Society of Labour Lawyers

Response to the Independent Human Rights Act Review

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INTRODUCTION

1. We are reassured to note that the United Kingdom is to remain committed not only to human rights in the abstract but also and importantly to human rights internationally and in particular to the European Convention on Human Rights (the "**ECHR**" or the "**Convention**"). We note that the Review is to proceed on the basis of the rights remaining as they are. This is fundamental, at least so far as the necessity of ensuring that these rights are not eroded is concerned. It is not to deny that there are rights, for example economic and social rights, which are not yet sufficiently addressed in the ECHR.

2. However, rights are of limited value and may even be illusory if they are not applied or enforced effectively. Rights cannot simply be downgraded when they overlap with policies that might conflict with them or invoked by those who may be unpopular.

3. Human rights made a great advance, after the era of Hitler and during the era of Stalin, when the ECHR was adopted. It was adopted with full UK support, and embodied rights already well established in our common law.

4. A further great advance was made when rights were brought home by the Human Rights Act 1998 (the "**HRA**" or the "**Act**").

5. The Act has stood the test of time well.

6. It struck skilful balances. It struck a balance between the requirement for an independent judiciary and the sovereignty of Parliament. It did so by drawing a line at the courts making a declaration of incompatibility. It struck a balance between recognising the benefits of the ECHR being within the jurisdiction of the European Court of Human Rights (the "**ECtHR**" or the "**Strasbourg Court**") and the sovereignty of the UK courts. It did so by requiring UK courts to take into account, no less and no more, the decisions of the Strasbourg Court.

7. The virtues of these balances have in no way diminished. Indeed, they have on the whole worked well. They play a critical role in binding together the four nations of the UK. They ensure that minorities are not tyrannised by majorities, while respecting the central role in a democracy of a majority.

8. UK courts have upheld the common law and have on occasions criticised and declined to follow Strasbourg jurisprudence. When they have followed it, they have explained why and have been justified in doing so. The Strasbourg Court for its part has shown proper and due respect for the UK's margin of appreciation and the judgments of UK courts. Moreover, there has been real positive dialogue between the courts.

9. UK judges always consider public interest criteria and the collective interest. Consistently with that, they rightly accept the need to give

weight to and achieve a balance between that interest and individual rights.

10. There is always potential for improvement in the protection of rights. However, it is simply not the case that our courts are being drawn unduly into areas of policy. Neither Parliament nor the executive has legitimate grounds for complaint. Indeed, the courts have performed their traditional role of protecting Parliament from excesses on the part of the executive.

11. The fact that more or less concurrently with this Review domestic judicial review is under threat makes the full preservation of international human rights and the role of UK judges in their protection all the more vital. In both cases, most of the criticisms are based on myths, misconceptions and misrepresentations.

THE ROLE OF HUMAN RIGHTS IN A DEMOCRACY

12. Any investigation into the HRA must be grounded in the essential social and political role played by human rights in our democracy. This Review will naturally, and rightly, focus substantially on the technical detail of the HRA and associated case law. It is important, however, to also step back and ensure that one can see the wood for the trees. The technicality of the HRA must deliver on a broader purpose. Without the context of this purpose, we cannot genuinely understand the efficacy of the legislative scheme.

Human rights, democracy, and the inherent value of the individual

13. Human rights and democracy are co-essential. They are both rooted in the recognition that all humans have a certain basic value. Philosophers may debate about whether this value is better expressed as “dignity” or “personhood” or “natural rights” or some other form of words. From a practical and constitutional perspective, the particular philosophical name is not important. What matters is that we recognise the value politically and legally. Democracy and human rights are part of the way this is done.

14. Democracy has not always played a substantial role in the constitution of the British Isles. It does so now because people demanded it. From the earliest days, demands for (what became) democracy were based on the equal basic value of individuals.

15. As John Ball, one of the leaders of the Peasants' Revolt of 1381, argued:

> "Are we not all descended from the same parents, Adam and Eve? And what can they show, or what reasons give, why they should be more the masters than ourselves? Except, perhaps, in making us labour and work, for them to spend."[1]

16. Nearly 300 years later, Thomas Rainsborough repeated the sentiment during the Putney Debates:

> "For really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under."[2]

17. The same principle lies behind every significant step in our democratic evolution, from the reform acts, through Chartism, women's suffrage, and many more. It forms the underlying case for democratic government: it is only if we accept that everyone has equal basic value that it becomes rational to take into account the will of the majority in government decision-making. It is, of course, well established that the ultimate legitimacy in our constitution now flows from the will of the electorate. As Lord Hope observed in in *Jackson v The Attorney General*:

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[1] Kellner, P., *Democracy: 1000 Years in Pursuit of British Liberty* (Kindle Ed.) (London; Mainstream Publishing, 2009), ll. 1275–1277

[2] Kellner, P., *Democracy: 1000 Years in Pursuit of British Liberty* (Kindle Ed.) (London; Mainstream Publishing, 2009), ll. 2142–2145

> "It must never be forgotten that this rule [that only parliament may make law] … depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary sovereignty… is built upon the assumption that Parliament represents the people whom it exists to serve."[3]

18. Human rights are a legal and political recognition and guarantee of the equal basic value of all individuals. The ECHR and, by extension, the HRA exist to express this principle in practicality. As the ECtHR put it in *Pretty v UK* (2002) 35 E.H.R.R. 1 at 65: "The very essence of the Convention is respect for human dignity and human freedom."

19. Lady Hale (with whom Lords Nicholls, Steyn, Millett and Rodger agreed) noted the same point in the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557 at 131:

> "When this country legislated to ban both race and sex discrimination, there were some who thought such matters trivial, but of course they were not trivial to the people concerned. Still less trivial are the rights and freedoms set out in the European Convention. The state's duty under article 14, to secure that those rights and freedoms are enjoyed without discrimination based on such suspect grounds, is fundamental to the scheme of the Convention as a whole. It would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another.
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> Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than

[3] *Jackson v. Attorney General* [2006] 1 AC 262 at 104–106

> others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom…"

20. Human rights are rooted in our constitution in a way that goes beyond the HRA. It is now almost trite to point out that the rights enshrined in the ECHR (and given effect by the HRA) are reflections of rights already established in common law [*Osborn v Parole Board* [2013] UKSC 64; *Kennedy v Charity Commission* [2014] UKSC 20]. Indeed, ECHR rights are based on longstanding common law rights. This is unsurprising given that they were drafted primarily by British lawyers and statesmen including David Maxwell-Fyfe, Samuel Hoare and Harold Macmillan. Further, the same principles are reflected in a network of international human rights treaties to which the UK is a signatory (and which British lawyers also had a substantial hand in drafting) such as the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the United Nations Charter.

21. The HRA is a mechanism for giving the recognition of equal human value effect in practice. Further sections of this submission will deal with how it does so but, at this point, it is worth considering why it is necessary that it does so. Practical realisation of the equality principle is vital because, if people's basic value is not respected in practice, then it is not respected at all. As Hersch Lauterpacht, arguably the intellectual force behind the Nuremberg Trials, argued, recognition of the principle, in the absence of enforcement "would come

dangerously near to a corruption of language" for "by creating an unwarranted impression of progress it would, in the minds of many, constitute an event that is essentially retrogressive".[4] Maxwell-Fyfe agreed, insisting that:

> "We cannot let the matter rest at a declaration of moral principles and pious aspirations, excellent though the latter may be. There must be a binding convention, and we have given you a practical and workable method of bringing this about."[5]

22. It is necessary, therefore, in analysing the HRA, to consider its impact and effectiveness, and the impact and effectiveness of any proposed reform, on the realisation of the equal basic value of individuals in practice.

