HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: The Government's Independent Human Rights Act Review, HC 1161

Wednesday 3 February 2021

Watch the meeting

Members present: Ms Harriet Harman (The Chair); Lord Brabazon of Tara; Fiona Bruce; Ms Karen Buck; Joanna Cherry; Lord Dubs; Lord Henley; Mrs Pauline Latham; Baroness Ludford; Baroness Massey of Darwen; Dean Russell; Lord Singh of Wimbledon.

Questions 17-29

Witness

I: Baroness Hale of Richmond, former President of the Supreme Court of the United Kingdom.

Examination of witness

Baroness Hale of Richmond.

Q17 **Chair:** Good afternoon and welcome, everybody, to this meeting of the Joint Committee on Human Rights. As our name suggests, we are a Joint Committee, which means we are half Members of the House of Commons—MPs—and half Members of the House of Lords. Also, as our name suggests, we are concerned with human rights, including the right not to be detained unjustifiably, the right to freedom of expression, the right to life—our fundamental basic human rights.

The Government have launched an independent review of the Human Rights Act, and we are conducting an inquiry into the Act so that we can give evidence to the review. We are absolutely delighted to be able to hear evidence today from Baroness Hale. Brenda Hale has had an extremely distinguished career in the judiciary, ending up as President of the Supreme Court, where she heard very many landmark cases. She has also studied in academia and, in her judicial capacity, has decided on human rights cases. There is no one better we could be hearing from, Brenda Hale, so we are extremely grateful, and because of your weight of experience we will listen very carefully to what you say about the operation of the Human Rights Act.

We have a number of detailed questions that committee members would like to put to you this afternoon. First, this review is predicated on the view that there is a problem. Is there a problem, as far as you are concerned, relating to the way our courts are operating, particularly in relation to Parliament? Is there a fix? Is there something, or are there some things, that Parliament could do that would make things better, in your view, or are there some things that could be done or that seem to be in the offing that might make things worse? Of course, we have had before us a government Minister, the Lord Chancellor and Justice Secretary, saying with absolute commitment that we are not going to leave the European Convention on Human Rights, so we are dealing just with the operation of the Human Rights Act.

So the rather broad question is: is there a problem? If so, how should we fix it? In trying to fix it, will it make anything worse? Perhaps we could ask you for the answer to that question based on your experience.

Baroness Hale of Richmond: As far as I am concerned, and I think as far as a great many people are concerned, there is no problem. The Human Rights Act brought rights home, in the sense that it enabled UK citizens and residents to bring cases alleging

that their human rights had been violated to the courts of the United Kingdom, and to get a remedy there if they had been. That must be a good thing, compared with having to take the United Kingdom to Strasbourg, to the European Court of Human Rights, in order to get a remedy years after the event and not a very effective one.

I do not think that the Human Rights Act causes a problem for Parliament, because it is very carefully crafted, as I think you heard from Lord Neuberger and Dominic Grieve last week, to ensure that Parliament remains supreme and can take whatever action it deems fit, including doing nothing at all, even if the courts have said that a particular piece of legislation is incompatible with the convention rights. I do not think there is a problem or any need to fix it. I cannot myself think of a fix that would make things better as opposed to potentially making things worse.

Chair: Are there things that have been floating around that you think might make things worse? What are the things that you fear might come out of this review? What do you think should not come out of this review but has been in the ether?

Baroness Hale of Richmond: I do not spend a lot of time in the ether these days. I am sure you are aware that I retired a year ago. I have been living in Yorkshire, which is a very fine place to live, but I am not in touch in the way I would have been a year ago.

I get the impression that there is some interest in Section 3, which is the interpretive obligation in the Act, and Section 4, which is the declarations of incompatibility. To my mind—and here again I agree with Lord Neuberger and Dominic Grieve—those are the two crucial sections that define the relationship between the courts and Parliament in what seems to be a very good way. We can get into some detail later on, if you would like.

Q18 **Chair:** Can I ask you about Section 2, the requirement to take the European Court of Human Rights jurisprudence into account? Has it made it easier for individuals to enforce their rights in the domestic courts? It is quite perverse, is it not, because of course before the Human Rights Act you had to go to the UK courts in order to exhaust your domestic remedy before you went to Europe, but you could not actually get your remedy under the European convention. You had to trail through in a fruitless quest, which just took longer and incurred more expense.

