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House of Lords

Joint Committee on
Human Rights

Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report

Second Report of Session 2019–21

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Publication

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Committee staff

The current staff of the Committee are Miguel Boo Fraga (Senior Committee Assistant), Samantha Granger (Deputy Counsel), Shabana Gulma (Specialist Assistant), Zoe Grunewald (Media Officer), Katherine Hill (Committee Specialist), Eleanor Hourigan (Counsel), Lucinda Maer (Commons Clerk), and Alexandra McMillan (Lords Clerk).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 2467; the Committee's email address is jchr@parliament.uk

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Summary

Whenever a person's human rights have been breached, that person should have a right to a remedy that is effective in addressing that violation of human rights. This right to an effective remedy is protected by Article 13 of the European Convention on Human Rights (ECHR). That remedy need not be damages (financial compensation)—indeed other remedies, if available, are often preferable. However, where there is no other effective remedy available, then damages may be required in order for there to be an effective remedy for the purposes of Article 13 ECHR.

The European Court of Human Rights (ECtHR) found, in the case *Hammerton v United Kingdom*,¹ that it was a violation of Article 13 ECHR (right to an effective remedy) for a person not to have recourse to damages for a violation of a Convention right if there was no other remedy available that would be effective in the circumstances of that case. The circumstances of the case involved a person, Mr Hammerton, who had been committed to prison for contempt of court. He had been committed to prison for a longer period of time than he would otherwise have been due to a judicial act which did not allow him rights under Article 6 (right to a fair trial). This judicial act included depriving him of legal representation when deciding whether to commit him to prison.

The reason that damages were not available in this case was due to the operation of section 9(3) of the Human Rights Act 1998 (HRA), which acts as a statutory bar to an award of damages where there has been a breach of the ECHR that is due to a judicial act done in good faith (except where damages would be required by Article 5(5) ECHR relating to the right to liberty and security). The rationale behind s. 9(3) HRA is to preserve judicial immunity, which underpins the principle of independence of the judiciary. However, like other immunities, the extent of judicial immunity should be limited to what is necessary and proportionate for its purposes.

The principle of judicial immunity does not require that a person whose human rights have been breached should be left without an effective remedy. In most cases where a judicial act violates an individual's Convention rights, there will be a possibility of appeal and this normally will be sufficient to provide an effective remedy for the violation. However, in some cases there will be no effective remedy possible other than damages. In such cases, where s. 9(3) HRA prevents the courts from awarding damages as a remedy, then this can lead to a breach of Article 13 (right to an effective remedy).

To address the incompatibility of s. 9(3) HRA with Article 13 ECHR, the Government proposed a draft Human Rights Act 1998 (Remedial) Order 2018.² A Remedial Order is a special form of delegated legislation which is made using powers under the HRA to amend primary legislation in order to remedy an incompatibility of primary legislation with basic human rights. It can only be used when the Courts have clearly identified such an incompatibility in a judgment. This proposed remedial Order contained an additional ability for courts to award damages following a human rights violation that was due to a judicial act done in good faith. However, under that drafting, such damages would only have been available in narrow circumstances. Firstly, the issue had to have started with a breach of Convention rights related to a lack of legal representation

¹ *Hammerton v United Kingdom* 2016 (Application No. 6287/10).

² Ministry of Justice, [A proposal for a Remedial Order to amend the Human Rights Act 1998](#), July 2018

contrary to Article 6 ECHR (the underlying breach). Secondly, that underlying breach of Convention rights had to have occurred in proceedings for contempt of court. Thirdly, that underlying breach of Convention rights had to have led to the individual spending time detained (or spending a longer period of time detained) which he or she would not otherwise have done without the violation of Article 6 ECHR. In the First Report³ on this Order the Joint Committee on Human Rights (JCHR) in the 2017–2019 Parliament considered that only allowing damages to be available in such narrow circumstances would not adequately address the incompatibility identified in *Hammerton v United Kingdom*.

