Ministry of Justice

The Right Honourable
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Joanna Cherry QC MP
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House of Commons
London
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MoJ ref: 98323

14 July 2022

Dear Joanna,

BILL OF RIGHTS

Thank you for your letters of 30 June about the Bill of Rights and its ECHR Memorandum. I am grateful to you for taking the time to set out your views so clearly at this stage.

Since you wrote these letters, I have – as I promised – responded to the Committee's previous report on our consultation on the Bill of Rights, in which I address a lot of the topics covered in your more general letter in the context of the Committee's previous recommendations.

I would take issue with your characterisation of the Bill of Rights as damaging in any way to the United Kingdom's international reputation. I have been clear, including to the House in my statement upon the Bill's publication, that our plan as a Government is to remain party to the European Convention on Human Rights; and that we shall continue to uphold the cause of human rights internationally. Indeed, were every member State of the Council of Europe to adopt and implement the approach of the Bill of Rights, the standard of human rights protection across Europe would rise markedly.

Likewise, the Bill of Rights strikes the right balance between guaranteeing rights protection to all people across the United Kingdom, as a foundation of shared values, while continuing to allow for devolved legislation relating to human rights issues within devolved policy areas. I have visited Scotland, Wales and Northern Ireland to engage with the executives, legislatures and stakeholders and this engagement is ongoing. We concur that our proposals for reform engage the Sewel Convention, and we have written to seek consent from the Scottish Parliament and the Senedd, and will in due course do the same with the Northern Ireland Assembly; and we continue to engage closely with all three devolved administrations.

As for your letter on our ECHR Memorandum, I am confident that it sets out clearly the basis on which I made a section 19(1)(a) statement that the Bill of Rights is compatible with the Convention rights. Nonetheless, for the benefit of your Committee's important scrutiny function, I am pleased to enclose with this letter a response to all the questions that you ask in that letter.

I regret that I have not been able to appear before your Committee again before the Summer Recess, but I look forward to doing so in the autumn.

Yours sincerely

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Responses to the Committee's questions regarding the ECHR memorandum

Q1. Could you please provide full analysis of how Articles 1 and 13 ECHR will be complied with under the future human rights landscape of the Government's Bill of Rights? Will there be any gaps in the ability of public authorities in the UK, and the UK Courts, to give effect to the ECHR domestically?

1. The UK will continue to comply with its obligations under Articles 1 and 13. There is no requirement for any particular model of adherence to those obligations.

2. The government has chosen to introduce legislation which would repeal the HRA and replace it with an equivalent framework under which, in particular, individuals will remain able to challenge the compatibility of legislation and acts of public authorities. Courts will remain, under this framework, responsible for determining whether the legislation or acts challenged are compatible with the Convention rights. Furthermore, the HRA is not the only means by which the UK secures the Convention rights or ensures effective remedies.

Q2. Could you please provide analysis of the impact of repeal of sections 3, 11 and 19 HRA on the respect for and enforcement of human rights in the UK. Including:

(a) How will the repeal of section 3 HRA impact on the compatibility of legislation with Convention rights? How will this repeal impact on legislation previously interpreted (whether by the courts of [sic] by public authorities) in a compatible way, having regard to section 3? Please provide us with the list of these interpretations, together with your analysis of how you propose to deal with these interpretations. Please explain why you have not retained all previous interpretations for legal certainty and have instead introduced the power in clause 40 for the Secretary of State to choose the judgments to retain at a later date?

(b) Please provide your analysis as to how the repeal of section 3 HRA will impact on clause 12/section 6 HRA, and the extent to which it will mean that public authorities will no longer be required to act compatibly with human rights? We would like to see analysis of the sort of sections of the population that this may impact in relation to how they are treated by public authorities. We would then like to see the justification for this weakening of protections.

(c) Please provide detailed analysis of how the repeal of section 11 HRA (and the absence of any other provision expressly saving existing rights and freedoms) will impact on existing rights, common law rights and other human rights in the UK. Please justify and explain the decision to repeal section 11 HRA.

