



Law Society
of Scotland

The Law Society of Scotland's Response

Response to the Independent Human Rights Act
Review

February 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders, and our membership.

The Society's Constitutional Law Subcommittee welcomes the opportunity to respond to this inquiry. The Committee has the following comments to put forward for consideration.

General Comments

Introduction: the Human Rights Act 1998 and Convention Rights in Scotland

The review is into the Human Rights Act 1998 (HRA) but it is important to point out at the outset that questions as to whether Acts of the Scottish Parliament ("ASP") or subordinate legislation or other executive acts by Scottish Ministers are incompatible with Convention rights, are usually not dealt with under the HRA (although they could be) but under the Scotland Act 1998 (SA).

Under section 29(1) and (2) (d) of the SA, a provision in an ASP is "not law" if it is incompatible with any of the Convention rights. Accordingly, any challenge to a provision in an ASP on the grounds that it is incompatible with a Convention right is a "devolution issue" and, as such, requires to be brought under the SA. This is so even although an ASP also is included in the definition of "subordinate legislation" in section 21 of the HRA and so could also be regarded as unlawful under section 6(1) of HRA.

Similarly, under section 57(2) of the SA, a member of the Scottish Government has "no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights." Accordingly, any challenge to such an act on that ground can be brought under the SA even although that act is also unlawful under section 6(1) of the HRA.

It was originally held by the Privy Council that the challenge to executive acts by a member of the Scottish Government had to be brought under the SA (see *R v HMA 2002 UKPC D3 Lord Rodger at para 128*) but it was later held by the House of Lords that it could be brought under either Act but, if it was brought under the Scotland Act, it was not subject to the procedural restrictions in the HRA, such as the time bar for claiming damages in section 7(5) of the HRA (*Somerville v Scottish Ministers 2007 UKHL 44*). The relevance of this decision has been reduced by amendment of the SA which has harmonised the time bar

provisions between the two acts. The key point is that under the SA the Scottish Ministers have no defence to a breach of Convention Rights under the SA as they do under section 6(2) of the HRA.

There have been five cases to date in which Scottish Parliament legislation has been held to be 'not law'. These cases all relate to specific provisions within the statutory scheme rather than to the statute itself or the overall policy objectives. Christopher McCorkingdale, Aileen McHarg and Paul Scott in *The Courts, Devolution and Constitutional Review 36 U. Queensland L.J.289 (2017)* identify that this is so because "the Supreme Court has so far adopted something of a 'dialogic' remedial approach as opposed to a rigid and final strike down.

18 ASPs have been subject to judicial review. 12 on the basis that incompatibility with Convention rights was the dominant ground of challenge. Five cases succeeded on Convention rights grounds: *Cameron v Cottam 2013 JC 12*; *Salvesen v Riddell 2013 SC (UKSC) 236*; *Christian Institute v Lord Advocate 2017 SC (UKSC) 29*; *P v Scottish Ministers 2017 SLT 271*; *AB v HMA 2017 SLT 401*.

In two of the three successful civil challenges, *Salvesen* and *Christian Institute*, the Supreme Court exercised its discretion under section 102(2)(b) of the Scotland Act 1998 to suspend the effect of its decisions (that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 and the information sharing provisions of Part 4 of the Children and Young People (Scotland) Act 2004 respectively) were incompatible with Convention rights. This allowed an opportunity for the Scottish Parliament and the Scottish Ministers to take measures in order to remedy the incompatibilities.

McCorkingdale, McHarg and Scott argue that this dialogue between the Court and the devolved institutions is clear in the *Christian Institute* case in which the Court felt it 'inappropriate to propose particular legislative solutions', but warned the executive and legislature that minimal amendments that failed to address the breach would run the risk of further judicial sanction.

In the criminal cases *Cameron* and *AB*, each of which raised 'compatibility issues' relating to criminal procedure – the decisions that section 58 of the Criminal Justice and Licensing (Scotland) Act 2010 and section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 respectively were 'not law' were returned to the High Court of Justiciary (Scotland's supreme criminal court) for it to determine whether or not to suspend or to vary the effects of the resulting invalidity.

Questions raised by the Independent Review.

