Independent Human Rights Act Review (IHRAR): Call for Evidence

RESPONSE OF GARDEN COURT CHAMBERS

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Introduction: Garden Court Chambers and our expertise

1. Garden Court Chambers is a multi-disciplinary chambers based in London. It has 200 barristers (including 26 Queen's Counsel) and is one of the largest in the country with over 40 years of experience in cases with a human rights context. Details are here: https://www.gardencourtchambers.co.uk/.

2. Around a third of chambers' members practise in criminal law, another 39 in family law and the remainder in civil law, comprising public and administrative law, housing law, inquests, immigration, civil liberties, and community care. In our practices we act predominantly for individuals or not-for-profit organisations. A large part of this work is either legally aided or, in the case of not-for-profit organisations, pro bono or with the benefit of a protective costs order. Some is conducted on conditional fee arrangements. Although not always "high value" in monetary terms this work is invaluable for the individuals and organisations concerned and can often have wider public interest implications, playing a key role in access to justice often for

disadvantaged groups, in ensuring equality before the law and in maintaining the rule of law by holding the executive and other public authorities to account.

3. Significant cohorts of the clients we represent face barriers in access to justice and effective participation in legal proceedings arising from factors such as physical or mental disability, race and ethnic origin, language, gender, education and social class. Many have a past experience of violence and abuse and are victims or potential victims of serious human rights violations in the UK and/or abroad.

4. Our experience of the Human Rights Act 1998 (HRA) and of human rights issues raised in litigation runs across all disciplines that we practise in. We are fully conversant with human rights arguments, whether that is in day-to-day practice in first instance hearings (Magistrates' and Crown Courts, County Courts, tribunals), in judicial review claims in the High Court, on appeal to the Court of Appeal and Supreme Court or representing individuals in their applications to the European Court of Human Rights (ECtHR).

5. The purpose of the HRA was and continues to be that human rights are made integral to our domestic law and legal practice, including the longstanding traditions established over many centuries in the common law of recognising and protecting fundamental rights.

Executive Summary

6. We believe, based on over 40 years' of experience of human rights issues arising in litigation, that on the whole the relationship between the domestic Courts and the ECtHR works well. It is a symbiotic one, with the two jurisdictions informing and influencing the other and largely marching "hand in hand" with our common law protections of civil liberties and human dignity. We see no need to amend the HRA.

7. Legislating so as to encourage departure from ECtHR jurisprudence is likely to undermine and distort the development of human rights protections in the UK.

It risks creating protection gaps, resulting in individuals having to undertake lengthy and costly applications to the ECtHR against the UK government, thereby involving the UK government in expense and reputational damage (if found by the ECtHR to have breached a Convention right). The HRA provides for human rights issues to be considered by domestic Courts within the context of domestic law, traditions and culture.

8. The UK Courts do not slavishly follow Strasbourg jurisprudence but rather approach decisions critically, and await a clear line of consistent jurisprudence from the ECtHR before interpreting domestic law and practice to ensure compatibility with Convention rights. They only rarely make declarations of incompatibility.

9. We provide examples of the HRA informing the law in the areas of criminal justice, children's rights, inquiries into the circumstances in which a person has died, and holding public authorities to account.

10. We note instances where domestic Courts have declined to follow ECtHR jurisprudence, notably in the areas of prisoners' rights, and also note where domestic Courts have applied a high degree of deference to Parliamentary decisions (in the areas of welfare benefits, compensation for miscarriages of justice, assisted dying and the relationship between private sector landlords and tenants).

11. It is our view, in relation to the "margin of appreciation" or deference given by domestic Courts to Parliament, that if anything Courts have been too cautious and should be more robust.

12. We note that Courts have observed that judicial decision-making has been enhanced by judicial dialogue between the domestic Courts and ECtHR, notably in the area of possession claims brought by public authority landlords and hearsay evidence in the criminal Courts.

13. We believe that sections 3 and 4 HRA respect Parliamentary sovereignty. Primary legislation cannot be struck down; a declaration of incompatibility does not have the effect of requiring a public authority to act differently. Instead, the mechanisms identify human rights breaches and, if a human rights

compatible reading is not possible, allow the Minister to consider the possibility of legislating to remedy the breach. There is no compulsion on the Minister to do so.

14. Section 3 interpretation has been used in order to afford rights enjoyed by heterosexual couples to same sex couples, in anticipation of Parliament's subsequent intention in the Civil Partnership Act 2004. It is an important tool, both to ensure that legislation passed prior to October 2000 is compliant with the modern framework of human rights, and to identify and remedy any possible human rights breaches that Parliament may have inadvertently committed in legislation passed since HRA came into force.

15. Section 4 declarations of incompatibility are made rarely. When they have been made, Parliament has legislated so as to remedy them.

16. Declarations of incompatibility in relation to secondary legislation have been helpful tools in ensuring that the will of parliament is put into effect and in clarifying the law, as accepted by the Government.

17. We consider that the territorial extent of the HRA, applying to actions of public authorities in the UK and only outside the UK where the UK is in effective control of that territory, as set out by the ECtHR in *Al Skeini* is correct. It would be wrong in principle for British troops not to be subject to the same human rights obligations when outside the UK as they are when inside it.