(d) Please provide your assessment as to how the repeal of section 19 HRA will impact on transparency and on Parliament's ability to properly consider instances where the Government of the day is asking it to pass primary legislation that may interfere with, or breach, the rights of people in the UK.

(a) Repeal of section 3 HRA

3. Following repeal of section 3, legislation will be interpreted in accordance with the normal rules of statutory interpretation. This includes legislation which has previously been interpreted using section 3. The repeal of section 3 will not have retrospective effect, meaning it will not change the effect of a previous section 3 judgment as between the parties to the relevant case. It will mean, however, that if an analogous situation arises in future, section 3 will no longer provide a basis to read and give effect to the relevant provision in a way that is compatible with the Convention rights. This will likely result in more declarations of incompatibility, which allow the government and Parliament to consider the issue.
4. The power in clause 40 will enable the government to assess whether legislation which has been interpreted by the courts under section 3 should remain in its current terms or be amended, and if so in what way. Addressing legislation in this way will enable greater legal certainty compared with including a general savings provision because it is not always clear how section 3 has been relied upon or the circumstances in which that interpretation should apply. This flexibility is also appropriate

because it will allow affected legislation to be considered on a case-by-case basis and consideration given to how best to address the situation as it now stands, including where circumstances have changed since a relevant judgment.

5. We have been examining section 3 judgments with reference to whether the legislation is still in force, the extent to which section 3 was necessary for the interpretation, and what the effect of the interpretation falling away would be. We are working with other government departments on which interpretations will need preserving. This work will continue.

(b) Impact of section 3 repeal on clause 12 of the Bill of Rights

6. Clause 12(1), like section 6(1) HRA, provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Both clause 12 and section 6 include exceptions, which all broadly cover situations where the incompatibility stems from primary legislation enacted by Parliament. These exceptions are necessary in order to protect parliamentary sovereignty, and to ensure that public authorities are not held to be acting unlawfully where they are giving effect to the will of Parliament.
7. Repeal of section 3 HRA will likely result in an increase in the number of cases where primary legislation cannot be interpreted compatibly with the Convention rights, and therefore where the exceptions in clause 12 will apply. We do not consider this to be a weakening of protections, but a recognition of the government's view that where legislation enacted by Parliament creates an incompatibility, it is not the role of the courts to remedy that incompatibility through strained interpretation of the relevant provisions. The appropriate remedy in such cases will be a declaration of incompatibility, which allows the government and Parliament to consider how to address the issue.

(c) Repeal of section 11 HRA

8. In the absence of section 11 HRA, no existing rights or freedoms provided for by legislation or reflected by the common law, nor rights to bring claims or proceedings, would have been affected by the enactment of the HRA. Accordingly, section 11 is not required in order to save existing rights and freedoms, which have continued to exist outside of the HRA. The removal of section 11 does not mean that those rights cease to exist or are affected in any other way. This is clear in particular from the terms of clause 3(2)(b), which expressly permits the courts to have regard to rights under the common law; that provision can only mean that such rights continue to exist outside of the Bill's framework.

(d) Repeal of section 19 HRA

9. The government believes that the simplistic binary imposed by section 19 of the HRA fails to reflect the complexity and nuance of compatibility analysis. The stigma attached to the making of a section 19(1)(b) statement risks acting as a deterrent to innovative policy-making, even in cases where the legislation in question may ultimately be successfully defended in court. As set out in the government's response to the consultation *Human Rights Act Reform: A Modern Bill of Rights*, repeal of section 19 will not prevent Parliament from considering and debating the human rights implications of Bills. Proposed legislation will still be accompanied by analysis of human rights implications, which will provide a transparent basis for parliamentary scrutiny.

Q3. Clause 3 (interpretation of the Convention rights) replaces section 2 HRA with considerable changes, and we would appreciate seeing detailed analysis of the implications of these changes. This should include, in particular:

(a) What is your assessment of the impact of clause 3 on legal certainty? How long do you estimate it will take for the Courts to clarify how clause 3 is to be interpreted, how they should approach the interpretation of the Convention rights and how they should use ECtHR judgments in assisting them in that work?