The revised draft Human Rights Act 1998 (Remedial) Order 2019 widens the circumstances in which damages would be available. Damages would now be available in circumstances where a judicial act done in good faith, in any proceedings, has led to an underlying breach of a person's rights under Article 6 (right to a fair trial) that has led to that person spending time detained (or spending a longer period of time detained) which he or should would not otherwise have done without the violation of Article 6 ECHR. The significant changes are that this could apply to judicial acts done in all proceedings (not only contempt of court proceedings) and in relation to all breaches of Article 6 (not only a lack of legal representation).

Following this amendment, this would mean that damages would be available (where other remedies would be ineffective) where a judicial act done in good faith has caused a violation of a person's rights under Article 5 (right to liberty and security) or Article 6 (right to a fair trial). In both cases this remedy would only be available where a person spent time detained (or spent a longer period of time detained) which they should not have spent detained but for that violation of Article 5 or Article 6 ECHR.

We do not rule out the possibility of other judicial acts done in good faith leading to a violation of a Convention right (other than Article 5 or Article 6). We therefore consider that a future Article 13 ECHR violation could be possible in circumstances where an effective remedy is unavailable. However, we are satisfied that the revised Order adequately responds to the incompatibility identified by the ECtHR in *Hammerton v UK*. We therefore recommend that the draft Order should be approved by both Houses of Parliament.

3 Joint Committee on Human Rights, Fifteenth Report of Session 2017–19, [Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), HC 1457 / HL Paper 228

1 Introduction

Background

1. This Remedial Order concerns the ability of a person whose rights have been violated by a judicial act done in good faith to have an effective remedy for the wrong suffered as a result of that violation.

The right to an effective remedy

2. Whenever a person's human rights have been breached, that person should have a right to a remedy that is effective in remedying that violation of human rights. This right to an effective remedy is protected by Article 13 European Convention on Human Rights (ECHR). That remedy need not be damages (financial compensation)—indeed other remedies, if available, are often preferable. However, where there is no other effective remedy available, then damages may be required in order for there to be an effective remedy for the purposes of Article 13 ECHR.

3. At present, where a person's human rights have been violated due to a judicial act done in good faith, there is a risk that, unless there is another effective remedy available, that person may be deprived of an effective remedy as required by Article 13 ECHR. This is because s. 9(3) Human Rights Act 1998 (HRA) prevents courts from awarding damages in such cases, even where there is no other available effective remedy.

The caselaw—Hammerton v United Kingdom

4. The European Court of Human Rights (ECtHR) found, in the case *Hammerton v United Kingdom*,⁴ that it was a violation of Article 13 ECHR (right to an effective remedy) for a person not to have recourse to damages for a violation of a Convention right if there was no other remedy available that would be effective in the circumstances of that case. The circumstances of the case involved a person, Mr Hammerton, who had been committed to prison for contempt of court. He had been committed to prison for a longer period of time than he would otherwise have been, due to a judicial act which did not allow him rights under Article 6 (right to a fair trial). This judicial act deprived him of legal representation when deciding whether to commit him to prison.

Judicial immunity and s. 9(3) Human Rights Act 1998

5. The reason that damages were not available in Mr. Hammerton's case was due to the operation of section 9(3) HRA, which acts as a statutory bar to an award of damages where there has been a breach of the ECHR that is due to a judicial act done in good faith (except where damages would be required by Article 5(5) ECHR relating to the right to liberty and security). The rationale behind s. 9(3) HRA is to preserve judicial immunity, which underpins the principle of independence of the judiciary. However, like other immunities, the extent of judicial immunity should be limited to what is necessary and proportionate for its purposes.

4 *Hammerton v United Kingdom* 2016 (Application No. 6287/10).

6. The principle of judicial immunity does not require that a person whose human rights have been breached should be left without an effective remedy. In most cases where a judicial act violates an individual's Convention rights, there will be a possibility of appeal and this normally will be sufficient to provide an effective remedy for the violation. However, in some cases there will be no effective remedy possible other than damages, for example because the damage has been done and cannot be adequately remedied by other measures such as appeal or restitution. In such cases, where s. 9(3) HRA prevents the courts from awarding damages as a remedy, then this can lead to a breach of Article 13 (right to an effective remedy).