Theme One

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

As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

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

a.1 How has the duty to “take into account” ECtHR jurisprudence been applied in practice?

Under section 2 of the HRA “a court or tribunal determining a question which has arisen in connection with a Convention right must take into account judgements of the European Court of Human Rights (ECtHR)”. Such judgements are not binding as *Blackstone’s Human Rights Digest (2.8) K. Starmer 2001 (with Iain Byrne)* states “the HRA is intended to provide a floor for Convention rights but not a ceiling”.

Controversy over the relationship between the UK courts and the Court of Human Rights in Strasbourg has been a significant feature of academic and public discourse since the HRA was brought into effect.

The Equalities and Human Rights Commission Research Report 83 *The UK and the European Court of Human Rights* by Alice Donald, Jane Gordon, and Philip Leach (2012) contains a comprehensive overview of the debate up to that time.

The research paper makes it clear that while the Human Rights Bill was passing through Parliament in 1997/98 the relationship between the UK courts and the European Court of Human Rights was examined closely. During the Committee stage of the Bill in the House of Lords, Lord Kingsland, the then Shadow Lord Chancellor promoted an amendment to provide that the courts “shall be bound by any judgment, decision, declaration or advisory opinion of the European Court of Human Rights...” Hansard House of Lords on 18 November 1997 col 511.

The amendment was not pressed to a vote, but many peers expressed the view that the amendment would be unacceptable. The then Lord Chancellor, Lord Irvine of Lairg, stated at col 514:

“We believe that Clause 2 gets it right in requiring domestic courts to take into account judgments of the European Court, but not making them binding. To make the courts bound by Strasbourg decisions could, for example, result in the Bill being confusing if not internally inconsistent when the courts are faced with incompatible legislation. In addition, the word “binding” is the language of precedent, but the convention is the ultimate source of the relevant law. It is also unclear to me how “binding” would fit within the doctrine of margin of appreciation under the convention...”

We must remember that Clause 2 requires the courts to take account of all the judgments of the European Court of Human Rights, regardless of whether they have been given in a case involving the United Kingdom. That was the point made by the noble Lord, Lord Lester: the United Kingdom is not bound in international law to follow that Court’s judgments in cases to which the United Kingdom had not been a party, and it would be strange to require courts in the United Kingdom to be bound by such cases. It would also be quite inappropriate to do so since such cases deal with laws and practices which are not those of

the United Kingdom. They are a source of jurisprudence indeed, but not binding precedents which we necessarily should follow or even necessarily desire to follow.

The Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might give a successful lead to Strasbourg. For example, it would permit the United Kingdom courts to depart from Strasbourg decisions where there has been no precise ruling on the matter and a commission opinion which does so has not taken into account subsequent Strasbourg court case law”.

Subsequent case law has developed and clarified the meaning of section 2.

Lord Bingham in the case of *R (Ullah) v Secretary of State for the Home Department [2004] UKHL 26* before the Judicial Committee of the House of Lords, stated:

“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 clear and constant jurisprudence of the Strasbourg court... 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...” this is the founding statement of the mirror principle “that the domestic law of human rights should in content and scope mirror its Strasbourg counterpart”.

Lord Rodger of Earlsferry speaking, with classical flair, in the case of *Secretary of State for the Home Department v AF [2009] UKHL 28* stated “Argentorum locutum, iudicium finitum – Strasbourg has spoken, the case is closed”.

However more recent case law has developed the judicial discretion available to the court. The court in *Horncastle [2009] UKSC 14*; stated that it would only follow ECHR case law which was “clear and constant” but even so decisions of the ECtHR can be departed from where that court misunderstood, misapplied or failed to consider some fundamental facet of law in the UK. The Supreme Court followed this approach in *Pinnock v Manchester City Council [2010] 3 WLR 1441*:

“This Court is not bound to follow every decision of the ECtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of value to the development of Convention law (see e g *R v Horncastle [2009] UKSC 14*; *[2010] 2 WLR 47*). Of course, we should usually follow a clear and constant line of decisions by the ECtHR: *R (Ullah) v Special Adjudicator [2004] UKHL 26*; *[2004] 2 AC 323*. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham [2009] 1 AC 367*, para 126, section 2 of the HRA requires our courts to “take into account” ECtHR decisions, not necessarily to follow them. 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.”(Lord Neuberger at para 48).