(b) The rights protected under the Convention system, as for all systems of human rights protection, are a minimum standard of rights protection. However, we note that in paragraph 10(a) of the Government's Memorandum the Government state that the intention is for human rights, as elucidated by the ECtHR, to be "a 'ceiling' but not a 'floor'". It is difficult to understand how the confusion between human rights being a

ceiling (i.e. a maximum level of basic protection) as opposed to the floor (i.e. human rights being a minimum level of basic protection) in clause 3 is compatible with respect for human rights. It is also difficult to understand how this provision would enable UK judges to undertake their role of meaningfully applying the Convention rights, having regard also to the common law and the specificities of the UK's legal and constitutional context, if they also are bound only to provide the same or lower level of rights protection as required under the ECHR system. Could you please provide detailed analysis of your reasoning in respect of clause 3 (current section 2 HRA)?

(a) Clause 3 and legal certainty

10. The extent to which domestic courts are free to diverge from, or go further than, ECtHR case law regarding the interpretation of the Convention rights has been the subject of confusion and differing judicial approaches under section 2 of the HRA. Clause 3 brings clarity to these issues, expressly providing that domestic courts are not required to follow the ECtHR approach but must not expand the protection of the Convention rights beyond the position that would be adopted by the ECtHR.

11. The government also considers that section 2 of the HRA has led to an overreliance on ECtHR case law, at the expense of a more distinctive UK tradition informed by our proud history of protecting rights, including through the common law. To address that overreliance, clause 3 highlights other matters relevant to the interpretation of Convention rights, specifically the text of the rights, the preparatory work of the Convention, and the common law. These are all matters with which domestic courts are already familiar.

12. That is not to say that no questions of interpretation will arise in relation to the provisions of the Bill of Rights. It is an ordinary and important part of the way our system operates that following the enactment of new legislation by Parliament, the meaning and effect of its provisions can be tested through litigation. That interpretative process is a matter for courts, and the timing is largely dependent on when proceedings are brought which require the determination of the relevant issues. We have complete faith in the ability of our courts to address any such questions as and when they arise.

(b) The "ceiling" provision (clause 3(3)(a))

13. We do not consider there to be any tension between the conception of ECHR rights as a minimum standard of rights protection and the "ceiling" established by clause 3(3)(a). It if of course the case that States Parties may choose to provide greater protection than is required by the Convention. However, the Committee appears to assume the only mechanism for providing such protection is through domestic court interpretation of the Convention rights. The government strongly disagrees. While clause 3(3)(a) limits judicial interpretation of the Convention rights, it does not prevent Parliament from legislating to provide greater protection in certain areas or prevent domestic courts from continuing to develop the common law.

14. We also do not believe the provision undermines the role of domestic courts. Indeed, it reflects the position set out recently in the Supreme Court judgment in *R(AB) v Secretary of State for Justice* that domestic courts should not take the protection of the Convention rights further than they can be fully confident the ECtHR would go.[1] As stated by Lord Reed in that case, "if domestic courts go further than they can fully confident that the ECtHR would go, and the ECtHR would not in fact go so far, then the public authority involved has no right to apply to the ECtHR, and the error made the domestic courts will remain uncorrected".[2]

Q4. Please explain how granting additional weight to certain rights in clause 4 (freedom of speech) is consistent with the UK's commitment to all of the rights set out in the Convention? Please also explain why clause 4 provides that only certain forms of expression should be given "great weight", whilst others should not?

15. The Convention recognises that interference with some of the rights and freedoms guaranteed may be necessary in a democratic society. Under the doctrines of subsidiarity and the margin of appreciation

1 *R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] AC 47.

2 At [57].

the ECtHR acknowledges that domestic authorities have scope for manoeuvre within the framework of the Convention, and that there should be deference to the state's assessment of what is appropriate for its context, including in determining what is a justified interference with qualified rights. Parliament is charged with representing the democratic society, and accordingly the government considers that it is appropriate for Parliament to specify through the Bill where particular weight should be given to a specified value.