Remedial Order procedure

7. The HRA provides that where a court has found legislation to be incompatible with a Convention right, Ministers may correct that incompatibility through a "Remedial Order" and may use such an Order to amend primary legislation.⁵ There are special provisions to ensure that this power is not misused.⁶

The Government's original proposal

8. The Government proposed a draft Human Rights Act 1998 (Remedial) Order 2018 to remedy the incompatibility of section 9(3) of the HRA with Article 13 ECHR. This proposed draft Order, together with the required information, was laid before both Houses on 16 July 2018.⁷ As is required, the Joint Committee on Human Rights produced its Report on this proposed Order "Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019" on 14 November 2018 (our "First Report").⁸

9. This proposed Order contained an additional ability for courts to award damages following a human rights violation that was due to a judicial act done in good faith. However, under that drafting, such damages would only have been available in narrow circumstances. Firstly, the issue had to have started with a breach of Convention rights related to a lack of legal representation contrary to Article 6 ECHR (the underlying breach). Secondly, that underlying breach of Convention rights had to have occurred in proceedings for contempt of court. Thirdly, that underlying breach of Convention rights had to have led to the individual spending time detained (or spending a longer period of time detained) which he or she would not otherwise have done without the violation of Article 6 ECHR. In the First Report⁹ on this Order the JCHR considered that only allowing damages to be available in such narrow circumstances would not adequately address the incompatibility identified in *Hammerton v United Kingdom*.

5 See Human Rights Act 1998, [section 10](#) & [schedule 2](#)

6 In the non urgent procedure, a proposal for a draft has to be laid before Parliament for 60 days, during which representations may be made. If the Government decides to proceed, it will then lay a draft Order, accompanied by a statement responding to the representations and explaining what changes, if any, have been made to the draft in consequence. In order to be made, the draft Order must be approved by each House of Parliament, a further 60 days after laying. There is also an urgent procedure, in which the Minister may lay a made order, but there is a period of 120 days (again, divided in two 60 day periods) during which representations may be made and responded to. In both cases, each House of Parliament must then approve the Order if it is to have effect (or continuing effect in the case of the urgent procedure).

7 Votes and Proceedings, [16 July 2018](#)

8 Joint Committee on Human Rights, Fifteenth Report of Session 2017–19, [Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), HC 1457 / HL Paper 228

9 Joint Committee on Human Rights, Fifteenth Report of Session 2017–19, [Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), HC 1457 / HL Paper 228

The revised draft Order

10. A revised draft Human Rights Act 1998 (Remedial) Order 2019 was subsequently laid before Parliament on 15 October 2019. This was accompanied by the Government's Response to the Committee's First Report.¹⁰ The revised draft Human Rights Act 1998 (Remedial) Order 2019 widens the circumstances in which damages would be available to any proceedings in which a judicial act done in good faith has led to an underlying breach of a person's rights under Article 6 (right to a fair trial) that has led to that person spending time detained (or spending a longer period of time detained) which he or she would not otherwise have done without the violation of Article 6 ECHR. The significant changes are that this could apply to judicial acts done in all proceedings (not only contempt of court proceedings) and in relation to all breaches of Article 6 (not only a lack of legal representation).

The role of the Committee

11. The Committee's Standing Orders require us to report to each House—

- a) Whether the special attention of each House should be drawn to the draft Order on any of the grounds on which the Joint Committee on Statutory Instruments may so report in relation to most other statutory instruments; and
- b) Our recommendation whether the draft Order should be approved.¹¹

12. The Committee issued a call for evidence on the Government's revised draft Order on 16 October 2019, although the period for responses was cut short by the dissolution of Parliament. The dissolution of Parliament combined with the length of time taken to establish Committees, has meant that we have moved quickly to report so as to scrutinise this draft Order and inform Parliament of our view before the Government moves the Order.