In *Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2017] UKSC 36; the Court refused to follow the conclusion reached by the ECtHR. The issue was whether a civil right and obligation was being determined under Article 6.1 ECHR when housing authorities made certain decisions under the Housing Act 1996. In *Ali v United Kingdom* (2016) 63 EHRR 20, the ECtHR had held that Article 6.1 was engaged notwithstanding the reservations made in *Ali v Birmingham City Council* [2010] UKSC 8 about extending the application of Article 6.1. The UK Supreme Court however refused to follow this in *Poshteh*, on the basis that Article 6.1 was not engaged by the Housing Act.

The ECtHR had adopted its stance in *Ali v UK*. The ECtHR had not responded to the expressions of concern and so the UK Supreme Court made its position clear in *Poshteh*.

In *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2 the question was whether English law concerning compensation for miscarriages of justice was compatible with the right to a fair trial under Article 6 of the ECHR. The court followed domestic precedent notwithstanding contrary ECtHR case law.

It is worth pointing out that public authorities which are obliged to avoid acting incompatibly with Convention rights have been able to apply this jurisprudence to their own interpretations of what is and is not permissible in HRA terms (although this is more in connection with section 6 than with section 2; but the requirement to take ECtHR case law into account is equally relevant under section 6).

a.2 is there a need for any amendment of section 2?

Analysis of the case law and judicial attitudes suggest that the UK courts have arrived at an interpretation of “take account” which respects both the jurisprudence of the ECtHR and fundamental substantive and procedural law as it applies in the UK. Accordingly, we do not accept that there is 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?

The term “margin of appreciation” is described by the Council of Europe as the space for manoeuvre that “the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention). The legal basis of the doctrine may be found in jurisprudence, not only that of the French *Conseil d'état*, which has used the term “marge d'appréciation, but also that of the administrative law system within every civil jurisdiction” :

https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

Because each Member State has different cultural and legal traditions uniform European standards of human rights are not easy to articulate. The ECHR is a “lowest common denominator” – a floor not a ceiling -- of those human rights. The Council of Europe acknowledges that “enforcement of the Strasbourg

organs 'undertaking ultimately depends on the good faith and continuing cooperation of the Member States".

The Council states "The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their obligations under the Convention".

It could be argued that it has no relevance in domestic law, but that the doctrine of deference plays a similar, albeit not identical role. Alternatively, the margin of appreciation may apply *between* the three UK legal systems. In other words, if there is a margin of appreciation, the Supreme Court should apply that where different approaches are adopted within the UK.

As Professor Ed Bates states, "Part of the criticism directed at Strasbourg from the UK was based on a perception that the former was too often dictating policy preferences, failing to apply the margin of appreciation appropriately, and micro-managing UK law. Related to that, there may also have been a perception that the UK Supreme Court was not in an equal relationship with Strasbourg...". Whether these perceptions were valid or not, they would seem hard to sustain when one looks at the record of UK-Strasbourg relations over recent years (see <https://ukstrasbourghspotlight.wordpress.com/> Principled Criticism and a Warning from the 'UK' to the ECtHR? Page 241, also discussed at a recent Public Law Project event *Unpacking the Human Rights Act Review* <https://vimeo.com/manage/513937442/general>).

Recent consideration of the relationship between the UK and Strasbourg courts focusses on the limitations of ECtHR's role taking into account the margin of appreciation and subsidiarity which is influenced by more "robust and critical positions adopted by the UK courts".

Professor Bates' analysis that the UK courts have "been respectful of Strasbourg's positions (although there may be a debate about McLoughlin and aspects of Nealon/Hallam), but also willing to test and interrogate them if they do not fit the UK context, with the interactions that have followed demonstrating that Strasbourg has been very receptive to the UK critique" (op cit. page 241) is very persuasive.