How has Section 2, in enabling our courts to take ECHR provisions and its jurisdiction into account, made it easier for individuals to

enforce their rights in the domestic courts?

Baroness Hale of Richmond: Of course, the whole Act has made it easier, because the Act has turned the convention rights into rights in UK law, which they were not before. They might coincide with some rights in UK law, but not expressly so. That is why people had to trawl through the courts and would not necessarily get a remedy: because they did not coincide. It is the Act that makes the difference, because it obliges public authorities to act compatibly with the convention rights and gives people a remedy in the UK courts if, in their view, public authorities have not acted compatibly.

Section 2 is an integral part of the Act. It requires the courts to take account of the Strasbourg jurisprudence, but not necessarily to slavishly follow it. That means that when the UK courts are thinking about whether a public authority has acted compatibly or incompatibly with the convention rights, they have to look at what the Strasbourg organs have said about it. They do not have to follow it, but they have to look at what they have said. Yes, it makes it easier.

Q19 **Lord Dubs:** Good afternoon. I am a Labour Member of the Lords. You have partly referred to the question I am about to ask you. What impact do you believe the Human Rights Act had on the relationship between the UK courts and the European Court of Human Rights?

Baroness Hale of Richmond: It is a profound impact, because they are now doing much the same thing. The UK courts are asking whether a public authority in the UK has acted compatibly with the convention rights. That is basically the question the Strasbourg court is asking itself. In the past, as Ms Harman has said, an individual would have to bring an action according to the ordinary law of the United Kingdom, which might or might not coincide with the convention rights. The UK courts will look at the ordinary law of the United Kingdom, whereas the Strasbourg court would look at the convention. As I am sure you know, there was a mismatch quite frequently, and the United Kingdom lost a great many cases in Strasbourg before the Human Rights Act came into force. It has lost far fewer since.

Lord Dubs: Thank you for that answer. Can you give any examples of where consideration of the issues in a case by the domestic courts has influenced the thinking of the European Court of Human Rights?

Baroness Hale of Richmond: I am sure there are lots of examples, because the UK courts are now reasoning the cases in

the same way in which the Strasbourg court would be reasoning them. They are not necessarily reaching the same conclusion, but they are taking the rights, looking at the limitations of the rights and asking whether those limitations apply, so it is the same sort of reasoning as Strasbourg. This means that when Strasbourg gets a case from the United Kingdom it recognises the way the United Kingdom court has been arguing the case and reasoning to the result. That means that it has influenced the thinking of the Strasbourg court. It now very rarely disagrees with us.

I can give a specific example. The one I would like to draw to your attention to, which was very striking, is the Animal Defenders International case. It was an unusual case, because it was one in which the Minister, when promoting the legislation in question, did not certify that it was compatible with the convention rights because they were afraid that it was not. This is all about political advertising. The House of Lords held that the legislation was compatible with the convention rights, even though there was case law in Strasbourg that suggested that it might not be. When the case got to Strasbourg, it went straight to the Grand Chamber. The United Kingdom won the case by the narrowest of possible margins, but it won the case.

The reasoning in the House of Lords—principally, of course, that of the great Lord Bingham—convinced the Strasbourg court that the legislation was compatible with the convention rights. It was about political advertising, as I said. I stressed the link between political advertising and limitations on electoral spending, which is a pretty crucial aspect of the whole thing. It certainly had an impact and just would not have happened had there not been the Human Rights Act. That is the strongest example I can think of, but there have been others.

Chair: What you are describing is that, prior to the Human Rights Act, the first time the European court would get to thinking about something was when it would hear from the representatives of the UK Government; it would hear from a party when deciding. After the Human Rights Act, the UK Government, as a party, and the claimant would rehearse their arguments in court, and therefore the European court would be able to look at the UK jurisprudence in advance of making its own decision.

Baroness Hale of Richmond: Yes, that is right. The jurisprudence would be reasoned in the same way in which it would reason it. That is what I am getting at. In the past, it would be reasoned according to whatever the UK law was.

Chair: Just leaving the European court guessing what the UK

courts might have found had they had that line of reasoning open to them.

Baroness Hale of Richmond: Yes.

Chair: That is a very helpful way of looking at it. Thank you very much. We now turn to Baroness Ludford, to introduce herself and to ask her question.

Q20 **Baroness Ludford:** I am Sarah Ludford. I am a Liberal Democrat Peer in the House of Lords. You have probably dealt with the question I was going to ask you. Do you think that seeing the reasoning of the UK courts in human rights cases has helped the Strasbourg court to understand UK laws? Does that have an impact on the likelihood of an adverse finding against the UK? You have covered that point a bit.

