK courts to react in a nuanced and principled way to that case-law. The approach that has been taken was summarised by the Court of Appeal in *R(on the application of Hicks) v Commissioner of Police of the Metropolis* [2014] 1 WLR 2152 at paragraph 80:-

> *"80. What conclusions can be drawn from this domestic case law on how English courts should deal with Strasbourg decisions on the interpretation of the ambit of a provision of the Convention itself, as opposed to a European Court of Human Rights decision on how a provision in the Convention is to apply to particular factual circumstances? We think that the following principles are clear: (1) It is the duty of the national courts to enforce domestically enacted Convention rights. (2) The European Court of Human Rights is the court that,*

ultimately, must interpret the meaning of the Convention. (3) The UK courts will be bound to follow an interpretation of a provision of the Convention if given by the Grand Chamber as authoritative, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which, properly explained, would lead to that interpretation being reviewed by the European Court of Human Rights when its interpretation was being applied to English circumstances. (4) The same principle and qualification applies to a "clear and constant" line of decisions of the European Court of Human Rights other than one of the Grand Chamber. (5) Convention rights have to be given effect in the light of the domestic law which implements in detail the "high level" rights set out in the Convention. (6) Where there are "mixed messages" in the existing Strasbourg case law, a "real judicial choice" will have to be made about the scope and application of the relevant provision of the Convention. We note that in Ostendorf's case 7 March 2013, the Strasbourg court was plainly not concerned with the English domestic processes of arrest and detention; however, it was concerned with them in Steel v United Kingdom 28 EHRR 603 , Brogan v United Kingdom 11 EHRR 117 and Nicol and Selvanayagam v United Kingdom 11 January 2001 ."

10. The Bar Council respectfully considers that this approach does represent a satisfactory approach to the Strasbourg case-law which is justified as a matter of basic principle. S.2 has to be operated in a way which enables the HRA to fulfil the task of bringing rights home. Accordingly, a strong commitment to following decisions of the Grand Chamber or a consistent line of authority is justified because in these two situations it is possible to predict what the reaction of the ECtHR would be and so there is everything to be gained from the UK courts giving effect to that predicted reaction. Not to do so would simply compel protracted litigation. But there will be other circumstances where this is not the case. Thus it is possible that the issue has not been addressed by Strasbourg; or that there are "mixed messages" in the existing Strasbourg case-law, and where accordingly a "real judicial choice" will have to be made about the scope and application of the relevant provisions of the Convention. This may involve departing from individual ECtHR decisions, as was done in *Hicks* itself – see the reference to Ostendorf's case which was not applied by the Court of Appeal to the English domestic processes of arrest and detention; an approach confirmed by the Supreme Court at [2017] AC 256. A striking example of the Supreme Court not following ECtHR authority is to be found in *R (Aguilar Quila and another) v Secretary of State* [2012] 1AC 621, in which it declined to apply the long-established authority of *Abdulaziz* [1985] 7 EHRR 471. Lord Wilson observed:-

"43. Having duly taken account of the decision in the Abdulaziz case pursuant to section 2 of the Human Rights Act 1998 , we should in my view decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the Court of Human Rights, in particular the Boultif case 33 EHRR 1179 and the Tuquabo-Tekle case [2006] 1 FLR 798 , are inconsistent with it. There is no "clear and consistent jurisprudence" of the Court of Human Rights which our courts ought to follow: see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295."

11. In other words, the passage of time coupled with considerable developments in the approach to immigration law had diminished the respect which should be afforded even to this long-established authority.

Evolution of the approach to section 2

12. The evolution of the approach of the UK courts to s.2 demonstrates that it provides an appropriate basis for the development of a nuanced and principled approach. As already stated, the Bar Council does not consider that any statutory intervention is necessary. The courts are clearly able to develop this principled approach satisfactorily.

13. The interpretation of s.2 HRA by English courts involves two inter-linked issues, namely: (a) the approach taken when there is clear ECtHR case law on a point; and (b) the domestic approach to be adopted when there is no such clarity.

14. The first situation poses the question of whether English courts consider themselves bound by clear ECtHR case law, notwithstanding s.2 HRA; the second situation poses the question of whether English courts consider themselves able, notwithstanding s.2, to determine the effect of European Convention on Human Rights ('ECHR') rights in domestic law in a way that effectively runs ahead of ECtHR case law.

15. The initial attitude of English jurisprudence to these issues can be seen in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 ('*Ullah*'). In *Ullah*, Lord Bingham, at [20], held that:

> *'In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'*

16. Thus, the general rule (i.e. 'in the absence of some special circumstances') was that an English court could not depart from clear ECtHR case law, nor could it develop ECHR rights in the absence of clear ECtHR case law. This leaves open the issue of what it means to 'keep pace' with ECtHR in UK-specific context. This approach suggests an interpretation of s.2 HRA which is not one which empowers the domestic courts but, instead, makes them subservient to the ECtHR.

17. This overly deferential approach was not consistent with the vision of the sponsor of the HRA, Lord Irvine of Lairg QC. In his speech of 14 December 2011 to the Bingham Centre for the Rule of Law: '*A British Interpretation of Convention Rights*,' Lord Irvine's critique of the position was founded on his contention that:

> *'Lord Bingham's own stated reasoning in Ullah was that the Convention rights should bear the same meaning throughout the CoE ["Council of Europe"]. However, even Homer can nod. This justification elides two distinct concepts. The UK Courts have no power to bind any other CoE member state, and the Strasbourg Court is of course not bound by their decisions. The domestic Courts do not interpret the content of the ECHR as an international Treaty; they interpret the Convention rights under domestic law.'*

18. The final sentence was the crux of the analysis. That is, in Lord Bingham's reasoning, an English court is prevented from relying on s.2 HRA to interpret ECHR rights for itself because the ECHR qua treaty required a uniform interpretation throughout the member states of the Council of Europe. As a result, English courts were subject to a self-imposed restriction on their ability to interpret ECHR rights in English domestic law in such a way that might depart from, or develop beyond, ECtHR jurisprudence.

19. Against that view, Lord Irvine posited that although it was true that Article 46 ECHR provides that '*The High Contracting Parties undertake to abide by the final judgment of the Court [the ECtHR] in any case to which they are a party*', that is an obligation of the UK qua state under international law, which obtains in the international plane only. Under English law's dualist system, there was no obligation on domestic courts to take that international law obligation into account when deciding what the effect of ECHR rights are as a matter of English domestic law.

20. A further critique is that Lord Bingham's analysis implicitly assumed that the application of ECHR in a domestic setting would be the same in all Contracting States. However, the margin of appreciation, reflecting the different cultural and societal norms in place, may permit an ECHR compliant answer that differs from state to state.

21. In his speech, Lord Irvine was of the view that s.2 HRA was precisely the means by which Parliament had provided that the English courts could depart from, or develop beyond,

ECtHR jurisprudence. Issues of compliance with international law were matters for Parliament and the Executive.

22. The cases Lord Irvine cited are to the effect that the position in *Ullah* was generally followed, with the result that ECtHR jurisprudence was not 'taken into account' but was applied as binding precedent. He did acknowledge, however, a handful of exceptions, such as cases where the ECtHR had overlooked or misunderstood some important fact, argument or point of principle, such as in the English law of negligence or court martial.

23. But there were few decisions of high authority in which the English courts had refused to follow clear ECtHR jurisprudence. An obvious example is *R v Horncastle*, where the House of Lords effectively asked the Grand Chamber to reconsider the Fourth Section's previous judgment in *Al-Khawaja v UK*. In *Al-Khawaja*, the ECtHR had held that Article 6 required – as an absolute rule – that no conviction can be based solely or to a decisive extent on hearsay evidence, even where the accused has successfully intimidated the primary witness or the witness has died.

24. As noted by Lord Irvine in his speech, there was danger that the effect of *Ullah* was that s.2 HRA made the English court an agent of the ECtHR, subordinated in a vertical relationship, akin to that in EU with the CJEU. In Lord Irvine's view, s.2 was intended to create a relationship of dialogue between the English courts and the ECtHR, i.e., when determining the specific effect of ECHR rights under English domestic law, English courts were to take into account ECtHR case law, but were not be bound by it.

A more mature approach to domestic human rights

25. The restraint evident in *Ullah* may be explicable by a number of factors, not least a cultural bias in favour of precedent and a lack of clarity about the scope of a UK-specific implementation of ECHR rights.

26. However, more recent authorities have shown that the courts have gone beyond the approach in *Ullah*. The two leading Supreme Court cases noted below set out the current position.

27. The first is *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] A.C. 196. This case concerned two victims of the serial rapist John Worboys. They had brought proceedings against the police, alleging that the failure to conduct effective investigations into his crimes constituted a violation of their rights under Article 3 ECHR, which provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment. The main issue was to what extent Article 3 imposes a positive obligation on states to investigate

reported crimes perpetrated by private individuals, which in turn required consideration of ECtHR case law on the point.

28. The majority of the Supreme Court narrowed the *Ullah* principle such that English courts could, in some circumstances, go beyond ECtHR jurisprudence where there was no clear ECtHR authority on a given issue.

29. Lord Mance's reasoning was based on a re-statement of Ullah, without a fundamental re-statement of principle. However, Lord Kerr's analysis went further. Specifically, Lord Kerr analysed the function of the HRA, concluding that when an English court determines ECHR rights thereunder, it does so as domestic rights, as a matter of domestic law.