13. **Under the current rules, whilst the 60 day “clock” stops for dissolution, and for long recesses, it does not wait for the establishment of our Committee following an election. It would be best for the Government to ensure that time is given for us to report before the orders are moved in all but the most urgent of cases and we are pleased that the Government has done so in this case. Every effort should be made to allow for proper parliamentary scrutiny of remedial orders which can be used to amend primary legislation. We will draw the attention of this difficulty in the timing of such orders over a dissolution period to the Procedure Committees of both Houses, who may wish to consider this matter in any future review of secondary legislation procedures.**

10 Ministry of Justice, [Response to the Joint Committee on Human Rights fifteenth report of session 2017–19: Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), 15 October 2019

11 House of Commons, Standing Orders, Public Business 2017, HC 4, [152\(B\)](#), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, [72\(c\)](#)

2 The Government's response to the Committee's First Report on the proposal for a draft Order

Procedural requirements

14. In the First Report, the Committee considered that the procedural requirements of the HRA had been met—the Government's reasons for proceeding by way of remedial order were sufficiently compelling reasons and using the non-urgent procedure struck a reasonable balance.

Further information sought on the scale of the incompatibility

15. Throughout work on this issue, we have sought further information from the Government as to whether there were other scenarios where the bar on obtaining damages for a human rights violation caused by a judicial act done in good faith in s. 9(3) HRA, might cause a breach of Article 13 ECHR. Moreover we have sought further information from the Government as to whether Article 13 ECHR is given sufficient effect through the operation of UK law. However, we did not receive a clear reply to this question in either the exchange of letters with the then Parliamentary Under-Secretary of State for Justice, Edward Argar, from September 2018¹² or the Response to our First Report.¹³

16. The Committee therefore wrote to the Parliamentary Under-Secretary of State for Justice, Chris Philp, on 23 October 2019 to seek further clarity. The Committee received a response on 4 November 2019. These letters can be found in the Annex to this Report.

17. In particular, the Parliamentary Under-Secretary of State has clarified in his response that the Government's scoping work "did not raise any other cases where the s.9(3) bar on damages led to a violation of Article 13" and that the Government considers that "the bar under section 9(3) HRA is unlikely to offend Article 13 ECHR in wider circumstances to those covered by the draft Remedial Order". We also note the clarification that the Government considers "that the s. 9(3) bar could only offend Article 13 ECHR if the result of the violation was that the person spent time detained, and would not have done so if the violation had not occurred".

18. We also note the Government's position on the way that Article 13 ECHR is given effect in UK law:

"The UK provides an effective remedy for victims of violations of the ECHR through the HRA which gives individuals the ability to bring proceedings to enforce their Convention rights or rely on those rights in other proceedings and, through the ability under section 8 of the HRA for courts and tribunals to grant any relief or remedy within their powers as they consider just and

12 This exchange of letters can be found in Appendix 1 and Appendix 2 to the [First Report](#).

13 Ministry of Justice, [Response to the Joint Committee on Human Rights fifteenth report of session 2017–19: Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), 15 October 2019

appropriate. This relief or remedy need not be damages; indeed, damages are often not necessary to afford just satisfaction for breaches of Convention rights.”

19. The Parliamentary Under-Secretary of State did, however, note an ongoing case against the UK that is currently before the ECHR *SW v UK* where the applicant is arguing that the lack of damages following a breach of Article 8 (right to family and private life) meant that there was a lack of an effective remedy for the purposes of Article 13 ECHR. The Government, which is contesting this case, notes that the Court of Appeal had found breaches of Article 8 and subsequently quashed the judicial decision that led to the breach, which in the Government’s view provided sufficient redress for the purposes of Article 13 ECHR. **The Committee would be grateful to be kept updated on developments in relation to this case that is currently before the ECHR.**

20. **It useful to have this further clarity on the Government’s position as to the application of Article 13 ECHR in the UK. We also note that there is the potential for the relevant caselaw to be developed further to help clarify the correct application of Article 13 ECHR, whilst also being careful to afford States the correct margin of appreciation in their implementation of Article 13 ECHR. We consider that it is certainly possible that cases may arise where an applicant may argue that s. 9(3) of the HRA has caused a breach of Convention rights other than Articles 5 and 6 ECHR. We also note the Government’s position that a breach of Article 13 ECHR due to an underlying breach of e.g. Article 7 ECHR is unlikely to arise in the UK due to our “independent and impartial judiciary and the appropriate structures in place within the UK to prevent such situations arising”.**

The revised draft Order

21. In our First Report, we considered that it was likely that situations would arise, albeit rarely, where s. 9(3) HRA, even if amended as proposed, would deprive an individual of an effective remedy for a breach of a Convention right. We therefore recommended that the “Minister consider whether alternative drafting could give better effect to removing the incompatibility in s. 9(3) HRA with Article 13 ECHR”.