18. We feel compelled to express our concern that this "review" is a fig leaf, designed to add credence to the unjustified criticisms of the HRA conducted by media and ministers who either fail to understand the legislation or who have their own agenda to pursue. We set out below evidence which demonstrates that the HRA is working as it should and in a way which has enhanced both the rights of the citizen and the global standing of the United Kingdom as a beacon of justice. What should come out of this review is a commitment from government to publicly support the HRA, to explain to the public how it works and its positive effects, and to promote the positive dialogue between the arms of the State that the HRA allows.

Theme 1: the relationship between domestic Courts and the European Court of Human Rights (ECtHR)

The IHRAR welcomes any general views on how the relationship is currently working, including any strengths and weaknesses of the current approach and any recommendations for change.

Detailed questions:

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?
b) When taking into account the jurisprudence of the ECtHR, how have domestic Courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?
c) Does the current approach to 'judicial dialogue' between domestic Courts and the ECtHR satisfactorily permit domestic Courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

General response

19. We believe, based on over 40 years' of experience of human rights issues arising in litigation, that on the whole the relationship between the domestic Courts and the ECtHR works well. It is a symbiotic one, with each informing and improving the other. We see no need to amend the HRA.

20. The purpose of the HRA was to bring human rights home: to make the rights enshrined in the European Convention of Human Rights enforceable in our domestic Courts thereby reducing the need for individuals to undergo the "inordinate delay and cost" of applying to the Strasbourg Court to obtain just satisfaction for human rights violations.[1] In order for the HRA to be effective in

[1] *Rights Brought Home: The Human Rights Bill*, White Paper (1997).

furthering this aim, there is a need for a degree of consistency in interpretation of Convention rights between domestic Courts and the ECtHR. Domestic Courts have applied ECtHR jurisprudence appropriately and consistently. Loosening the mechanism of section 2 so as to encourage further departure from ECtHR jurisprudence is entirely unnecessary and would undermine a key purpose of the HRA. It would lead to inconsistency and disruption to the symbiotic relationship between the domestic Courts and the ECtHR. Indeed, legislating so as to encourage departure from ECtHR jurisprudence is likely to result in more individual applications being made to the ECtHR against the UK government, thereby involving the UK government in expense and reputational damage (if found by the ECtHR to have breached a Convention right). Section 2 permits domestic Courts to acknowledge and subsequently remedy breaches of Convention rights in a domestic context.

Application of section 2 in practice

21. Both the framework of the HRA, and also importantly the substance of the ECHR rights themselves and ECtHR jurisprudence, allow considerable scope for our Courts to apply domestic legal frameworks. The UK Courts do not follow Strasbourg jurisprudence unquestioningly but rather approach decisions critically and await a clear line of consistent jurisprudence from the ECtHR before departing from or developing existing domestic law and practice. The jurisprudence of the ECtHR itself carefully guards the rights of individual States to legislate for themselves and to operate within their own national legal frameworks, except where there are clear violations of Convention rights.

22. The starting point is that domestic Courts should follow clear and consistent Strasbourg case law, as expressed by Lord Slynn in the first case to reach the House of Lords after HRA had come into force, and which concerned Article 6(1): *"Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the*

European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence." [26], *R (Alconbury Developments) v Secretary of State for Transport and the Regions* [2001] UKHL 23 [2003] 2 AC 29, HL.

23. The requirement to take into account the decisions of ECtHR does not mean that the facts of a particular case are treated as a binding precedent, see Underhill J in *R (Saunders) v IPCC* [2008] EWHC 2372 (Admin), [2009] 1 All ER 379*: "Decisions of the European Court of Human Rights on the facts of a particular case ought not to be treated as a binding precedent, even in a case where the material facts appear to be similar. The only authoritative parts of a judgment are the statements of principle which it expounds*."

24. The requirement simply means that domestic Courts should keep up with the ECtHR jurisprudence, see Lord Bingham in *R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323, HL: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*." [20]. The "no more" principle was applied in *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435, when Lord Hope said: "*Lord Bingham's point, with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation*."

25. We set out below particular examples from our areas of practice where the application of Convention rights have led to decisions respecting family rights, protecting children, allowing for full investigations into certain deaths, and ensuring that the police and public authorities act fairly.

Children's rights:

- *Re B (a Child)* [2013] UKSC 33: where the Supreme Court drew upon ECtHR jurisprudence in order to decide that the test for severing the relationship between a child and a parent is very strict and an adoption order should only be made in exceptional circumstances. This case led to the now commonly used phrase in care cases that adoption should only take place where "nothing else will do".
- *Re D (A Child)* [2016] EWFC 1: where Sir James Munby, then President of the Family Division, was considering whether an adoption order should be made where the parents had learning disabilities. He said "*…everything must be done to preserve personal relations and, where appropriate, 'rebuild' the family*" and that *"[i]t is not enough to show that a child could be placed in a more beneficial environment for his upbringing*" in order for an adoption order to be made. This case highlighted the requirement on local authorities, in order to comply with the State's positive obligations under Article 8, to first provide support to parents with learning disabilities in order to preserve a family unit before the course of adoption is embarked upon.
- *A Local Authority v M* [2018] EWHC 870 (Fam): the Local Authority had applied for a Female Genital Mutilation Protection Order ("FGMPO") to prevent a child from travelling to Sudan with her mother as there were concerns that her father's family would subject the child to FGM. The Court took into account, in deciding what order to make under the Female Genital Mutilation Act 2003, ECtHR jurisprudence on the state's responsibility to protect individuals against Article 3 harm if there were substantial grounds to believe that the individual would face a real risk of such harm if they were removed to another country. This is an example of the ECtHR jurisprudence assisting in the interpretation of the state's responsibility to protect individuals, and specifically children and other vulnerable persons, from harm in family cases.

