Written evidence from Justice (HRA0069)

Introduction

Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil, and criminal – in the United Kingdom. It is the UK branch of the International Commission of Jurists. JUSTICE's vision is of fair, accessible, and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law.

1. JUSTICE has a long history of work relating to the Human Rights Act 1998 (the "**HRA**"). We were involved in the process of drafting the HRA, and in subsequent training of judges on its operation. We have contributed to various public debates and consultations relating to a British Bill of Rights[1] and have intervened in numerous cases involving the HRA.[2] Through all our work, through working parties of our members and responding to consultations and proposed legislation, we assess the impact of justice system processes on the rights of those using them.

2. JUSTICE convened an advisory group of experts to inform its response to the Independent Human Rights Act Review (the "**Review**").[3] The response consisted of detailed answers to the questions posed by the Review and sought to clarify the legal positions underpinning the incorporation of the European Convention of Human Rights ("**ECHR**" or the **"Convention**") through sections 2, 3 and 4 of the HRA. This response draws on the evidence submitted to the Review, applying those findings to the questions posed by the JCHR and should be read in light of that evidence which gives a more

[1] JUSTICE, 'A British Bill of Rights: Informing the Debate' (2007), available at <https://justice.org.uk/wp-content/uploads/2015/07/A-British-Bill-of-Rights.pdf>; JUSTICE, 'Commission on a Bill of Rights: Do we need a bill of rights?: JUSTICE's Response' (2011), available at <https://justice.org.uk/wp-content/uploads/2015/01/JUSTICE-BORC-Response-November-2011-FINAL.pdf>; JUSTICE 'Commission on a Bill of Rights: Response to Second Consultation' (2012), available at <https://justice.org.uk/wp-content/uploads/2015/12/BORC-Second-Consultation-JUSTICE-Response-FINAL-2012.pdf>.

[2] Including *R (Ullah) v Special Adjudicator* [2004] UKHL 26; *Jones v R (Al Jedda) v Secretary of State for Defence* [2007] UKHL 58; *Cadder v HM Advocate* [2010] UKSC 43; *Home Office v Tariq* [2011] UKSC 35; *Smith & others v Ministry of Defence* [2013] UKSC 41; and *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2.

[3] The advisory group was chaired by Sir Michael Tugendhat and comprised the following members: Professor Brice Dickson; Tessa Gregory; Dominic Grieve QC; Raza Husain QC; Jennifer McDermott; Jonathan Moffett QC; Chrintine O'Neill QC and Professor Alison Young. JUSTICE, 'The Independent Human Rights Act Review: Call for Evidence – Response' (2021), available at <https://justice.org.uk/justice-response-to-independent-human-rights-act-review/>.

[4] See ibid at paras. 25, 30 and 34 (for section 2), at paras. 46, 55 and 58 (for section 3), and at paras. 60 and 63 (for section 4).

[5] Ibid at paras 107-8.

[6] In the early 2000s, where the figures would be broadly indicative of the pre-HRA position, between 2001 and 2004 there were on average each year 22 judgments involving the UK where one or more violation of the Convention was found, while between 2017 and 2020 there were on average only 2 to 3 (2.5) such judgments. Averages calculated from statistics in the Annual Reports published by the ECtHR since 2001, available here: < https://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c>. Data was taken from the tables entitled 'Violations by Article and by [respondent] State' for 2017 – 2020 and 'Judgments' for 2001 - 2004.

detailed account.

3. Ultimately, JUSTICE concluded that no amendments to the operation of sections 2, 3, or 4 were warranted.[4] Minor amendments were recommended to the non-urgent remedial order process.[5]

4. Despite their diverse backgrounds, the strong consensus from the group of experts advising JUSTICE was the HRA functions very well at present. We are concerned that amending the current HRA mechanisms could give rise to a number of risks or adverse impacts.

Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?