Baroness Hale of Richmond: I have not covered it fully, because there have been examples of where the convention rights have to be seen in the context of the UK law and procedure. In the case of Horncastle, it looked as if our rules on the admissibility of hearsay evidence, which was basically previous witness statements in criminal cases, might be declared incompatible in Strasbourg. We went to a huge amount of trouble to explain why criminal trials in the UK had enough safeguards in them to mean that somebody was not at risk of being wrongfully convicted if, for example, the written statements of people who had died were admitted in the criminal case—that sort of thing.

Yes, it has enabled Strasbourg to understand more about the surrounding context in UK law. Of course, when it comes to the convention, we are all operating basically the same law, the convention rights. Does that make sense?

Q21 **Baroness Ludford:** Yes, absolutely. When the Human Rights Act was going through Parliament, the then Lord Chancellor, Lord Irvine, said that Section 2 would provide flexibility and discretion for judges to develop human rights law and to depart from Strasbourg jurisprudence where appropriate. Do you think that this flexibility of discretion has been successful?

Baroness Hale of Richmond: I think the flexibility and discretion is a very good thing, because it has enabled us to follow, not slavishly, the Strasbourg jurisprudence. But I have a feeling that when Lord Irvine said that in Parliament—Jack Straw said something quite similar in the House of Commons—he had in mind that we might be more adventurous than Strasbourg in developing the convention rights, rather than less adventurous than Strasbourg. That is what I think he had in mind.

Generally speaking, we have stuck with the mantra of no more and no less than Strasbourg. In other words, if the case went to Strasbourg and it was clear that the United Kingdom would lose, it would be a bit contrary to the purpose of the Act for the claimant to lose in the United Kingdom court, because the purpose of the Act is to enable people who would win in Strasbourg to win in the UK. If that is clear, then generally speaking we follow its jurisprudence.

If we do not know what Strasbourg would do because Strasbourg has not yet had such a case—I have had a few examples of that in my career—we have to do our best to apply the principles in a way we think is consistent with the sort of reasoning Strasbourg would employ in relation to the case. The Rabone case was about a psychiatric hospital patient who was allowed out for the weekend and killed herself. There was no Strasbourg case directly on point, but we worked out from principles whether or not there had been a violation of the convention rights.

If it is fairly clear that the claimant would lose in Strasbourg, we have very rarely found for them in the United Kingdom because that would be going further than Strasbourg has gone. We would be quite reluctant to do that. There might be a case where we think that Strasbourg was wrong and would take that further step, but on the whole we have not done that. We have stuck with either the claimant wins if they would win in Strasbourg or we try to work out the answer if we do not know it, but we would rarely find in favour of a claimant if it was clear that they would lose in Strasbourg. These are rules of thumb; there are always bound to be exceptions. Nothing is as clear-cut as that in the law, as you probably know.

Chair: Thank you very much. Can I take you back to the very interesting example you gave in relation to the inadmissibility of evidence?

When you were writing your judgments, if you were finding in favour of the UK Government—in anticipation of a case possibly going up to Strasbourg and in order to help the European Court of Human Rights—would you write thinking of your audience not just being the two parties and the judiciary and lawyers in this country but, "We need to spell out very clearly indeed why we do not think this a breach of the convention rights"? Did you write them up with Strasbourg in mind and to help it to understand why it should come to the same view?

Baroness Hale of Richmond: Very much so in that particular example, because an earlier case before the chamber in Strasbourg raised the same point and the chamber had found against the

United Kingdom. What we were trying to do was to persuade Strasbourg to let that case go to the Grand Chamber so that it could reconsider the matter. That is what happened. It did reconsider the matter and a sensible accommodation was made between what its previous view had been and what we wanted their view to be. Yes, we do write with Strasbourg in mind.

Chair: What you are describing is a situation where the UK courts have been able to provide a buffer between the UK Government and findings against them in relation to the European convention, so that, with your experience of this country, you are able to protect the UK Government from adverse findings in Europe. Rather than bringing problems to the UK Government, there have been times when you have been able to protect the UK Government when they have not deserved to get a hard time in Europe but when, without your jurisprudential explanations, they might have done. Is that a way of looking at it?