16. As a public authority the Court will be bound by Clause 12 to act compatibly with all the Convention rights. Accordingly, the great weight to be given to the importance of protecting freedom of speech will never operate to extinguish those other rights. No new limitations of the rights in question are being introduced and the requirement does not predetermine the outcome of the balancing exercise. Instead, the court is directed to approach the balancing exercise by giving great weight to the importance of protecting freedom of speech, with the awareness that there may still be a countervailing weight justifying interference with freedom of speech.

17. The government considers that freedom of speech underpins our democracy, ensures greater transparency and accountability, and preserves the space for wide and vigorous public debate. Therefore Clause 4 strengthens the right to freedom of speech specifically, rather than other aspects of Article 10 and freedom of expression more widely. This reflects the importance of free speech in our society and will ensure that individuals feel empowered to partake in wide-ranging public debate.

Q5. Please explain how clause 5 (positive obligations) is compatible with respect for human rights. The clause would introduce a barrier to UK courts imposing positive obligations on the State. How is it therefore compatible with Convention rights which can only be made practical and effective by the positive duty placed on states? Did the Government conclude that this was compatible with its international obligations? If so, please provide your legal reasoning.

18. Where the ECtHR or domestic courts have interpreted rights as including a positive duty placed on the State, that interpretation will remain the law under the Bill of Rights. Clause 5 only bars the domestic courts from adopting new interpretations which they might otherwise have adopted, or which might in the future be adopted by the ECtHR. Such new interpretations do not currently form part of the international or domestic law. The ECHR rights are at present practical and effective without such obligations having been recognised.

19. There is no obligation as a matter of international law to legislate for the recognition of principles which constitute purely hypothetical future expansions of the law. Were such expansion to arise in the future, the appropriate response could be determined at that point.

Q6. Please explain how the requirement in clause 6 to give the greatest possible weight to public protection from persons given custodial sentences is compatible with the court undertaking an effective balancing of competing Convention rights.

20. Interference with a qualified right is justified where it is in accordance with the law and necessary in a democratic society, and has a legitimate aim, as conceived by the limitations on the right itself. These legitimate aims encompass a range of factors that relate to the protection of the public, including the prevention of disorder or crime, and the protection of the rights and freedoms of others. The ECtHR acknowledges that domestic authorities have a margin of appreciation to determine what is appropriate for its context, including in determining what is a justified interference with qualified rights.

21. No new limitations on the rights in question are being introduced and the requirement does not predetermine the outcome of the balancing exercise. Instead, the court is directed to approach the balancing exercise by giving the greatest possible weight to the principle set out in clause 6, with the awareness that in some circumstances there may still be a countervailing weight.

Q7. Please provide analysis to explain how clause 7 (decisions that are properly made by Parliament) will be compatible with the requirement to conduct proportionality assessments? Please include consideration of the clear caselaw of both the ECtHR and the domestic courts, in particular in relation to proportionality assessments. In this light, we note that the Government's Memorandum principally relies on one judgment of the

Supreme Court to support its approach (R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26) and does not address all of the wealth of caselaw that would seem unlikely to support the compatibility of this clause. Given the wealth of case-law on these issues from both the ECtHR and domestic courts, we would like to see the Government's fuller analysis as to how this clause complies with the caselaw of both domestic courts and the ECtHR.

22. Pursuant to clauses 10 and 12 the domestic courts are given responsibility in domestic law for assessing the compatibility of legislation and acts of public authorities carried out in accordance with it. In doing so the courts will, when considering interference with qualified rights, consider whether such interference is proportionate. Clause 7 does not prevent a proportionality analysis being carried out, nor does it predetermine the outcome of the exercise.

Q8. Please explain how clause 8 is compatible with the right to private and family life and, in particular, the procedural requirement of Article 8 which requires the courts to undertake a balancing exercise where there are competing rights and interests engaged. Given the extremely high threshold that clause 8 provides for FNOs to rely upon their Article 8 rights, do you consider that the courts will still be able to undertake an effective balancing exercise?