22. Following drafting changes in the revised draft Remedial Order, damages would be available (where other remedies would be ineffective) where a judicial act done in good faith has caused a violation of a person’s rights under Article 5 (right to liberty) or Article 6 (right to a fair trial). In both cases this would have entailed a person spending time detained (or spending a longer period of time detained) which they should not have spent detained but for that violation of Article 5 or Article 6 ECHR.

23. **We do not rule out the possibility of other judicial acts done in good faith leading to a violation of a Convention right (other than Article 5 or Article 6). We therefore consider that a future Article 13 ECHR violation could be possible in circumstances where an effective remedy is unavailable. However, whilst there could potentially be situations where s. 9(3) HRA continues to act so as to prevent a person from having an effective remedy for a violation of Convention rights, we are content that such**

situations are difficult to foresee following on from the *Hammerton v UK* judgment and therefore do not fall within the remedial Order requirement of being “necessary to remove the incompatibility”¹⁴.

24. We are therefore content that the Government has revised its draft Order and has adequately taken into consideration situations where breaches of Article 13 ECHR may arise that may similarly give rise to the incompatibility identified by the ECtHR. This means that damages will now be available under s. 9(3) HRA where a judicial act has violated an individual’s rights under Article 6 ECHR leading to a person spending time in detention (or spending more time in detention) than that person would have done without the Article 6 ECHR violation. We are therefore satisfied that the revised Order adequately responds to the incompatibility identified by the ECtHR in *Hammerton v UK*.

Drafting and Technical Issues

25. Two minor drafting issues have arisen from the redraft that we mention here for the purposes of public elucidation, but which we consider the Courts would construe in the intended meaning. A further matter has arisen relating to the word “necessary” as part of the vires which we also think is sufficiently clear, but we have again addressed here for the purposes of clarity.

Drafting

26. Firstly, the drafting of the wording that would become s. 9(3)(b) HRA provides that damages may be awarded “to compensate a person for a judicial act ...”. We understand it to be the loss caused by the subsequent detention, and not the judicial pronouncement in and of itself, that would cause the damage. We therefore understand the reference to compensate a person “for a judicial act” to mean “for loss as a result of a judicial act”. We consider that this can be readily construed from the context and also from the further clarification in s.9(3)(b) that specifically refers to the detention.

27. Secondly, the drafting of the wording that would become s.9(3)(b) HRA provides that damages may only be awarded where “the person is detained ...” as a result of a judicial act that is incompatible with Article 6 ECHR. We understand this to require actual detention, but to cover both past and present detention as a result of that judicial act. We mention this for the purposes of public elucidation.

Vires

28. Section 10(2) HRA provides that the Minister may by remedial Order “make such amendments to the legislation as he considers necessary to remove the incompatibility”. This is duly recorded in the preambular paragraphs to the draft Order laid by the Government. It is also the opinion of the Committee that the amendments included in the draft Order are “necessary to remove the incompatibility” identified - and therefore

14 Human Rights Act 1998, [section 10\(3\)](#)

that the draft Order is within the vires of s. 10(2) HRA. However, in a slightly different context, the Government's response states that this amended scope "goes wider than we consider necessary to address the incompatibility identified".¹⁵

29. In subsequent informal correspondence, Ministry of Justice (MoJ) officials have clarified that this reference on page 6 of the Government Response is not intended to refer to the vires to make the Remedial Order under s. 10(2) HRA, which they consider is met. In explaining the wider context to that reference MOJ Officials clarified that "although we initially drafted the amendment to address the narrow facts of Hammerton, which we considered, at the time, adequate to address the incompatibility identified by the ECtHR, we took into account the JCHR's point that section 9(3) could lead to a similar breach of Article 13 in circumstances other than contempt proceedings (albeit rare circumstances) - leaving the possibility that the incompatibility would not be removed if the Remedial Order did not cover such circumstances. We are therefore of the view that the scope of the Remedial Order is within the vires of s. 10(2) HRA". The Committee agrees with this understanding and clarification.