Extended inquiries in inquests into "*in what circumstances*" a person died:

- *R (Amin) v Secretary of State* [2003] UKHL 51, [2004] 1 AC 653, HL: where their Lordships decided that the state's obligations under Article 2 required a public inquiry into the circumstances in which Zahid Mubarak had died whilst detained Feltham Young Offenders Institute, following a violent attack on him by his racist cellmate, led to Parliament enacting section 5(2) Coroners and Justice Act 2009 which extended the ambit of inquests beyond investigation of "how" a person died into an investigation of "in what circumstances" a person died when his or her death might be at the hands of the state.
- the *Hillsborough Inquests*, held 25 years after the deaths had occurred, were another example of Article 2 requiring an extended investigation into the circumstances of those deaths. The Hillsborough Inquests righted a historic wrong, and also investigated features of the deaths not previously investigated.

- *R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, [2011] 1 WLR 1460: where the High Court and Court of Appeal relied on the HRA in deciding that there needed to be funding to allow the family of a child who had died following an asthma attack to be represented at the inquest in order to ensure an Article 2 compliant investigation.
- the recent inquest into the death of *Ella Adoo-Kissi-Debrah*, who lived near the South Circular Road and who died in 2013 in circumstances where it was found that air pollution made a material contribution to her death, and was viewed as a landmark decision by government advisors on air pollution: https://www.bbc.co.uk/news/uk-england-london-55330945.

Holding police and public authorities to account:

- *DSD v Commissioner of Police* [2018] UKSC 11, [2019] AC 196: where the police were held liable to victims of the "black cab" serial rapist, John Worboys. The Supreme Court agreed with the Court of Appeal that the positive obligation to

investigate allegations of ill-treatment is not solely confined to cases where allegations have been made against state agents. Article 3 (prohibition on torture and inhuman or degrading treatment) places a positive duty upon the police to investigate crimes committed by non-state persons in order to ensure that individuals are protected against ill-treatment of the seriousness envisaged by Article 3. This is a duty which is owed to individual victims. In order to be an effective deterrent and serve its purpose, the Court stated that the law prohibiting ill-treatment must be rigorously enforced and complaints of such conduct must be properly investigated. This case would not have succeeded but for the taking into account of Strasbourg authority in relation to Article 3 ECHR.

- *ZH v Commissioner of Police* [2013] EWCA Civ 69, [2013] 1 WLR 3021: where the police were held liable for the suffering of a boy who had autism and epilepsy and had been forcibly removed by them from a swimming pool. Lord Dyson pointed out that "*operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything that they do*." In that case, damages were awarded for breaches of Articles 3, 5 and 8, having found the following facts: *"ZH was a very vulnerable young man. He suffered from autism and was an epileptic. He was only 16 years of age at the time. The episode lasted about 40 minutes. He would not have understood what was going on and why he was being forcibly restrained by a number of officers by the poolside and later in the police van. He was restrained by handcuffs and leg restraints. He was wet and lost control of his bowels. His carer was not permitted to get into the cage to comfort him. He had done nothing wrong and he was extremely distressed and crying. The consequence of the experience was that he suffered (i) post-traumatic stress disorder from which he was only recovering by the time of the trial (more than two years after the event); and (ii) a significant exacerbation of his epilepsy for about two years. On the other hand, it is also relevant that the officers did not intend to humiliate or debase him, although this is not a conclusive factor."* [76].

- *Zenati v Commissioner of Police* [2015] EWCA Civ 80 [2015] QB 758: where an innocent man had remained detained in custody after evidence had emerged which showed that there were no grounds for continuing to suspect him of the commission of an offence. The Court of Appeal held that the requirements of Article 5 ECHR prevented people being detained if material information was not brought to the attention of the Court: see Lord Dyson at paragraphs 41-44.

Deprivation of Liberty Safeguards for incapacitated persons:

- the importance of human rights protections for people lacking capacity and deprived of their liberty was emphasised by the Supreme Court judgment in *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor) (Appellants) v Surrey County Council (Respondent)* [2014] UKSC 19. The Court in that case, taking into account ECtHR jurisprudence, found that deprivation of liberty is a universal concept which is defined without reference to disability, and regardless of compliance and non-objection of the individual concerned. What is relevant is whether action taken or care provided does, in fact, represent an intrusion and restriction on the lives of individuals. Where it does, as in that case it did, periodic independent checks are required to ensure that the arrangements are in the person's best interests.