5. Prior to the HRA individuals were unable to enforce their Convention rights in domestic courts and had to take cases to the European Court of Human Rights (the "**ECtHR**" or "**Strasbourg**"). Now individuals are able to directly enforce their Convention rights in domestic courts, indeed the purpose of the HRA was to 'bring rights home'. This is reflected in the reduction in the number of ECtHR judgments finding a violation of Convention rights by the UK since the HRA came into force.[6]

In particular, section 3 has provided a strong mechanism for domestic enforcement of individual rights. It gives the courts the ability to adopt statutory interpretations that comply with Convention rights, even where the ordinary, unambiguous meaning of a statute would result in a breach of Convention rights, if it is "possible" and not against the thrust of the legislation.

6. Any attempt to weaken or repeal section 3 would have adverse consequences on the ability of individuals to enforce their human rights in the UK. The alternative to a compatible interpretation under section 3 is a declaration of incompatibility. Whilst a declaration of incompatibility has, in all cases so far, ultimately led to a change in the law, in most cases this will not provide a meaningful remedy for the individual claimant in the case whose rights are currently being infringed. This is particularly so given the significant delays in responding to declarations of incompatibility.[7] Further, a declaration of incompatibility has been found not to constitute an effective remedy for the purposes of the ECHR.[8] In addition, where a declaration of incompatibility is made damages will not be available.[9]

Moreover, a suggestion that declarations of incompatibility should be made more frequently implies that access to Convention rights are subject to Parliamentary approval. On the contrary, as Lady Hale has noted, '[t]he whole point about human rights is their universal

[7] Jeff King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley Hooper, and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

[8] *Burden v UK* (2008) 47 EHRR 38 [40]–[44].

[9] Under s.8(1) the courts can award damages where they find that an act (or proposed act) of a public authority is (or would be) unlawful. However, by virtue of s.6(2) it will not be unlawful for a public authority to act in a way which is incompatible with a Convention right if it could not have acted differently as a result of primary legislation (or subordinate legislation which could not have been made differently).

character. The rights set out in the European Convention are to be guaranteed to "everyone" (Article 1)."[10] *A greater reliance on declarations of incompatibility would imply that Parliament determines whether individual rights are guaranteed to 'everyone'.*

How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?

Section 6 of the HRA makes it unlawful for public authorities to act in a way which is incompatible with Convention rights. By ensuring that infringement of Convention rights by a public authority will give rise to a remedy the HRA has encouraged compliant behaviours and helped to embed human rights considerations within the decision making of public authorities.

What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?

The HRA is a well-crafted delicately balanced piece of legislation. It enables the courts to give effect to and protect the rights of individuals whilst at the same time maintaining Parliamentary sovereignty and the balance between the different branches of Government.

7. We do not agree with criticism of section 3 of the HRA which suggests that it has fundamentally altered the relationship between Parliament and the courts by authorising judicial law making or undermining the will of Parliament.[11] Although section 3 enables courts to go beyond the unambiguous words of a statute, the courts have, in most cases, been careful not to go beyond the enacting Parliament's overarching intention.[12] A review of the section 3 case law from 2013 onwards showed that: (i) section 3 is used infrequently; and (ii) when it has been used this has not been done in a radical way.[13]

In cases where the proposed interpretation would undermine a fundamental feature of the legislation the proposed interpretation is rejected.[14] *The courts are particularly conscious not to use section 3 in circumstances where to do so would go beyond their institutional competence.*[15]

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[10] *P v Cheshire West and Chester Council* [2014] UKSC 19 [36].

[11] For example, Richard Ekins, *Protecting the Constitution: How and why Parliament should Limit Judicial Power*, (Policy Exchange, 2019, available at <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf>

[12] See, for example, *R (on the application of Aviva Insurance Ltd) v Secretary of State for Work and Pensions* [2021] EWHC 30 (Admin) [35]-[36]; *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam) [26]-[28], [31], [35], [54]; *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39 [24]-[29], [85]-[86], [93]; *O'Donnell v Department for Communities* [2020] NICA 36 [77]; *C v Governing Body of a School* [2018] UKUT 269 (AAC) [95]; *Wandsworth LBC v Vining* [2017] EWCA Civ 1092 [75]; *Fessal v Revenue and Customs Commissioners* [2016] UKFTT 285 (TC) [28]-[29].