<u>Majoritarianism and human rights</u>

23. Human rights and democracy are often mistakenly placed in opposition to each other. It is argued that, should the majority "democratically" choose a particular course, the "human rights" of individuals (particularly those who attract social condemnation, such as immigrants, people of colour, "foreigners", or those who disagree with the current government) should not prevent "the will of the people". This conflates "democracy" with "majoritarianism".

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[4] Lauterpacht, H., *An International Bill of the Rights of Man* (Oxford, 1945, reissue 2013), p. 9
[5] Torrence, M., "Maxwell-Fyfe and the Origins of the ECHR", J. Law Soc. Sc. (19 September 2011)

24. Under majoritarianism, the majority of the moment can do whatever it likes including taking measures to ensure it remains in power permanently. Democracy, by contrast, recognises that the composition of the majority can change and evolve. The "majority view" today may be the "minority view" tomorrow. This is because, under majoritarianism, the weight of numbers is the ultimate source of legitimacy. Under democracy, legitimacy flows from the inherent value of the individual. Government by majority vote is, therefore, a means to an end, not an end in itself. It is simply the rational reaction to the acknowledgement of the principle of equality. Where the majority of the moment exercises absolute power, it can use that power to silence competing views, preventing the composition of the majority from changing. If, however, we recognise (and enshrine in law) the equal basic value of every individual, then the mere circumstance of belonging to a transient majority at a particular point in time cannot justify undermining the essential personhood of another.

25. This is no mere hypothesis. In their book *How Democracies Die*, Harvard's Steven Levitsky and Daniel Ziblatt describe how modern democracies can and have succumbed to exactly this danger. In Poland, Hungary and Russia (to name but a few, purely European, examples), "elected autocrats" have used the theoretically temporary powers to convert democratic states into autocracies (their preferred descriptor "illiberal democracies" is nothing more than lipstick on a pig). They have achieved this by eliminating the opportunities for

effective opposition, maintaining the veneer and even the language of democracy, while ensuring, in practice, that "opposition is all but impossible".[6] Effective human rights, as provided by the HRA, provide a check against this sort of abuse by preventing the majority from making itself permanent by undermining the basic value of individuals.

The global nature of human rights

26. The second principal criticism of human rights, and the HRA in particular, is that it allows a "foreign court" to exert undue influence on domestic jurisprudence and imports legal ideas and principles that are somehow incompatible with or injurious to domestic law. The technicalities of this claim are dealt with in detail in further sections, but here it is addressed purely at the level of principle. Simply put: If we accept that (a) individuals are all of equal basic value and (b) human rights are the principal legal recognition of this, then the role of the ECtHR is, in principle, unproblematic because individuals who happen to be born in the UK have the same equal basic value as individuals born elsewhere.

27. The ECtHR might be problematic if it were intervening in uniquely domestic issues, which are rightly the view of Parliament. But it is not, human rights are something more fundamental: they recognise an inherent value that transcends nation states and thereby denote the

[6] Applebaum, A., *Twilight of Democracy* (London; Allen Lane, 2020)

necessary limits of the state's powers over individuals. Given the breadth and complexity of this function, it would be problematic if the ECtHR was to take a rigid or dogmatic approach but, in fact, it does the opposite, developing the doctrine of the "margin of appreciation" explored below. Finally, it might be problematic if the ECtHR was somehow unrepresentative, dictating what British citizens' rights should be rather than protecting what they are. But the UK, like all other members, is represented on the ECtHR, as are all other signatories to the ECHR.

28. There are those who argue that there is a unique "Britishness" about our constitution that makes the role of the ECtHR in domestic jurisprudence (as defined by the HRA) inappropriate. In John Laws' words, it takes no account of the "constitutional balance". This view, however, accords the British state an inherent value that it does not possess. This harks back to pre-democratic constitutions in which the state was embodied in the monarch "chosen by God" or an aristocratic class. In fact, while the British nation is arguably inherently special by virtue of its rich culture and shared history, the British state is a mere mechanism. It derives its entire purpose and legitimacy from the electorate. The state only has value insofar as it protects and respects the equal inherent value of the individuals that it governs. Any other conception of the state is inevitably profoundly anti-democratic.

29. This was recognised by the victorious powers in 1945, which collaborated in creating the practice of international and regional

human rights.[7] The recognition and protection of the equal basic value of all individuals must, therefore, supersede the interests of the state. The international and European human rights systems recognise this and the UK, in remaining a part of those systems, does so too.

30. Finally, it is worth noting the principal practical benefit of the HRA to individuals: it gives us direct access to the rights that recognise and protect our equal basic value at first instance. It makes the principles discussed above a reality for individuals on a day-to-day basis and thereby makes our equal basic value a more genuine reality.

[7] See Beitx, C., *The Idea of Human Rights* (New York; OUP, 2011)

SECTION 2 OF THE HUMAN RIGHTS ACT: A STUDY

The Act – "bringing rights home"

31. When considering the impact of the Human Rights Act (the "**HRA**" or the "**Act**") twenty years after it came into force, it is critical to first understand and appreciate its purpose. The White Paper presented to Parliament in October 1997 was titled "Rights Brought Home: The Human Rights Bill". The Prime Minister, in the preface, stated that the bill would "give people in the United Kingdom the opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the Human Rights Commission and Court in Strasbourg".[8]

32. The White Paper went on to state [1.18]:

> "Enabling courts in the United Kingdom to rule on the application of the convention will also help to influence the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. Our courts' decisions will provide the European Court with a useful source of information and reasoning for its own decisions.
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> [1.19] Our aim is a straightforward one. It is to make more direct accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home."

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8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

Section 2 – "take into account"

33. With regards to what became section 2 of the Act ("**Section 2**"), the White Paper stated [2.4] "our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights (although these will not be binding)".

34. The aim of Section 2 was to ensure domestic courts take into account Strasbourg decisions, rather than automatically follow suit. There is a need for some consideration of principles and precedents from Strasbourg when it is "clear and constant", otherwise the incorporation of the European Convention on Human Rights (the "**ECHR**" or the "**Convention**") into domestic law would be problematic. As Lady Hale has said:

> "As the purpose of the Human Rights Act was avowedly to 'bring rights home' and avoid the need for people to take their cases to Strasbourg, we should take into account their jurisprudence with a view to finding out whether or not the claimant would win in Strasbourg. If it is clear that she would do so, then we should find her a remedy. Hence the view that if there is a 'clear and constant' line of Strasbourg jurisprudence indicating that the claimant should win, then we should follow it."[9]

35. However, Strasbourg judgments were not to be binding. The underlying purpose of this was two-fold. Firstly, as above, there may be particular features of domestic law, customs, our practices and procedures in the UK that mean decisions from Strasbourg cannot, or

[9] "Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?", Human Rights Law Review, Volume 12, Issue 1, March 2012

should not, be followed. Secondly, the autonomy for domestic courts to decline to follow Strasbourg would provide for our courts and judges to influence the development of Convention case law themselves. Therefore, Section 2 is a careful balancing act – bringing rights home, but also giving our own courts a role in shaping how they are to be interpreted.