Baroness Hale of Richmond: That is a way of looking at it. The two examples I gave—the Animal Defenders International case, which was the political advertising case, and the Horncastle case, which was the evidence in criminal cases case—are examples of that happening. There are no doubt others, but those happen to be the ones that come to mind.

Chair: So that was not your purpose, but sometimes what happened.

Baroness Hale of Richmond: Yes.

Q22 **Baroness Massey of Darwen:** Good afternoon, Lady Hale. I am Doreen Massey. I am a Labour Peer in the House of Lords. My question relates to things that were asked a few minutes ago, but I want to tease them out a bit further. Do you think that the domestic courts have felt able to depart from Strasbourg jurisprudence where appropriate, as Parliament intended? First, how would you define the word "appropriate" in this case, and could you give any examples?

Baroness Hale of Richmond: As I have tried to explain, I would certainly not have thought it appropriate to depart from Strasbourg in a case where it was absolutely clear that if the claimant went to Strasbourg the United Kingdom would lose. The reason for not wanting to depart from Strasbourg in that situation is because the purpose of the Human Rights Act was to bring rights home. The Strasbourg court is the ultimate interpreter of those rights, so it would seem a bit of a futile exercise to bring those rights home and

then find that they were not being properly applied in the United Kingdom.

Generally speaking—there will be exceptions—I would not regard it as appropriate to depart if it was clear that the UK would lose. If the situation is not clear, it might very well be appropriate for the UK court to work it out for itself. Of course, we do always work it out for ourselves, but we work it out having regard to the jurisprudence of the European Court and indeed to the Council of Ministers and other organs of the Council of Europe. Does that all make sense?

Baroness Massey of Darwen: Yes. Could you give us a pithy example of where there has been doubt?

Baroness Hale of Richmond: The example that instantly came to mind was the case about the young woman who was a psychiatric hospital patient in Stockport. She was given leave of absence from the hospital for the weekend, despite the fact that her parents said, "Oh, don't do that, don't do that. We are sure she is going to kill herself if you do" and indeed she did kill herself. The question therefore was whether the hospital was or ought to have been aware of an imminent risk to her life unless it did something to protect her. That of course is a question of fact that goes back, but we held that in that situation there was a duty, if it knew or ought to have known of the imminent risk to her life, to take reasonable steps to protect her.

There was no Strasbourg case that had gone as far as holding that, but we did. As it happened, there was a Strasbourg case only a few weeks later that held the same way we had, so we had correctly anticipated what Strasbourg would do in that situation.

Chair: What country was that?

Baroness Hale of Richmond: It was another UK case, which had been rumbling for ages before Strasbourg. The facts had happened long before, but it had only just got to Strasbourg because, as you know, of the length of time that cases take there, arguments about exhaustion of domestic remedies and all of that. I should be able to, but I cannot remember the name of the subsequent Strasbourg case.

Baroness Massey of Darwen: What was that case about? It sounds fascinating.

Baroness Hale of Richmond: It was the same thing. It was about a psychiatric patient who had killed themselves, and whether the principle under the right to life applied to psychiatric patients. The

principle was that, if you knew or ought to know of an imminent risk, you should take reasonable steps to protect. It had previously been clear that that principle applied to prisoners, so the question was whether it applied to psychiatric patients. Yes, it applied to detaining psychiatric patients, but what about informal psychiatric patients? All legal reasoning is a step-by-step thing and you do not necessarily know whether the next step will be taken.

Chair: How do you know whether the Strasbourg judgment, which subsequently endorsed your judgment, was you anticipating correctly what the Strasbourg court would do or whether it was Strasbourg looking at your judgment and thinking, "This is extremely well argued. We'll go along with that"?

Baroness Hale of Richmond: I do not know the answer to that question, because you would have to ask somebody from Strasbourg, but I think it was a bit of both.

Chair: That is very interesting and very helpful. Thank you.

Baroness Hale of Richmond: We had reasoned consistently with what we thought Strasbourg reasoning might be. I think it looked at our reasoning and thought, "Yes, that's our reasoning too". It did not say so in the later case, but it was fairly clear.

Q23 **Dean Russell:** Hello, Lady Hale. I am the Conservative Member of Parliament for Watford. My question builds on the previous excellent questions regarding the courts. Do you think the courts have taken sufficient account of the UK's margin of appreciation when considering whether to follow Strasbourg case law? If so, do you have any examples of where they have or have not done so, please?