[13] See JUSTICE, 'The Independent Human Rights Act Review, Call for Evidence – Annex to Response from JUSTICE', March 2021, available at, https://sqe-justice.s3.eu-west-2.amazonaws.com/wp-content/uploads/2021/03/09152051/Annex-to-response-to-IHRAR-call-for-evidence-JUSTICE.pdf

[14] See, for example, *AR v Secretary of State for Work and Pensions* [2020] UKUT 165 (AAC); *Steer v Stormsure Ltd* [2020] 12 WLUK 427; *FS v RS* [2020] EWFC 63; *WB (a protected party through her litigation friend the Official Solicitor) v W District Council v Equality & Human Rights Commission* [2018] EWCA Civ 928; *R. (on the application of K (A Child)) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin)*Re K (Children) (Unrepresented Father: Cross-Examination of Child)* [2015] EWCA Civ 543; *Re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73; *R (on the application of Boots Management Services Ltd) v Central Arbitration Committee* [2014] EWHC 65 (Admin).

*We found that section 3 was often used to address unforeseen drafting issues or factual situations that clearly fell within the overall intention of the legislative scheme. This is not the same as interpreting statutes in a manner inconsistent with Parliament's intention and can in fact ensure that Parliament's overarching intention is realised. For example, in Re X (Parental Order: Death of Intended Parent Prior to Birth)[16] a parental order in respect of a child born following a surrogacy agreement was overwhelmingly in the child's best interests. However, the biological father had died unexpectedly meaning that the criteria for the making of the parental order as set out in the Human Fertilisation and Embryology Act 2008 ("**HFEA**"), would not have been met without the use of section 3. The reading down met the policy and legislative aims of the HFEA which "sought to provide a comprehensive legal framework for those undertaking assisted conception, with the aim of securing the rights of any child born as a result.[17] Likewise in Warren v Care Fertility[18] section 3 meant that an error in documentation provided by a clinic was not fatal to a consenting deceased man's sperm being stored and used by his widow, which was the purpose of the relevant regulations.*

Crucially, in our view the will of Parliament includes an intention that legislation should not be incompatible with Convention rights. Legislation interpreted under section 3 has to be read in light of both the enacting Parliament's intention and the intention of Parliament in 1998.[19] For the vast majority of post-HRA primary legislation this assumption is made explicit by a statement issued by the Minister in charge of the Bill to the effect that the provisions of the Bill are compatible with Convention rights.[20] In respect of pre-HRA legislation, the intention of Parliament in enacting section 3 of the HRA was that such legislation should, as far as possible, be read in a way that renders it compatible with Convention rights. It is, of course, always open to Parliament to legislate to reverse or modify a section 3 interpretation. We are concerned that criticisms of section 3 misconstrue the 'will of Parliament' as the clear words of the statute alone. Under long-established common law rules for interpreting statutes, the 'will of Parliament' is not to be viewed as the actual subjective intention of a particular group of politicians. It is the intention that must be imputed to the legislature by reference to the words used and the context in which they are used.[21]

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[15] For example in *AR v Secretary of State for Work and Pensions* [2020] UKUT 165 (AAC) the Upper Tribunal held that the Social Security Contributions and Benefits Act 1992 could not be interpreted so as to grant widowed parent's allowance to an unmarried parent whose partner had died. Such a benefit could only be paid to a 'spouse' married under English law. The UT held that the different democratic functions of Parliament and the courts had to be respected and that it was not possible to read the legislation any other way without crossing the divide between the interpretative function of the courts and matters of policy that were democratically entrusted to Parliament

[16] [2020] EWFC 39

[17] Ibid, [95].

[18] [2014] EWHC 602 (Fam)

[19] *Ghaidan* (n13) [40] (Lord Steyn): 'there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.'

[20] HRA s 19(1)(a).

[21] See *R (Black) v Secretary of State for Justice* [2017] UKSC 81 per Lady Hale 'the goal of all statutory interpretation is to discover the intention of the legislation… That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose', [36].