23. The clause does not affect challenges to individual deportation decisions and, therefore, impact the way in which the courts carry out the balancing exercise for the purpose of Article 8 appeals by foreign national offenders presently. The relevant case law in this area establishes that the court or Tribunal should give consideration to the circumstances in balancing the public interest in removing the offender with the weight of the right being interfered with, and as part of that consideration look at the harm that could be caused in particular to a partner or child where they have a genuine and subsisting parental relationship with the offender. It is in principle for states to design their deportation systems subject to those principles. The clause does not establish factors and their weighting to be applied in carrying out the balancing exercise, but rather creates a threshold against which such provisions can be considered, which as a matter of principle is for Parliament to establish.

Q9. We note that in paragraph 15 of the Government's Memorandum, the Government asserts that the UK is not required "to follow/apply all decisions of the Strasbourg Court". Whilst it is true that the UK is not bound by all judgments of the ECtHR, it is bound by those judgments to which it is a party. Further, it is bound to secure to everyone within its jurisdiction the human rights protections contained in the ECHR, as interpreted by the ECtHR as the ultimate arbiter for determining the scope of those rights. Convention rights should be applied compatibly with the consistent and clear caselaw of the ECtHR. We are concerned that the Government's statement of compatibility and basis for asserting compatibility in relation to clauses 3-8 is based on the UK disregarding relevant ECtHR judgments and not needing to comply with the UK's international legal obligations. Could we please see detailed reasoning to justify the Government's position in para 15, and in particular how this would relate to the clear and consistent jurisprudence of the ECtHR.

24. The government intends that the UK will secure to everyone within its jurisdiction the human rights protections conferred by the ECHR. The obligation under Article 1 ECHR does not, however, require that UK legislation oblige the domestic courts to invariably follow ECtHR case law, and we observe that section 2 of the HRA equally does not require that outcome. In the event of future divergence from settled ECtHR case law which could not be resolved through judicial dialogue, the UK would be able to act to secure compliance in the usual ways, including through further legislation.

25. The government also intends that the UK will continue to comply with those judgments by which it is bound as a party pursuant to Article 46.

Q10. We note that the Government considers, in paragraph 18 of its Memorandum, that the Bill of Rights will result in an "increase in declarations of incompatibility" but that the Government does "not consider those incompatibilities would be created by the Bill of Rights itself". Could the Government please explain why it considers it to be consistent with its human rights obligations to change the law so as to increase the number of

incompatibilities as between UK laws and the requirements of basic human rights? Could the Government please explain how it proposes dealing with this increased number of incompatibilities?

Q11. A remedy needs to be effective in order to comply with Article 13 ECHR. A declaration of incompatibility (whilst a useful tool) is, of itself, not an effective remedy. We would therefore like to receive more detailed reasoning (following on from paragraph 20 of the memorandum) in relation to clause 10 (previously section 4 HRA) and how this may affect the right to an effective remedy (Article 13 ECHR).

26. The Bill of Rights will change the approach to be taken to legislation which is on usual principles of statutory interpretation incompatible, and the circumstances in which declarations of incompatibility may be made. There is likely to be an increase in declarations of incompatibility being made, which is considered appropriate because where Parliament has made or approved legislation, the government considers it is for Parliament to consider and address the incompatibility through proper legislative means, rather than the courts being required to strain interpretation to achieve compatibility.

27. Article 13 does not require a particular remedy again a State[3]. It is our view that a DoI can be capable of providing an effective remedy as it requires consideration of the incompatibility and can result in its removal. It is already the case that some legislation is incapable of being read compatibly under section 3 HRA such that the only remedy an individual can receive is a declaration of incompatibility under section 4 HRA.

28. The government will continue to use normal legislative procedures to amend legislation, as well as having the option of making remedial regulations under the Bill where appropriate, to deal with an increased number of declarations of incompatibility.

Q12. Clause 14 (overseas military operations) would, without separate changes to either international law or domestic law, seem likely to breach a number of human rights, including the obligation to secure the Convention rights to everyone within the UK's jurisdiction (Article 1 ECHR), the right to life (Article 2 ECHR), the prohibition on torture (Article 3 ECHR), the right to liberty and security (Article 5 ECHR) and the right to an effective remedy (Article 13 ECHR). We note that the Government seem to acknowledge this in paragraph 22 and that this is why this clause could not enter into force without further changes to international or domestic law. However, firstly, we would like to see the Government's reasoning as to why it is necessary to include this clause before achieving those changes under international or domestic law; and also we would like to receive further analysis as to how the Government foresees this clause being compatible with the ECHR.