36. This submission argues that, despite early difficulties in grappling with the scope of the instruction to "take into account" Strasbourg decisions, the provision and substance of Section 2 has been successful. It has ensured that UK has higher standards in protecting human rights, allows for the particularities of our system, values and procedure to be taken into account, and influenced the European Court of Human Rights (the "**ECtHR**" or the "**Strasbourg Court**") in a positive and constructive manner.

37. This position, which argues that there is no need to amend Section 2, is taken because the nature of the provision is inherently progressive. It allows for a gradual and collaborative development of human rights principles, while ensuring that domestic courts apply legal principles to the UK context. Our developing understanding of the duty to "take into account" European case law coupled with the developing relationship between the Strasbourg Court and our domestic courts ensures that modern British values are protected. The interpretation of the Convention is based on the premise that it should be treated as a

"living instrument which must be interpreted in the light of present-day conditions and the ideas prevailing in democratic States today".[10]

38. As the Lord Chancellor, Lord Irvine, taking the bill through Parliament told the House of Lords in 1998, "[Section 2 got the balance] right in requiring domestic courts to take into account judgments of the European court, but not making them binding. The Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so".

39. The purpose was clear and, it is argued, has been given effect over the two decades since.

40. The famous declaration of Lord Rodger of Earlsferry, "*Argentoratum locutum*: *iudicium finitum* – Strasbourg has spoken, the case is closed",[11] proved something of a false conclusion to judicial debate as to the meaning of Section 2. This followed the pronouncement of Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26:

> "It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the produce of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform through-out the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

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[10] *Austin and Ors v UK* [2012] (Applications nos. 39692/09, 40713/09 and 41008/09), para 53

[11] *Secretary of State for the Home Department v AF* (No 3) [2009] UKHL 28

41. This line of judicial interpretation was furthered by Lord Brown in *R (on the application of Al-Skeini) v Ministry of Defence* [2007] UKHL 26 who described the duty of the courts in relation to Strasbourg case law to keep pace with the jurisprudence, "no less but certainly no more". The inherent danger in this approach, as Sir Stephen Sedley has said, is that, by adopting such a limited ambition to merely attempt to stay level with Strasbourg decisions, the UK could easily fall behind.

42. Therefore, as new cases reached what is now the Supreme Court, two challenges forced the court to reconsider the approach to Section 2 and the duty to "take into account" Strasbourg case law. Firstly, cases were brought in which the Supreme Court felt unable to follow Strasbourg decisions – for a variety of reasons. Secondly, cases emerged where Strasbourg was silent, or had not extended principles to certain circumstances, and the domestic courts had to consider whether to take the opportunity to plough their own furrow.

43. With regard to the court's emboldened approach to declining the opportunity to follow Strasbourg precedent, the starting point is arguably *R v Horncastle* [2009] UKHL 14. The human rights academic Conor Gearty has said that "since Horncastle, there has indeed been a new mood of – not defiance exactly – but more calm co-responsibility so far as the UK courts have been concerned". The case involved consideration of a defendant's right to a fair trial (protection in the Convention via Article 6) and the use of hearsay evidence. The

appellants relied upon the principle in *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1 – which held that convictions "solely or decisively" based on hearsay evidence breached the right to a fair trial.

44. In *Horncastle*, the Supreme Court found the trials in these cases were fair notwithstanding the decision in *Al-Khawaja*, declaring that the "sole or decisive" rule lacked clarity in the domestic context whereby Parliament had enacted exceptions to the hearsay rule in a regime which contained safeguards that rendered the "sole or decisive" rule unnecessary. Domestic law on hearsay was extensive and well developed, carefully drawn in a way that compensated for the absence of direct evidence with numerous safeguards designed to give the accused person against whom such statements were being entered a fair trial, notwithstanding the exceptional circumstances in which the evidence was being admitted.

45. Lord Phillips said [para 11]:

> "The requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision or the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes

> place what may prove to be a valuable dialogue between this court and the Strasbourg court. This is such a case."

46. When the issue was heard in the Grand Chamber, there was a change in approach. In *Al-Khawaja and Tahery v United Kingdom* (15 December 2011), Strasbourg found, following careful consideration of the Supreme Court judgment in *Horncastle*, that [para 126]:

> "It is not the Court's task to consider the operation of the common law rule against hearsay *in abstracto* nor to consider generally whether the exceptions to that rule which now exist in English criminal law are compatible with the Convention. As the Court has reiterated Article 6 does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.
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> The Court is of the view that the sole or decisive rule should also be applied in a similar manner. It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise. To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice. [146]"

47. This dialogue illustrates Section 2, and the Act in general, functioning well. It shows that our domestic courts are, in the words of the White Paper of the incipient Act, "influencing the development of case law on the Convention by the European Court of Human Rights on the

basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom". The effective nature of the dialogue, and the particularities of UK systems and procedures being giving effect is further illustrated in the *Vinter*[12] and "whole life orders" stream of cases.

48. Indeed, the importance and strength of the dialogue between domestic courts and Strasbourg has been commented upon in approving terms in speeches and interviews made by the judiciary. Lord Mance has said:

> "The relationship with Strasbourg is not as stringent as the relationship with the Court of Justice of the European Union, and this actually offers greater opportunity for dialogue. We can dig our heels in and say '*Sorry we aren't bound by your decisions and we don't agree with this decision for these reasons*'. The Strasbourg court then has to reconsider the problem in the next case that comes up in that area and it will then do so with the benefit of our input and I think we have therefore a greater opportunity to help shape Convention jurisprudence than we do in the case of EU law. Dean Spielmann (President of the European Court of Human Rights) has said that he values the contribution that British courts have made and they value our explicit (albeit sometimes lengthy) judgments. There is a real dialogue and I think the ECtHR has given real content to the margin of appreciation. There is a whole string of recent cases (*Austin*, *Axel Springer*, *von Hannover*, *Firth*, *Ibrahim* and *Hutchinson*), where the ECtHR has bent over backwards to make clear that it is not its duty to intervene in every case. Most recently of all, in *Nicklinson* (*Nicklinson and Lamb v the United Kingdom*), the ECtHR said that our appreciation of the constitutional position in the UK was not something they would interfere with and that we were entitled to take the view that Parliament should now consider the matter."

[12] *Vinter v UK* (Grand Chamber) 9 July 2013; R v Nealon; *R v Sam Hallam v the Secretary of State for Justice* [2015] EWHC 1565 (Admin)

49. Sir Nicolas Bratza, retired UK judge at Strasbourg, has also said:

> "... the Strasbourg Court has ... been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act and this because of the very high quality of the judgments of these courts, which have greatly facilitated our task of adjudication ..."

50. It is also part of the two-way process, whereby Strasbourg has developed restraining principles that it imposes on itself, such as "the margin of appreciation" and the "principle of subsidiarity".[13] The flexible approach taken by the Strasbourg Court, eager to understand and give effect to particular circumstances, traditions and democratic debates within contracting states, is evidenced in two controversial cases involving the police technique of "kettling" protestors and individuals seeking assistance in ending their own lives (assisted suicide).