Does the draft Order remedy the incompatibility?

30. **The Committee welcomes the Government's acceptance of the Committee's recommendations in the First Report and the amendments it has made to the draft Order to give effect to those recommendations.**

31. **We consider that the procedural requirements of the Human Rights Act 1998 for the use of the remedial power have been met in this case and consider that the draft Order remedies the incompatibility identified by the courts.**

32. **The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft Order on any of the relevant grounds, or on any other grounds.**

33. ***We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft Order should be approved.***

15 Ministry of Justice, [Response to the Joint Committee on Human Rights fifteenth report of session 2017–19: Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), 15 October 2019

Conclusions and recommendation

Introduction

1. Under the current rules, whilst the 60 day “clock” stops for dissolution, and for long recesses, it does not wait for the establishment of our Committee following an election. It would be best for the Government to ensure that time is given for us to report before the orders are moved in all but the most urgent of cases and we are pleased that the Government has done so in this case. Every effort should be made to allow for proper parliamentary scrutiny of remedial orders which can be used to amend primary legislation. We will draw the attention of this difficulty in the timing of such orders over a dissolution period to the Procedure Committees of both Houses, who may wish to consider this matter in any future review of secondary legislation procedures. (Paragraph 13)

The Government’s response to the Committee’s First Report on the proposal for a draft Order

2. The Committee would be grateful to be kept updated on developments in relation to this case that is currently before the ECHR. (Paragraph 19)
3. It useful to have this further clarity on the Government’s position as to the application of Article 13 ECHR in the UK. We also note that there is the potential for the relevant caselaw to be developed further to help clarify the correct application of Article 13 ECHR, whilst also being careful to afford States the correct margin of appreciation in their implementation of Article 13 ECHR. We consider that it is certainly possible that cases may arise where an applicant may argue that s. 9(3) of the HRA has caused a breach of Convention rights other than Articles 5 and 6 ECHR. We also note the Government’s position that a breach of Article 13 ECHR due to an underlying breach of e.g. Article 7 ECHR is unlikely to arise in the UK due to our “independent and impartial judiciary and the appropriate structures in place within the UK to prevent such situations arising”. (Paragraph 20)
4. We do not rule out the possibility of other judicial acts done in good faith leading to a violation of a Convention right (other than Article 5 or Article 6). We therefore consider that a future Article 13 ECHR violation could be possible in circumstances where an effective remedy is unavailable. However, whilst there could potentially be situations where s. 9(3) HRA continues to act so as to prevent a person from having an effective remedy for a violation of Convention rights, we are content that such situations are difficult to foresee following on from the *Hammerton v UK* judgment and therefore do not fall within the remedial Order requirement of being “necessary to remove the incompatibility” (Paragraph 23)
5. We are therefore content that the Government has revised its draft Order and has adequately taken into consideration situations where breaches of Article 13 ECHR may arise that may similarly give rise to the incompatibility identified by the ECtHR. This means that damages will now be available under s. 9(3) HRA where a judicial act has violated an individual’s rights under Article 6 ECHR leading to a person spending time in detention (or spending more time in detention) than that person

would have done without the Article 6 ECHR violation. We are therefore satisfied that the revised Order adequately responds to the incompatibility identified by the ECtHR in *Hammerton v UK*. (Paragraph 24)

6. The Committee welcomes the Government's acceptance of the Committee's recommendations in the First Report and the amendments it has made to the draft Order to give effect to those recommendations. (Paragraph 30)
7. We consider that the procedural requirements of the Human Rights Act 1998 for the use of the remedial power have been met in this case and consider that the draft Order remedies the incompatibility identified by the courts. (Paragraph 31)
8. The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft Order on any of the relevant grounds, or on any other grounds. (Paragraph 32)
9. *We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft Order should be approved.* (Paragraph 33)

Annex: Exchange of letters with the Parliamentary-Under Secretary of State for Justice

Letter from Ms Harriet Harman MP, Chair, Joint Committee on Human Rights, to Chris Philp MP, Parliamentary Under-Secretary, Ministry of Justice, regarding Draft Human Rights Act 1998 (Remedial) Order 2019, dated 23 October 2019

I am writing in relation to the draft Human Rights Act 1998 (Remedial) Order 2019 which your Department laid on 15 October 2019. The Committee welcomes this development and the revised drafting approach in that Order.