Starting with the speech by Lord Irvine, in 2011 who suggested: '[a]n appropriately critical, but respectful, approach [...] [would] have [a] positive influence in encouraging Strasbourg to observe the appropriate limitations inherent in its own role, and to respect the State's margin of appreciation'. Professor Bates ventures the opinion "If the UK Supreme Court has decided to take on board this advice, it seems to have had effect: indeed, for some the question today could even be whether it is now Strasbourg that is being 'rolled over' too easily by the UK Supreme Court, in some cases at least". (op.cit page 241)

Such views together with the Conference declarations at Interlaken (2010), Izmir (2011) and Brighton (2012) such as "The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity"https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf make it clear that the principle of subsidiarity is a joint venture.

Protocol No. 15 amending the Convention introduces a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It will enter into force as soon as all the States Parties to the Convention have signed and ratified it: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

Notwithstanding criticism of the ECtHR from Lord Judge 'Constitutional Change — Unfinished Business' (3 December 2013) and Jack Straw (Hamlyn Lecture 2012 <https://www.cambridge.org/core/series/hamlyn-lectures/75134AF22A92EB13326CFFAA4592FDD3>), Professor Bates has expressed the view that “even if there may have been doubts in the past, the Court’s recent jurisprudence evidences that it is very alert to being accused of not respecting its subsidiary position, and very anxious to be seen to respect the democratic legitimacy of national authorities. This deference point may offer no guarantees, but it is of great relevance to the validity of concerns about Strasbourg’s purported illegitimate domination of UK law when issues of national interest are at stake” (The UK and Strasbourg: A strained relationship – The Long View, in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?*, (Hart, 2015) page 65).

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?

We believe that the current approach to judicial dialogue between domestic courts and the ECtHR allows domestic courts to raise concerns about the application of ECtHR jurisprudence and consequently adhere to the terms of section 2 of the HRA.

As we have drawn attention to above, recent case law indicates the UK courts can persuade ECtHR to interpret Convention standards to fit UK contexts. As Professor Bates states, “the boundaries of ECHR law can be adjusted such that UK law fits within them” see <https://ukstrasbourgsportlight.wordpress.com/> Principled Criticism and a Warning from the ‘UK’ to the ECtHR? Page 232.

Dialogue between the ECtHR and UK courts can be analysed as follows:

- a. The ECtHR approach when it addresses features of UK law for the first time, which law has already been upheld at the domestic level (under the HRA) as compatible with Convention rights; and
- b. The UK courts’ preparedness to use dialogue with ECtHR to seek a rectification of an ECtHR conclusion that a specific feature of UK law is incompatible with the Convention.

An example relating to Article 10 ECHR is *R (On the Application Animal Defenders International) v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15. In this case the House of Lords explained that a restriction on Article 10 ECHR was constitutionally important for the UK taking into account the parliamentary consideration when the Communications Bill was being considered.

When the case reached the Grand Chamber: *Animal Defenders International v UK* [2013] 57 EHRR 21 the Grand Chamber noted the parliamentary consideration and held that UK law prohibiting political advertising on television did not breach Article 10 ECHR. When the Communications Bill 2003 was introduced into

Parliament, the Government considered that it was not able to make a statement of compatibility under the HRA, in light of an ECtHR precedent against Switzerland, which had imposed a similar ban (see Communications Bill Second Reading Hansard HL Deb 25 March 2003 col 658). The UK Government believed, however, that if its legislation were to be challenged it would be able to show that its position was legitimate and respectful of human rights. Following such challenge, that was the position which the Grand Chamber later accepted (see also oral evidence by Baroness Hale JCHR HC 1161 3 February 2021 Q19 page 4).

Although in the vast majority of instances UK judges will follow the relevant Strasbourg jurisprudence, the application of the Pinnock criteria and the development of the dialogue in *Animal Defenders International*, *Horncastle*, *Poshteh* and *Hallam* shows that the UK courts have indicated that they will not follow the ECtHR on the question of whether “a defined aspect of UK law is in fact a breach of Convention rights”.

d) How can such dialogue best be strengthened and preserved?

Firstly, the UK and other members of the Council of Europe should encourage through diplomacy the ratification of Protocol No. 15 which amends the Convention by introducing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation.

Secondly, Government can, in response to the Independent review of the Human Rights Act, make it clear that it upholds the independence of the judiciary and the process of dialogue which exists between the UK Courts and Strasbourg.

Theme Two

The second theme considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances those roles, including whether the current approach risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy.