30. Because this case involved the English court going beyond ECtHR case law where it was not clear, rather than departing from it where it was clear, the full extent of Lord Kerr's principle, and its tension with Lord Mance's narrower view, was not tested. But in the abstract, Lord Kerr's analysis is much closer to the emancipation of English courts envisaged by s.2 HRA (as contemplated by Lord Irvine) than the subjugation imposed by *Ullah*.

31. The second case is *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] A.C. 279 where the majority of the Supreme Court held that once criminal proceedings had terminated in an acquittal or discontinuance, the presumption of innocence in Article 6.2 ECHR, which governed the investigation and trial of criminal charges, had no continuing relevance, except to prohibit a public authority from suggesting that the acquitted defendant should have been convicted.

32. In so deciding, the Supreme Court refused to follow ECtHR jurisprudence that Article 6.2 has a continuing relevance after acquittal or discontinuance.

33. Lord Reed (dissenting) at [172]-[173] held that:

> *'172. This court's approach to judgments of the European Court of Human Rights is well established. Section 2 of the Human Rights Act 1998 requires the courts to "take into account" decisions of the European court, not necessarily to follow them. In taking them into account, this court recognises their particular significance. As Lord Bingham of Cornhill observed in Kay v Lambeth London Borough Council [2006] 2 AC 465 , para 44: "The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states." Nevertheless, it can sometimes be inappropriate to follow Strasbourg judgments, as to do so may prevent this court from engaging in the constructive dialogue or collaboration between the European court and national courts on which the effective implementation of the Convention depends. In particular, dialogue has proved valuable on some occasions in relation to chamber decisions of the European court, where this court can be confident that the European court will*

respond to the reasoned and courteous expression of a diverging national viewpoint by reviewing its position.

173. The circumstances in which constructive dialogue is realistically in prospect are not, however, unlimited. As Lord Neuberger of Abbotsbury MR explained in Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2011] 2 AC 104, para 48:

"Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

There is also unlikely to be scope for dialogue where an issue has been authoritatively considered by the Grand Chamber, as Lord Mance JSC indicated in R (Chester) v Secretary of State for Justice [2014] AC 271 , para 27:

"It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level."'

34. Lord Mance at [72] referred back to the above passages of Lord Reed, but added a further gloss as follows:

'72. … As to the relationship between this court and the European Court of Human Rights' jurisprudence, I am of course very conscious of what has been said by Lord Neuberger and myself in the passages cited by Lord Reed DPSC in his para 172. Like Lord Wilson JSC, I would, however, draw attention to the further words of Lord Hughes JSC and myself in R (Kaiyam) v Secretary of State for Justice [2015] AC 1344, para 21, where we said:

"The degree of constraint imposed or freedom allowed by the phrase 'must take into account' is context specific, and it would be unwise to treat Lord Neuberger MR's reference to decisions 'whose reasoning does not appear to overlook or misunderstand some argument or point of principle' or Lord Mance JSC's reference to 'some egregious oversight or misunderstanding' as more than attempts at general guidelines, or to attach too much weight to his choice of the word 'egregious', compared with Lord Neuberger MR's omission of such a qualification."'

35. On that basis, distinguishing ECtHR case law on this point, which he considered not to be 'coherent or settled,' Lord Mance addressed the construction of Article 6 ECHR, by way of s.2 HRA, as applied to the case, as follows:

"Article 6 is headed "right to a fair trial" and article 6.2 reads: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." In construing article 6.2, we must under section 2(1)(a) of the Human Rights Act "take into account" any relevant case law of the European Court of Human Rights ("ECtHR"). This sharpens what would anyway be our natural approach when construing provisions designed to incorporate domestically the provisions of a Convention binding on the United Kingdom internationally in senses fixed internationally by the decisions of a supra-national court. But

on any ordinary reading, whether by reference to the principles in the Vienna Convention on the Law of Treaties 1969 (Cmnd 4140) or domestic principles, article 6.2 is limited to the pre-trial phases of any criminal accusation or proceedings.'

36. Furthermore, Lord Mance noted obiter, at [73] that '*I question whether the area of law currently under discussion is one where uniformity of approach is critical, even if the precise implications of the ECtHR case law were clear*.'

37. In summary, the direction of travel of recent Supreme Court case law is clearly away from a strict view of the *Ullah* principle, to a position in which, even on Lord Mance's more cautious view, clear ECtHR case law should be followed only as a matter of 'general guidelines,' and that the extent to which it should be followed appears to be variable according to the area of law in question.

38. By way of context of "taking into account" Strasbourg jurisprudence, there is a large number of Indian cases where the Supreme Court of India has relied on the ECHR to interpret the Indian Constitution. The South African Constitutional Court has developed its jurisprudence of human rights relying to a large extent on international material and decisions from other Courts, jurisdictions and human rights instruments, including the European Convention on Human Rights.

39. UK Courts often" take into account" and are informed by Australian and Canadian jurisprudence. For example, in AG's Reference No. 3 of 1999 in relation to police and criminal evidence, in 2007 in relation to a case involving extradition, in 2009 in relation to a case involving disclosure of criminal antecedents and history, and in 2015 in relation to a case involving police retention of personal information, the Supreme Court of the UK cited Canadian and Australian decisions and drew upon their jurisprudence.

THEME 1 (a) and (b)

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?

40. This section does not offer a comprehensive survey of the practical approach taken by the courts in recent years. Instead, it considers a number of illustrative cases.

41. *R (on the application of Minto Morrill Solicitors) v Lord Chancellor* [2017] EWHC 612 (Admin). This first instance case concerned solicitors who prepared applications to the

ECtHR. Kerr J held that they did not provide services relating to the law of England and Wales within the Access to Justice Act 1999 s.19 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.32. The Legal Aid Agency had therefore rightly refused payments claimed for work done on ECtHR applications. In coming to that conclusion, Kerr J stated at [24] – [25]:

> *'... even if it were linguistically accurate to describe the HRA as having "incorporated" into domestic law the Convention rights referred to in it, it would not follow that the law applied in the ECtHR is that of England and Wales. The ECtHR applies the law of the Convention, not that of England and Wales. The two legal systems are separate.*
>
> *Thus, the Convention regime in domestic law is only available to the extent provided for in the HRA , against public authorities, as defined, in the performance of functions that engage Convention rights. The domestic courts are not bound by decisions of the ECtHR, though they must take them into account. Domestic courts must apply domestic legislation even if it is incompatible with the obligations of the United Kingdom under the Convention (when it cannot be read down under section 3 to prevent the incompatibility).'*

42. *Secretary of State for the Home Department v Onuorah* [2017] EWCA Civ 1757. This case concerned whether there was 'family' or 'private' life under Article 8 ECHR with regard to a Nigerian national and her brother, who lived in the UK. Counsel argued that the Court should distinguish one of its own earlier cases on the basis of the ECtHR jurisprudence on which it was based. Singh LJ held, at [37], that:

> *'In my view, the legal position has now been authoritatively settled by this Court [in its earlier case on the point]. Although this Court has an obligation under section 2(1) of the HRA to take into account any relevant decision of the European Court of Human Rights or the former European Commission for Human Rights, we are normally bound by former decisions of this Court, in accordance with the domestic law principle of precedent.'*

43. *Poshteh v Kensington & Chelsea* [2017] UKSC 36. The Supreme Court declined to depart from one of its own earlier decisions that the duties imposed on local housing authorities under the Housing Act 1996 Part VII did not give rise to civil rights or obligations, and that accordingly Article 6 ECHR did not apply. A later decision of the ECtHR to the opposite effect did not change its view. Lord Carnwath held, at [36], that:

> *'Our duty under section 2 of the Human Rights Act 1998 is "take account of" the decision of the court. There appears to be no relevant Grand Chamber decision on the issue, but we would normally follow a "clear and constant line" of chamber decisions: see Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2011] 2 AC 104 , para 48. This might perhaps be said of some of the previous decisions referred to in the judgment, including most recently Tsfayo v United Kingdom [2007] LGR 1 in which the application of article 6 was conceded by the Government. However, it is apparent from the Chamber's reasoning (see Ali v United Kingdom para 58 cited above) that it was consciously going beyond the scope of previous cases. In answer to Lord Hope DPSC's concern that there was "no clearly defined stopping point" to the process of expansion ([2010] 2 AC 39, para 6), its answer seems to have been that none was needed. That is a possible view, but one which*

should not readily be adopted without full consideration of its practical implications for the working of the domestic regime.'

44. Lord Carnwath's reasoning, as per the passages emphasised, makes clear that he took account of the practical impact of the domestic social housing regime, especially in light of the fact that the Grand Chamber decision in question has 'consciously departed' from previous ECtHR case law, and did not identify a limit to the principle it articulated.

45. *R (Christie Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin). In this case an individual, who identified as non-gendered, challenged the Government's policy not to issue non gender-specific 'X' passports to non-gendered, non-binary and other trans persons who do not identify as, or exclusively as, male or female.

46. This case exemplifies an English court moving beyond ECtHR jurisprudence. Jeremy Baker J, at [108], noted that it was questionable whether the Ullah principle applied at all following Lord Kerr's analysis in *Commissioner of Police of the Metropolis v DSD*. He then proceeded to analyse the issue despite the fact that 'the ECtHR does not appear to have dealt with a case involving the potential Article 8 rights of an individual who identifies as non-gendered, as opposed to being transgendered': see [105]. However, Jeremy Baker J went on to hold that, under the principle of the margin of appreciation, the scope of the applicant's right under Article 8 did not require the UK Passport Office to issue passports with a non-binary category.