Baroness Hale of Richmond: One of the most difficult questions for us was what to do if a situation was fairly clearly one that Strasbourg would regard as being within the UK's margin of appreciation. Were we therefore to say, "We're not going to interfere. We're not going to say that this is contrary to the fundamental rights, the convention rights", or were we, on occasions, to make up our own minds consistently with the principles of the convention as to whether it was or was not incompatible?

In a way, that takes us back to our previous discussion about when we go further than Strasbourg would have gone. It is fairly clear that the promoters of the Human Rights Act did want us to go further and to develop the convention rights on occasions, but equally, of course, we have been quite cautious about that, on the whole.

I can think of two examples, and both of them are very sensitive. One was the Northern Ireland abortion case, where there was a view that Strasbourg would regard abortion as being within the margin of appreciation for member states. That is because of the great care it had taken not to interfere with abortion law in the Republic of Ireland in certain respects. Would it regard this as a matter within the margin of appreciation? If it did regard it as a matter within the margin of appreciation, what was our role? Were we to make up our own minds or were we to say, "Hands off, we're not going to do anything"?

The majority of us decided that we would be abdicating the responsibility that the Human Rights Act gave us if we did not try to make up our own minds about the situation, because the Human Rights Act says that public authorities must act compatibly with the convention rights. If the legislation obliges them to act incompatibly, we make a declaration of incompatibility. Are we not ducking our responsibility if we do not make up our own minds about what the correct situation is? That is what the majority did in the Northern Ireland abortion case.

The other case was the Nicklinson assisted suicide case, where again we had a question. Clearly there were some Strasbourg principles that were developing, but again it would probably have regarded it as within the margin of appreciation for the United Kingdom. Of course, the assisted suicide case was one we all would have wanted Parliament to debate thoroughly and to decide, and basically Parliament kept on ducking the issue. Some of us felt that we had to try to supply an answer, but others felt differently. This is the benefit of a collegiate court where differences of opinion can be voiced and argued through. Those are the two examples I can think of where the margin of appreciation has obviously caused a dilemma for the UK courts.

Q24 **Dean Russell:** Thank you. Those are excellent examples, if I may say so. My next question builds on that. Do the courts distinguish between Strasbourg case law and cases where the UK was a party, and case law where the UK was not a party to that litigation?

Baroness Hale of Richmond: I am not sure that one does so in a very formal way. We are much more likely to distinguish between Strasbourg decisions that are Grand Chamber decisions and decisions that are just that of a particular chamber. That is a much clearer distinction. If something has been decided by a Grand Chamber, we are much more likely to follow it than if it is something that has been decided by a chamber. There are thousands and thousands of Strasbourg decisions, and some of the chamber decisions seem quite surprising or difficult to understand,

or are explicable only in the context of the particular country from which they are coming—that sort of thing.

That is the distinction I would draw, rather than the country that it came from. Obviously there are a whole raft of cases from eastern European countries where the context is so different from the context in the United Kingdom that they are of less assistance than ones that come from countries where the context is comparatively similar.

Chair: Can you just remind everybody about the difference between the Grand Chamber and the chamber, just so that people watching know what those terms refer to?

Baroness Hale of Richmond: By all means. Most cases are heard by a chamber of seven judges. They now have fast-track processes where fewer judges can decide them, but basically most cases of substance are decided by a seven-judge panel, including a judge from the country from which the case comes. If it is a case from the UK, the UK judge is always on the panel.

Then there is the possibility—I do not think it is technically an appeal—of referring the case to a Grand Chamber, which is 17 judges. Obviously that is not the whole court, but it is 17 judges. The Grand Chamber decisions are obviously much more authoritative than the chamber decisions.

Chair: Before we go on to Lord Henley's question, you have mentioned a couple of times your sense that the Labour Government, at the time of introducing the Human Rights Act, harboured the hope that our courts might strengthen human rights beyond what Strasbourg might otherwise have done. That was an implicit hope of bringing in the UK courts: that they would somehow up the progressiveness that you might otherwise get at Strasbourg.

Having been around at the time on the Shadow Cabinet and then subsequently in the Cabinet when it was being brought in, the sense was that Strasbourg was hotter on human rights issues than our courts were at that time. It was going to be the other way around: that Strasbourg was going to help to stiffen the human rights of our courts, rather than our courts going native and radicalising themselves once they had the opportunity of reading down the European convention into their own judgments.

That is just an obiter dicta, if I might, before we move on to Lord Henley's question.