In both our earlier correspondence with your predecessor (October 2018) and in its First Report on this topic the Committee asked for examples as to whether similar problems might arise where the s. 9(3) Human Rights Act 1998 (HRA) bar on damages could create a barrier to a person's right to effective remedy under Article 13 of the European Convention on Human Rights (ECHR). We wanted to understand further the MOJ's scoping work as to whether the s. 9(3) HRA bar on damages might risk creating wider problems of incompatibility with Article 13 ECHR. We also sought further information on the way that Article 13 ECHR was given effect in UK law.

The MOJ's responses on both occasions did not fully answer our questions. We would therefore be grateful for a response to the following questions:

What scoping work has the MoJ done to consider whether there are situations where the s. 9(3) HRA bar on damages could prevent the UK from complying with the Article 13 ECHR right to an effective remedy?

In which sort of scenarios do you envisage this might arise? If you do not, please explain why.

Do you only envisage that the s. 9(3) HRA bar would offend Article 13 ECHR when relating to an underlying breach of Article 5 or 6? Could violations of any other ECHR Articles (e.g. Article 7) be feasible?

Do you only envisage that the s. 9(3) HRA bar could offend Article 13 ECHR when the result of the violation was that a person spent time detained (or spent a longer period detained than they would otherwise have done)? What other scenarios have you contemplated?

I would be grateful for a reply by 7 November 2019.

Yours sincerely

Rt Hon Harriet Harman MP

Chair of the Joint Committee on Human Rights

Response from Chris Philp MP, Parliamentary Under-Secretary, Ministry of Justice, to Chair, dated 4 November 2019

Thank you for your letter dated 23 October 2019, requesting further clarification in relation to four points:

What scoping work has the MoJ done to consider whether there are situations where the s. 9(3) HRA bar on damages could prevent the UK from complying with the Article 13 ECHR right to an effective remedy?

In which sort of scenarios do you envisage this might arise? If you do not, please explain why.

Do you only envisage that the s. 9(3) HRA bar would offend Article 13 ECHR when relating to an underlying breach of Article 5 or 6? Could violations of any other ECHR Articles (e.g. Article 7) be feasible?

Do you only envisage that the s. 9(3) HRA bar could offend Article 13 ECHR when the result of the violation was that a person spent time detained (or spent a longer period detained than they would otherwise have done)? What other scenarios have you contemplated?

On the first and second points, at the time of laying the initial draft Remedial Order, the MoJ had conducted significant scoping work to consider whether there are situations where the s.9(3) HRA bar on damages could prevent the UK from complying with the Article 13 right to an effective remedy.

Officials conducted an extensive search of the HMCTS and caselaw databases, searching for statistics on contempt cases where legal representation was absent and, more widely, where judicial acts led to a breach of any Convention right to check whether the s.9(3) bar prevented the UK from complying with Article 13 ECHR. The searches produced no records of cases or situations where the s.9(3) HRA bar on damages had led to a breach of Article 13.

With regard to the sort of scenarios in which we envisage this might arise, you may be aware, that since the case of *Hammerton*, the UK has become party to the case of *SW v UK* in the European Court of Human Rights (ECtHR). In that case the Court of Appeal had found breaches of Article 8 in respect of *SW* and subsequently quashed the judicial decision that led to the breach, which in our view provided sufficient redress. However, the applicant has now brought a claim for damages before the ECtHR which the UK is contesting. Given that this is an ongoing case, it would not be appropriate for us to comment further. We will consider the outcome of the case once the case has been concluded.

As our scoping work did not raise any other cases where the section 9(3) bar on damages led to a violation of Article 13, we consider that such a situation could only very rarely arise, if at all.

In relation to the third point, we have considered whether the s.9(3) HRA bar could potentially lead to non-compliance with Article 13 in respect of Convention rights other

than Articles 5 and 6, including Article 7. However, we do not envisage any other scenarios where the s.9(3) bar could prevent the right to an effective remedy under Article 13 for the reasons set out below.