47. *Ismail Abdurahman v R* [2019] EWCA Crim 2239. This Court of Appeal (Criminal Division) decision concerned Mr Abdurahman, who had been convicted, and sentenced to 10 years imprisonment, for assisting an offender with intent to impede his apprehension or prosecution, and failing to give information about acts of terrorism, in relation to Mr Hussain Osman, one of the men who had attempted to detonate a bomb at Shepherd's Bush tube station in London on 21 July 2005 (which followed the 7 July 2005 bombings).

48. The majority of the Grand Chamber of the ECtHR had previously ruled that the prosecution of Mr Abdurahman before the domestic courts was a breach of his Article 6 rights on the basis that his access to legal advice had been restricted.

49. Dame Victoria Sharp P, following *R (Hallam) v Secretary of State for Justice*, departed from the judgement of the majority of the Grand Chamber to rule that there was no breach of Article 6: see [114]. Sharp P did so on the basis that there were compelling reasons for restricting access to legal advice in this case.

50. Sharp P took account of ECtHR jurisprudence not only in terms of the majority decision of the ECtHR, but more broadly too, in agreeing with the minority of the Grand Chamber, and a line of ECtHR cases prior to the Grand Chamber decision: see [121].

51. Although the safety of the conviction was not before the Grand Chamber, Sharp P went on to consider that issue as follows at [124]:

> *'Given the basis of the CCRC's reference, we have sought to analyse the safety of the conviction through the lens of Article 6 of the Convention, taking into account the reasoning of the Grand Chamber and indicating the extent to which we are, and are not, constrained by that reasoning. However, even on the assumption that the Grand Chamber was correct that the fairness of the trial was 'irretrievably prejudiced', the conclusion we have recorded at [123] above would in our judgment be sufficient to compel the dismissal of this appeal. That is because, as Mr Mably submitted, the Grand Chamber itself recognised, at [315], that its conclusion on fairness did not entail that Mr Abdurahman was wrongly convicted. Moreover, it is clear on the domestic authorities (especially Lambert and Dundon) that a conviction may be regarded as safe where the evidence against the appellant is overwhelming, even though the trial has been unfair for the purposes of Article 6.'*

52. As the emphasised passage indicates, Sharp P also took into account domestic authorities on this point, and rejected the argument that a finding of a breach of Article 6 by the Grand Chamber necessarily meant that the conviction was unsafe.

53. The case illustrates how the courts have, in appropriate cases, departed from ECtHR case law, while taking account of the wider position both within the context of other ECtHR cases, and domestic law, so as to interpret ECHR rights as domestic rights for themselves.

54. *In the Matter of an Application by Grainne Close and Shannon Sickles v Christopher Flanagan-Kane and Henry Flanagan-Kane for Judicial Review* (Northern Ireland Court of Appeal [2020] NICA 20) this case illustrates, more broadly, how the texture of ECHR rights can vary across the member states of the Council of Europe in line with the width of the margin of appreciation on a given issue.

55. The Northern Ireland Court of Appeal noted at [29] that the ECtHR allowed a wide margin of appreciation on the issue of same-sex marriage in the case of *Schalk and Kopf v Austria* [2010] 53 EHRR 20:

> '*The court said that marriage had deep-rooted social and cultural connotations which may differ largely from one society to another. It should not rush to substitute its own judgement in place of that of the national authorities who were best placed to assess the response to the needs of society. The conclusion was that Article 12 of the Convention did not impose an obligation to grant a same-sex couple access to marriage.*'

The Northern Ireland Court of Appeal further noted that at that time, no more than 6 out of 47 Council of Europe states provided for same-sex marriage.

56. On that basis, having identified that the approach a court should take to ECtHR jurisprudence was that set out by Lord Mance in Commissioner of Police of the Metropolis v DSD, Morgan LCJ held, at [41], that:

> *'Applying that guidance we consider that the jurisprudence of the ECtHR makes it clear that Article 12 does not establish a right to same sex marriage. Secondly, the case law establishes that same sex couples in loving relationships have rights under Article 8 of the Convention both in respect of private life and family life. Article 8 cannot, however, supply what Article 12 , the lex specialis, does not supply and cannot, therefore, provide a means of establishing a right to same sex marriage. Thirdly, the issue of how to recognise same sex relationships is within the ambit of both Articles 8 and 12 and therefore, a matter to which Article 14 of the Convention applies. Fourthly, states enjoy a margin of appreciation in Convention law on the application of discrimination caught by Article 14.'*

57. Morgan LCJ concluded, at [59]: '… *by the time of the delivery of the first instance judgment in this case in August 2017 that the absence of same-sex marriage in this jurisdiction discriminated against same-sex couples, that a fair balance between tradition and personal rights had not been struck and that therefore the discrimination was not justified'* (though in the event there was no need to make a declaration of incompatibility as the legislative position has since changed to allow same-sex marriage).

58. Hence this case is an example of a court, despite it being in theory open to it to move beyond ECtHR jurisprudence, deciding not to do so, not least in light of the legislative position.

<u>A common law approach to rights?</u>

59. It should also be noted that the courts are increasingly open to arguments based on common law rights to develop the law in a way that might otherwise not be possible on the basis of ECHR rights.

60. Thus, in *Kennedy v Charity Commission* [2014] UKSC 20, [2015] A.C. 455 the Supreme Court held that the Freedom of Information Act 2000 s.32(2) provided an absolute exemption from any duty of disclosure in respect of documents created by a public body or placed in its custody for the purposes of an inquiry conducted by that body. That exemption continued until the documents became historical records. Contrary to the appellant's argument, Article 10 ECHR did not affect that conclusion.

61. However, Lord Mance at [46] held (obiter, since the appellant's claim was not put on a common law rights basis) that:

> *'Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law. Not surprisingly, therefore, Lord Goff of Chieveley in Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 , 282-284 and the House in Derbyshire County Council v Times Newspapers Ltd [1993] AC 534 , 551E both expressed the view that in the field of freedom of speech there was no difference in principle between English law and article 10. In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene. As Toulson LJ also said in the Guardian News and Media case [2013] QB 618 , para 88:*
>
> *"The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition."*
>
> *Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that court itself, not being bound by any doctrine of precedent, would not itself undertake.'*

62. However, in *Commissioner of Police of the Metropolis v DSD* itself, in relation to the police's common law duty of care, and its duties under the ECHR, the Supreme Court cautioned, at [68], that:

> '*the bases of liability are different. In as much as it was considered that the common-law duty should not be adapted to harmonise with the perceived duty arising under ECHR, so should the latter duty remain free from the influence of the pre-HRA domestic law. Alternatively, it requires, at least, to be considered on its own merits, without the encumbrance of the corpus of jurisprudence under common-law*.'

And further at [69] that:

> '*more importantly, no assumption should be made that the policy reasons which underlay the conclusion that an exemption of police from liability at common law apply mutatis mutandi to liability for breach of Convention rights*.'

63. In sum, it is open for English courts to ground their decisions on common law rights that may run in parallel to rights under the ECHR, or depart from them as regards a given issue, even when a similar ECHR right, as mediated though the HRA 1998, is not available. However, this is very much a developing area of jurisprudence.

THEME 1 (c)

Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

64. One circumstance addressed by the Court of Appeal in paragraph 80 of *Hicks* [paragraph 9 above] and recognised to justify a failure to follow Strasbourg authority is where *"it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which, properly explained, would lead to that interpretation being reviewed by the European Court of Human Rights when its interpretation was being applied to English circumstances."* This thought leads on to the topic of dialogue. A major advantage of the incorporation of convention rights directly into UK law is that the convention concepts themselves will be directly examined by UK courts; with the result that if the issue does go on to Strasbourg, either in the same or another case, that court will have a considered explanation of the relationship between those convention concepts and domestic law. It was foreseen at the time of the White Paper that this would reduce potential scope for misunderstanding and would enable the ECtHR to fully appreciate the UK context.

65. This has proved to be the case. *De Smith "Judicial Review"* 13-036 fn 85 contains references to some of the principal cases. They include *R v Horncastle* [2010] 2 AC 373, in which the Supreme Court declined to follow ECtHR doctrine of the exclusion of hearsay evidence in criminal trials. As *De Smith* puts it: *"The SC held that the ECtHR had failed to appreciate the carefully crafted code which Parliament had introduced in the Criminal Justice Act 2003 and that, when looked at in its proper context, there was no breach of Article 6"* This position was subsequently accepted by the Grand Chamber in *Al-Khawaja and Tahery v UK* [2012] 54 EHRR 23.

66. Another case where the Supreme Court thought that the ECtHR had not correctly appreciated English law was *R v Spear* [2003] 1 AC 734. The issue concerned the independence of the junior officers who sit on courts-martial. Lord Bingham observed that in the earlier case of *Morris v UK* 34 EHRR 52 the ECtHR had *"not received all the help which was needed to form a conclusion"* and had therefore reached an erroneous view on a matter particularly within the knowledge of the domestic courts.

67. A striking example of the dialogue in action was given by Baroness Hale in her recent evidence to the Joint Committee on Human Rights referring to *R (on the application of Animal Defenders International) v Secretary of State* [2008] 1 AC 1312, which was concerned with a then recently enacted statutory prohibition on political advertising. The government had not provided an opinion under s19 of the HRA, fearing that the legislation might not be compatible because of an ECtHR authority. The House of Lords, however, held that the

legislation *was* compatible declining to apply the authority (*VgT Verein gegen Tierfabriken v Switzerland* 2002 34 EHRR 4). In the event, the Grand Chamber (Case 48876/08) agreed with the House of Lords, albeit by the smallest possible majority. The involvement of the House of Lords proved crucial in ensuring that the ECtHR had the benefit of a full analysis of the relationship between the convention rights in issue and the UK context. Indeed, *De Smith* comments that *"So far, the ECtHR has tended to accept the reinterpretation of its precedents by UK courts"*, citing the "whole life tariff" case of *Hutchinson v UK* App No 57592/08.