Q25 **Lord Henley:** I am a Conservative Member of the House of Lords

and a new member of this committee, or rather I have returned after a little absence.

I wanted to ask about informal links between the UK judiciary and the judges of the European Court of Human Rights and whether the informal links, the informal dialogue, have a positive impact. Are there ways in which mutual understanding in that way could be improved upon?

Baroness Hale of Richmond: There have obviously been informal links of a variety of sorts. The Strasbourg court has a ceremony to open the legal year in January each year, and that is accompanied by a seminar where matters of mutual interest are discussed. The UK always sends a delegation to that. We also have bilateral meetings with representatives of the Strasbourg court and representatives of the courts throughout the UK, because obviously this is a UK matter, not just an England and Wales matter. We meet and discuss matters of common interest. These always generate friendly respect between the judges and give us food for thought.

I expect there are a few more informal exchanges as well, particularly between the UK judges and the UK judge on the Strasbourg court. I think there is plenty of dialogue and opportunity for informal dialogue at present. I am not sure whether there is a need for any more. All sorts of dialogue has been successful in producing a greater alignment of thinking between the Strasbourg court and the UK courts and, I think, UK authorities generally.

The best possible example of that, which is not so much to do with the courts, is the prisoners' voting issue. You will recall that Strasbourg started off with a very firm view about prisoners voting, which it then modified in later cases and eventually accepted some comparatively minor administrative changes which the UK Government put forward as being sufficient to comply with the convention. The Committee of Ministers did that. Those sorts of dialogue can be extremely effective. There is a great deal of good will in Strasbourg towards the UK, and they want relations to be friendly because they know that we are doing our best to operate the convention in a sensible and practical way.

Lord Henley: There is one further point, which I ought to know the answer to but I have forgotten. The UK judge is normally seconded from one of our courts for a period of years. Is there a normal way in which we do this, or does it vary?

Baroness Hale of Richmond: There is a formal appointments process whereby the country concerned puts forward, I think, three

candidates to the Committee of Ministers—it might be the European assembly—and they choose from those three candidates. In the UK, the three candidates are chosen by an open and transparent competition along our usual lines.

Judges have not usually previously been judges before they go to Strasbourg. Our present judge, Tim Eicke, was an extremely busy and successful QC, generally acting for the UK Government, in my experience. He appeared before us in the Supreme Court quite frequently. Before that it was Sir Nicolas Bratza, who again was not, I think, a judge in the High Court before he went to Strasbourg but again was an extremely successful QC. They have not normally been serving judges when they have gone, but they have been extremely successful prominent lawyers and advocates.

Q26 **Lord Singh of Wimbledon:** Good afternoon. I am Indarjit Singh, a Cross-Bench Member of the House of Lords. Has the Human Rights Act had any impact on parliamentary sovereignty? Has the Act or its use or interpretation by the courts served to constrain Parliament?

Baroness Hale of Richmond: The answer to that, in my view, is the same as the answer that you were given by Lord Neuberger and Dominic Grieve last week. The Act does not act as a constraint on parliamentary sovereignty. It is not possible for the UK courts to invalidate provisions in Acts of the UK Parliament, however incompatible with the convention rights they may be. The most a court can do is make a declaration of incompatibility, which leaves it entirely up to Parliament to decide what, if anything, to do about it. It can promote a new legislative scheme, which is appropriate if it is a complicated matter.

Responding to the challenge of transgender people and their status is a good example of that—it is a new legislative scheme—or there is the fast-track remedial order, but that tends to be used for something that can be put right very simply, such as by a simple piece of rewording. That has been used on a few occasions. There has been the odd occasion when Parliament has not done anything. The only real example of that is the prisoners' voting case, which I referred to earlier, but it is always up to Parliament what, if anything, to do about an incompatibility.

Not only that, but if Parliament does not like something that the courts have done in pursuance of the interpretation obligation in Section 3 of the Act, Parliament can always put it right. It can always say, "No, this is what the law is", and you cannot interpret your way out of it, basically. It may have given a few messages to

Parliament, but that is not the same as constraining what Parliament do in any way.

Q27 **Joanna Cherry:** Good afternoon, Baroness Hale. I am the Scottish National Party Member of Parliament for Edinburgh South West.

Does the obligation on the courts to give effect to legislation in a way that is compatible with convention rights, so far as it is possible to do so, cause any problems in practice? Can you give us any examples of a case where the courts have had to give an unduly strained interpretation to legislation in order to read it compatibly with the convention?