The courts' approach to subordinate legislation that is incompatible with Convention rights further illustrates the courts' unwillingness to be drawn into matters of policy making. The courts frequently confine their judgement to the specific elements of the scheme in question that are incompatible, or the specific circumstances of the claimant.[22] The courts rarely use their power to quash subordinate legislation due to the broader policy impacts that a quashing order may have.[23] Any removal of the courts' ability to quash or disapply incompatible subordinate legislation would shift the balance of power significantly from the courts to the Executive. It would be at odds with the division of responsibilities across the branches of government in respect of other areas of law; it has long been the constitutional role of the courts to ensure that the executive only exercises its powers to make secondary legislation in the way in which Parliament intended it to do so.

Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?

The relationship between the domestic courts and the ECtHR is principally addressed by section 2 of the HRA, which requires the domestic courts and tribunals to 'take into account' the jurisprudence of the ECtHR, so far as the domestic court considers it relevant to the proceedings. Early judicial consideration of section 2 followed the 'mirror' approach, typified by a stricter adherence to ECtHR decisions, captured by Lord Bingham's statement in Ullah that 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[24]

8. However, from around 2009 onwards, there has been a clear shift away from strict adherence to the mirror principle. First, in the absence of a 'clear and consistent' line of Strasbourg jurisprudence the courts have been increasingly willing to undertake their own interpretation of the Convention rights.[25] Second, the domestic courts have been more willing to find the ECtHR has fallen into error, misunderstanding the domestic law or misapplying the facts, or simply disagreed with Strasbourg's reasoning.[26] This has led to circumstances in which the domestic courts have done both 'more' and 'less' than Strasbourg.

Despite a clear and increased willingness to depart from decisions of Strasbourg, in the majority of cases the courts still do follow the clear jurisprudence of Strasbourg even though they are not bound to do so. The position was summarised by Lord Wilson in AM (Zimbabwe) v Secretary of State for the Home Department:

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[22] See for example, *R (TP, AR & SXC) v Secretary of State for Work and Pensions* [202] EWCA Civ 37, the Court of Appeal stressed that in 'these appeals we are concerned only with the position of the Respondents and those in a similar position to them. These appeals do not concern the validity of the [Universal Credit] scheme as a whole.' [198]

[23] For example see *Tigere v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 "*The problem with quashing the settlement criterion in its entirety is that there must be cases in which it is not incompatible with the Convention rights…. But the appellant is clearly entitled to a declaration that the application of the settlement criterion to her is a breach of her rights under article 14, read with article A2P1, of the Convention"* [49].

[24] *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, [20].

[25] See *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2.

[26] See *R v McLoughlin* Attorney General's Reference (No.69 of 2013) [2014] EWCA Crim 188 [28]-[29]; *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC [33].

Our refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances.[27]

This makes sense; if the domestic courts were to frequently depart from clear Strasbourg jurisprudence, this would result in the UK being consistently non-compliant with its international treaty obligations. Doing so would undermine the purpose of the HRA to give individuals whose rights have been breached a remedy in domestic law, without resorting to Strasbourg.[28] *It is also in line with the Brighton Declaration, which was initiated under the UK's chairmanship of the Council of Ministers.*[29] *However, in enacting section 2 Parliament clearly contemplated that domestic courts would not follow Strasbourg in all cases.*[30] *Indeed, the case law demonstrates that where there is good reason not to follow Strasbourg, the courts are very willing not to do so. We do not see any need to alter the position so that the Courts follow Strasbourg less frequently.*

Additionally, section 2 allows for a dialogue between the domestic courts and the ECtHR. This has enabled domestic courts to raise concerns as to the application of ECtHR jurisprudence in the UK. There are numerous examples of this including Animal Defenders International v UK,[31] *where Strasbourg followed the reasoning of the House of Lords which upheld a ban on political advertising despite a ECtHR case that held a Swiss ban on political advertising as it applied to an animal rights group violated Article 10.*[32] *In Cooper v UK*[33] *accepted the view of the House of Lords in Spear*[34] *that it had previously misunderstood the nature of the safeguards that existed to ensure the independence of a court-martial in Morris v UK.*[35] *Hutchinson v UK marked the successful conclusion of a developed dialogue between the domestic courts and the ECtHR on the issue of whole-life sentences for prisoners.*[36]

While dialogue has its limits, the current framework permits flexibility and a discursive relationship between the domestic courts and the ECtHR and we do not see any need to

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[27] [2020] UKSC 17, [340]. Similar interpretations of section have been provided in *R (Alconbury Developments Ltd et al) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 [26]; and *Secretary of State for the Home Department v AF* [2009] UKHL 28, [98].