68. A review of the judgments of the English courts establishes that s.2 of the HRA has been used in order to balance the need to bring rights home by aligning with Strasbourg, with the importance of protecting the integrity of UK law.

69. One can see the same result in the way UK courts have approached challenges in areas of social and economic policy, for example, in relation to welfare benefits. A decision of the Grand Chamber in *Stec v UK* established that these fell within the ambit of A1 P1; but also that decisions of government should be accorded a high degree of respect – unless they were "*manifestly without reasonable foundation*". A line of Supreme Court authority, including challenges to highly controversial policies such as the benefits cap and the "bedroom tax", have shown a high degree of respect for executive and parliamentary decision-making – see, for example, the deliberate restraint showed by Lord Wilson in [87] of *R(DA and others) v SSWP* [2019] 1 WLR 3289 (*"This court must impose on itself the discipline not, from its limited perspective, to address whether the Government's evaluation of its impact was questionable…."*).

<u>THEME 2: the impact of the Human Rights Act on the relationship between the judiciary, the executive and the legislature</u>.

70. One of the fallacies surrounding discussions on the HRA is that it altered the relationship between the judiciary, executive and legislature. The Bar Council is clear it did not. The HRA is a domestic statute by which Parliament conferred on the courts the duty to ensure that executive powers are exercised in accordance with individual rights. This was nothing more than the enactment of the common law principle of legality; the assumption that Parliament does not, without express words, intend to violate individual rights, nor to authorise the executive or any other public body to do so. In enacting the HRA Parliament supplemented rights provided in the common law (the substantive nature of which the IHRAR has said it is not considering) but it did not alter the relationship between the judiciary, executive and legislature. In that regard a distinction must be drawn between altering the relationship between the judiciary executive and legislature, which the HRA did <u>not</u> do, and altering the substantive matters that the judiciary considers, which the HRA did do – essentially by supplementing common law rights.

71. So, by ss. 3 and 6 HRA Parliament made explicit what had always been implicit; that in enacting legislation Parliament intended to comply with fundamental human rights and that in exercising statutory powers, public authorities should also comply. By s.2 Parliament required the UK Courts to "*take into account*" judgments of the ECtHR in determining compliance but did not mandate that the courts be bound by them.[12] The HRA therefore retained the pre-existing common law rules of statutory interpretation.

72. This was explained by Lord Hoffman in *R (Simms) v Secretary of State for the Home Department* [2000] 2 A.C. 115 a case decided before the coming into force of the Human Rights Act. He noted:

> "*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. 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. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*
>
> *The Human Rights Act 1998 will make three changes to this scheme of things. First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention. But much of the Convention reflects the common law: see Derbyshire County Council v. Times Newspapers Ltd. [1993] A.C. 534, 551. That is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights. Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the Minister in charge of a Bill to make a statement of compatibility under section 19. Thirdly, in those unusual cases in which the legislative infringement of fundamental human rights is so clearly expressed as not to yield to the principle of legality, the courts will be able to draw this to the attention of Parliament by making a declaration of incompatibility. It will then be for the sovereign Parliament to decide whether or not to remove the incompatibility*".

73. The case concerned a statutory power conferred on the Home Secretary to make rules for prisons. The Home Secretary argued that this included a power to impose a blanket ban on prisoners being interviewed with journalists for any purpose (albeit that the relevant rule

[12] The Court has on occasions expressly departed from Strasbourg jurisprudence, as it is entitled to do: *R v Horncastle and others (Appellants)* [2009] UKSC 14, in which the Supreme Court expressly diverted from Strasbourg case law relating to the right to a fair trial.

in that case did not involve a blanket ban). The House of Lords rejected that claim, holding that an absolute ban breached the fundamental right to freedom of expression. Lord Steyn, referring to Lord Goff of Chieveley in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, at 283-284 and Lord Keith of Kinkel in *Derbyshire County Council v. Times Newspapers Ltd*. [1993] A.C. 534 (at 550H- 551A and 551G), emphasised the consistency of the common law with the obligations assumed by the Crown under Article 10 of the European Convention of Human Rights Treaty (freedom of expression).[13]

74. This is but one of many examples where, prior to the HRA, the courts, relying on the common law, ensured that the executive discharged its powers and duties in line with the UK's obligations under the Convention, then a purely international law obligation.

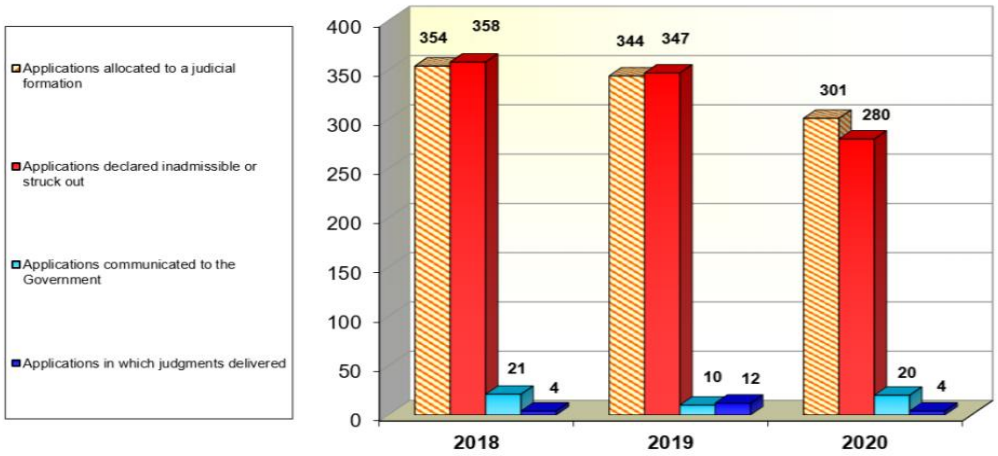
75. Ss.2 and 3 enable the UK courts directly to analyse and assess the Convention position. In so far as an applicant nevertheless pursues his or her case to the ECtHR, the Strasbourg Court is given the benefit of the domestic courts' analysis on the Convention arguments, enabling it better to understand the UK position and specifically, the reasons the UK Courts had considered the relevant act or omission not to be in violation of the Convention.

76. The latter is particularly important. In assessing proportionality, the Strasbourg Court permits the state a certain discretion or 'margin of appreciation'. This concept acknowledges that national authorities are in principle in a better position than the Court to assess the necessity of a restriction '*[b]y reason of their direct and continuous contact with the vital forces of their countries*': *Handyside v UK*, No. 5493/72, 7.12.1976, para. 48. Ss. 2and 3 of the HRA enable the UK Courts to explain why the domestic action (whether legislative or executive) is proportionate. That explanation assists the ECtHR Court to apply the margin of appreciation, something that did not exist before the HRA and in particular, ss. 2 and 3. It is not possible to assess the empirical consequence of this. However, in 2020 there were only three judgments by the ECtHR in respect of the United Kingdom, only two of which found it to be in violation of the Convention and both concerning Article 7. By contrast there were 15 in respect of

[13] Cf. *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696: where no question of the construction of or any ambiguity in, domestic legislation arises, the applicants cannot rely upon the Convention. Nonetheless "*this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment*." Per Lord Bridge 748-749. And to similar effect Lord Templeman at p. 751: "*It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable*."

France, 8 in respect of Germany, 10 in respect of Spain, 14 in respect of Switzerland. The very low percentage of UK applications declared admissible may well reflect the fact that the domestic courts' analysis of the human rights position satisfies the ECtHR that there is no issue to examine.

Graph 104 Major procedural steps in processing applications



[14]

77. Thus, ss. 2 and 3 of the HRA protect the UK from being held by the ECtHR to have violated fundamental rights. A notable example of where such a finding would likely have been avoided had the HRA been in force, was the challenge to the ban on LGBT men and women serving in the Armed Forces: *R v Ministry of Defence, ex p Smith* [1996] QB 517. Four soldiers were dismissed following an investigation by military police into their sexual orientation. The policy of the Ministry of Defence was that homosexuality was incompatible with service in the armed forces and that personnel known to be homosexual would be administratively discharged. As Bingham M.R. noted, it was not open to the Court to determine whether the interference in question "*answers a pressing social need and in particular is proportionate to the legitimate aim pursued*" and as such, it could not consider "*the evidence which would be relied on if it were this court, and not the European Court of Human Rights, with whom the responsibility for deciding this issue lay.*": [1996] Q.B. 517 Page 559.

78. The soldiers' challenge was dismissed by the Divisional Court and the Court of Appeal on the basis that whilst "*the minister's stance…may to many seem unconvincing*" it could not be said to be so "*outrageous in its defiance of logic*" that there was "*no room for another view*" ([1996] Q.B. 517 at 541) per Simon Brown LJ., who expressed the view, however, that "*so far as this country's international obligations are concerned, the days of this policy are numbered.*" [ibid p. 542].

[14] ECHR, Analysis of Statistics 2020, page 61, https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf.

He was proved correct and the Strasbourg Court held that the United Kingdom had breached the soldiers' rights under Articles 3, 8 and 14.[15]

THEME 2 – preliminary remarks

79. Before addressing the detailed questions the review has formulated under Theme 2, we make some brief observations on the formulation in the introductory paragraph, *viz*. the potential concern "*whether the current approach risks `over-judicialising' public administration and draws domestic courts unduly into questions of policy*".