51. On kettling, and whether the technique was in breach of human rights, the ECtHR said [para 56]:

> "As the Court has previously stated, the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them. Moreover, even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale.

[13] *Handyside v United Kingdom* (1976) 1 EHRR 737; *Von Hannover v Germany* (No 2) (2012) 55 EHRR 55

> Police forces in the Contracting States face new challenges, perhaps unforeseen when the Convention was drafted, and have developed new policing techniques to deal with them, including containment or 'kettling'. Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness."[14]

52. In the assisted suicide case, the ECtHR showed appropriate deference to the views of our sovereign Parliament, as emphasised by a majority in the Supreme Court, stating [85]:

> "In any event, the Court is satisfied that the majority of the Supreme Court judges did deal with the substance of the first applicant's claim. With the exception of Baroness Hale and Lord Kerr, they concluded that she had failed to show that developments since *Pretty* meant that the ban could no longer be considered a proportionate interference with Article 8 rights (see Lord Neuberger at paragraph 38 above; Lord Mance at paragraph 40 above; Lord Wilson at paragraph 43 above; and Lord Reed at paragraph 52 above). The fact that in making their assessment they attached great significance (see paragraph 41 above) or 'very considerable weight' (see paragraph 52 above) to the views of Parliament does not mean that they failed to carry out any balancing exercise. Rather, they chose – as they were entitled to do in light of the sensitive issue at stake and the absence of any consensus among Contracting States – to conclude that the views of Parliament weighed heavily in the balance."

53. Our domestic courts have also gone further than Strasbourg at times when the ECtHR has not kept pace with the "living instrument" that is the Convention. This has allowed the UK to extend human rights protections beyond the constraints of Strasbourg case law. In *R (Quila*

[14] *Austin and Ors v UK* [2012] (Applications nos. 39692/09, 40713/09 and 41008/09)

and another) v Secretary of State for the Home Department [2011] UKSC 45, the issue was whether the Government had acted lawfully by introducing a ban on entry for settlement of foreign spouses under the age of 21 in an attempt to deter, or prevent, forced marriages. The Government sought to rely upon *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 in which the Strasbourg Court held that there was no lack of respect for family life in denying entry to foreign spouses. Lord Wilson said [para 43]:

> "Having duly taken account of the decision in *Abdulaziz* pursuant to section 2 of the Human Rights Act 1998, we should in my view decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the ECtHR, in particular *Boultif* and *Tuquabo-Tekle*, are inconsistent with it. There is no 'clear and consistent jurisprudence' of the ECtHR which our courts ought to follow."

54. Accordingly, any notion that the courts are forced to follow European jurisprudence – or that the Act leads to the "Europeanisation" of our law – because of the Act is unsubstantiated. In fact, the drafting of Section 2 encourages the domestic courts to influence European jurisprudence, especially when there is a degree of certainty or confusion in the Strasbourg Court's recent decisions. Similar circumstances were commented upon by *Lord Commissioner of Police of the Metropolis v DSD and Anor* [2018] UKSC 11 when he said [at para 142]:

> "What has happened in the Strasbourg jurisprudence is, unfortunately, not unprecedented. The European Court of Human

> Rights starts from a solidly rationalised principle, but then extends it to situations to which the rationale does not apply, without overt recognition of the extension, without formulating any fresh rationale and relying on supposed authority which does not actually support the extension. Further, the European Court of Human Rights has not in the present context really focused at any stage on the implications for policing of the general duty which it has suggested.
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> [143] In these circumstances, while appreciating the pressures under which the European Court of Human Rights operates, and the difficulties of maintaining coherence and discipline in a court consisting in the first instance of multiple chambers, an approach, careful to identify, rationalise and justify any significant development of principle, would save domestic litigants and courts time, effort and expense."

55. The ability, derived from Section 2, to shape human rights jurisprudence also ensures our British values and principles are, to use a phrase, taken into account in Strasbourg. In *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, there was a challenge to the Labour Government's attempt to ban fox hunting, with the claimants arguing that this was an unlawful interference with Article 8. Lord Bingham, finding against the claimants, emphasised the particular British character stating that "the familiar suggestion that the British mind more about their animals than their children does not lack a certain foundation of fact". Lady Hale, commenting upon the decision, stated "one can imagine that in other European countries, an interference with the time-hallowed right to hunt over other people's land or shoot tiny song-birds for sport would not have been justified". Human rights

have been brought home and are, accordingly, read in a very British context.

56. The story of the HRA and the duty to take into account the jurisprudence from Strasbourg is a very British tale, avoiding an overly rigid or dogmatic approach and seeking to draw the best from the Strasbourg system, while preserving the autonomy of British courts to develop the law and influence Strasbourg in turn. Baroness Hale has described it as "striking the balance in a very British way". Lord Mance and Lord Hughes described the provision in these terms:

> "The degree of constraint imposed or freedom allowed by the phrase 'must take into account' is context specific."[15]

57. This neither fully constrains our courts in a straight-jacket nor overly empowers them to ignore the Convention. Where there is a clear and consistent principle developed from Strasbourg over a period of time, the domestic courts will very likely follow. But where there is space to shape the jurisprudence, the HRA is clear that they have the autonomy to do so. Indeed, when Strasbourg authority does not align with a particularity of our legal system or framework, or indeed our values, the domestic courts will not be timid to decline to follow such an authority.

[15] *R (Kaiyam) v Secretary of State for Justice* [2015] 2 WLR 76, para 21

THEME TWO: THE RELATIONSHIP BETWEEN THE JUDICIARY, THE EXECUTIVE AND THE LEGISLATURE

The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy.

Introduction

58. Since the Human Rights Act 1998 (the "**HRA**" or the "**Act**") came into force on 2 October 2000, individual litigants have been able to enforce rights under the European Convention on Human Rights (the "**ECHR**" or the "**Convention**") in domestic courts. Parliament retains the power to repeal the Act, and the Government to propose such repeal. In this sense, as with any other piece of legislation, it is these branches of government that have the ultimate say on whether it remains law.

59. It is appropriate that the role of adjudicating on Convention rights is given to the courts, rather than another branch of government. First, the principle that there should be a judiciary independent of the executive and legislature to interpret and apply enacted laws is a cardinal feature of a modern liberal democracy.[16] Moreover, the courts are well suited to this purpose. Parliamentarians scrutinising or voting on legislation will never be able to consider how it might apply in every eventuality. Ministers enacting secondary legislation or exercising

[16] See e.g. Lord Bingham's discussion of this in *A and Ors v Secretary of State for the Home Department* [2004] UKHL 56, para 42

democratically conferred powers will not be able to foresee every possible consequence. The specific consideration of the facts of each individual case means the court procedure is well suited for adjudication on whether or not there has been a breach of a Convention right in a given case.[17]

60. In part 1 of this section of the submission, the architecture of the Act and how it is interpreted by the courts will be examined. In part 2, the issue of how Article 8 is applied in the particularly politically sensitive sphere of immigration law will be considered in detail.

