SUBMISSION TO THE INDEPENDENT HUMAN RIGHTS ACT REVIEW

3 March 2021

Contents

The Human Rights Lawyers Association (HRLA)

1. The HRLA is an independent, specialist lawyers' association that deals exclusively with human rights law. Members of the Association include solicitors, barristers, judges, government lawyers, legal academics, legal executives, in-house lawyers, pupils, trainees and law students.

2. Our principal objective is to protect and promote human rights in the United Kingdom. We aim to increase knowledge and understanding of human rights and to aid their effective implementation within the UK legal framework and system of government.

3. This written evidence has been produced by a Working Group comprising members of HRLA's Executive Committee and was informed by a survey of HRLA members. In common with HRLA's members, the HRLA Working Group includes barristers and solicitors who are experts in the field of human rights law. The practitioner members of the Working Group have extensive experience of human rights litigation, both for claimants and for defendants, including the UK Government.

Executive Summary

4. The HRA "brought human rights home" by providing people with a simple set of standards against which all state action can be judged by an independent judiciary. The HRA helps the UK guarantee the rule of law.

Theme 1

5. Section 2 of the HRA was specifically designed so as to ensure that domestic courts can draw upon ECtHR jurisprudence, whilst allowing them the freedom to develop their own interpretation of Convention rights where appropriate to do so. The expectation was that the UK could lead the way in showing Strasbourg how an effective model for vindicating rights worked in the British context, rather than being beholden to the approach of the ECtHR. This expectation has largely been borne out in practice. There is no need for reform of Section 2.

Theme 2

6. The HRA was carefully crafted to allow the judiciary to play an important role as a protector of fundamental rights without undermining the sovereignty of Parliament. Judicial deference to Parliament was built into the structure of Sections 3 and 4. Removal of Section 3 would run contrary to the Government's ambition to uphold the rights of the British public, making it more difficult for individuals to enforce their rights.

Extraterritorial application of the HRA

7. The HRA applies to acts of UK public authorities extraterritorially in the same exceptional circumstances in which Article 1 ECHR applies beyond the territories of ECHR member states. The current approach protects the rights of foreign nationals within our jurisdiction and British military personnel serving abroad. It also allows our courts to contribute to evolving human rights standards and protects the reputation of the UK. Accordingly, there is no need to alter the extraterritorial application of the HRA.

Introduction

Importance of the HRA

7. The Human Rights Act 1998 (HRA) "brought human rights home" by making the rights in the European Convention on Human Rights (ECHR) legally enforceable in domestic courts and providing people with a simple set of universally accepted standards, against which all state action can be judged, by an independent judiciary. By enabling individuals to hold the state to account for breaches of their basic rights, the HRA is a key feature of the UK's commitment to the rule of law.

8. The present context of the COVID-19 pandemic illustrates that the HRA is more important than ever.[1] Public policy decisions taken in the last 12 months will represent the greatest interference in the lives of individuals that many people have ever experienced. This has included restrictions on the freedoms of all members of the public, and measures affecting the most vulnerable, such as restrictions on family visits to the elderly in care homes and the imposition of "do not resuscitate" orders on COVID-19 patients with serious health conditions.

9. The HRA ensures that individuals have a means to enforce their rights where they have been breached. This safety net is vital in protecting the public's lives and other freedoms, particularly, in times of crisis. For example:

    i. A dementia charity challenged "blanket bans" on family visits to care homes, arguing that Government policy breached Articles 2, 3, 8 and 14 of the ECHR.[2] The Government subsequently changed their policy on care home visits.

    ii. A mother challenged NHS guidance about which patients should be admitted to hospital and referred to critical care.[3] She argued that the guidance discriminated against people with learning difficulties and mental disorders and breached Articles 2, 3, 8 and 14 ECHR. The Government agreed to amend the guidance so that it would not be used for younger people, people with stable long-term disabilities, and in other inappropriate cases.

    iii. The Doctors' Association UK has challenged the Government's failure to conduct an urgent inquiry into the provision of adequate PPE for healthcare workers on the basis that an inquiry was required by the Government's duties under Article 2 ECHR.[4]

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[1] See Joint Committee on Human Rights, *The Government response to COVID-19: human rights implications* (2019-21 HC 265 HL Paper 125).

[2] Leigh Day, *John's Campaign issues challenge to 'blanket ban' approach on care home visits in higher risk areas* (28 October 2020). Available at: <https://www.leighday.co.uk/latest-updates/news/2020-news/johns-campaign-issues-challenge-to-blanket-ban-approach-on-care-home-visits-in-higher-risk-areas/>

[3] Hodge, Jones & Allen, *NICE amends COVID-19 Critical Care Guidelines after judicial review challenge* (31 March 2020). Available at: <https://www.hja.net/press-releases/nice-amends-covid-19-critical-care-guideline-after-judicial-review-challenge/>

[4] Good Law Project, *PPE: There needs to be a public inquiry*. Available at: <https://goodlawproject.org/case/ppe-urgent-inquiry/>

iv. It is likely that a number of inquests in the coming years will investigate potential Article 2 breaches in cases where there are certain questions arising from the deaths of people with COVID-19, for example if there are questions as to whether the deceased contracted COVID-19 due to inadequate protections in a hospital or a detention setting.

10. There are many other examples of the vital role that the HRA has played in allowing people to enforce their rights, sometimes through changes to public policy secured without litigation, and from the use of the Article 2 inquest procedure in allowing bereaved families to hold the state to account for the Hillsborough Stadium disaster, to the use of Sections 7 and 8 HRA and Article 3 ECHR by victims of John Worboys to challenge police failures in investigating his crimes (see Case Studies at page 15 for further examples).

History and purpose of the HRA

11. The HRA was introduced in the context of a long debate on whether and how to introduce a British bill of rights (e.g. the 1979 Conservative Manifesto). By 1998 there was support within all political parties for incorporating into domestic law most of the ECHR rights the UK had ratified in a form which respected parliamentary sovereignty. This became the Human Rights Act which allowed people to avoid waiting many years for their human rights to be vindicated at Strasbourg.