80. First, it has always been the province of the courts to determine the proper lawful scope of the exercise of powers of public administration. From its very inception, through its development in the Victorian era and through to the present day, the doctrine of *vires* has always required the courts to interpret and apply legislation which both confers power on the executive and defines the limits of that power. That principle is itself a facet of Parliamentary sovereignty. The HRA stands in exactly that tradition. By s. 6(1), Parliament has instructed that public administration be carried out in conformity with the Convention rights of individuals, and by ss. 3, 7 and 8 has instructed the courts ensure that it is carried out in that way.

81. Second, the courts are in no sense trespassing on the role of government in making policy or that of Parliament in enacting it. The courts do not formulate policy nor do they legislate. Their function under the HRA is engaged only where an executive decision, or a legislative provision, comes into conflict with a Convention right of the individual that, as a result of Parliament passing the HRA, has effect in domestic law. The court is not concerned in the abstract with the merits of a policy adopted by government or enacted by Parliament. It is simply concerned with whether the decision-maker has established sufficient justification, in the particular facts of the case and on the available evidence, for interfering with a right whose importance Parliament has expressly recognised. We comment further on the separation of the judicial and legislative roles below, in the context of declarations of incompatibility.

82. Third, the tools the court uses to assess the question of sufficient justification – such as the proportionality doctrine and the principle of legality – are not inventions of the HRA but an integral part of the vocabulary and method of the common law, not just in the UK jurisdictions but throughout the commonwealth and elsewhere (as pointed out above).

83. Thus the function of the court in determining whether fundamental rights of the citizen have been violated in a particular case neither `over-judicialises' public administration nor `over-politicises' judicial decision-making.

[15] Smith and Grady v United Kingdom (1999) 29 EHRR 493.

THEME 2 (a) (i) - Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

84. The IHRAR asks at Theme 2: (a)(i) whether the domestic courts have interpreted legislation in a way that is inconsistent with the intention of Parliament. That question misunderstands the structure and intention of the HRA, which as explained above, is premised on the common law principle of legality; namely the presumption that Parliament, unless it explicitly states to the contrary, does not intend to breach fundamental rights. In all legislation post 1 October 2020 that is made explicit in the signing of a section 19 statement by the Minister promulgating the legislation. Accordingly, in relation to any post-1 October 2020 legislation where a s. 19 statement was signed, the courts are entitled to approach legislation on the footing that Parliament enacted it satisfied with the Minister's assurance that it was compatible with fundamental rights. Thus the court may properly draw the inference that Parliament intended the language used to be read compatibly with those rights if possible, Parliament having conferred on the courts power to determine compatibility.

85. As regards cases that concerned legislation enacted prior to the coming into force of the HRA, there are inevitably cases where the Courts have given effect to legislation in a way that may not have been considered by Parliament at the time it was enacted. This is because of changing social attitudes as well as the nature of the Convention as a 'living instrument'. A good example is the 1977 Rent Act. Same-sex sexual activities were only legalised in England and Wales in 1967 (Scotland 1981 and Northern Ireland 1982). It was hardly surprising therefore that in 1977 Parliament did not provide for a right for long term homosexual partners to succeed to an assured tenancy. In 2004 the House of Lords held that the relevant provision, which allowed a spouse to succeed to the tenancy on the death of his or her partner, could however, properly be read pursuant to s. 3(1) HRA to include a surviving longstanding homosexual partner: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.[16] This might perhaps be considered as the high point of judicial interpretation under s. 3 HRA. By contrast, in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29 the House of Lords held that sections 36 and 37 of the Social Security Contributions and Benefits Act 1992, which made provision only for payment to widows could not be read as authorising payment to widowers, the intention of Parliament clearly being that payment should only be made to widowers.

86. The Bar Council does not believe that there is any case where it can properly be said that Parliament's legislative intention was undermined or contradicted by an interpretation

[16] Notably, this case preceded by 10 years the introduction of gay marriage, which came into effect on 13 March 2014.

adopted pursuant to s. 3. Moreover, were such a case to occur, it would be open to the Executive to correct that position by bringing forward legislation in Parliament. For this reason, and the other reasons set out in this paper, the Bar Council considers that no amendment to section 3 is necessary. Indeed, the Bar Council urges extreme caution on this issue. Any amendment to section 3, which is the core of the HRA's carefully calibrated system, would create confusion in a now carefully developed area and risk putting the United Kingdom in breach of international law.

THEME 2 (a) (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?

87. The Bar Council expresses its serious concern at the suggestion that section 3 might be repealed. As already stated, s.3 is the mechanism by which Parliamentary Sovereignty is guaranteed. Crucially, s. 3 does not affect the validity, continuing operation nor enforcement of any incompatible primary legislation, nor of any incompatible subordinate legislation where the relevant primary legislation prevents removal of the incompatibility. Far from s.3 threatening or impinging on Parliamentary Sovereignty, it is its essential guarantee. As to the idea that a repeal with retrospective effect might be countenanced, the Bar Council emphasises that the consequences of such a decision would likely be chaotic, requiring Courts to re-open well-established lines of legal authority causing an upsurge in litigation. The legal uncertainty produced by such an approach would have profound ramifications not just for public administration but also for private bodies, which would be unable confidently to rely on the established legal position. Moreover, it could well lead to a substantial expansion of the common law and a constitutional conflict between the Judiciary and the Executive or Parliament. The Bar Council urges the IHRAR not to countenance such a change.

THEME 2 (a) (iii) and 2(e) - Declarations of incompatibility and remedial orders: the respective roles of Parliament and the courts

2 (a) (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?

2 (e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

88. Declarations of incompatibility and remedial orders are closely related, and we deal with these points together. For the reasons that follow, our view is that the current architecture of the HRA carefully preserves not only the legislative supremacy of Parliament but also, and

equally importantly, the separation of powers. Introducing a role for Parliament to intervene, or express a view, in pending judicial proceedings would compromise that principle and would also be procedurally cumbersome. However, where proceedings conclude with a declaration of incompatibility, we consider there are opportunities for an enhanced Parliamentary role, particularly where Ministers propose to amend primary legislation.

Declarations of incompatibility: the role of Parliament

89. Parliament's function is to enact legislation. That of the courts is to interpret and apply it and to grant remedies to individuals whose legal rights – including those made justiciable by the HRA – are infringed. Where the judicial process concludes with a finding that a piece of primary legislation cannot be read and given effect compatibly with a Convention right, the baton is passed back to Parliament to consider the appropriate legislative response. That may be fresh primary legislation, or a draft remedial order laid for approval under HRA Schedule 2. The legislative and judicial functions are thus kept distinct. There is a symmetry to that distinction: the court does not trespass on Parliament's role in determining how best to remedy an incompatibility that lies beyond the court's interpretative power in s. 3(1), and Parliament does not trespass on the courts' role in interpreting legislation and applying it to the concrete case before it.

90. A remedial order is not an ordinary judicial remedy. It is tantamount to a finding by the court that it cannot grant a remedy in the ordinary way. Although finding, on the facts before it, that a particular decision or state of affairs violates an individual's Convention rights, the court has concluded that the decision or state of affairs results from the effect of a legislative provision that the court is unable to read in any other way – despite the strong injunction in s. 3(1) to avoid that conclusion if it is "possible" to do so.

91. The task of every court or tribunal determining a case in which a question of potential legislative incompatibility arises is, first, to find the facts; then to interpret the requirements of the Convention in that situation, applying the appropriate standard of review; and if the facts reveal a violation of a Convention right, to proceed to consider whether it is "possible" to read the statutory provision in question in a manner that enables to court to find that the violation of the Convention is unlawful, as opposed to mandated or authorised by the provision. If the courts or tribunal finds the violation unlawful, it will grant a remedy – whether a declaration (of the ordinary kind), a quashing order, an injunction, damages, etc – in the usual way. If it finds the violation mandated or authorised by the statute, that is the end of the road for the usual kind of remedy.

92. That is a fundamentally and inherently judicial process. It would be constitutionally improper for the executive or legislative branch of the State to intervene in any part of it, other than as a party making submissions to the court in the usual way. There is a well-established

line of ECtHR case-law deprecating legislative intervention in judicial decision-making.[17] The Review team will also recall the recent events concerning attempts by individual Parliamentarians to influence decision-making in proceedings relating to a former colleague,[18] resulting in their censure for failing to respect the separation of powers.

93. Where the court is one of the higher courts listed in s4, if at the end of that process it has found it impossible to read the statute compatibly with the Convention, it must go on to consider whether to make a remedial order. That too is an exercise of judicial discretion.

94. So, under the present architecture of the HRA, it is – very properly - only once a remedial order has been made that the process reaches the proper province of the legislative function, and not before. It is hard to see how involving Parliament at some earlier stage of the process would avoid breaching the proper constitutional boundaries of both legislative and judicial functions.

95. To explore that, it is worth imagining how such machinery might work. It would inevitably have to operate at some mid-point of the judicial process, before the court has reached its final conclusions on the question of compatibility of legislation. Presumably, having found at least a *prima facie* case that a statutory provision authorises or mandates an act that is incompatible with a Convention right, and that it might not be possible to read the provision compatibly under s. 3(1), the court would make a direction seeking the views of Parliament. Effectively the court would ask: "Did you really mean this?"