29. As set out in the consultation paper *Human Rights Act Reform: A Modern Bill of Rights,* the government is concerned about the expansion of the scope of the Convention rights to cover overseas military operations, given the drafters intended Convention to apply only on States Parties' territories and it was never designed to regulate conflict situations. The government is of the view that as we undertake wider domestic human rights reform, it is the right time to signal at domestic level our commitment to the principle that claims relating to overseas military operations should not be brought under human rights legislation.

30. Nevertheless, we recognise that unless and until this issue is addressed at the international level, it will be necessary to ensure that alternative remedies are available in domestic law to maintain compliance with the UK's obligations under the ECHR. The government believes those remedies are best provided for outside the framework of the Bill of Rights. However, to ensure compliance with the ECHR, clause 39(3) provides that the Secretary of State may commence the provisions excluding overseas military operations only if satisfied that doing so is consistent with the UK's obligations under the Convention.

Q13. Could you please provide analysis as to how the changes to admissibility in clauses 15-16 comply with Articles 1 and 13 ECHR? In particular, we would like to receive your analysis of

[3] *James v UK* (1986) 8 EHRR 123.

whether the imposition of a threshold based on "significant disadvantage" in the domestic courts might differ from its use in Strasbourg, bearing in mind that the ECtHR's approach is premised on the basis of subsidiarity (as promoted as part of the changes introduced in Protocol 14), whereas access to the UK Courts ensures enforcement of human rights within the UK in line with the principle of subsidiarity.

31. The concept of a permission stage is not new, and it is appropriate for the use of Court time to be regulated. Human rights claims brought by way of judicial review already have to meet minimum thresholds of arguability and consequence.

32. Clauses 15 and 16 provide for a threshold which is the same as that contained in Article 35. The Courts will interpret the term "significant disadvantage" in accordance with ECtHR jurisprudence. The term is designed to ensure a claim has reached a minimum level of severity based on pecuniary and non-pecuniary disadvantage.

33. Protocol 15 to the Convention came into force on 1 August 2021.It amended Article 35 of the Convention which contains the admissibility criteria. Prior to the amendment, Article 35 read as follows:

> *The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: ...*
>
> > *(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as de-fined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."*

34. The amendment omitted the following words:

> *In Article 35, paragraph 3, sub-paragraph b of the Convention, the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" shall be deleted.*

35. This amendment to Article 35 of the Convention arguably left it open to the contracting parties to introduce permission a permission stage to stop trivial claims occupying court time. This is because a claim can now be declared inadmissible, even if it has not received full judicial consideration at a national level.

36. In any event, there will be consideration, at a domestic level, of whether a human rights claim raises a serious issue; and there will be a right of appeal against a decision to refuse permission at first instance.

Q14. We note that the Government asserts that clause 18 (Judicial remedies: damages) is compatible with human rights. However, we would need to see more detailed analysis. Could you please provide this analysis. Moreover, how is removing the reference to ECtHR principles in clause 18 considered to be compatible with the UK's obligations under the ECHR and the right to an effective remedy (Article 13 ECHR)?

37. Under clause 17(1), the court may grant such remedy as it considers just and appropriate, reflecting the notion of just satisfaction under Article 41 of the Convention. Under clause 18(1)(a), a court may award damages only where the person has suffered loss or damage arising from the unlawful act, reflecting the causal link required under Article 41 of the Convention. Therefore, where the causal link is established, domestic courts will continue to be able to award damages insofar as the compensation is for the loss or damage arising from the unlawful act, including non-pecuniary damage for non-material harm such as mental suffering.

38. It is well established under the ECtHR's equitable approach, and domestic jurisprudence, that relief does not necessarily require financial compensation and that an appropriate remedy is to be determined according to the specific facts and circumstances of the case.