12. Reflecting the broad purpose of the legislation, which was to fulfil the objectives of a British bill of rights, rather than the incorporation of the jurisprudence of the ECHR along with the rights, the language of section 2 HRA was purposefully drafted to avoid the domestic courts from being bound by Strasbourg jurisprudence, whilst still requiring them to "take [it] into account".

13. The expectation was that the UK could lead the way in showing Strasbourg how an effective model for vindicating rights worked in the British context, rather than being purely reliant on the approach of the European Court of Human Rights (ECtHR). The "distinctly British contribution"[5] our courts would make to developing European human rights jurisprudence was emphasised in the parliamentary debates on the HRA and the accompanying White Paper:

"The Convention is often described as a 'living instrument'…In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention."[6]

14. As Justice Secretary Robert Buckland recently noted, the UK played a leading role in crafting and implementing the ECHR but, under the HRA, domestic courts have retained enough flexibility to determine how its provisions most appropriately apply in the British context:

[5] See Home Department. *Rights Brought Home*. October 1997 para.1.14; Jack Straw and Paul Boateng. 'Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK law'. *European Human Rights Law Review* (December 1996).

[6] *Rights Brought Home,* para.2.5.

"But … the idea that we're going to leave the convention is for the birds. You know, it was British Conservative lawyers who wrote [the ECHR] in 1950. We wrote it because we were leaders of Europe when it came to freedom, we wanted to underline the importance of fundamental rights and freedoms back then and that frankly for me is hugely important.

"It is a badge of honour for this country that we did that. Yes, there have been moments when we have had disagreements and clashes about aspects of its interpretation, but you know there is a wide margin of appreciation that allows member states, Britain, France, other countries, to make their own laws which give us a huge amount of freedom."[7]

15. A similarly careful approach was taken in crafting the HRA to allow the judiciary to play an important role as a protector of fundamental rights without undermining the sovereignty of Parliament. In explaining the intention behind the Act, then Home Secretary Jack Straw stressed that:

"Having decided that we should incorporate the Convention, the most fundamental question that we faced was how to do that in a manner that strengthened, and did not undermine, the sovereignty of parliament."[8]

16. Section 3 of the HRA requires the Courts to read primary legislation compatibly with HRA rights "so far as it is possible to do so", but does not permit them to strike it down.[9] Section 4 of the HRA introduced the declaration of incompatibility to indicate to Government the laws that need to be amended, where it is impossible to read legislation in accordance with HRA rights. However, the courts expressly recognise that the decision on whether and how to rectify the defects is a matter for Parliament. Parliament and the Government are not required to comply with declarations of incompatibility.

17. When Lord Irvine introduced the HRA in the House of Lords, he said that it would "*deliver a modern reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their human rights secured*".[10] It is the HRLA's position that the HRA in its current form strikes this balance.

[7] Owen Bowcott, *UK Government plans to remove key human rights protections* (13 September 2020). Available at: <https://www.theguardian.com/law/2020/sep/13/uk-government-plans-to-remove-key-human-rights-protections>

[8] 306 HC 771. February 15 1998.

[9] See *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 in which the House of Lords made clear that primary legislation should be given a convention-compliant interpretation only *"insofar as it is possible to do so."*

[10] HL Deb., col.1234, November 3, 1997.

Theme 1: The relationship between domestic courts and the European Court of Human Rights

18. The HRLA believes that the relationship between the domestic courts and the ECtHR is working well. The structure of the HRA – and in particular section 2 – allows domestic courts to draw on the jurisprudence of the ECtHR, whilst remaining free to develop their own interpretation of Convention rights where appropriate. Domestic courts are in an ongoing and effective dialogue with the ECtHR. There is accordingly no need to alter the status quo.

(a) Practical application of the duty to "take into account" ECtHR jurisprudence

19. Section 2 of the HRA requires domestic courts, when determining a question which has arisen in connection with a Convention right, to *"take into account"* any ECtHR judgment which *"in the opinion of the [domestic] court or tribunal"* is relevant to the case before them.

20. It is immediately obvious from the wording of the provision that section 2 does *not* bind domestic courts to follow ECtHR jurisprudence. Rather, domestic courts are required to consider ECtHR case law, but remain free to apply a different approach where appropriate to do so. In addition, section 2 clearly states that the duty to take ECtHR case law into account only arises where *the domestic court* considers that case law to be relevant to the issue which it has to decide.

21. This mechanism was carefully and deliberately crafted by Parliament to enable UK courts to draw on ECtHR jurisprudence whilst remaining free to apply a different approach where appropriate. During the House of Commons debate on the HRA, the then Home Secretary, Jack Straw, explained that *"through incorporation we are giving a profound margin of appreciation to British courts to interpret the convention in accordance with British jurisprudence as well as European jurisprudence"*.[11]

22. Through the section 2 mechanism, it was also anticipated UK courts would be able to contribute to the ECtHR's interpretation of Convention rights. Speaking during the passage of the Bill through the House of Lords, Lord Bingham observed that *"it seems to me highly desirable that we in the United Kingdom should help to mould the law by which we are governed in this area…British judges have a significant contribution to make in the development of the law of human rights"*.[12]

23. The HRLA believes that, in practice, the section 2 mechanism has largely been applied consistently with its legislative purpose. Through the so-called 'mirror principle', domestic courts have generally sought to keep pace with clear and consistent lines of ECtHR

[11] Hansard, HC vol.313, col.424 (June 3, 1998). Indeed, the government rejected an amendment proposed by the Conservative peer, Lord Kingsland, which would have made ECtHR jurisprudence binding on domestic courts. As the then Lord Chancellor, Lord Irvine explained, this would risk *"putting the courts in some kind of straitjacket where flexibility is what is required…our courts must be free to try to give a lead to Europe as well as to be led"* (Hansard, HL vol.583, cols 514-515 (November 18, 1997)).

[12] Hansard, HL vol.582, col.1245 (November 3, 1997).

jurisprudence.[13] In so doing, domestic courts have recognised that there are often good reasons for domestic courts to apply the approach taken in ECtHR cases (for example, where there is a pan-European consensus on the contents of a right, or where it is highly likely that a claimant would succeed on appeal to the ECtHR). In these cases, they have adopted the approach taken by the ECtHR, adapting it as necessary to the specific characteristics of our domestic legal system.