26. We note that the duty to take into account ECtHR jurisprudence at section 2 has not led to the Courts over-reaching into key policy areas that are recognised to be the domain of Parliament. There are a number of examples of the Courts choosing not to interfere with decisions of Parliament.
    - Prisoners and voting: it is well known that the decision of ECtHR (*Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41) that prisoners should be permitted to vote in the UK has not been implemented. Not only has Government expressed to Parliament a clear intention not to legislate in

order to amend the Representation of the People Act 1983, but the Courts have resisted an application for a declaration of incompatibility: *R (Chester) v Secretary of State for Justice and another*; *McGeoch v Lord President of the Council and another* [2013] UKSC 63 [2014] AC 271.

- Determination of welfare rights: the Supreme Court has declined to hold that decisions relating to homelessness duties owed by local housing authorities to individuals constitute "civil rights" and thus should be subject to the procedural requirements at Article 6(1): *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] AC 624. The Supreme Court in that case declined to follow a decision of the ECtHR, instead favouring the earlier Supreme Court decision with which the Strasbourg Court had disagreed.[2] The Court criticised in particular the ECtHR decision's failure to address "*concerns over-judicialisation of the welfare services, and the implications for local authority resources*".

- Compensation for miscarriages of justice: section 133 (1ZA) Criminal Justice Act 1988 limits compensation for those who are discovered to have been wrongly convicted to situations where "*a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice*". The Supreme Court declined to state that section 133(1ZA) was incompatible with Article 6(2) in a case brought by two people, who had been convicted of serious criminal offences and sentenced to imprisonments, whose convictions were subsequently quashed on the grounds that fresh evidence rendered the convictions unsafe but where compensation had been declined on the grounds that the new evidence did not show beyond reasonable doubt that there had been a miscarriage of justice: *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2019] 2 WLR 440.
- Assisted dying: despite the Courts accepting that the right to respect for private life under Article 8 was engaged by section 2(1) Suicide Act 1961, whereby assisted suicide is a criminal offence, including where someone has

[2] *Ali v United Kingdom* (2015) 63 EHRR 20; *Ali v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2010] 2 AC 39, SC (E).

assisted a terminally ill loved one to take their own life, the Courts have consistently declined to make a declaration of incompatibility, considering this is a matter best left to Parliament: *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 A.C. 345 and *R (Nicklinson) v Secretary of State for Justice* [2014] UKSC 38, [2015] AC 657.

- Relationship between private landlords and tenants: the Supreme Court in *McDonald v McDonald* [2017] AC 273 decided that the Article 8 right to respect for his or her home did not extend to a private tenant being able to raise the proportionality of making a possession order where the landlord had a right, in domestic law, to possession. The Court considered a line of ECtHR authority and followed it to the extent that it was conceded that Article 8 is "engaged" in the context of possession proceedings brought by private landlords. The Court found, however, that there was no requirement for a proportionality exercise to be conducted by the Court on hearing a possession claim under section 21 Housing Act 1988 in order to avoid a violation of the occupier's rights under that article. The Court held that the existing statutory framework already adequately balances the competing human rights claims of the property rights of a claimant for possession and the home rights of the occupier. In reaching this decision the Supreme Court explicitly relied upon the wide margin of appreciation afforded to the state in the context of housing,[3] and gave significant weight to the democratic legislative processes giving rise to the statutory framework in question. This case cemented the clear division under domestic law between possession claims by public authorities, and those brought by private parties, as far as the applicability of human rights law is concerned. This was despite certain Strasbourg decisions finding a requirement for proportionality analysis under Article 8 in the context of private claimants,[4] demonstrating the willingness of our domestic Courts to develop human rights jurisprudence autonomously of the Strasbourg Court.

[3] *Blečić v Croatia* (2006) 43 EHRR 48.
[4] Lemo v Croatia [2014] Application Nos 3925/10, 3955/10, 3974/10, 4009/10, 4054/10, 4128/10, 4132/10 and 4133/10) (unreported); Brežec v Croatia [2013] Application No 7177/10.

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?

27. We start by observing that "margin of appreciation" is a concept which the ECtHR applies to states, and is not a concept that should be applied to domestic Courts in relation to the legislature. However, domestic Courts do use the phrase when, in practice, giving deference to Parliament as the legislature.

28. We note that the concept of "margin of appreciation", or rather deference to Parliament (and the limits of that deference) in the context of the HRA, sits comfortably within our domestic constitutional framework and the concept of separation of powers. As described by Lord Bingham in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68: "*The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions*." This approach was expressly noted to reflect "*the unintrusive approach of the European court*". [29].

29. In that case the House of Lords refused to interfere with the parliamentary finding that the threat of terrorism in the aftermath of the 9/11 attacks was a public emergency threatening the life of the nation justifying derogation from Article 5 ECHR, on the basis that the judgment involved was of a "*pre-eminently political*" nature. However, the Court reviewed the proportionality of the relevant legislative provisions (which allowed for indefinite administrative detention of foreign terrorism suspects) and justified that review

on the basis of the fundamental constitutional role of the Courts: "*the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself*." [42] The Court also drew upon "*the long libertarian tradition of English law dating back to chapter 39 of Magna Carta 1215*" [36] demonstrating the symbiosis of ECHR principles and domestic law.