[28] Home Office, *Rights Brought Home: The Human Rights Bill* (CM 3782, 1997) para 1.18. Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf>.

[29] ECHR, 'High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration' (2012), para 9 a) iv), available at <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf>.

[30] A proposed amendment suggested that section 2 should read 'A court… determining a question which has arisen in connection with a Convention right shall be bound by a judgment etc of ECtHR', however this was rejected. HL Deb 18 November 1997, vol 583, cols 511 – 516.

[31] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

[32] *VgT Verein gegen Tierfabriekn v Switzerland* (2001) 34 EHRR 159.

[33] *Cooper v UK* (2004) 39 EHRR 8.

[34] *R v Spear* [2002] UKHL 31.

[35] *Morris v UK* (2002) 34 EHRR 52.

[36] *Hutchinson v UK* [2017] 1 WLUK 173.

alter it.

Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?

9. The current position is that the HRA applies to acts of public authorities outside of UK territory where the UK exercises 'authority and control' over individuals.[37] As a result of this extraterritorial application of the HRA, there will be circumstances where the deaths and treatment of individuals in the course of overseas operations will be subject to the requirements of Articles 2 and 3 of the Convention, including the procedural obligations to conduct effective investigations.

10. We do not see any reason to alter this position. The rights in question in these cases are the most fundamental rights to life and freedom from torture and inhuman and degrading treatment; we believe that our armed forces should respect these rights. The Baha Mousa Inquiry highlights the importance of such investigations. It found a number of serious failing of policies and training governing interrogation and treatment of detainees, which were remedied as a result.[38] Further, limiting the extraterritorial effect of the HRA and removing the investigative duties could risk exposing British troops to prosecution in the International Criminal Court (the "**ICC**"), as the ICC only investigates when the state in question is unable or unwilling to examine war crimes domestically.[39]

11. The Supreme Court has applied the same 'authority and control' test to the question of whether British soldiers carrying out operations in Iraq were within the jurisdiction of the HRA, holding that they were.[40] British military personnel are required to give complete allegiance and obedience to the UK and are subject to the control and authority of the UK (including UK criminal law) wherever they are. In exchange, they should also be entitled to the protection of UK law at all times, including the HRA. It would be illogical for UK forces to extend the reach of the UK courts but remain outside of their protection themselves. In terms of the practical impact, we note that the Supreme Court held in *Smith v Ministry of Defence* that the actual application of the HRA to UK forces must take account of the difficult and dynamic conditions on the battlefield.[41]

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[37] See *Al-Skeini v UK* (2011) 53 EHRR 18 [149]; *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26.

[38] Sir William Gage, *The Report of the Baha Mousa Inquiry* (HC 2011, 1452-I), available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf>. See Oral Statement to Parliament by Dr Liam Fox, 'Statement on the report into the death of Mr Baha Mousa in Iraq in 2003' (8 September 2011) available at <https://www.gov.uk/government/speeches/2011-09-08-statement-on-the-report-into-the-death-of-mr-bahamousa-in-iraq-in-2003>.

[39] The ICC prosecutor recently found that there was 'a reasonable basis to believe' that UK soldiers had committed war crimes against detainees during the conflict in Iraq, however she closed the case due to the existence of inquiries by UK authorities (The Office of the Prosecutor of the International Criminal Court, *Situation in Iraq/UK: Final Report* (2020) available at <https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>).

[40] *Smith v The Ministry of Defence* [2013] UKSC 41, [76].

[41] Ibid.