24. However, the domestic courts have been equally clear that there are circumstances in which it would not be appropriate to adopt the ECtHR's approach. For example, UK courts do not apply ECtHR case law which is inconsistent with a fundamental feature of our constitutional system,[14] or which overlooks or misunderstands a particular aspect of domestic law (as in the case law relating to the use of hearsay evidence in criminal trials: see below). Nor do they apply ECtHR jurisprudence which is insufficiently clear, consistent and coherent.[15] The domestic courts are also increasingly willing to find a breach of a Convention right where such a right has yet to be recognised or considered in ECtHR case law.[16] In all such cases, domestic courts exercise the discretion which is inherent in the section 2 mechanism to depart from ECtHR jurisprudence where appropriate to do so.

25. The HRLA accordingly does not consider that section 2 of the HRA requires amendment. The duty to *"take into account"* is generally applied by domestic courts in a way which recognises the authority and expertise of the ECtHR as the ultimate arbiter of Convention rights (which would remain the case with or without the HRA), whilst preserving sufficient flexibility to respect and accommodate the unique aspects of our domestic legal system. As one survey respondent put it: *"[ECtHR case law] has been taken into account, and the law has marched in step [with] (whilst not slavishly following) Strasbourg jurisprudence. There is no requirement for amendment"*.

(b) Approach of the domestic courts to the margin of appreciation

26. The margin of appreciation is not a concept which applies in domestic law.[17] In the well-known formula, the ECtHR acknowledges that *"by reason of their direct and*

[13] See Lord Bingham's speech in *R (Ullah) v SoS for the Home Department* [2004] UKHL 26; [2004] 2 AC 323 at [20]: *"a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law…"*.

[14] See, for example *R (Alconbury Developments Ltd) v SoS for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295, at [76] *per* Lord Hoffmann: ECtHR decisions which *"compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution"* should not be followed by domestic courts. See also *Pinnock v Manchester City Council* [2010] UKSC 45; [2011] 2 AC 104 at [48].

[15] See, for example, *Poshteh v Kensington and Chelsea LBC* [2017] UKSC 36; [2017] AC 624, in which the Supreme Court declined to depart from its previous position (that certain housing duties imposed on local authorities did not engage Article 6 ECHR) on the basis of a single ECtHR decision.

[16] In *R (Limbuela) v SoS for the Home Department* [2006] 1 AC 396, the House of Lords held that a failure to provide a destitute asylum seeker with food and shelter could breach Article 3 ECHR. In *Surrey County Council v P* [2014] UKSC 19; [2014] AC 896, the Supreme Court held that living arrangements made for a mentally incapacitated person amounted to a deprivation of liberty falling within Article 5 ECHR, notwithstanding the fact that an equivalent case had never been directly addressed by the ECtHR.

[17] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016, *per* Lord Mance at [44] and [54].

continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions."[18] It denotes a situation in which the ECtHR has deliberately declined to lay down an interpretation of a Convention right which applies to all member states. This is usually on the basis that it is not possible to identify even a broad consensus amongst signatory states on the issue under consideration. Once an issue has been held to fall within the margin of appreciation, each state must decide for itself how to accommodate individuals' Convention rights and any competing interests, according to its own constitutional traditions.[19] In considering issues which fall within the UK's margin of appreciation, domestic courts recognise the sovereignty of Parliament and accord due weight to the decisions of the executive, in accordance with ordinary domestic law principles. Respect for these domestic law principles is inherent within the structure of sections 3 and 4 of the HRA, as set out in respect of Theme B below.

(c) Judicial dialogue between domestic courts and the ECtHR

27. The HRLA believes that an ongoing and effective dialogue exists between domestic courts and the ECtHR. This process enables domestic courts, where appropriate, to explain how a given Convention right or line of ECtHR case law should be applied in light of the particular characteristics of the UK legal system.

28. Again, the potential for inter-court dialogue to address issues of this kind was recognised and hoped for when the HRA was enacted. During the Bill's passage through the House of Lords, Lord Bingham explained that *"…when cases from this country reach Strasbourg…the court will have the benefit of a considered judgment by a British judge on the point in issue. That will mean, I hope, that some of our more idiosyncratic national procedures and practices may be better understood"*.[20]

29. There have been a number of cases in which Lord Bingham's expectation has proved true in practice. For example, in *Al Khawaja v UK* (2009) 49 EHRR 1, a chamber of the ECtHR held that the use of a dead victim's witness statement to convict a man of sexual assault was incompatible with the accused's right to a fair trial under Article 6 ECHR. The UK asked for the case to be referred to the Grand Chamber of the ECtHR. In the meantime, a similar issue came before the Supreme Court in *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373. In a unanimous judgment, the Supreme Court declined to follow the ECtHR's approach, explaining why the range of protections given to criminal defendants under English law meant that the admission of such evidence was not incompatible with Article 6. As the President of the Supreme Court observed, at [11]:

> *"...where this court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process...it is open to the 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*

[18] *Buckley v UK* (1996) 23 EHRR 101 at [75].
[19] *"If the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment"*: *per* Lady Hale in *In Re G (Adoption)* [2009] 1 AC 173 at [120].
[20] Hansard, HL vol. 582, col 1245 (November 3, 1997).

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

30. The Grand Chamber in *Al Khawaja* subsequently held in favour of the UK government, finding that in all the circumstances of the case, the jury had been able to conduct a fair and proper assessment of the allegations in accordance with Article 6 ((2012) 54 EHRR 23). A similar dialogue has resulted in the ECtHR accepting the view of UK courts that, in certain exceptional circumstances, the imposition of whole life sentences for particular crimes is not incompatible with Article 3.[21]

31. The potential for inter-court dialogue has also allowed domestic courts to play a role in the development of Convention jurisprudence. For example, in *Rabone v Pennine Care NHS Foundation Trust*,[22] discussed below, the Supreme Court held that there was a positive obligation to protect the life of a mentally ill young woman who had been admitted to hospital for her own safety, but who was subsequently discharged. Whilst this decision went further than existing Strasbourg case law, the ECtHR subsequently reached a similar conclusion in an analogous case, in which the Supreme Court's decision in *Rabone* was considered with apparent approval.[23]

32. In addition to this process of 'dialogue via judgment', the senior UK courts and the ECtHR are in regular informal dialogue (for example, through inter-court visits and seminars, and the exchange of information on domestic and ECtHR law). In this way, UK courts are able to provide the ECtHR with expert information about our domestic legal system. This provides a further important mechanism for strengthening and preserving the dialogue between domestic courts and the ECtHR. No legislative changes are required.