30. Examples of Courts giving deference to Parliament are those of assisted dying and prisoner voting rights (as above). In the sphere of welfare benefits, and in the field of economic and social policy more generally, it has been held that Courts should not interfere with the balance struck by the executive, save where the executive's justification for the measure in question is 'manifestly without reasonable foundation'. This has led to the Courts rejecting challenges to the bedroom tax (*R (Carmichael) v Secretary of State for Work and* Pensions [2016] 1 WLR 4550) and the benefit cap (*R (DA) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289).

31. The issue was summarised by Lord Mance JSC in *Re Recovery of Medical Cost for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, SC, where he said "*domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis*" [54]. In that case, retrospective legislation enacted by the Welsh Assembly was struck down, principally on the grounds that it did not fall within the Assembly's competence under the Government of Wales Act 2006, but also by reference to the right to peaceful enjoyment of possessions under Article 1 of the First Protocol.

32. It should be noted that the ECtHR has held in the case of *JD and A v United Kingdom* [2020] HLR 5 that the "manifestly without reasonable foundation" test is of limited applicability in the context of Article 14 discrimination claims, applying only to transitional measures to correct an inequality. There are early indications however that our domestic Courts may refuse to follow this

decision, as in the permission decision of McAlinden J in the High Court of Northern Ireland in *Re Cox's Application for Judicial Review* [2020] NIQB 53. This is a further example of the critical approach taken by domestic Courts to the section 2 duty.

33. It is our view that, if anything, Courts are too deferential to the role of Parliament and should be more robust. We consider that the test is put too high and that, where interference with human rights is found, the burden should be on the state to justify such interference rather than any justification being accepted unless it is manifestly without reasonable foundation.

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 be strengthened and preserved?

34. Judicial dialogue arises, broadly, in circumstances where domestic Courts consider that a key or determinative judgment of the ECtHR is wrong, or where there is said to be lack of clarity or inconsistency in the ECtHR's jurisprudence.

35. We consider that judicial dialogue in these circumstances has been helpful, and resulted in decisions which have benefitted from that dialogue. Examples are:

- *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104: where the Supreme Court held that a proportionality inquiry is required under Article 8 where a public authority landlord seeks possession and there is no domestic right to an inquiry into the occupier's circumstances. Lord Neuberger, giving the leading judgment, held that the earlier House of Lords' authorities were not in accordance with the jurisprudence on Article 8 and that a proportionality review was required. He said that conclusion would have been reached even without the most recent decision of ECtHR.

That case was the culmination of extensive judicial dialogue between the House of Lords[5] and ECtHR[6].

- *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373: a case concerning hearsay evidence in criminal proceedings, where the Supreme Court discussed circumstances in which it would decline to follow Strasbourg, the Chamber of the ECtHR having held in *Al Khawaja v UK* (2009) 49 EHRR 1 that hearsay evidence in certain circumstances would be admissible: "*There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case*." (Lord Phillips at [11]) The point was subsequently reconsidered by the Grand Chamber of the ECtHR and its decision modified the earlier decision of the Chamber, drawing substantially on the Supreme Court's decision (*Al Khawaja v UK* (2012) 54 EHRR 23). Lord Bratza said "*The present case affords, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention to which Lord Phillips was referring. The Horncastle case was decided by the Supreme Court after delivery of the judgment of the Chamber in the present case, to which I was a party, and it was, in part, in order to enable the criticisms of that judgment to be examined that the Panel of the Grand Chamber accepted the request of the respondent Government to refer the case to the Grand Chamber. As the*

[5] *Harrow London Borough Council v Qazi* [2004]1 AC 983, HL(E); *Kay v Lambeth London Borough Council* [2006] 2 AC 465, HL(E); *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] AC 367, HL(E)).
[6] *Blečić v Croatia* (2004) 41 EHRR 185; *Connors v UK* (2005) 40 EHRR 9; *McCann v United Kingdom* (2008) 47 EHRR 91; *Cosic v Croatia* (2009) 52 EHRR 1098; *Zehentner v Austria* (2009) 52 EHRR 739; *Paulic v Croatia* (Application No 3572/06) (unreported); *Kay v United Kingdom* [2011] HLR 13.

national judge in a case brought against the United Kingdom, I had the uncomfortable duty under the Convention of sitting and voting again in the Grand Chamber. The judgment of the Grand Chamber, in which I concur, not only takes account of the views of the Supreme Court on the sole or decisive test and its application by the Chamber but re-examines the safeguards in the 2003 Act (and its predecessor, the Criminal Justice Act 1998) which are designed to ensure the fairness of a criminal trial where hearsay evidence is admitted. While, as is apparent from the judgment, the Court has not been able to accept all the criticisms of the test, it has addressed what appears to be one of the central problems identified by the Supreme Court…" [2-3].