39. The case law reveals several common themes which are reflected in clause 18 under subsection (5). For example, in considering whether to award a financial remedy, the ECtHR may consider the seriousness of the violation[4] and the conduct of the respondent, including the conduct giving rise to the application and a record of previous violations by the State[5].

40. The conduct of the applicant may also be taken into account. This may be in terms of whether the applicant's conduct is relevant to causation and may have contributed directly to the loss[6], but the Court has also considered the applicant's conduct or character more generally in determining whether to make an award[7].

41. As with the HRA, we do not envisage the Bill of Rights as being the sole means through which the UK complies with its obligations under Article 13 because reliance can be placed on other routes to redress and remedies.

Q15. Could you please provide further analysis on your assessment of how clause 20 (limits on court's power to allow appeals against deportation) will work compatibly with Convention rights? Specifically, do you consider that "nullification" would mean the same as "flagrant denial of justice", the term generally used by the ECtHR? If so, why have you not used that language? If not, how do you consider this to comply with the relevant human rights standards? Please also explain how the severely reduced ability of the courts to consider diplomatic assurances is compatible with the existing caselaw in relation to assurances – we would be grateful for a detailed analysis of the caselaw and how this clause complies with it.

42. While clause 20 establishes a high bar for when a tribunal is hearing an appeal in relation to Article 6, it is considered to present a threshold equivalent to the prevailing case law and simply uses language considered appropriate for a domestic Bill of Rights. The clause enables an independent tribunal to consider whether the circumstances of an individual's deportation amount to a nullification of the right to a fair trial in the recipient State where the Secretary of State has relied upon assurances. It does not fetter the Court's discretion to a degree that prevents it from considering whether there will be a breach of the substantive right irrespective of those assurances. This is considered to be consistent with the leading case of *Othman v United Kingdom*[8].

Q16. Please explain how clause 21 (limit on court's power to require disclosure of journalistic sources) compares with the existing protections in the Contempt of Court Act 1981, and the impact that these changes will have on Convention rights, and in particular Article 10 ECHR.

43. Clause 21 is intended to make it less likely that the courts would order a journalist to disclose their sources than is the case under section 10 of the Contempt of Court Act. In addition to the requirements that an applicant must satisfy under section 10, that the disclosure is necessary in the interests of justice or in the interests of national security or for the prevention of crime and disorder, the court must also be satisfied that there are exceptional and compelling reasons in the public interest to order the disclosure. This will enhance the protection guaranteed by Article 10.

Q17. Please explain whether you consider clause 24 (interim measures of the ECtHR) to be compatible with Article 34 ECHR and the clear caselaw of the ECtHR. Please provide detailed analysis and a clear statement whether you consider this to be compatible with the UK's international obligations.

44. Clause 24 addresses the status and effect of interim measures indicated by the ECtHR in domestic law. Subsection (1) makes clear that such measures do not impact on domestic legal rights or obligations, which reflects the UK's dualist legal system. It does not prevent public authorities or

[4] *Aksoy v Turkey* (1996) 23 EHRR 553.
[5] *Bozano v France* (1987) 13 EHRR 428.
[6] *Luberti v Italy* (1983) 6 EHRR 440.
[7] *Eckle v Germany* (1983) 13 EHRR 556.
[8] *Othman v United Kingdom* (2012) 55 EHRR 1.

others from complying with interim measures of the ECtHR. Subsections (2) and (3) ensure that interim measures indicated by the ECtHR do not influence domestic court decisions as to whether to grant relief in the context of Convention rights.

45. We consider clause 24 to be compatible with the UK's international obligations, including under Article 34 of the Convention.

Q18. Finally, we note that the Bill, in clause 28, would remove the obligation (in section 17 HRA) to regularly review the UK's reservation to Article 2 of Protocol 1 (the right to education). We note the absence of an explanation in this respect in the Explanatory Notes and would be grateful for further information in relation to the reasoning behind this change.

46. The government does not consider this obligation to be useful or necessary, and therefore does not believe it should be replicated in the Bill of Rights.