[21] *R v McLoughlin* [2014] EWCA Crim 188; [2014] 1 WLR 3964 and *Hutchinson v UK* (57592/08).
[22] [2012] UKSC 2; [2012] 2 AC 72.
[23] *Reynolds v UK* (2012) 55 EHRR 35.

Theme 2: The impact of the HRA on the relationship between the judiciary, the executive and the legislature

33. Again, the HRA was carefully crafted to allow the judiciary to play an important role as a protector of fundamental rights without undermining the sovereignty of Parliament:

    i. **Section 3** of the HRA requires the Courts to read primary and subordinate legislation compatibly with HRA rights "*so far as it is possible to do so*", but does not permit them to strike it down[24] or reinterpret statutes in a way which is inconsistent with a fundamental feature of the scheme of the legislation in question. For example, Section 3 enabled the courts to interpret the Coroners Act 1988 to allow for a wider form of verdict - strengthening a family's ability to find out the truth of how their loved one came to die.

    ii. **Section 4** of the HRA is a permissible power enabling the courts to issue a declaration of incompatibility to indicate to Government the laws that need to be amended, where it is not possible to read primary legislation in accordance with HRA rights. This provision expressly recognises that the decision whether, and if so how, to rectify defects in primary legislation is a matter for Parliament. Parliament, and the Government are not required to comply with declarations of incompatibility.

34. Concerns that Sections 3 and 4 HRA pose a threat to the British doctrine of parliamentary sovereignty are not borne out by either the structure of these sections or their application by the judiciary.[25]

35. Judicial deference to Parliament was carefully built into the structure of Sections 3 and 4. This can be seen in practice. As the Home Secretary said in a Written Statement on the day that the House of Lords made a Declaration that Section 23 of the Anti-Terrorism Crime and Security Act (ATCSA) was incompatible with Articles 5 and 14 of the ECHR, "*It is ultimately for Parliament to decide whether and how we should amend the law*.[26]"

36. As a respondent to our survey of practitioners said, *"the courts have been careful to limit the use of Section 3 so as not to reinterpret legislation in a way that would cut across central and clear aspects of Parliament's intent"*. Section 3 allows the courts to address incompatibilities in the statute book and to ensure, as far as it is possible to do so, that laws are applied in a convention-compliant way. If this is not possible, the court must "hand over" to Parliament using Section 4.

37. Further, as another respondent to our survey noted, "*it is difficult to accept the proposition that Parliament intended to enact legislation which deliberately or by implication violated fundamental rights of citizens*." On that basis, at least with regard to statutes introduced after the HRA came into force, Parliament cannot have intended to

[24] See *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 in which the House of Lords made clear that primary legislation should be given a convention-compliant interpretation only *"insofar as it is possible to do so."*

[25] For example, in *AS (Somalia) v Entry Clearance Officer (Addis Ababa)* [2009] UKHL 32; [2009] 1 WLR 1385, the House of Lords refused to read down Section 85 of the Nationality Immigration and Asylum Act 2002 in a manner compatible with Article 8 ECHR using Section 3, stating that "reading (the words) down would be to cross the boundary between interpretation and amendments of the statute" (per Lord Hope at [19]).

[26] Hansard, HC 16 December 2004 col 151.

enact legislation which is incompatible with the HRA unless expressly stated. Indeed, the effect of Section 19 of the HRA is that, in respect of every Bill published by the Government, the responsible Minister states that, in his or her opinion, the provisions of the Bill are compatible with Convention rights. As such, unless stated otherwise, compatibility with the HRA is the Parliament's express intention in respect of every piece of legislation it enacts and Section 3 does no more than require courts to adopt the well established purposive approach to statutory interpretation, where a literal interpretation would lead to a breach of Convention rights (i.e. a result that cannot have been intended by Parliament).

38. The possibility has been raised of Section 3 being removed or significantly amended (forcing the courts to "skip" straight to Section 4 where a question of incompatibility has been raised). This would lead to more interpretations and applications of domestic law in ways that breached basic human rights, undermining the effectiveness of the HRA as a protector of individual rights. Such a move would also likely lead to the overuse of Section 4, potentially leading Parliament to address even minor or unintended inconsistencies between legislative provisions and our obligations under the Convention. As a result, enforcing individual rights in such cases would become far more complex and likely take much more time.

39. If Section 3 was to be removed, there is a risk that, as was the case prior to the HRA, legislation would sometimes be read and enforced incompatibly with Convention rights by public authorities, and individuals would need to wait for a declaration of incompatibility under Section 4, and for new legislation to be enacted by Parliament, before they could effectively enforce their rights. The practical consequence would be that the upholding of Convention rights would be subject to Parliamentary time allowing for the introduction of new legislation. Section 3 however enables an individual's Convention rights, which would have otherwise been breached if the relevant statute was interpreted incompatibly, usually without any explicit intention to do so by Parliament, to be protected without such delay.

40. As put by Lord Steyn in *Ghaidan*, "*the use of the interpretative power under section 3 is the principal remedial measure, and that the making of a declaration of incompatibility is a measure of last resort*".[27] In that case, the question before the House of Lords was whether, under paragraph 2(2) of Schedule 1 to the Rent Act 1977, a person who had been living with a partner in a same-sex relationship could be regarded as a "surviving spouse" who was entitled to succeed to a statutory tenancy when their partner died or whether the provison applied only to opposite-sex couples. If the Lords did not have the option to read the provision compatibly with Convention rights under Section 3, and had instead been forced to make a declaration of incompatibility under Section 4, Mr Godin-Mendoza would have had to wait for the incomaptiblity to be addressed by Parliament before the discrimination was removed or take his case to the European Court of Human Rights. Parliament chose not to legislate to overturn this interpretation, presumably because, by 2004, legislators were content with an interpretation they had not considered in 1977. However, Parliament is always free to legislate to re-enact, in the event of an interpretation it disagrees with, provided its intention is expressly stated, in line with section 19.