Baroness Hale of Richmond: Thank you for that question. The weasel word in it, if I may say so, is "unduly". When is an interpretation unduly strained? I do not think it has caused a great many problems in practice. I know there was discussion last week about the main case, Ghaidan and Godin-Mendoza, which was about whether the words "living together as husband and wife" could be interpreted so as to include a same-sex couple who were living together in a marriage-like relationship. Four of us in the House of Lords held that, yes, it could be so interpreted, and there was one person who disagreed, but I think most people would think that that was a perfectly proper use of the interpretive obligation and consistent with how things are moving. It was necessary, because Strasbourg takes a very firm line on discrimination against people because of their sexual orientation. It is one of the things that Strasbourg has been very clear about for a long, long time.

Could I say something else about that case, and indeed about most of the other interpretive cases? That was a case in which the Government intervened to argue very strongly that that was what we should do. We have three choices. Usually the Government argues first for compatibility, but if we decide that it is incompatible, there is then a choice between the interpretive obligation, if we can, to try to cure it or simply to make a declaration of incompatibility. I cannot remember a case that I was involved in where we did not do whichever of those two the Government asked us to do. The Government's first line was always, "It's compatible" but if they lost on that they would then argue either for using the interpretive obligation or for a declaration, and we would usually do what the Government asked for in that respect.

Q28 **Joanna Cherry:** How important do you think it is that the choice between using the interpretive obligation or making a declaration of incompatibility is preserved, if indeed the Government want to proceed with any amendments to the Human Rights Act?

Baroness Hale of Richmond: I think it is extremely important, as I indicated earlier. It is a very subtle and sensitive way of enabling the law to conform to the convention rights. I am fairly sure that some of the things that the Government were suggesting, "It can be interpreted in the following way" were because they did not want to have to go to the trouble of promoting legislation, whether a full Act of Parliament or a remedial order, in order to put it right. If the courts could put it right, that was good enough for them. On the whole, I think it works in a very practical way.

There are limits to the interpretive obligation. You cannot completely twist the statutory meaning and the statutory purpose in order to produce a compatible interpretation. When those limits have been reached, the declaration is a discretionary matter. We do not have to make one, but it is a useful tool to send a warning shot, basically, over the bows of Government and Parliament as to what we think would happen when the case got to Strasbourg, if it did.

Q29 **Joanna Cherry:** Thank you. That is extremely helpful. My next question is linked to some of what has been discussed already and to Lord Singh's question. Do you think the incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act has resulted in the courts having to make decisions about controversial issues that would be better addressed by Parliament?

Baroness Hale of Richmond: I am pretty sure that the answer to that is yes. It is a feature of incorporating the European Convention on Human Rights and indeed of written constitutions in other parts of the world where there are fundamental rights protected by those constitutions. The courts sometimes have to tackle questions that Parliament has, for whatever reason, been unwilling to tackle.

I am fairly sure that the courts would much prefer Parliament to be providing a convention-compliant solution to the problem for all sorts of reasons. There are lots of things about parliamentary decision-making that are different from and in some respects better than judicial decision-making, but if the courts are presented with a case that has been properly brought by somebody with a proper interest in the case, the courts have no choice but to resolve it according to law.

That is the situation with the two examples that I mentioned, which were the Northern Ireland abortion case—mind you, that had a standing problem, but had it been brought by an individual there would have been no problem—and the Nicklinson assisted suicide case. We did not have a choice about deciding, whereas Parliament

does have a choice; Parliament has a "do nothing" option, and sometimes in the courts we would much rather that you did something rather than nothing.

Chair: That brings our questions to you, Baroness Hale, to an end this afternoon. In thanking you, could I also thank you for your incredible work that you have done over the years in academia, which has been inspiring to a whole generation of people who have become lawyers and to those who just believe in the law and care about that? So thank you for your work in academia, and of course for the trail that you have blazed in the judiciary. It has meant a huge amount. I know you said you are happily settled in Yorkshire, but you would certainly be my nomination next time there is a vacancy on the European court. Anyway, that is just my hope. Thank you very much indeed for your evidence, which has been absolutely admirable in its clarity. I am sure all the members of the committee will have found it incredibly useful. Thank you.

Baroness Hale of Richmond: Thank you for inviting me. It has been a great pleasure to meet all of you. Thank you.