61. As will be explained below, the HRA has preserved balance between the three branches of government and has not drawn the courts unduly into areas of policy or been used as a means of judicial activism. In the immigration context, the courts have not thwarted or subverted Parliamentary legislation or executive policy, but have appropriately navigated their duties to the individual and the wider public interest to chart a course that ensures that rights in individual cases are protected, but with the wider public interest kept in full view.

Part 1: The architecture of the HRA

62. The essential structure of the HRA is as follows:

[17] For detailed discussion of the differing roles and approaches of the lawmakers and the courts, see *The Constitutional Balance*, John Laws (Hart, 2021), chapter 3

a. Under s. 6 (1), it is provided that it is unlawful for a public authority, including a court or tribunal under subsection (3), to act in a way which is *"incompatible with a Convention right"*.

b. However, s. 6 (2) provides that this will not apply if the public authority, as a result of other primary legislation, *"could not have acted differently"*.

c. These two provisions are applied under the interpretive principle in s. 3 – that, so far as it is possible to do so, primary legislation must be read in such a way as to give effect to Convention rights.

d. But where, despite this, primary legislation is found to be incompatible with a Convention right, then under s. 4 the court may make a declaration of incompatibility, which does not affect the continuing operation of the primary legislation and is not binding on the parties to the dispute.

<u>Section 3: Harmony of interpretation</u>

63. Section 3 of the HRA requires courts to read legislation in accordance with Convention rights as far as possible. Although there were initial suggestions after the Act came into force that this provision may be used in a strained way to give effect to Convention rights (see *R v A (No. 2)* [2001] UKHL 25, para 44), the courts stepped back from using it as a means of judicial activism. Rather, s. 3 (1) is not available where a suggested interpretation *"is contrary to express statutory words or is*

by implication necessarily contradicted by the statute" (*R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, para 59). In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, the House of Lords indicated that a touchstone will be whether the proposed reading of a statutory provision *"would remove the very core and essence, the 'pith and substance' of the measure that Parliament had enacted … Section 3(1) gives the courts no power to go that far."* (Lord Rodger at para 111)

64. This strikes the right balance. For the HRA 1998 to protect the rights of individuals properly under the Convention, it is appropriate for the courts to seek to read legislation in a way that is compatible with them. This minimises dissonance between the protection of Convention rights and the effects of interacting legislation. This provision, together with the wider scheme of the HRA 1998 in defining the rights of UK residents and the responsibilities that public authorities owe to them, places the Act into the class of constitutional statutes.[18]

65. But in interpreting s. 3 the courts have made clear that judicial restraint is required – the provision gives no power to undermine the essence of a Parliamentary statute in order to give effect to Convention rights. If a particular provision in issue cannot be read in

[18] Further discussion of this may be found in e.g. *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)

harmony with the Convention, then the recourse is a declaration of incompatibility.

Section 4: The declaration of incompatibility

66. A declaration of incompatibility is non-binding and cannot strike down Parliamentary legislation. In effect, such a declaration poses the question to the Government as to whether it wishes to reconsider. But it does not tie its hands. As Lady Hale stated in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, in a dissenting judgment that would have led to a declaration of incompatibility had she been in the majority:

> "Parliament is then free to cure that incompatibility … or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative." (para 300)

67. This has important practical ramifications. The decision of a nine-judge Appellate Committee of the House of Lords in the "Belmarsh case" (*A and Ors v Secretary of State for the Home Department* [2004] UKHL 56) that the holding of terror suspects under the detention regime at the time was incompatible with the right to liberty (Article 5) and the prohibition on discrimination (Article 14) did not bring about the release of the suspects. The power remained with the Government and Parliament to choose whether or not to devise a new detention regime, or whether to continue to detain the suspects under the existing (non-Convention-compliant) powers.

68. Therefore, the declaration of incompatibility is kept within careful bounds. It does not place undue power into the hands of judges to undermine national security measures which have been enacted by Parliament, or to override Parliamentary legislation in any other way in the name of human rights.

Part 2: Article 8 in immigration law

69. In the sphere of immigration law, the qualified right to private and family life is frequently the basis upon which an individual seeks to regularise their status in the UK or resist deportation for criminal offending.

70. This is a particularly politically sensitive area of law. In the autumn of 2011, the then Home Secretary, the Rt. Hon. Theresa May MP, stated to the Conservative Party Conference:

> "… We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter – for whom he pays no maintenance – lives here. The robber who cannot be removed because he has a girlfriend. The illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat."[19]

71. This statement was, on a generous interpretation, economical with the truth. In the third case, the key point in the appellant's favour was not his cat, but his relationship with his cohabiting partner, which counsel

[19] https://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full-2/

for the Secretary of State accepted had not properly been considered under a relevant Home Office policy in effect at the time.[20] The Secretary of State agreed that the appeal had to be allowed on this basis. The cat was mentioned in the judgment as an aside, in what was perhaps a misguided attempt at humour. It was not the reason that the appeal was successful.

72. Whether the other two cases mentioned were real or not is unclear. But it is important to note that this speech was made over seven years after the House of Lords explained that, when the courts consider a claim under Article 8, it is necessary in each case to consider whether the consequences of removing the person from the UK were sufficiently grave to engage Article 8, and if so, whether such an interference was proportionate, having regard to interests including those of the wider community (*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, para 17). In this regard, Lord Bingham stated that:

> "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis" (*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, para 20).

[20] https://www.theguardian.com/law/2011/oct/04/theresa-may-wrong-cat-deportation

73. In light of this guidance, even if the other cases mentioned by the Home Secretary did exist, it seems very unlikely that they were as simple as she suggested.

74. In any event, in June 2012, a major overhaul of human rights immigration law was announced. Announcing the reforms, the Home Secretary stated as follows:[21]

    a. Regarding the deportation of foreign criminals: *"It is unacceptable that foreign nationals whose criminal behaviour undermines our way of life can use weak human rights claims to dodge deportation. We want these new rules to make it clear when the rights of the law abiding majority will outweigh a foreign criminal's right to family and private life. By voting on this in the House of Commons, Parliament will define for the first time where the balance should lie."*

    b. Regarding family migration: *"We welcome those who wish to make a life in the UK with their family, work hard and make a contribution but family life must not be established here at the taxpayer's expense. To play a full part in British life, family migrants must be able to integrate – that means they must speak our language and pay their way. This is fair to applicants, but also fair to the public. British citizens can enter into a relationship with whomever they*

[21] https://www.gov.uk/government/news/radical-immigration-changes-to-reform-family-visas-and-prevent-abuse-of-human-rights

choose but if they want to establish their family life here, they must do so in a way which works in the best interests of our society."

75. The reforms were implemented through changes to the Immigration Rules and also by the enactment of the Immigration Act 2014, which introduced a new Part 5A to the Nationality, Immigration and Asylum Act 2002 (the "**NIAA 2002**").[22] The measures included the following:

a. In cases of criminal deportation, the newly introduced Part 5A of the NIAA 2002 provides that:

i. Where a person who has been sentenced to at least 12 months' imprisonment resists deportation on the basis of Article 8, the public interest will nevertheless require that person to be deported unless: (i) this would result in *"unduly harsh"* consequences for a British partner, or for a child who is British or has resided in the UK continuously for at least seven years; or (ii) the person has been resident in the UK for most of their life, they are socially and culturally integrated here, and there would be *"very significant obstacles"* to their integration in their country of origin.