[27] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at [39].

41. Judges do however continue routinely to recognise the limits of their interpretive power under Section 3 by making declarations of incompatibility. They recognise that they must only interpret legislation compatibly with Convention rights insofar as it is possible to do so and this is why the Section 4 backstop is necessary. Section 3 does not provide a "back door" to disapplying statutes which breach Convention rights. Since the clarification of the Section 3 power in *Ghaidan*, courts have been guided by very clear parameters on what that power does and does not allow. By way of example, the High Court decided that it was not open to the Central Arbitration Committee to read words into the meaning of the phrase "collective bargaining" where the legislation expressly prevented it from doing so, even where the result was that an employee's right to collective bargaining, as protected by the Convention, was violated.[28] In such circumstances, the only result allowed by the HRA was for the High Court to make a declaration of incompatibility under Section 4.

42. On introducing the IHRAR, the Lord Chancellor described how "*human rights are deeply rooted in our constitution and the UK has a proud tradition of upholding and promoting them at home and abroad*".[29] Any removal of Section 3 would run contrary to this welcome ambition, making it more difficult for the British public to enforce their rights.

43. When the HRA was introduced, the then Home Secretary made its purpose clear. The intention was not only to encourage dialogue between the UK courts and the ECtHR but between parliament and the judiciary: "...*this dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens*."[30] The current framework established under sections 3 and 4 of the HRA was carefully crafted to protect Convention rights while respecting the sovereignty of Parliament, with the apparent mischief the review seeks to remedy borne well in mind. It works effectively and no change is required.

The extraterritorial application of the HRA

In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

44. Generally, it is presumed that when Parliament passes legislation it does not intend for it to apply to the acts of British subjects taking place outside the territory of the UK.[31] Nevertheless, it has been recognised that specific legislation can have an extraterritorial effect in certain circumstances.

45. In *Al-Skeini,*[32] which concerned the killing of Iraqi nationals by British troops in Basra during the 2003 Iraq war, the House of Lords decided that the HRA could apply to acts of

[28] *R (on the application of Boots Management Services Ltd) v Central Arbitration Committee* [2014] EWHC 65 (Admin); [2014] IRLR 278.
[29] Ministry of Justice. *Government launches independent review of the Human Rights Act.* 7 December 2020. Available at: <https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act>
[30] 314 HC 1141, 24 June 1998.
[31] *R (on the application of KBR, Inc) v Director of the Serious Fraud Office* [2021] UKSC 2; [2021] 2 WLR 335 at [21].
[32] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153.

public authorities taking place outside of the UK. The reasons given for this were that, where a public authority operates outside the UK's territory, it should be treated the same way as when it operates at home.[33] Furthermore, as the purpose of the HRA was to provide remedies in UK courts to those whose human rights had been violated by a UK public authority, making such remedies available for acts of a UK public authority on the territory of another state would not infringe on the sovereignty of that state.[34]

46. The HRA was designed to "bring rights home" and provide a remedy for people domestically where one would be available at the ECtHR. The judges in *Al-Skeini* decided that it should therefore apply to the acts of public authorities outside the territory of the UK in the same exceptional circumstances in which Article 1 ECHR, which requires that member states secure Convention rights to those within their jurisdiction, has been held to apply beyond member states' territories.[35]

47. The implications of this approach are that, in line with the ECtHR's case law, the HRA primarily applies to UK territory; however, it will *exceptionally* apply to the acts of UK public authorities outside the UK's territory where the state exercises "effective control" over an *area*, and where there is *state agent authority and control* over individuals.[36]

48. Effective control by a state over an area is determined by looking at the strength of a state's military presence in the area in addition to other factors, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.[37] State agent authority and control over individuals, is determined by looking at the degree of authority and control a state exercises over individuals during hostilities; it often arises where individuals are detained or taken into custody by the authorities of another state.[38]

49. Thus, in *Al-Skeini*, where the UK had assumed authority and responsibility for the maintenance of security in Basra and exercised authority and control over individuals through its soldiers engaged in security operations, the ECtHR determined that those killed in the course of those operations were within the Article 1 jurisdiction of the UK.

50. The current approach, whereby the extraterritorial scope of the HRA is coextensive with that of Article 1 ECHR, is beneficial for a number of reasons.

51. Firstly, as well as protecting the fundamental rights of non-nationals in the exceptional circumstances outlined above, such an approach plays an important role in protecting the rights of British military personnel who are serving abroad. This was demonstrated in the 2013 Supreme Court case of *Smith and Others,*[39] which arose out of the deaths of British soldiers during a military operation in Iraq; the deaths occurred as a result of the soldiers being required to patrol in lightly armoured vehicles, which provided inadequate

[33] *Ibid,* at [53].
[34] *Ibid,* at [54].
[35] *Ibid*, at [150].
[36] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 at [133]-[140]. The Supreme Court recently referenced these two recognised bases of extraterritorial jurisdiction in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857 at [25].
[37] *Georgia v Russia* (II) 38263/08, Judgment 21.1.2021 [GC] at [116].
[38] *Ibid*, at [117].
[39] *Smith and Others v The Ministry of Defence* [2013] UKSC 41; [2014] AC 52.

protection against improvised explosive devices. In determining the extraterritorial scope of the HRA, the Supreme Court interpreted and applied the prevailing Strasbourg case law on the scope of Article 1, and the UK's jurisdiction was found to extend to securing the protection of the soldiers' Article 2 right to life when they were serving outside of UK territory. Thus, by following the current approach, the soldiers' fundamental rights were protected in this case.