36. We observe that the backlog of cases at the ECtHR does not assist judicial dialogue and potentially undermines it. Both judicial dialogue and consistency of judicial opinion would be assisted if the UK was to ratify Protocol 16 of the ECHR, thereby permitting domestic Courts to request that the ECtHR provides a non-binding advisory opinion. This would be a quicker and more effective process and allow UK Courts to request and receive advisory opinions from the ECtHR which would subsequently inform the domestic Courts' decisions.

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

The IHRAR welcomes any general views on how the roles of the Courts, Government and Parliament are balanced in the operation of the HRA, including whether Courts have been drawn unduly into matters of policy. It welcomes views on any strengths and weaknesses of the current approach and any recommendations for changes.

Detailed questions:

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

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

(ii) **If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the Courts?**

(iii) **Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?**

b) **What remedies should be available to domestic Courts when considering challenges to designated derogation orders made under section 14(1)?**

c) **Under the current framework, how have Courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?**

d) **In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?**

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

<u>General response</u>

37. Our response is that the existing arrangement expressly retains Parliamentary supremacy and is underpinned by Parliamentary sovereignty. Unlike, for

example, the US Supreme Court, UK domestic Courts are not permitted under the HRA to declare that an Act of Parliament is unconstitutional and therefore null and void.

38. Parliament retains supremacy and sovereignty in that:

- it was Parliament's decision to confer section 3 and section 4 powers on the Courts.
- Parliament frequently expressly confers power on Courts and tribunals to supervise and review decisions made under controversial legislation including on the merits *(A and Others v Secretary of State for Home Department* [2005] UKHL 71, [2006] 2 AC 221) or on judicial review principles (Prevention of Terrorism Act 2005).
- whatever else Courts do, it is their constitutional role to interpret legislation, to ascertain and give effect to the terms Parliament has used, its intentions and purpose: "*the courts are the authoritative organ for the interpretation of a statutory power*" (*R (Palestine Solidarity Campaign Ltd and another) v Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774, per Lady Arden at 67).
- Courts afford appropriate deference depending on the context, see for example the welfare benefits decision referred to above: *R (Carmichael) v Secretary of State for Work and* Pensions [2016] 1 WLR 4550), *R (DA) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289 and *R (JCWI) v SSHD* [2020] EWCA Civ 542, [2020] HLR 30. See also *McDonald v McDonald* where the Supreme Court's decision that a proportionality inquiry should not be undertaken in cases brought by private landlords against their tenants was based upon its conclusion that the existing statutory framework contained an adequate balance.
- a section 3 reading of legislation as interpreted by the Courts can subsequently be overturned by legislation, as was the case when the House of Lords held that private care homes were not exercising public functions in their provision of care and therefore their residents could not rely on human rights (*YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95. Parliament subsequently legislated so as to bring those private care

homes within the scope of the HRA (Health and Social Care Act 2008, section 145, now at Care Act 2014, section 73).

- where a section 3 reading is not possible, and the Courts make a declaration of incompatibility, that declaration does not prevent public authorities from continuing to apply the primary legislation (section 6(2)(b)).
- a declaration of incompatibility does not strike down legislation, the issue of whether or not to amend, repeal or otherwise deal with the incompatible legislation is a matter for Parliament.
- the mechanisms at section 3 (human rights compliant reading of legislation) and section 4 (declarations of incompatibility) exist to right wrongs potentially contained in Acts of Parliament enacted prior to October 2000.
- in relation to Acts of Parliament enacted since October 2000, Parliament receives a statement from the Minister that the proposed legislation is compatible with Convention rights, if a breach of human rights is subsequently identified by the Courts, the Courts are implementing Parliament's intention to legislate in compliance with the Convention, the Courts' role in identifying legislation or decisions which is incompatible with minimum human rights protections is a proper "check" and functions as part of the constitutional checks and balances.

Are there instances where, as a consequences of domestic Courts and tribunals seeking to read and give effect to legislation compatibly with 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?

Section 3: interpreting legislation

39. The leading authority on how section 3 principles should be applied is the House of Lords' decision of *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557. In that case, the House of Lords interpreted the words "as his or her wife or husband" as extending to same sex partners, for the purposes of Rent Act 1977 and whether the surviving partner of a same sex partnership should be entitled to succeed to the deceased tenant's statutory tenancy. The

Secretary of State, as intervenor, submitted that this was the correct interpretation.

40. It is certainly possible that Parliament, when it enacted the Rent Act 1977, considered that the mechanism for succession should be limited to married couples only (which, at the time, meant married heterosexual couples). The additional mechanism for succession, between heterosexual cohabiting couples, was added by Parliament by amendment in 1988. Again, it is likely that in 1988, Parliament would not have considered that the same mechanism should be applied to same sex couples. However, once HRA came into force, the House of Lords recognised that the failure to provide for succession by same sex couples, on the same basis as different sex cohabiting couples, was discrimination contrary to Article 14 and that it could not be justified. The House of Lords accordingly applied section 3 so as to create a human rights compliant reading of the legislation.