[22] In particular, in Part 5A of the NIAA 2002: s. 117A sets out the application of this Part, s. 117B sets out public interest considerations relevant to all cases, s. 11C sets out public interest considerations relevant to cases involving foreign criminals and s. 117D explains how this Part is to be interpreted.

ii. If the person was sentenced to at least four years' imprisonment, then they must show *"very compelling circumstances"* going beyond the criteria above.

b. In general family migration cases:

i. The Immigration Rules were altered so that the minimum income that the British citizen must earn in order to sponsor a foreign spouse was raised from approx. £5,000 to £18,600 gross annual income (or a considerably larger amount in savings). Further amounts are required where non-British children are involved – a further £3,800 per annum for the first child and then £2,400 per annum for each additional child.

ii. Furthermore, Part 5A of the NIAA 2002 provides that courts and tribunals must *"have regard to"* the principles including that *"[i]t is in the public interest … that persons who seek to enter or remain in the United Kingdom are able to speak English"* and that they are *"financially independent"*, that only *"little weight"* should be given to a private life or a relationship with a British partner established when the person was in the UK unlawfully, and that only *"little weight"* should be given to a private life established by a person while their immigration status was *"precarious"*.

76. When deciding cases following these reforms, the duty of the courts was to interpret the provisions in a way that was harmonious with the right to private and family life (as they are required to by s. 3 HRA). Indeed, it was expressly accepted by the Secretary of State before the courts that Part 5A of the NIAA 2002 is *"intended to provide for a structured approach to the application of article 8 which produces in all cases a final result which is compatible with, and not in violation of, article 8"* (*Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, para 36).

A. The deportation of foreign criminals

The *"unduly harsh"* test

77. The courts have made clear that the *"unduly harsh"* test must be applied stringently. When a two-judge panel including the then President of the Upper Tribunal[23] considered it shortly after it came into force, it was stated:

> "… we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher." (*MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC), para 46)

[23] The court that hears appeals from the First-tier Tribunal and may itself be appealed to the Court of Appeal.

78. When the provision was examined by the Supreme Court in 2018, it was explained:

> "… the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' … taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level." (*KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, para 23)

79. In September 2020, the Vice-President of the Court of Appeal stated:

> "… The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability … The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders) … The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest." (*HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, para 51)

80. The courts have accordingly made clear that it is very difficult for a foreign criminal to satisfy this test.

<u>Private life alone</u>

81. When considering whether a foreign criminal who has resided in the UK for over half their life and is socially and culturally integrated here and would suffer from *"very significant obstacles"* to integration in their country of origin, the Court of Appeal stated:

> "The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life." (*Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, para 14)

82. When considering whether the test is met, a Court of Appeal that included the then Vice-President and the current Vice-President stated that *"the words 'very significant' connote an 'elevated' threshold and … the test will not be met by 'mere inconvenience or upheaval' … The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as 'very significant'."* (*Parveen v Secretary of State for the Home Department* [2018] EWCA Civ 932, para 9)

83. Owing to this requirement, together with the need for the person to have resided in the UK for over half their life and to be socially and culturally integrated here (which will tend to be countered where a person has engaged in criminal offending and been sent to prison), the courts have made clear that it is very difficult for a foreign criminal to succeed in resisting deportation on the basis of private life alone.

The *"very compelling circumstances"* test

84. Finally, where a foreign criminal resisting deportation has been sentenced to at least four years' imprisonment (or has received a lesser sentence but is unable to meet either set of preceding criteria), they must show that their claim involves *"very compelling circumstances"*.

85. The Supreme Court has explained that relevant factors for such an assessment are likely to include *"the nature and seriousness of the offence committed by the applicant"*, *"the length of the applicant's stay in the country from which he or she is to be expelled"*, *"the applicant's conduct during that period [since the offence was committed]"*, *"the applicant's family situation"* and *"whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult"* (*Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, para 26; reaffirmed in *Akinyemi v Secretary of State for the Home Department (No. 2)* [2019] EWCA Civ 2098).

86. This is a particularly difficult test to meet, in view of the need, as reaffirmed by the Vice-President of the Court of Appeal, for circumstances that are *"sufficiently compelling to outweigh the strong public interest in deportation"* (*HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, para 38). The Supreme Court has stated that such cases *"are likely to be a very*

small minority" (*Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, para 38).

87. Moreover, the Vice-President has explained that particular care must be taken before making a finding in a foreign criminal's favour as to their risk of reoffending. Not only will such a matter *"rarely be of great weight bearing in mind that … the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern"*, but tribunals are instructed to be cautious about making such a finding in any event:

> "and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or the absence of subsequent offending for what will typically be a relatively short period." (*HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, para 141)

88. Therefore, the stringency of this test and the need for caution when considering the risk of reoffending have been made clear by the courts.

89. Overall, therefore, the courts have upheld the strict criteria enacted by Parliament that must be met by foreign criminals in order to resist deportation on the basis of private and family life.

B. Family migration

The minimum-income requirement

90. In *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10, a seven-judge Supreme Court largely dismissed a wide-ranging claim brought on a number of grounds, including a challenge to the minimum-income requirement on the basis of Article 8. Lady Hale and Lord Carnwath stated:

> "There can be no doubt that the MIR [minimum-income requirement] has caused, and will continue to cause, significant hardship to many thousands of couples who have good reasons for wanting to make their lives together in this country, and to their children … But the fact that a rule causes hardship to many, including some who are in no way to blame for the situation in which they now find themselves, does not mean that it is incompatible with the Convention rights or otherwise unlawful at common law." (paras 80–81)

91. Moreover, the aim of the minimum-income requirement, as part of an overall strategy to reduce net migration, was *"entirely legitimate: to ensure, so far as practicable, that the couple do not have recourse to welfare benefits and have sufficient resources to be able to play a full part in British life"* (para 82). As such, the minimum-income requirement was upheld. Despite noting that its effects may cause significant hardship, the court did not undermine the requirement or declare it incompatible with Article 8.

92. In this case, the Supreme Court upheld a specific challenge brought on the basis that the Rules (in their form at the time) did not sufficiently cater to the requirement under s. 55 of the Borders and Citizenship Act 2009 to take into account the welfare of children affected by immigration decisions (paras 91–92). As a result of this, the requirement for officials specifically to consider the impact of the decision on any children was then added directly to the Rules.

Article 8 where the Immigration Rules cannot be met

93. Even where a person is unable to meet the requirements of the Immigration Rules (including the minimum-income requirement), this will not necessarily dispose of the case under Article 8.

94. The Rules are the executive's statement of policy for how, where it is relevant, Article 8 should apply. However, the facts of a given case may include individual factors not countenanced by the criteria under the Rules. In this regard, the Secretary of State remains under a duty (ultimately deriving from s. 6 (1) of the HRA) to exercise discretion to allow a claim even where the criteria under the Rules are not met if there would otherwise be a breach of Convention rights.

95. Moreover, as executive policy, rather than Parliamentary statute, the Rules are not directly binding on the courts, which also have a duty under s. 6 (1) of the HRA to decide each case under Article 8 on its facts to avoid a breach of right. Detailed discussion of the status of the Rules in this regard may be found in the Supreme Court's judgment in

Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 at paras 15–23 and 46.