52. Secondly, the current approach allows the UK to make its own unique contribution to the development of fundamental rights in this area. The ECHR has been described as a "living instrument", which is constantly evolving as the ECtHR is confronted with new cases. Whilst our courts do, and should, take stock of these evolutions in human rights protections, they are nevertheless given the latitude to decide how best to interpret and apply ECHR rights and case law in the matters that arise before them domestically. This allows our courts to play a central role in the shaping of human rights norms in relation to the extraterritorial scope of human rights, being guided by the latest developments at the ECtHR without being obliged to blindly adhere to them.

53. Thirdly, the current approach is beneficial for the reputation of the UK. As underscored by the Court in *Al-Skeini*, the HRA was designed to bring rights home and provide a domestic remedy where one would be available at the ECtHR. If applicants fail to receive a remedy in UK courts for violations of their human rights by the acts of public authorities outside the UK's territory, they will still have the potential to receive a remedy at the ECtHR, and it could tarnish the UK's strong record of protecting fundamental rights if our domestic law and court rulings on the extraterritorial scope of human rights were persistently found to be in breach of Convention rights.

54. All things considered, the HRLA is of the view that there is not a strong case for seeking to alter how the HRA applies to acts of public authorities beyond the territory of the UK. It is only in exceptional circumstances that the HRA will apply to such acts, and the current approach has been shown to protect the rights of non-nationals within our jurisdiction in those circumstances as well as those of British military personnel serving abroad. It also permits our courts to make a unique contribution to fundamental rights and protects the global reputation of the UK as a nation which promotes and respects human rights.

55. The HRLA believes it to be of critical importance that, if the UK intends to engage in conflicts abroad then, consistent with our recognised international legal obligations, we should be exporting human rights guarantees also. In the, now indelible, words of Judge Bonello in *Al-Skeini*, "*those who export war ought to see to the parallel export of guarantees against the atrocities of war.*"[40]

[40] *Al-Skeini* [GC], supra note 36, Concurring Opinion of Judge Bonello at [38].

Case studies

56. The HRA has allowed people to rely upon fundamental rights and protections in domestic courts in a wide range of situations. The following cases illustrate the importance of the HRA in enabling people to vindicate their rights without having to resort to bringing a case before the European Court of Human Rights.

Article 2 - Right to life

Hillsborough Inquests

On 15 April 1989, a fatal crush took place at the Hillsborough Stadium which resulted in the death of 96 people and the injury of hundreds of others. In the wake of the disaster, Liverpool supporters were blamed for causing the disaster by the police and vilified in the press.

The inquests which followed were limited in nature and ended in verdicts of accidental death. This did not provide justice to the families and survivors devastated by the event. After the public disclosure of documents and a report concerning the disaster in 2012,[41] the High Court allowed an application to quash the verdicts of the original inquests and ordered fresh inquests to be held.

In order to comply with the procedural duty under Article 2 of the Convention to investigate deaths for which the state might be responsible, it was necessary for the fresh inquests to investigate more comprehensively the circumstances in which the victims died, with a much greater remit to consider multiple factors which may have contributed to the deaths.

The fresh inquests lasted two years and the jury returned a verdict of unlawful killing, vindicating the bereaved families' struggle for justice which had lasted nearly three decades. The jury determined that there was no behaviour by football supporters which caused or contributed to the dangerous situation developing and concluded that there were errors or omissions by the police and ambulance service which caused or contributed to the loss of life. This was a vital outcome and made possible by the breadth of investigative obligations afforded as part of Article 2 inquests.

Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72

A young woman suffering from severe depression, Melanie Rabone, was urgently admitted to hospital after a suicide attempt, where she was assessed as being at risk of a further attempt. Following a stay in hospital, she was granted home leave, despite concerns expressed by her parents. Tragically, upon being discharged, she hanged herself and died. Her parents brought a claim against the NHS Trust in negligence as well as for a breach of Article 2.

[41] Hillsborough Independent Panel, *The Report of the Hillsborough Independent Panel* (House of Commons, 12 September 2012). Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229038/0581.pdf>

The Supreme Court was asked to determine whether the obligation under Article 2, for the state to take preventative operational measures to protect a person whose life is at real and immediate risk, could be owed to a hospital patient who is mentally ill but not detained under the Mental Health Act 1983. The Supreme Court held that such a duty is owed to patients like Melanie Rabone and that it had been breached in this case. Melanie's parents were therefore entitled to redress and crucially, through their legal challenge, highlighted the legal obligations of healthcare facilities to protect patients' fundamental right to life.

Smith v Ministry of Defence [2013] UKSC 41; [2014] AC 52

In proceedings which arose from the deaths of young servicemen serving in the British Army in Iraq, family members of the servicemen claimed that the Ministry of Defence had breached the implied positive obligation under Article 2 to protect their lives. The families argued that the Ministry of Defence had failed to take possible measures in light of the real and immediate risk to the lives of the soldiers. They were required to patrol in lightly armoured vehicles that were not designed to provide any significant protection against the roadside bombs which killed Private Phillip Hewett and Private Lee Ellis.

The Supreme Court considered whether the jurisdiction of Article 2 extended to members of the Armed Forces serving outside of UK territory, and determined that it does. As a result, the bereaved families' claims could proceed to trial and were eventually settled. The Secretary of State for Defence apologised and confirmed that the government would ensure that the Armed Forces are properly equipped in future.

Article 3 - Prohibition of torture

Commissioner of Police of the Metropolis v DSD [2018] UKSC 11; [2019] AC 196

John Worboys, the driver of a black cab, committed an onslaught of sexual offences against women who had ridden in his cab, between 2003 and 2008. Two women, DSD and NBV, who had been victims of serious sexual assaults by Worboys, brought proceedings against the police under sections 7 and 8 of the HRA. These provisions allow proceedings against a public authority to be initiated when a person claims that it has acted incompatibly with their Convention rights and that a remedy is to be granted if the public authority is found to have acted unlawfully.