41. Parliament had the opportunity to legislate so as to amend the Rent Act 1977 to exclude same sex couples, following the House of Lords' decision. It did not do so. Indeed, shortly after the House of Lords' decision, it passed the Civil Partnership Act 2004 which amended Rent Act 1977, Housing Act 1985 and Housing Act 1988 so as to provide for statutory succession to certain tenancies to be available on the same terms for same sex couples (whether in a civil partnership or cohabiting) as for different sex couples.

42. *Ghaidan* is therefore an example of a case where section 3 human rights interpretation was appropriately used, to reflect current attitudes and values, and Parliament's subsequent actions, in enacting the Civil Partnership Act 2004, supported this interpretation.

43. In *R v Waya* [2013] 1 AC 294, the Supreme Court applied section 3 to avoid a breach of Article 1, Protocol 1 of the ECHR and read into the Proceeds of Crime Act 2002 a provision that a confiscation order should not be made if, and to the

extent, that to do so would be disproportionate. We presume that it was not the original intention or policy of the 2002 Act that confiscation orders be disproportionate to the extent that they effect double recovery, which is what the amendment avoids. Indeed, Parliament subsequently amended the legislation by way of the Serious Crime Act 2015 to specifically add the proviso created by the Supreme Court into POCA 2002, suggesting that they endorsed the Supreme Court's decision. *Waya* is therefore a good example of a positive dialogue between the Courts and the legislature created by virtue of the HRA.

44. Even in protest cases, which are often more political in substance, it cannot be said that Courts have been drawn into policy issues. Section 3 has had a hugely positive effect in relation to enhancing freedom of expression, requiring the Courts to take Articles 10 and 11 into account when interpreting criminal legislation used against demonstrators. For example, when determining whether particular conduct was reasonable, which amounts to a defence in some cases, the Courts are required to bear in mind the rights to protest and to free speech. In *Percy v DPP* [2002] Crim LR 835, a conviction under section 5 of the Public Order Act 1986 arising out of a protest against an American air base was quashed where the judge had failed to properly take Article 10 into account.

45. Section 3 interpretation is an effective remedy, in that if a person has had his or her human rights breached, the domestic Courts can declare that is the case and award compensation for just satisfaction. Without this mechanism for interpretation, dissatisfied claimants would petition the ECtHR directly, which would require the government to spend resources and face potential embarrassment. Additionally the existing backlog of cases awaiting determination by the ECtHR would increase.

<u>Section 4 declarations of incompatibility</u>

46. We note that a declaration of incompatibility is a last resort and can only be made where the Court decides that a section 3 interpretation is not possible. The effect of a declaration of incompatibility is to put the matter back to the relevant Minister, whose decision it then is whether or not to propose legislation to remedy the incompatibility.

47. Courts are reluctant to make declarations of incompatibility. The Supreme Court in *R (Chester) v Secretary of State for Justice and another*; *McGeoch v Lord President of the Council and another* [2013] UKSC 63 [2014] AC 271 declined to make a declaration of incompatibility despite a finding that the United Kingdom's blanket prohibition on convicted prisoners voting in elections was incompatible with Article 3 Protocol 1 ECHR. The Court noted declarations, including under the HRA, are a discretionary remedy. In light of a previous declaration of incompatibility which had been made with respect to the same legislation[7] and government's indication that it would not amend the provision, in addition to the "*active consideration*" already being given to the issue by UK Parliament, it was considered that there would be "*no point in making any further declaration of incompatibility*".

48. Another example is *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27 [2019] 1 All ER 173, SC. The application was refused on the basis that the NIHRC did not have standing. Had there been standing, the Supreme Court would have made a declaration of incompatibility of the criminalisation of abortion in Northern Ireland on the basis of fatal foetal abnormality, rape or incest, but not in relation to serious foetal abnormality nor in relation to a termination in general.

How have Courts and tribunals dealt with provisions of subordinate legislation that are incompatible with HRA Convention rights? Is any change required?

[7] A decision of the Scottish Registration Appeal Court in *Smith v Scott* 2007 SC 345.

49. Our view is that no change is required. We draw the Review's attention to the process working well, identifying a breach of human rights which the government subsequently accepts.

50. One example of judicial caution is *Cameron Mathieson, a deceased child (by his father Craig Mathieson) v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, SC, where the Supreme Court found that the rules suspending payment of Disability Living Allowance to disabled children once they had been in hospital for 48 days were discriminatory and contrary to Article 14 but declined either to make a declaration of incompatibility or to read the Regulations in accordance with section 3. Lord Wilson JSC said "*the Secretary of State must at any rate be afforded the opportunity to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children following their 84th day in hospital.*" [49]

51. In *C & C v The Governing Body of a School, the Secretary of State for Education and the National Autistic Society* [2018] UKUT 269 (AAC) Regulation 4(1)(c) Equality Act 2010 (disability) regulations 2010, SI 2010/2118 was found to be contrary to Article 14 in so far as it was applied to disabled children with autism who were excluded from school. The Upper Tribunal concluded that the children in those circumstances should be treated as disabled persons, whether by a section 3 complaint reading of the Regulation, or by declaring that it is to be dis-applied. Parliament has had the opportunity to enact primary legislation so as to re-apply Reg 4(1)(c) in these circumstances and has chosen not to do so.