96. That underlines the constitutional difficulty. Not only would Parliament be given some special role or influence in the outcome of an essentially judicial exercise, beyond that enjoyed by an ordinary party to litigation, but the basic character of statutory interpretation would risk being significantly altered, with repercussions well beyond the sphere of the HRA. As is well understood, interpretation of primary legislation entails ascertaining the intention of Parliament. But it is equally well understood that the court is not concerned with the subjective intent of the Parliamentary majority who enacted the legislation, but rather with a rule-governed exercise of attributing objective meaning to the language used. That is so whether or not the HRA is involved. It is all the more difficult to see how it could be legitimate for the court to seek out the meaning that a majority of the present Parliament might subjectively wish to attribute to language used by its predecessors.

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[17] *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293, ECtHR. *Smokovitis v Greece*, 46356/99, 11.4.2002, ECtHR; *Draon v France* (2006) 42 EHRR 40, ECtHR.

[18] Criminal proceedings relating to former MP Charlie Elphicke: https://www.standard.co.uk/news/crime/charlie-elphicke-letters-mps-rebuked-b77666.html (accessed 22.2.21)

Parliamentary scrutiny of remedial orders

97. Under HRA Sch.2, ordinary (as opposed to urgent) remedial orders are subject to a "super-affirmative" resolution procedure. First, a draft of the proposed order must be laid; then, following a 60-day waiting period, a draft is laid for approval, also with a waiting period of 60 days for the necessary resolutions. Where "representations" made during the first 60-day period, a summary must be laid with the approval draft, together with details of any changes the Minister has made to the original draft in the light of the representations. The "representations" process is intended to enable scrutiny by the Joint Committee on Human Rights. That process has, on occasion, resulted in the Minister altering the original draft in the wake of concerns expressed by the JCHR.[19]

98. Nevertheless, at the second stage, Parliament is faced with a binary "take it or leave it option", with the result that if either House has misgivings about the terms of the proposed order, it faces the invidious choice of either making law which it consider fails adequately to repair the flaw which a declaration of incompatibility, or ECtHR judgment, identified, or rejecting the order and leaving a potentially lengthy hiatus while the Department formulates an alternative order or introduces primary legislation.

99. Moreover, as with all subordinate legislation, the opportunity for Parliamentary debate on the draft instrument is extremely limited. That may be a cause for particular concern where Ministers propose to exercise the Henry VIII power in HRA Sch. 2 para. 1(2)(a), which enables a remedial order to amend not only the legislation found incompatible but other primary legislation too. Of course, one way of providing more extensive opportunity for Parliamentary scrutiny is to introduce fresh primary legislation rather than a remedial order. But, once more, that risks a lengthy hiatus during which the law remains incompatible with Convention rights. Another unwelcome binary choice.

100. It seems to us that this difficulty could at least be mitigated by providing for heightened Parliamentary scrutiny, particularly in case cases where Ministers propose to deploy the Henry VIII power. We favour giving Parliament the third option of amending, rather than merely approving or rejecting, the second draft laid under Sch. 2 para. 2(a). That could be achieved by a succinct amendment to Sch. 2 para. 2 (and we would be happy to prepare possible amendment text for consideration if that would assist the Review). Meanwhile Parliamentary Standing Orders could prescribe the detailed procedure, including the

[19] For example, the remedial order made following the ECtHR judgment in *Hammerton v. UK*, 6287/10, 12.9.16. See MoJ, Responding to Human Rights Judgments, December 2020 (CP 347) at pp. 25-26: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf (accessed 22.2.21).

requirement for notice of any amendment, together with a moderately extended period for debate on the draft order where one or more amendments are moved.

101. We recognise that proposing a Parliamentary power to amend a draft instrument raises wider questions about the balance between the respective roles of executive and legislature in relation to subordinate legislation. See for example the comments of the (Lords) Secondary Legislation Scrutiny Committee as reported by the Select Committee on the Constitution in 2018, that "*a general power to amend secondary legislation*" could "*defeat*" the purpose of secondary legislation in making efficient use of Parliamentary time, so that "*more time will be available for the discussion of major matters of public concern*".[20] While that position may have much to commend it in relation to a general power of amendment, surely few matters of public concern could be weightier than ensuring due protection for citizens' most fundamental legal rights. A power of amendment in the unique context of the HRA would strike an appropriate and pragmatic balance, respecting the importance of rapidly and properly remedying an infringement of human rights, while avoiding the need to introduce fresh primary legislation (with its attendant delay and consumption of Parliamentary time) in order to ensure adequate Parliamentary scrutiny.

THEME 2 (b) - What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

102. The HRA recognises the power of the Secretary of State to make an order for a derogation from an Article of the Convention or of any protocol to the Convention. S. 16 limits the period for which such an Order can operate.

103. There have been two derogations made thus far. One of them was prior to the HRA in 1988 (arising from the anti-terror law enacted to deal with the situation in Ireland). The second derogation was by a Designated Derogation Order under s.14 of the HRA. The latter was the subject of a challenge decided by the House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56.

104. Sections 14 and 16 do not delineate the contours of the power to make such an Order. Lord Bingham's opinion set out what can fairly be said to be the view of the House on this issue.[21]

[20] 16th Report of Session 2017-19, "The Legislative Process: The Delegation of Powers" (HL Paper 225), para. 102: https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22507.htm (accessed 22.2.21).

[21] Lord Scott expressed a different view on the construction of Section 14.

105. Lord Bingham explained the purpose of Section 14 thus: "*a member State availing itself of the right of derogation must inform the Secretary general of the Council of Europe of the measures it has taken and the reasons for them. It must also tell the Secretary general when the measures have ceased to operate and the provisions of the Convention are being fully executed. Article 15 of the Convention is not one of the Articles expressly incorporated by the 1998 Act, but Section 14 of that Act makes provision for prospective derogations by the United Kingdom to be designated for the purposes of the Act in an order made by the Secretary of State*".[22]

106. The Bar Council's view is that there is no reason to alter the language of s. 14 of the HRA.

107. Lord Sumption described the relationship between the Convention and the UK constitution in *Chester and McGeoch v Secretary of State for Justice and another* [2013] UKSC 63 in the following way:

> "*119. It is an international obligation of the United Kingdom under article 46.1 of the Convention to abide by the decisions of the European Court of Human Rights in any case to which it is a party. This obligation is in terms absolute. The remainder of article 46 contains provisions for its collective enforcement by the institutions of the Council of Europe. Many states have written constitutions which give automatic effect in domestic law to treaties to which they are party. Constitutional provisions of this kind are generally accompanied by provisions giving the legislature a role in the ratification of treaties. But the making of treaties in the United Kingdom is an exercise of the royal prerogative. There was no legal requirement for parliamentary scrutiny until the enactment of Part 2 of the Constitutional Reform and Governance Act 2010 , although pursuant to an undertaking given to Parliament in April 1924 treaties were in practice laid before Parliament and there was a recognised constitutional convention (the so-called 'Ponsonby Rule') that this should be done. The result of the constitutional status of treaties in the United Kingdom is that they are not a source of rights or obligations in domestic law unless effect is given to them by statute: R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696 , 747–748 (Lord Bridge of Harwich), 762 (Lord Ackner); R v Lyons [2003] 1 AC 976 ; In re McKerr [2004] 1 WLR 807 , para 25 (Lord Nicholls of Birkenhead), para 48 (Lord Steyn), para 63 (Lord Hoffmann), para 80 (Lord Rodger of Earlsferry) and para 90 (Lord Brown of Eaton-under-Heywood).*
>
> *120. The Human Rights Act 1998 might have given direct legal effect to interpretations of the Human Rights Convention by the Strasbourg Court, or required the executive to give effect to them by statutory instrument. Both techniques were employed in relation to EU law by the European Communities Act 1972. But as is well-known, its drafting was a compromise designed to make the incorporation of the Convention into English law compatible with the sovereignty of Parliament. Neither of these techniques was therefore adopted. Under section 10 of and Schedule 2 to the Act, the Crown has a power but not a duty to amend legislation by order so as to*

[22] Paragraph 10.

conform with the Convention where there are "compelling reasons" for doing so, but this is subject to prior parliamentary approval under the positive resolution procedure (there are special provisions in urgent cases for an order to be made with provisional effect subject to such a resolution being passed). .."[emphasis added]

108. Or as Lord Nicholls of Birkenhead put it in In *re S (Minors) (Care Order: Implementation of Care Plan*) [2002] 2 AC 291, 313, §39

> "*The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament."*

109. The circumstances surrounding *Chester* and *McGeoch* and those of *Hirst v United Kingdom* (No 2) (2005) 42 EHRR 849 and *Greens and MT v United Kingdom* (2010) 53 EHRR 710 prior to it related to prisoners voting rights and incompatibility with the convention. In *R (National Council for Civil Liberties (Liberty)) v Secretary of State for the Home Department* [2019] Q.B. 481; [2018] 3 W.L.R. 1435 the High Court subsequently considered *Chester* and *McGeoch* in the context of retention of criminal data and compared the Courts powers where there was a finding of incompatibility with the Convention with a finding at that time of incompatibility with EU law. These cases serve, in the Bar Council's view, to exemplify how the HRA operates with the Convention to affect UK Parliamentary Sovereignty but nevertheless clearly maintains it.