We would welcome 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. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR:

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

- i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and

give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

We believe that it is for those who propose that change should be made to the framework established by sections 3 and 4 of the HRA to justify the case for change.

Section 3 of the HRA provides:

3. Interpretation of legislation.

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

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Section 3 is not simply about the interpretation of legislation it encapsulates aspects of the separation of powers and Parliamentary sovereignty. Making changes to section 3 would raise the prospect of further constitutional change to the distribution of powers between the legislature, the executive, and the judiciary.

Section 3 requires the courts, so far as it is possible to do so to read and give effect to primary and subordinate legislation “in a way which is compatible with Convention Rights”.

Some cases appear to envisage a stronger role for s3 than others. *Regina v A [2001] UKHL 25* is the example usually cited as having gone too far. The approach of the majority in *Ghaidan v Godin-Mendoza [2004] UKHL 30* seems more representative. The choice between using section 3 or section 4 turns not only on a question of what is linguistically possible, but rather involves a contextually sensitive assessment of the limits of judicial law-making in the context of each case. Similarly exercise of judicial deference involves a contextually sensitive analysis of the court’s institutional competence to make judgments about whether particular rights have been breached. This mirrors the contextually sensitive nature of the margin of appreciation doctrine itself.

We take the view therefore that on the whole the courts are aware of the where the limits lie when determining rights and applying section 3 acknowledging the broad context, the role of Government and the concept of Parliamentary sovereignty.

Accordingly, the courts acknowledge that section 3 will not allow them to interpret Convention Rights in such a broad or expensive way so as to touch on matters of policy. In such circumstances, they will leave Parliament to legislate on such rights in law.

As Lord Neuberger said recently to the Joint Committee on Human Rights, “As for the reading down point, Section 3 of the Act, as Dominic Grieve has said, enshrines a principle that is applied generally, but it ensures that judges are able to do their utmost to enable a statute to comply with the Human Rights Act. There is, of course, the protection of Section 4, the declaration of incompatibility, if it does not”. (Joint Committee on Human Rights Oral evidence: The Government’s Independent Human Rights Act Review, HC 1161 Wednesday 27 January 2021Q5 page 11)

- 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?

Any change should not be retrospective because that could undermine legal certainty, and the ability of Parliament to legislate to reverse particular section 3 interpretations if it is unhappy with them.

- 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?

We note the general concern that section 3 is used too much and section 4 too little, and that use of section 3 rather than section 4 undermines the ability of Parliament to exercise the last word on whether the law should be convention compliant or not. It is not clear how, objectively, one would decide what is the optimal balance between section 3 and section 4, in any event as we comment above section 3 interpretations are only binding so long as parliament does not change the law. There might, however, be a case for some sort of notification if a court is proposing to use section 3, in the same way as this operates in relation to the use of section 4. One of the issues here is that we know how many section 4 declarations there have been, but there is no easy way of finding out how often section 3 is used or how much that has altered the interpretation that would have been given but for section 3.

Parliament has a number of opportunities to assess the compatibility of legislation as it proceeds through its Parliamentary process. For example, the ministerial statement of compatibility (Section 19 HRA) which must be made before second reading in either House, explanatory memorandums and human rights memorandums together with scrutiny by MPs and Peers all provide a significant opportunity for Parliament to consider whether the measure is compatible or not. The doctrine of the separation of powers as supported in the HRA ensures that judges do not assume legislative roles and that the sovereignty of Parliament is preserved. It would be similarly inappropriate to give Parliament a role in the interpretation process which is within the judicial province.

Section 4 of the HRA provides:

4 Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section “court” means—

(a) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the Court Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Chancellor of the High Court or a puisne judge of the High Court.

(6) A declaration under this section (“a declaration of incompatibility”)—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

Under section 4(2) the court has a discretion to make a declaration of incompatibility if it is satisfied that a provision in an Act of Parliament is incompatible with a Convention right. Section 4(6) preserves parliamentary sovereignty by providing that a declaration of incompatibility does not affect the validity, operation or enforcement of the law to which it refers. The law is not affected by the declaration. It is a matter for Parliament to change the law. Furthermore, the declaration is not binding on Ministers.