96. To resolve the tension between the importance of paying heed to executive policy made under democratically conferred executive powers, and the duty of the courts and tribunals to undertake individual consideration of each case to avoid a breach of Convention rights, the approach that has been established is as follows:

a. If the individual cannot meet the relevant criteria under the Rules, this will be the starting point for consideration of the case, but not the end point (House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, para 6).

b. Nonetheless, *"where the Secretary of State has adopted a policy based on a general assessment of proportionality … [tribunals] should attach considerable weight to that assessment"* and should only depart from this if the claim is *"compelling"* (Supreme Court in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 at para 46).

c. As such, the Secretary of State's assessment under the Rules should be followed by the tribunal unless, on the individual facts, this is a rare case in which this would lead to *"unjustifiably harsh"* consequences for the individual or their family (Supreme Court in

R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11, paras 60, 70).

97. This scheme has been accepted both by the Government and by the Strasbourg Court. The requirement to consider circumstances not captured by the criteria under the Immigration Rules has now been enacted by the Secretary of State into the Immigration Rules themselves.[24] Moreover, while a British tribunal was held to have erred in an assessment of a particular case, the Immigration Rules were recently upheld by the Strasbourg Court (*Unuane v United Kingdom* (Application no. 80343/17), 24 November 2020, para 83).

<u>The statutory public interest criteria</u>

98. When consideration is to be given as to whether there will be *"unjustifiably harsh"* consequences for a person or their family such that a claim should be allowed outside the Rules, the courts have implemented the relevant criteria that were added by the Immigration Act 2014.

99. These provisions created a question for how a tribunal should decide a claim under Article 8. On the one hand, under s. 6 (1) of the HRA 1998, the tribunal must give effect to Article 8 in each particular case. On the

[24] See, in particular, under paragraphs 390A, 391, 397, 398 (c), 399 (b) (ii) and 399D (in cases of criminal deportation) and paragraph GEN 3.2 of Appendix FM (in cases of non-criminal deportation))

other hand, Parliament has set out criteria in legislation that form a prism under which Article 8 should be interpreted.

100. In particular, a question arose regarding the statutory provisions stating that courts and tribunals should *"have regard to"* the principle that *"little weight"* should be given to a private life or a relationship with a British partner established when the person was in the UK unlawfully, or to a private life established by a person while their immigration status was *"precarious"*.[25] It was not clear whether this mandated a particular outcome in a given case, and, if so, whether this would be compatible with the courts' duty to undertake specific consideration of the facts of each case.

101. To reconcile the duties to give effect to Part 5A of the NIAA 2002 but also to decide the facts of each particular case, the Supreme Court held in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 that a court or tribunal must have regard to the consideration that little weight should be given to private life established in the relevant circumstances. But to permit specific factual consideration in each case, it was held that, inbuilt into the wording of the statute (which states that it requires tribunals to *"have regard to"* this principle), there was *"a small degree of flexibility"*, which meant that the generalised normative guidance *"may be overridden in an*

[25] As to the meaning of this concept, the Supreme Court has established that every person without citizenship or indefinite leave to remain will have a *"precarious"* immigration status for the purposes of the *"little weight"* provisions (*Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, para 44).

exceptional case by particularly strong features of the private life in question" (para 49).

102. Therefore, the *"little weight"* provisions will usually mean that an appeal under Article 8 brought on the basis of criteria captured by the provisions will be dismissed. But, in an exceptional case, more than a little weight may still be given to relevant factors, in order to avoid an outcome incompatible with Article 8. This ensures that Part 5A of the NIAA 2002 is not denied of effect, but also that the courts are still able to consider each case on its own facts.

Conclusion

103. The approach taken by the courts indicates that the HRA 1998 is not being used to step inappropriately into the role of the executive or legislature or thwart the purpose of statutory law. Rather, there is a healthy and balanced relationship between the three branches of government, in which each fulfils its proper role. The requirement to read legislation, so far as possible, to give effect to Convention rights is not licensed by the higher courts for use as a means of judicial activism. The declaration of incompatibility does not affect the continuing operation of primary legislation.

104. In the sphere of immigration law, the House of Lords made clear not long after the HRA 1998 came into force that it is only in exceptional cases (stated to be *"a small minority"*) that private and family life may be relied upon to resist immigration control.

105. Furthermore, the courts implemented the 2012-14 immigration law reform in a way that gives proper effect to the stringency of the new requirements in each case, while ensuring harmony with the duty to protect Convention rights.

106. In order to meet the duties under ss. 3 and 6 to read legislation in harmony with Convention rights and to make decisions that do not breach such rights, the court or tribunal deciding an appeal makes its own independent assessment of the claim on its facts. However, in doing so, it will give due and careful consideration to the criteria enacted by the legislature in the Immigration Act 2014 and by the executive in the Immigration Rules.

107. In the area of criminal deportation, the courts have implemented the relevant tests enacted in statute and provided guidance that makes clear the stringency of the correct approach. The effect has been that it is substantially more difficult for a foreign criminal to rely on private and family life to resist deportation.

108. Moreover, the courts have upheld in substance the minimum-income requirement under the Immigration Rules. Furthermore, where a person cannot meet the criteria under the Rules, the Secretary of State's view on their claim must be given significant weight such that their appeal may only succeed where the alternative would be

"unjustifiably harsh". If the statutory public interest criteria are engaged, the claim may only succeed if is an *"exceptional case"*.

109. Accordingly, the courts have not thwarted or subverted Parliamentary legislation or executive policy on Article 8. Nor have they stepped into the policy arena to change the meaning of statutory language. Rather, the courts have appropriately navigated their duties to the individual and the wider public interest to chart a course that ensures that rights in individual cases are protected, but with the wider public interest kept in full view.

EXTRA-TERRITORIALITY

The Gross Review will consider the implications of the way in which the Human Rights Act applies outside the territory of the UK and whether there is a case for change.

Introduction

110. On 8 September 2011, speaking from Downing Street, the then Prime Minister David Cameron responded forcefully to the conclusion of the Baha Mousa Inquiry:

> "It is clearly a truly shocking and appalling incident. This should not have happened, it should never be allowed to happen again. The British Army, as it does, should uphold the highest standards. We should take every step possible to make sure this never happens again. If there is further evidence that comes out of this inquiry that requires action to be taken, it should be taken.
>
> Britain does not cover these things up, we do not sweep them under the carpet. We deal with it."

111. The idea that "Britain does not cover things up" but is prepared to confront and "deal with" questions of human rights compliance even where those arise outside of the physical territory of the UK is the best and most compelling argument we can see for maintaining the extra-territorial application of human rights laws.

112. Baha Mousa was an Iraqi citizen and hotel worker who died while in British Army custody in Basra, Iraq in September 2003. The inquiry into

his death found it had been caused by "factors including lack of food and water, heat, exhaustion, fear, previous injuries and the hooding and stress positions used by British troops – and a final struggle with his guards". He was subjected to practices banned under domestic law and the Geneva Convention. The inquiry heard that Baha Mousa was hooded for almost 24 hours during his 36 hours of custody and that he suffered at least 93 injuries prior to his death. The appalling and brutal treatment by British forces, which led directly to the death of Baha Mousa in Iraq in 2003 while he was held in British custody, was brought to light by the independent public inquiry led by Sir William Gage. The inquiry condemned the Ministry of Defence for "corporate denial". The court martial had revealed only a "conspiracy of silence" on the part of officers who before the independent inquiry denied any wrongdoing.