110. In *Hirst* the Grand Chamber of the ECtHR had confirmed that the blanket restrictions on voting by all prisoners as a consequence of Representation of the People Act 1983 was a violation of Article 3 of the First Protocol and subsequently in *Greens and MT* the ECtHR had directed that the UK should *"bring forward…legislative proposals intended to amend the 1983 Act"* which would render it Convention-compliant (rather than award the damages sought). The Government duly responded publishing the Voting Eligibility (Prisoners) Draft Bill (Cm 8499), setting out three options, (a) a ban on voting by prisoners sentenced to four years imprisonment or more, (b) a ban for prisoners sentenced to more than six months imprisonment, or (c) a general ban which was to be regarded in any event as being incompatible with the Convention. This approach arises not as a matter of law of course but convention. There was no question that the ECtHR could act to disapply or strike out the legislation. In the interim following the rulings in *Hirst* and *Greens*, Messrs Chester and McGeoch had sought to rely upon the continuing disenfranchisement. The Court of Appeal in Chester considered this was an attempt to sanction the UK Parliament for failing to amend the legislation and dismissed the further appeal.

111. The same issue arose in the context of EU law in the *Liberty* case. As confirmed by Singh LJ at paragraph 78 it is clear that *"the only remedy which can be granted by a court under the HRA, if it is found that primary legislation is incompatible with a Convention right, is a declaration of*

incompatibility. Section 4 of the HRA makes it clear that such a declaration is not binding. Nor does the court have any power to disapply primary legislation if it is incompatible with a Convention right."

112. As noted above, whilst such a declaration has implications upon the nature of legislation it does not truly affect the status of that legislation. It is for Parliament to respond.

113. Whilst the consequence of declarations of incompatibility by the Courts (or indeed the consequence of reading the Convention into domestic legislation) on the one hand remains reliant upon 'merely' constitutional convention, on the other hand, even those who fear that the HRA acts to compromise parliamentary democracy recognise that this is because it places political bodies under pressure to amend legislation, when a court declares it to be incompatible with convention rights[23], but nothing more than that.

114. It is the Bar Council's view that the HRA at a fundamental level strikes the right balance between the court's power to interpret legislation and parliament's power to make it or change it. In short, the Committee does not support a change to the HRA that would enable the Courts to strike down legislation. Equally, the legislature must consider itself bound by and give effect to the Courts' rulings in order to avoid violating the rule of law. This is because should the Government either reject or ignore such rulings, this would ultimately lead to a failure to comply with the UK Government's obligations under international law.

Theme 2(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?

115. The HRA makes a principled and deliberate distinction between acts of public authorities made pursuant to subordinate legislation that breach convention rights but where the breach is mandated by primary legislation; and acts which are made pursuant to subordinate legislation where the breach is not mandated by primary legislation. The distinction is present in the structure of HRA s6. Thus, a public authority (including a court or tribunal) acts unlawfully if it gives effect to a provision of a regulation that contains a provision that discriminates in breach of convention rights unless that discrimination is required by the parent piece of primary legislation.

116. The Supreme Court decision of *RR v SSWP* [2019] 1 WLR 6430 provides an example of the provisions of s6 in action. It concerned one particular group of claimants to which the bedroom tax – or size criteria – had been applied by regulations. The general challenge by the disabled to the bedroom tax had failed applying the general approach to decisions that were

[23] See Policy Exchange Submission to the Joint Committee on Human Rights "20 years of the Human Rights Act" 18 September 2018: Richard Ekins and Graham Gee.

not manifestly without reasonable foundation – see [69] above – but there was one very specific circumstance where the challenge succeeded. This was where the size criteria themselves proceeded on assumptions that were discriminatory. Thus the assumption in the size criteria that a couple could share a bedroom was falsified where the disability of one of the partners meant that this was not possible. This was discrimination on the grounds of disability that could not be justified. In *RR* the Supreme Court held that a local authority or tribunal on appeal confronted by this position should refuse to apply the discriminatory assumption. The assumption in the size criteria was not mandated by the primary legislation, and it was accordingly unlawful to give effect to it.

117. The Bar Council regards s.6 HRA (and accordingly cases such as *RR*) *as* reflecting a correct and principled approach. The sovereignty of parliament is protected by the approach to primary legislation; but it is correct that effect is not given to subordinate legislation that is incompatible with convention rights if that incompatibility is not required by the parent act.

Theme 2 question (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?

118. The essential determinant as to whether a person falls under UK jurisdiction for the purposes of the Convention and the HRA when overseas, is whether s/he is under UK authority and control, that is, the international law concept of 'state agent authority and control'.[24] The present position is an aspect of the role of the HRA in bringing rights home.

119. This applies, for example, in the context of embassies. The Bar Council assumes however, that the question is addressed primarily to the position of the British military when operating overseas; an area that has garnered significant political debate, albeit not always legally well-informed. In relation to that issue, there are different lines of case law relating to different factual circumstances reflective of the way that the Courts ensure that context is central to the delineation of rights' protection (in much the same way as applies in the context of tort law).

120. Specifically, the case law relating to the obligations of the British state towards British soldiers when operating overseas in non-combat and combat situations is different to the case law that applies in relation to the rights of military detainees and civilian populations. In relation to the latter two categories, the international humanitarian law of armed conflict ("IHL") modifies the effect of the Convention. Further, the UK has a right to derogate from

[24] More fully, "*the exercise of jurisdiction…involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that state or who have been brought within that states control." Bankovic case 11 BHRC 435* cited by CA in *R (Smith) v Coroner of Oxfordshire* [2011] 1 AC 1 at 34 §16.

the Convention pursuant to Article 15 including in relation to "*deaths resulting from lawful acts of war*" but not in respect of torture, inhuman or degrading treatment, slavery or retrospective criminal penalties: Arts 3, 4 and 7 respectively. This is dealt with at paragraphs 102 – 105 above.

121. The Bar Council does not consider that it is for it to comment on whether there is 'a case for change', which is a political matter. As to the legal implications however, the Bar Council notes that the current position under the HRA ensures that the scope of its application is identical to 'jurisdiction' under Article 1 of the Convention. This ensures that the British courts can hear and determine any case that could be considered by the ECtHR. Any restriction of the scope of application of the HRA would not alter the 'jurisdiction' of the United Kingdom under Article 1 of the Convention (and the IHRAR has made clear that it is not considering UK withdrawal from the Council of Europe). Consequently, individuals who could no longer bring a case under the HRA would be obliged to take their case directly to Strasbourg, which in turn would not benefit from factual findings and reasoned analysis by the domestic courts. Forseeably, the ECtHR could find violations by the United Kingdom, which would not have been found by the domestic courts. Thus, in opposing an amendment tabled to remove the Armed Forces from the Human Rights Bill Lord Irvine of Lairg stated:

> "*I am not aware that the chiefs of staff have made any representations to the government along the lines of this amendment. The Government is plainly answerable in Strasbourg for the actions of the Armed Forces which plainly engage the responsibility of the state. Individuals aggrieved at the actions of the Armed Forces, would, if the Bill were amended in the way that is proposed, still be required to go to Strasbourg to argue their case because they would be unable to rely on their convention rights before our domestic courts*."

122. Lord Goodhart further noted: "*The English courts know perfectly well, - no doubt better than the European Court of Human Rights – the importance of discipline in the British Army and apply the law sensibly and properly…*" [Hansard, House of Lords, 19 January 1998, Col. 1352-1359].

123. Finally, it should be noted that much of the debate surrounding the application of the HRA to soldiers overseas is in fact concerned not with the HRA at all, but with tort law. It was Parliament that in 1987 (after the Falklands War) decided to remove the immunity of the armed forces from tort liability by way of amendment of the Crown Proceedings Act 1947. As accepted by all the judges in *Smith v. MoD*, there remains today a common law principle of "combat immunity": [2014] AC 52, [89] per Lord Hope (the doctrine's existence is "not in doubt") (judgment of majority). It is now 33 years since British soldiers have been able to sue the Ministry of Defence. Despite numerous operations overseas, the Bar Council is not aware of significant litigation.

The case law

124. The first case in which the question of extra-territorial application of the HRA to British soldiers was raised was the case of *R (Smith) v Oxfordshire Assistant Deputy Coroner and Secretary of State for Defence* [2011] 1 AC 1. That case arose out of an inquest into the death of Private Smith from heat illness in Iraq. During the inquest, the question arose as to the scope of the Coroner's investigation, that is, whether it entailed an obligation under Article 2 of the Convention to investigate not just the direct cause of death but also its wider circumstances. The latter obligation arises out of the State's duty under Article 2 not only to have in place laws to protect the right to life, but also to ensure an investigative system into potential breaches of the right to life by the state, in particular in relation to deaths of individuals under the State's authority and control, most obviously in prisons: *R (on the application of Amin) v Secretary of State for the Home Department* [2004] 1AC 653 at [31] .The Secretary of State for Defence argued before the inquest that despite Private Smith being under its authority and control, there was no obligation to investigate the wider circumstances surrounding his death because he had not died on British soil, such that the HRA did not apply. The High Court and the Court of Appeal rejected that argument. They noted that UK law applied to soldiers operating outside the UK and that the HRA was no exception. Lord Clarke M.R. in the Court of Appeal stated as follows:

> *"…there is no question but that members of the British armed forces are subject to United Kingdom jurisdiction wherever they are. They remain subject to United Kingdom military law without territorial limit and may be tried by court martial whether the offence is committed in England or elsewhere. They are also subject to the general criminal and civil law. Soldiers serve abroad as a result of and pursuant to the exercise of United Kingdom jurisdiction over them. Thus, the legality of their presence and of their actions depends on their being subject to United Kingdom jurisdiction and complying with United Kingdom law. As a matter of international law, no infringement of the sovereignty of the host state is involved in the United Kingdom exercising jurisdiction over its soldiers serving abroad.*
>
> *30 It is not in dispute that the army owes soldiers a duty of care while they are in Iraq, as elsewhere. However, it does not follow from this that a soldier in Iraq is within the jurisdiction of the United Kingdom under the Convention. We stress that we are not saying that such a soldier is within the jurisdiction merely because the army may owe soldiers a duty of care. We recognise that that is a different question. However, it is accepted that a British soldier is protected by the 1998 Act and the Convention when he is at a military base. In our judgment, it makes no sense to hold that he is not so protected when in an ambulance or in a truck or in the street or in the desert. There is no sensible reason for not holding that there is a sufficient link between the soldier as victim and the United Kingdom whether he is at a base or not. So too, if he is court-martialled for an act committed in Iraq, he should be entitled to the protection of article 6 of the Convention wherever the court martial takes place: see in this regard per Lord Brown in the Al-Skeini case, at para 140."*

125. Whilst the Supreme Court overturned the High Court and Court of Appeal in that case, three years later in *Smith v Ministry of Defence* [2014] AC 52 the Supreme Court reversed itself,

in substance upholding the reasoning of the High Court and Court of Appeal in the first *Smith* case.