An example which shows how section 4 is designed to operate and how the court and Parliament dealt with it in practice is the case of *Bellinger v Bellinger (2003) UKHL 21*. As a result of this decision

Parliament enacted the Gender Recognition Act 2004 which provides legal recognition for those who have undergone gender reassignment.

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

Article 15 ECHR allows the state parties to the Convention the possibility of derogating from obligations to secure some of the Convention's rights. Derogation is subject to supervision and challenge on the ground that it is exercised in breach of its Article 15.

The Article states:

"1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations....to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

"2. No derogation from Article 2 (right to life), except in respect of death resulting from lawful acts of war, or from Articles 3 (torture), 4 para 1 (slavery) and 7 (no punishment without law) shall be made under this provision."

(No derogation also now applies to Protocol 13 on the total abolition of the death penalty, where it has been signed and ratified as was made clear in the case of *Al-Saadoon and Mufdhi v the UK 2010* in which the court held that two Iraqi nationals accused of the murder of two British soldiers and transferred by the British authorities in Iraq into Iraqi custody for trial where they faced a possible death penalty had had their Article 2 rights violated, as Protocol 13 applied in all circumstances and could not be derogated from and ranked as a fundamental right.)

"3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General...when such measures have ceased to operate and the provisions of the Convention are being fully executed."

Article 15 was not incorporated in the HRA however, under Section 14 the Secretary of State is empowered to make an order incorporating any derogation into the Act, so that it has effect domestically.

Section 16 provides that any such domestic derogation can only last a maximum of five years and then is automatically repealed unless extended again by a fresh order and further requires repeal if the derogation from the ECHR itself has been withdrawn.

These issues have been considered in an opinion by Rt Hon Dominic Grieve QC for the Northern Ireland Assembly <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/derogation-from-human-rights-briefing-paper/> . Mr Grieve stated in that opinion "In practice the arrival of the HRA has had a significant impact on the functioning of derogation, as

it has opened the ability of the UK domestic courts to look at the matter first and make decisions that might be potentially different, as to the validity of a derogation, from what the European Court itself might do”.

An example of a challenge is *A v Secretary of State for the Home Department [2004] UKHL 56*. In this case concerning detention under the Anti-Terrorism, Crime and Security Act 2001 the House of Lords recognised an emergency threatening the life of the nation to justify a derogation but issued a declaration of incompatibility under the HRA because the detention scheme discriminated unjustifiably against foreign nationals. The derogation order made under Section 14 HRA was quashed. This was followed by the ECtHR in *A and Others v the UK 2009*, which upheld the House of Lords and found a violation of Article 5(1) and awarded damages. The offending section of the Act had been repealed in 2005, following the 2004 House of Lords decision.

The remedies which a court can order include:

- a. Judicial review, by which the court can declare that a public authority has acted unlawfully, quash the relevant order, cancel the decision or order a public authority to stop acting. In Scotland the remedies are categorised as reduction, declarator, suspension, interdict, implement, restitution, or interim order. If a decision is found to be unlawful the court will remit the issue back to the public authority to make the decision again. In *Wood v Commissioner for Police of the Metropolis [2009] EWCA Civ 414*, the Court of Appeal decided that the Metropolitan Police had acted unlawfully when it retained photographs of an anti-arms trade campaigner as he was leaving the AGM of Reed Elsevier Plc. This is an important judgment on the scope of the Article 8(1) right to privacy and on the scope of the justification defence available under Article 8(2).
- b. Awarding compensation to the extent the court considers it necessary, just and appropriate (under section 8 of the HRA). In *R (B) v DPP [2009] EWHC 106 (Admin)* The decision to discontinue a prosecution for wounding with intent and witness intimidation, on the basis that the victim's mental illness meant he could not be placed before the jury as a credible witness, was irrational on the facts; there had been a breach the positive obligation under Article 3 (which includes the duty to provide a legal system for bringing to justice those who commit serious acts of violence against others) and £8000 was awarded in compensation.
- c. Making a declaration that the law (rather than the decision made under the law) is in breach of human rights.

These remedies cover the range of options which a court could reasonably be expected to provide.

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?