The women argued that the police had failed to carry out effective investigations into Worboys' crimes, breaching their right under Article 3 not to be subjected to torture or to inhuman or degrading treatment. The Supreme Court held that Article 3 required the state to undertake an effective investigation into crimes involving serious violence (which can include sexual violence), whether committed by state agents or individual criminals. Egregious and significant errors in investigation could give rise to a breach of Article 3. This was a particularly significant case for the rights of women and for those who have been sexually assaulted, raped, and/or suffered domestic abuse. It confirmed the state's protective obligation to properly investigate such reported crimes amounting to a violation of Article 3.

Article 4 - Prohibition of slavery and forced labour

R (TDT, by his litigation friend Topteagarden) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening) [2018] EWCA Civ 1395; [2018] 1 WLR 4922

Proceedings were brought on behalf of a young Vietnamese man, TDT, who was thought to be a victim of trafficking. After being discovered by police in the back of a lorry along with other boys or young men, he was held in immigration detention. He was subsequently released, in spite of warnings to the Home Office that he faced a serious risk of being re-trafficked if his release was not accompanied by arrangements to reduce that risk, including safe accommodation provided by the local authority, to which West Sussex County Council had agreed in principle. TDT disappeared after his release and police enquiries into his location proved fruitless.

The Court of Appeal allowed the appeal brought on his behalf and made a declaration that the Secretary of State for the Home Department breached her duty under Article 4 of the Convention by releasing TDT without having put in place adequate safety measures to protect him from being re-trafficked. The Court suggested that the case should prompt careful consideration of whether any general lessons could be learnt by the Home Office in relation to the treatment of potential victims of trafficking in the UK.

Article 5 - Right to liberty and security

BP v Surrey County Council [2020] EWCOP 17; [2020] COPLR 741

An application was made to the Court of Protection on behalf of BP, an 83-year-old man who is deaf and has been diagnosed with Alzheimer's disease. The care home he resided in decided to suspend visits during the COVID-19 pandemic, however this measure was impacting his welfare and ability to remain connected with his loving family.

The application sought to reinstate family visits to BP or to discharge him from the care home with a declaration that it was in his best interests to return home, with a package of care, while the restrictions subsisted. It was argued that the complete prohibition on visits constituted a disproportionate interference with BP's rights under Article 5 and Article 8 read together with Article 14.

BP's family were divided on the question of whether it was in his best interests to return home with a package of care or stay in the care home. The Judge concluded that it would not be realistic for BP's daughter to provide 24-hour care at home; instead, the Judge approved a plan for BP to be introduced to Skype communication involving creative use of a communication board, as well as for family members to be permitted to come to BP's bedroom window at the care home. The consideration of BP's fundamental rights as well as the risk posed by the pandemic allowed a determination of his best interests to be made.

London Borough of Hillingdon v Neary [2011] EWCOP 1377; [2011] 4 All ER 584

Steven Neary, a young man with autism and a severe learning disability, was accepted into respite care by a local authority at the request of his father. He was expected to remain there for a couple of weeks. However, against his own wishes as well as those of his father,

Steven was subsequently refused to be allowed to return home and ended up residing at a behaviour support unit for a year.

The Court of Protection was asked to determine whether this was lawful. The Court held that by keeping Steven away from his home, the local authority had breached his rights under Articles 5 and 8. The Court also identified further failures on the part of the local authority, such as the failure to refer the matter to the Court of Protection sooner, as a result of which Steven was deprived of his entitlement under Article 5 to pursue proceedings by which the lawfulness of his detention would be decided speedily by a court. Additionally, this was one of the first Court of Protection cases which was opened to public scrutiny on the application of the press and media relying on Article 10.

Article 6 - Right to a fair trial

DG v Secretary of State for Work and Pensions [2010] UKUT 409 (AAC)

A man suffering from mental health problems had his Employment and Support Allowance ('ESA') stopped. He had asked that the Jobcentre contact his doctor, in order to obtain medical evidence and because the welfare support process was exacerbating the state of his health, but no evidence was requested of his doctor or social worker before the decision to stop his ESA was taken. He decided to appeal this decision, but when he approached the Jobcentre Plus for advice about the appeal, he was badly advised that he did not need to do anything. He did not seek an oral hearing and the First-tier Tribunal went on to dismiss his appeal.

He then appealed to the Upper Tribunal, arguing that given his mental health conditions and the poor advice he had received, he had not been provided with a proper opportunity to make his case. Allowing the appeal, the Judge of the Upper Tribunal concluded that in light of numerous factors, including being ill-advised by the Jobcentre and the failure of the Department for Work and Pensions and the tribunal service to contact his doctor, he had not received a fair hearing, contrary to Article 6. The decision of the First-tier Tribunal was therefore set aside and the case was remitted to be considered afresh.

Article 8 - Right to respect for private and family life

Paton v Poole Borough Council (2010) IPT/09/01/C-IPT/09/05/C

Jenny Paton's family was placed under covert surveillance for three weeks by Poole Borough Council, on suspicion of providing a fraudulent address within a catchment area in order to qualify for a place at a particular school. After the directed surveillance operation had been completed, the Council concluded that at the relevant date, the family had in fact been ordinarily resident at the stated address within the catchment area of the school. Upon learning that they had been the targets of clandestine surveillance, Jenny brought a legal challenge complaining of unlawful interference with her family's rights under Article 8. The Investigatory Powers Tribunal concluded that the surveillance was disproportionate and could not reasonably have been thought to be proportionate. The suspected crime did not necessitate the placing of three young children under surveillance. The family had been unlawfully subjected to directed surveillance by the Council in violation of Article 8.

R (Tracey) v Cambridge University Hospitals NHS Foundation Trust [2014] EWCA Civ 822; [2015] QB 543

A claim for judicial review was brought by David Tracey, concerning his late wife, Janet Tracey. Janet had been diagnosed with lung cancer with an estimated life expectancy of 9 months shortly before being admitted to hospital as a result of a major road accident. During her stay in hospital, she was placed on a ventilator. It was subsequently decided by doctors that she should be taken off the ventilator, which carried a risk of cardio-respiratory arrest, and a doctor completed a Do Not Attempt Cardio-Pulmonary Resuscitation (DNACPR) notice. The procedure to take Janet off the ventilator was successful. However, after one of Janet's daughters learned that a DNACPR notice had been implemented, she objected to this and the notice was cancelled. Janet's health subsequently deteriorated and she passed away.