On your query on the feasibility of a breach of Article 7, we are aware of the case of *Ecer and Zeyrek v Turkey* (2002) 35 E.H.R.R. 26, where the ECtHR held that there was a violation of Article 7 as the applicants had been convicted for offences that took place before the relevant legislation was in place. In that case, the applicants claimed they had spent an additional 3 months in prison as a result of the violation of Article 7. The ECtHR awarded them damages as it said they suffered distress which could not be compensated by its finding of a violation alone. Whilst we acknowledge such a situation could potentially occur, we are not aware of any cases in the UK in which there have been breaches of Article 7 where damages have been claimed. It should also be noted that the legal system in Turkey is very different to that of the UK and in our view, the likelihood of a similar occurrence in the UK is minimal. This is because of our independent and impartial judiciary and the appropriate structures in place within the UK to prevent such situations arising.

Furthermore, the availability of damages for breaches of Article 5 under s.9(3) HRA was intended by Parliament to satisfy the requirement under Article 5(5) for an enforceable right to damages for those who have been victims of arrest or detention in contravention of the provisions of Article 5. Care was taken at the same time to ensure that s.9(3) respects the important constitutional principle of judicial immunity. This continues to be an important consideration in the implementation of the Hammerton judgment.

As my predecessor set out in his letter of 25 September 2018, the ECtHR has been clear that states enjoy a certain margin of appreciation in the implementation of Article 13. What it does require is that the substance of the rights in the ECHR is secured to those in the state's jurisdiction; and that an effective remedy is available to enforce those rights in whatever form they are secured. The effective remedy need not be a judicial remedy and Article 13 can be complied with by an accumulation of remedies.

In the event however, where an arguable breach of Convention rights has arisen as the result of a judicial act done in good faith, sections 7 to 9 HRA ensure that it is possible for an individual to bring proceedings or rely on a Convention right or rights in any legal proceedings, and that proceedings may be brought by way of an appeal or an application or petition for judicial review. The ECHR does not require States to award damages to those who have had convictions overturned, or those who have been subject to adverse and unwarranted judicial findings in good faith and where those adverse findings have been overturned by the appeal court.

The UK provides an effective remedy for victims of violations of the ECHR through the Human Rights Act 1998 (HRA) as a whole, which gives individuals the ability to bring proceedings to enforce their Convention rights or rely on those rights in other proceedings; and through the ability under section 8 HRA for courts and tribunals to grant any relief or remedy within their powers as they consider just and appropriate. This relief or remedy need not be damages; indeed, damages are often not necessary to afford just satisfaction for breaches of Convention rights.

On the final point, (whether we only envisage that the s. 9(3) HRA bar could offend Article 13 ECHR when the result of the violation was that a person spent time detained, or spent

a longer period detained than they would otherwise have done), as you will be aware, the incompatibility in Hammerton that we are seeking to address was that Mr Hammerton had spent longer in detention than he would otherwise have done if he had received legal representation. There was therefore a causal link between the incompatible act and the extra time spent in detention. It was the bar under s.9(3) on an award of damages for the extra time spent in detention that led to the breach of Article 13. Furthermore, even in *Ecer and Zeyrek v Turkey* referred to above, the Article 7 breach resulted in an additional period of detention which had caused distress and it was that for which damages were awarded. Consequently, we do consider that the s.9(3) bar could only offend Article 13 ECHR if the result of the violation was that the person spent time detained, and would not have done so if the violation had not occurred.

I have outlined above our view that the bar under s.9(3) HRA is unlikely to offend Article 13 ECHR in wider circumstances to those covered by the draft Remedial Order, and our reasoning, and I have referred to the procedural safeguards and remedies that are available under the HRA to enable individuals to obtain an effective remedy.

I hope this information is helpful.

Chris Philp MP

Lords Declaration of Interests¹⁶

Lord Brabazon of Tara

- No relevant interests to declare

Lord Dubs

- No relevant interests to declare

Baroness Ludford

- No relevant interests declared

Baroness Massey of Darwen

- No relevant interests declared

Lord Singh of Wimbledon

- No interests declared

Lord Trimble

- No relevant interests to declare

¹⁶ A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/>

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