113. The Ministry of Defence eventually admitted to "substantial breaches" of the European Convention on Human Rights (the "**ECHR**" or the "**Convention**") Articles 2 and 3 (right to life and prohibition of torture) and agreed to pay £2.83 million in compensation to the family of Baha Mousa and nine other men.

114. But for the litigation brought under the Human Rights Act (the "**HRA**" or the "**Act**"), the findings of Sir William Gage's inquiry would have been swept under the carpet.

Current approach to the scope of human rights laws

115. Article 1 of the ECHR says that states have a duty to secure the rights and freedoms set out in the Convention to "everyone within their jurisdiction".

116. Where the state, through its representatives, exercises "effective control" over an area or person, those representatives are subject to human rights obligations. The person under the state's control could be a foreign citizen or British solider.

117. In two leading cases arising out of the Iraq War, the courts held that the UK Government's human rights obligations are not limited to the territorial UK but can exceptionally extend overseas to situations in which British officials exercise *"control and authority"* over foreign nationals.

118. *Al Skeini v United Kingdom*[26] concerned the killing of six Iraqi civilians by British soldiers in southern Iraq, including the brutal death of Baha Mousa during his detention at a UK army base. The House of Lords had ruled that the HRA did not apply to the soldiers' actions, save those on the army base. However, the Strasbourg Court ruled that the UK Government had a duty to conduct an effective investigation into the deaths of all the civilians killed by British soldiers, whether or not they

[26] Application no. 55721/07

were within the confines of a UK military base.[27] It based its decision on the fact that the UK had assumed responsibility for the maintenance of security in southern Iraq and were exercising "authority and control" over Iraqi civilians.

119. *Al Jedda v United Kingdom*[28] involved the indefinite detention of a dual British/Iraqi citizen in a Basra facility run by British forces. In 2007, the House of Lords ruled unanimously that the detention was lawful because the UK Government had been authorised by UN Security Council resolution 1546. However, the Grand Chamber held that the Security Council resolution did not displace the UK Government's obligations to protect the right to liberty under Article 5 of the ECHR.

120. It is right that the UK Government's duties under human rights laws do not stop at Dover. The adherence of our public bodies to the rule of law and human rights obligations in particular should know no borders.

121. The two main areas where this has been tested are in cases involving detainees in British custody and in cases involving British soldiers. There is nothing in the manner in which the courts have approached these inherently sensitive situations that suggests that the current

[27] This was a series of joined cases. Whereas the UK Government had earlier accepted that responsibility for those including Baha Mousa who were held within its facilities were within the scope of the Convention, it had argued that those arrested and shot outside the base should be treated differently.

[28] Application No 27021/08

state of the law fails to strike the right balance between upholding individual human rights and allowing broad discretion to take challenging decisions during overseas military operations.

People in military prisons

122. In *Al-Jedda*, the Strasbourg Court decided that the ECHR applied to an Iraqi civilian, Mr Al-Jedda,[29] who was held by British forces in Iraq for three years with no criminal charges brought against him. The UK Government argued that Mr Al-Jedda's detention was not attributable to the UK, but rather to the United Nations. But the Court recognised that the UN's role was to provide humanitarian relief and help with reconstruction, not security. Mr Al-Jedda was detained in a facility in Basra controlled exclusively by British forces. The Court said that the UK had jurisdiction over Mr Al-Jedda and had an obligation to secure his human rights.

Soldier cases

123. Human rights laws protect British soldiers serving abroad as well. Both the UK and European courts have ruled that Convention rights can apply to British soldiers outside the UK.

124. *Smith v Ministry of Defence* [2013] UKSC 41 concerned the case of two British soldiers who were killed in their armoured vehicles in Iraq by improvised explosive devices. The Supreme Court held that the

[29] https://eachother.org.uk/stories/its-about-control/

soldiers were within the jurisdiction of the UK (Article 1, ECHR) and so were entitled to the protection of the HRA. They reasoned that, regardless of whether the UK had effective military or governmental control over that part of Iraq, the UK did exercise authority and control over its soldiers as persons. Therefore, this authority and control was enough to create a jurisdiction link with the UK even when the soldiers were on duty abroad. The UK Government therefore was required to uphold the soldiers' rights granted by the HRA.

125. A finding of jurisdiction does not mean that the Ministry of Defence will be deemed to have violated soldiers' human rights. It simply means that wounded soldiers and families of deceased soldiers can go to court and have their cases heard rather than thrown out because of a lack of jurisdiction.[30] To have decided otherwise would mean that their families could not have had their cases heard at all.

126. The implications of this finding of jurisdiction was simply that it *could* be the case that the right to life of the soldiers had been breached. That would still need to be proven. The right to life requires the UK to take reasonable preventative measures to protect the lives of those in its jurisdiction. If it could be shown that it would have been reasonable to expect the Ministry of Defence to provide the soldiers with better equipment, then by failing to do so they could have

[30] *Smith v Ministry of Defence* [2013] UKSC 41

breached the right to life of the soldiers. Those were questions of fact and degree to be determined on the evidence.

127. The courts have shown they are well aware of the challenges faced by military personnel and the realities of military decision-making. The Supreme Court also recognised that military life means soldiers and their families cannot always expect the same standard of protection as civilians. In practice, because the courts are aware of the difficulties of military decision-making, they will often consider it appropriate to defer to the judgment of military personnel. In one case, the Divisional Court said the right to life would not give a soldier protection against errors in the chain of command in carrying out an order relating to the conduct of operations where the error created or increased the risk of loss of life.[31]

128. Contrary to the argument that the extra-territorial application of human rights legislation prevents the army from confronting enemy threats abroad and acting freely on the battlefield, the operation of Article 1 does not mean that the UK has a duty to uphold human rights laws during *active* combat. However, the further away from the battlefield you go, the weaker the justification for disapplying human rights obligations becomes. Why should it make a difference whether the British army is exercising powers in Northern Ireland or northern

[31] *Long v Secretary of State for Defence* [2014] EWHC 2391 (Admin)

Iraq? We should hold military personnel to the same human rights standards.

CONCLUSION

Should human rights apply when the UK acts abroad?

129. We return to where we started. Either the British state is committed to its human rights obligations and confronting abuses where they arise or it is not. Having signed to these obligations, it is hard to think of any principled reason why people – whether British citizens or not – should not be protected in places outside of the UK where the British state is in effective control.

130. There will always be hard cases where it is not clear whether the state is "in control" of territory but those are the sorts of cases to which the courts are well accustomed and are well placed to decide. The argument that human rights laws inhibit soldiers on the battlefield misunderstands how those laws operate. Without the positive role played by our human rights laws, abuses such as the torture and killing of Baha Mousa would never have come to light.

131. The current government has talked about reducing the influence of human rights outside UK territory. That would sweep abuses like those that led to the killing of Baha Mousa under the carpet and reduce the protection of our own soldiers. As the former Prime Minister's words suggest, that would be a most un-British thing to do.