126. As regards the position of detainees, the Government conceded in *R (Al-Skeini) v Secretary of State for Defence* that when an individual is within a UK military base, he is within the jurisdiction of the United Kingdom for the purposes of the application of the Human Rights Act. However, in that case several of the applicants were not detained but killed outside the military base. The Strasbourg Court, in examining their cases in *Al-Skeini and others v United Kingdom* (App. No. 55721/07) [2011] ECHR 55721/07 reiterated established case law, which provided that whilst jurisdiction was primarily territorial, it could arise under other exceptional circumstances.

127. First, the acts of diplomatic and consular agents, who were present on foreign territory in accordance with provisions of international law, might amount to an exercise of jurisdiction when those agents exert authority and control over others.

128. Secondly, the exercise of extra-territorial jurisdiction through the consent, invitation or acquiescence of the Government of that territory, such that the contracting state exercised all or some of the public powers normally to be exercised by that Government. Thus, where, in accordance with custom, treaty or other agreement, authorities of the contracting state carried out executive or judicial functions on the territory of another state, the contracting state might be responsible for breaches of the Convention thereby incurred, as long as the acts in question were attributable to it rather than to the territorial state.

129. Thirdly, the use of force by a state's agents operating outside its territory might bring the individual thereby brought under the control of the state's authorities into the state's art 1 jurisdiction. That principle had been applied where an individual was taken into the custody of state agents abroad. Whenever the state through its agents exercised control and authority over an individual, and thus jurisdiction, the state was under an obligation under art 1 to secure to that individual the rights and freedoms under art 1 of the Convention that were relevant to the situation of that individual. In that sense, therefore, the Convention rights could be 'divided and tailored' (contrary to what the Supreme Court had understood in *Al-Skeini*).

130. Fourthly, the obligation to secure, in an area over which the contracting authority exercised effective control and authority, the rights and freedoms set out in the Convention whether exercised directly, through the contracting state's own armed forces, or through a subordinate local administration. The fact that the local administration survived as a result of the contracting state's military and other support entailed that state's responsibility for its policies and actions. The controlling state had the responsibility under art 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and

those additional Protocols which it had ratified. It would be liable for any violations of those rights. It was a question of fact whether a contracting state exercised effective control over an area outside its own territory. The 'effective control' principle of jurisdiction did not replace the system of declarations under art 56 of the Convention (formerly art 63) which the states decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible.

131. The position under the Convention in territories where IHL applied was subsequently considered. In its judgment in *Hassan v United Kingdom* (App. No. 29750/09) [2014] ECHR 29750/09 it held that Mr. Hassan had been under the jurisdiction of the UK following his capture by British troops. While it was true that certain operational aspects relating to T's detention at Camp Bucca had been transferred to US forces, the UK had retained authority and control over all aspects of the detention relevant to the applicant's complaints under art 5 of the Convention. Further, once T had been cleared for release and taken to the civilian holding area, he had remained in the custody of armed military personnel, and under the authority and control of the UK until the moment he had been let off the bus that had taken him from the camp. As such, he had been within the jurisdiction of the UK for the purposes of Article 1 of the Convention.

132. However, the Court held his detention had not violated Article 5. In that regard, it noted that the lack of formal derogation under art 15 of the Convention, did not prevent the court from taking account of the context and provisions of IHL. In cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who posed a threat to security were accepted features of IHL, article 5 could be interpreted as permitting the exercise of such broad powers. Deprivation of liberty, pursuant to powers under IHL had to be lawful to preclude a violation of art 5(1) of the Convention. Thus, detention had to comply with IHL and be in keeping with the fundamental purpose of art 5(1) of the Convention; to protect the individual from arbitrariness. Similarly, the procedural safeguards in relation to detention: art 5(2) and (4) of the Convention also had to be interpreted in a manner which took into account the context and the applicable rules of IHL. Whether the situation in South East Iraq in late April and early May 2003 was characterised as one of occupation or of active international armed conflict, the four Geneva Conventions had been applicable. The individuals capture and detention had been consistent with the powers available to the UK, and the third and fourth Geneva Conventions, and had not been arbitrary, such that there had been no violation of art 5 of the Convention (see [103]-[107], [108]-[110], [111] of the judgment).

133. This approach to Article 5 was applied by the Supreme Court in *Al-Waheed v Ministry of Defence; Mohammed (Serdar) v Ministry of Defence and another (No 2) (Qasim and others intervening)* [2017] 2 WLR 327, albeit in the case of non-international armed conflict, where detention of combatants was mandated by UN Security Council Resolutions.

134. The Supreme Court held that irrespective of whether customary international law sanctioned the detention of combatants during a non-international armed conflict, Security Council Resolutions 1546/2004 and 1383/2001, as extended by Resolution 1890/2009, in principle constituted authority for the detention and internment of enemy combatants in Iraq and Afghanistan respectively where it was necessary for imperative reasons of security; that the United Kingdom was not restricted by the policy applied by British armed forces which limited detention to 96 hours; that article 5 of the Convention required modification to accommodate its six permitted grounds of detention with the power to detain; that the six permitted grounds, having been formulated in relation to peacetime conditions, did not readily adapt to a military context involving a non-Convention state and they were to be seen, not as exhaustive, but as illustrations of the exercise of the power to detain in the course of either an international or a non-international armed conflict; that their objective, which was to provide protection against arbitrary detention, was achieved where there was a legal basis for detention and the power to detain was not exercisable on grounds which were unduly broad or discretionary; that the United Kingdom's procedure governing military arrest and detention in Afghanistan was sufficiently precise and comprehensive to meet the standards of article 5.1; and that, accordingly, article 5.1 as modified did not prevent a Convention state from acting under authority conferred by a United Nations Security Council Resolution.[25] (post, paras 28, 30, 38–39, 50, 63, 93, 119, 134–136, 164–167, 180, 188, 224, 232).

135. Accordingly, the establishment of jurisdiction did not hinder the British military in carrying out security operations.

136. On 8 October 2013 Policy Exchange released a report –'The Fog of Law: An introduction to the legal erosion of British fighting power'. This was released in the light of the Smith cases but before the nuanced case law that developed subsequently, which modified the application of the Convention by reference to IHL. It recommended:

- The government should introduce legislation to define Combat Immunity to allow military personnel to take decisions without having to worry about the risk of prosecution.
- Parliament should legislate fully to exempt the MOD from the Corporate Manslaughter and Corporate Homicide Act 2007.
- The UK should derogate from the ECHR during deployed operations. Instead, the government should define the Law of Armed Conflict (LOAC) as the relevant body of law to govern operations.
- Legal aid should be removed from lawsuits brought by non-UK persons against the government in line with the Ministry of Justice's current proposals for reform.

[25] See paras 28, 30, 38–39, 50, 63, 93, 119, 134–136, 164–167, 180, 188, 224, 232 in *Al-Waheed v Ministry of Defence; Mohammed (Serdar) v Ministry of Defence and another (No 2) (Qasim and others intervening)* [2017] 2 WLR 327

137. In terms of legal objectives, none of these involve restricting the scope of the HRA in terms of its jurisdictional reach. The Bar Council reiterates that to limit its jurisdictional reach would have the significant negative consequence of individuals having their cases heard for the first time in the Strasbourg Court rather than being fully considered and analysed by British judges.

Conclusion

138. The Bar Council believes that the HRA has worked and continues to work well. The UK courts take into account and are informed by the jurisprudence of different jurisdictions, including Strasbourg. The central machinery of the HRA – ss.2, 3 and 4 has operated well and stood the test of time.

139. The Bar Council does not regard any statutory intervention desirable in connection with s.2 insofar as it deals with ECtHR caselaw or the HRA more generally.

140. The Bar Council would resist any amendment to the relationship between s.3 and s.4 of the HRA. The strong interpretative duty created by section 3 is appropriate in the context of bringing rights home and the relationship between s.3 and s.44 respects the constitutional architecture of the U.K.

141. The Bar Council does not consider that the application of s.3 by the courts has illegitimately undermined the will of Parliament. A simple amendment to Schedule 2 would strengthen Parliamentary supervision of remedial orders by introducing a third option of amending a draft order rather than the binary choice of approving or rejecting the draft. Amendments to Parliamentary standing orders could provide the detailed procedure.

The Bar Council
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For further information please contact

Eleanore Hughes, Policy Manager, Regulatory Affairs, Law Reform & Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: EHughes@BarCouncil.org.uk