In *RR v Secretary of State for Work and Pensions [2019] UKSC 52*, the Supreme Court dealt with a question about the powers of public authorities and tribunals. The Court held that a public authority, court or tribunal can disapply a provision of subordinate legislation which would otherwise result in their acting

incompatibly with rights under the European Convention on Human Rights where this is necessary to comply with the HRA. This decision is a significant judgment on the constitutional status of the HRA because it sets out how local authorities and tribunals can deal with situations in which secondary legislation is incompatible with Convention rights.

The Court relied upon the distinction between primary and secondary legislation in the context of the HRA. While it is unlawful for a public authority to act in a way which is incompatible with a convention right (section 6(1) of the HRA), there is an exception in section 6(2) if the public authority is compelled to act in a certain way as a result of a provision of an Act of Parliament. The Court observed that no exception applies to secondary legislation. The Court highlighted precedent where the courts have held that a provision of subordinate legislation which results in the breach of a Convention Right must be disregarded.

The only change which we suggest would be to require the Minister making the subordinate legislation to certify whether or not it was compatible with Convention rights as under section 19 of the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill (see <https://beta.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>).

Change is being advocated that the HRA should be amended to protect subordinate legislation, as well as primary legislation, from invalidation on the grounds of incompatibility with convention rights. This would discourage political litigation retrospectively to impugn the lawmaking choices of responsible authorities, helping uphold settled law and protecting the rule of law (Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021) (available at <https://ukconstitutionallaw.org/>)).

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?

Mr Grieve's opinion with which we agree covers this point too <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/derogation-from-human-rights-briefing-paper/>. He states "The Overseas Operations (Service Personnel and Veterans) Bill, if enacted would probably need derogation before overseas operations take place, as it proposes to introduce a discriminatory regime for civil and criminal liability arising out of combat conditions, which is hard to reconcile with Article 14. It also raises significant issues as to whether or not such a derogation would be successful to allow the legislation to work as intended".

Mr Grieve identifies that "There has been a number of cases which established that the ECHR and the HRA will apply in certain circumstances outside of the territory of the UK".

Al-Skeini [2007] UKHL 26 where the House of Lords decided that the HRA could apply to the actions of British forces abroad where this occurred on a British Army base, but not more generally in Southern Iraq as the UK in practice did not exercise control there.

When the case went to the ECtHR in *Al-Skeini v UK* (2011) 53 EHRR 18, it was held that the UK Government had a duty to conduct an effective investigation into the deaths of all civilians killed by British soldiers, in Southern Iraq because the UK had assumed responsibility for the maintenance of security there and was therefore exercising “control and authority” over Iraqi civilians.

Al-Jedda v Sec of State for Defence [2007] UKHL 58, the House of Lords had held that the indefinite detention without charge of a dual British/Iraqi national in a Basra facility was lawful because the UK had been authorised to act by UN Security Council Resolution 1546 on which the UK was entitled to rely and which took precedence over any ECHR obligation. When the case went to the Grand Chamber *Al-Jedda v UK* 2011 ECtHR, it held that the Security Council Resolution did not displace the Government’s obligations to protect the right to liberty under Article 5 of the ECHR and where no derogation under Article 15 had place, such a system of detention was a breach of Convention rights.

Since then the case law has developed further in a manner that emphasises that the Convention and the HRA can apply to UK actions abroad in varied forms.

Smith v MOD [2013] UKSC 41 the Supreme Court held that claims under Article 2 (the Right to Life) brought by relatives of some British soldiers killed in Iraq, on the grounds of inadequate equipment and training, should not be struck out and could proceed to trial, as Article 2 applied and they were entitled to argue Article 2 rights had been breached. It also declined to rule that the principle of “combat immunity” from negligence claims was absolute in a number of cases that relied on claims of negligence alone. It allowed for the possibility of the claims being considered on factual merits that took account of the legal principles involved.

So far there has been no successful claim in court either under Article 2 or for negligence following these cases.

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?

No case has been advanced for any change to the remedial order process set out in section 10 or schedule 2 to the HRA. We note that schedule 2 makes provision which applies to Scottish ministers and the Scottish Parliament.



For further information, please contact:

Michael P Clancy

Director, Law Reform

Law Society of Scotland

DD: 07785 57833

michaelclancy@lawscot.org.uk