52. In *R (RF) v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin) the Administrative Court quashed certain of the Regulations governing Personal Independent Payments, on the grounds that there was

discrimination, contrary to Article 14, against claimants who had mental health conditions. The SSWP initially sought permission to appeal against the judgment and indicated that the permission to appeal application would be pursued to the Court of Appeal. However, within a month, the Secretary of State confirmed in a written statement to Parliament that permission to appeal would not be sought and that steps would be taken to implement the judgment.[8] This is an example of the positive impact of the HRA, in identifying a breach of human rights and thus drawing it to the government's attention.

53. It is further noted that in nearly every case where the ECtHR has found the UK is in breach of its obligations under ECHR, Parliament has chosen to remedy that breach, demonstrating Parliament's enduring intention to legislate in a Convention compliant manner.

54. An example of this is in relation to Deprivation of Liberty Safeguards for incapacitated persons. Following the decision of the ECtHR in *HL v United Kingdom* (45508/99) [2004] ECHR 720 (concerning the deprivation of liberty of an autistic man with a profound learning disability), Parliament legislated to introduce Deprivation of Liberty Safeguards (frequently known as DoLS) as amendments to the Mental Capacity Act 2005 via the Mental Health Act 2007. The ECtHR held in that case that HL had been deprived of his liberty in violation of Article 5, and that the regulatory structures in effect at that time were insufficiently robust to meet the requirements of that article (a lack of regulation now known as the "Bournewood gap" with reference to the domestic case name). DoLS under the MCA 2005 now ensure that there is an independent professional assessment of (a) whether the person concerned lacks the capacity to make their own decision about whether to be accommodated in the hospital or care home for care or treatment, and (b) whether it is in their best interests to be detained.

[8] (House of Commons (2018) "Welfare: The Secretary of State for Work and Pensions". Hansard: Vol 634, 19 January 2018. Last accessed 7 December 2018 at https://hansard.parliament.uk/commons/2018-01-19/debates/18011939000006/Welfare)

55. The section 3 power provides a means by which such breaches can be brought to the attention of Parliament without necessitating a lengthy and expensive application to the ECtHR.

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?

56. We consider that the law on territorial application was clearly and correctly stated by ECtHR in *Al-Skeini v United Kingdom; Al-Jedda v United Kingdom* (Application No 55721/07) (Application No 27021/08).

57. The starting position is that the ECHR has territorial jurisdiction and so only applies to acts of public authorities in the UK. There is an exception only where the UK is exercising effective control in a foreign jurisdiction, or is exercising public functions in lieu of the foreign jurisdiction. As such, the ECHR applies (in limited circumstances) to actions of the British Army. We stress how limited those circumstances are. It does not apply to actions on the battlefield. It applies where people are in the custody of British troops (as in the case of Baha Mousah who was killed in a British military detention centre). The Court found that, between May 2003 (when the government of Saddam Hussein was removed by Coalition forces) and June 2004 (when the interim Iraqi government acceded to power), the British Army was in effective control of the area of Basra, Iraq, and therefore the HRA applied.

58. If Parliament legislated to remove the application of the HRA, British troops would be able to act with impunity and in disregard of human rights. We do not consider that a different standard should be applied to the actions of British forces outside of the UK to the standard applied inside the UK.

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

59. Many of the declarations of incompatibility have been made in circumstances where the government agrees the legislation is incompatible, for example because it is historic legislation and our understanding of rights has moved on. Two examples are the consequences of recognition of single fathers in surrogacy (*In the matter of Z (A child) (No 2)* [2016] EWHC 1191 (Fam)), and the citizenship rights of illegitimate children (*R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, [2017] 1 AC 365).

60. There is already a clear role for Parliament in the remedial process:

- section 10 provides a power for a minister of the crown to make not only amendments to secondary legislation but also in appropriate cases to primary legislation by order. Procedure for doing this is set out in Schedule 2 paragraph 2(2) and requires a draft of the order to be approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid or it is declared in the order that because of urgency it is necessary to make the order without the draft being approved.
- if representations are made during the 60 day period and changes are made a further draft must be laid before Parliament and a further period of time given (up to 120 days from the date it was first laid). If the order is not approved by resolution of each house in either the original or replacement form by the end of that period it ceases to have effect.

61. In our view there is no need to amend the procedure in order to further enhance the role of Parliament. In fact any such amendment is likely to have the corollary effect of introducing further delay in obtaining a remedial order following a declaration of incompatibility. The process in its present form already involves a significant delay: broadly speaking this it is around two years,

even in cases where there is government agreement during the litigation that the relevant legislation is incompatible.

62. The position for those affected by the incompatibility in the intervening period is insecure, unclear and can result in serious injustice. Using the above two cases by way of illustration:

- *In the matter of Z (A child)(No 2)* [2016] EWHC 1191 (Fam) resulted two years later in the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018/1413.

- *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, [2017] 1 AC 365 resulted three years later in British Nationality Act 1981 (Remedial) Order 2019/1164.

63. In our view any amendment to the remedial order process ought to be such as to streamline it (for instance through Parliamentary approval in a single sitting) rather than to introduce further stages which would doubtless give rise to delay.

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