The lawfulness of this DNACPR notice formed the basis of the claim for judicial review. It was not accepted that the doctor who completed the DNACPR notice had consulted Janet about resuscitation before imposing it. The Court of Appeal held that the NHS Trust had breached Janet's Article 8 right to respect for private life by failing to involve her in the process which led to the imposition of this DNACPR notice.

R (TB) v The Combined Court At Stafford [2006] EWHC 1645 (Admin); [2007] 1 All ER 102

A claim for judicial review was brought by TB, a young girl aged 15, who was the main prosecution witness in the trial of a man charged with committing sexual offences against her. He was subsequently convicted for sexual activity with a child.

In the months before the trial, TB was receiving psychiatric treatment. She had taken overdoses of paracetamol and ibuprofen on several occasions. The defence sought a witness summons to require the Trust treating TB to disclose her confidential medical records, which was ordered by the Crown Court. TB was not consulted before the documents were disclosed. In her claim for judicial review, TB sought a declaration that she was entitled to have been given notice of the application for the production of her medical records and a right to make representations prior to a decision being made. She also sought a declaration that the Crown Court had acted unlawfully in not affording her those entitlements.

The High Court agreed. Under section 6(1) of the HRA, it is unlawful for a public authority (such as a Crown Court) to act in a way which is incompatible with a Convention right. Medical records are confidential and a patient has a right of privacy under Article 8 of the Convention. The High Court held that procedural fairness pursuant to Article 8 required that the Crown Court give TB notice of the application as well as an opportunity to make representations. In the absence of this, the interference with her rights could not be necessary and was unlawful.

Article 9 - Freedom of thought, conscience and religion

R (Ghai) v Newcastle City Council [2010] EWCA Civ 59; [2011] QB 591

Davender Ghai was a devout Hindu who, in accordance with his beliefs, wished to be cremated through an open-air funeral pyre when he died. This type of cremation was prohibited under the Cremation Act 1902, which only permitted cremation within a building. Davender argued that this amounted to an impermissible interference with his right to manifest his religion under Article 9.

The Court of Appeal agreed that Davender's Article 9 rights were engaged and decided to define the term "building" in the Cremation Act broadly, so as to include buildings or structures which facilitated open-air cremation. This would allow Davender to be cremated in a way that was commensurate with his interpretation of his Hindu faith and safeguarded his Article 9 rights.

Article 10 - Freedom of expression

London Borough of Hillingdon v Neary [2011] EWCOP 413

An application was made for permission by journalists from five media organisations to attend Court of Protection proceedings in the case of Steven Neary—whose matter is discussed above in the context of Article 5—to report on the proceedings. As a general rule, Court of Protection hearings were at that time held in private. The Court needed to consider whether there was good reason to make an order authorising the media's request and if so, whether such an order was justified upon balancing Articles 8 and 10.

Taking into account cumulatively the public interest in understanding the work of the Court of Protection, the serious violation of rights alleged in the case, and that the issues before the court had to an extent already entered the public domain, the Court held that there was good reason to exercise its powers.

The Court observed that it was not in the interests of litigants or wider society for a court dedicated to protecting disadvantaged people to be described as "secretive". There was no evidence which showed a real risk that Steven would suffer more than trivial detriment if the media were included. Taking into account his right to private and family life and balancing this with the importance of freedom of expression, which is further underpinned by section 12 of the HRA, the Court concluded that it was right to allow the media's request.

Livingstone v Adjudication Panel for England [2006] EWHC 2533 (Admin); [2006] LGR 799

Ken Livingstone, who was then the Mayor of London, appealed against a decision to suspend him for four weeks on the basis that he had not complied with the Code of Conduct of the Greater London Authority. The Mayor had made offensive comments to a journalist who accosted him after he left a reception.

The High Court emphasised that restraints in a code of conduct should not go beyond what is necessary to maintain proper standards in public life. At the time of the incident, the Mayor was not acting in his official capacity. Article 10 applied and individuals are entitled to say

what they like provided they do not act unlawfully, unless Article 10(2) provides the necessary reasons for imposing liability to sanctions.

It was therefore not proportionate for the application of the Code of Conduct to be extended in the way that it had been, nor had it been demonstrated that the restraint in question was necessary in a democratic society. The High Court allowed the appeal and quashed the suspension, stating that whilst the Mayor's actions had not been appropriate, the sanction of suspension was clearly wrong.

Article 11 - Freedom of assembly and association

R (Laporte) v Chief Constable of Gloucestershire [2006] UKHL 55; [2007] 2 AC 105

The claimants were protesters who were stopped by police whilst on their way to protest the Iraq war at an airbase. There were no arrests, however the police decided the coaches could not proceed to the protest and escorted them back to London.

The protesters brought a legal challenge, arguing in part that the police had breached their right to freedom of assembly and association under Article 11. On appeal, the House of Lords agreed. The Court ruled that there had been no imminent threat to a breach of the peace and the police's decision to limit the protesters was indiscriminate, disproportionate, and therefore unlawful following Article 11.

Article 12 - Right to marry

R (Baiai) v Secretary of State for the Home Department [2008] UKHL 53; [2009] AC 287

Three couples challenged the scheme governed by section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, which regulated marriages where one or both parties were subject to immigration control, alleging that it breached their right to marry. To marry in the UK, those subject to immigration control who were not settled in the UK or had not been granted entry to the UK specifically for the purpose of marrying were required to apply to the Secretary of State for the Home Department for permission to marry.

The policy of the Secretary of State was to grant such permission only if the individual who needed it had been granted permission to come to the UK for more than six months and had at least three months left upon making the application, unless there were "exceptionally compassionate features". The House of Lords considered it open to states to adopt laws to prevent sham marriages, but held that none of those conditions was relevant to the genuineness of a marriage. The scheme allowed the Government to forbid marriages regardless of whether or not they were genuine or conferred an immigration advantage. The House of Lords concluded that the scheme constituted a disproportionate interference with and violation of the right to marry.

Article 14 - Prohibition of discrimination

R (L) v Manchester City Council [2001] EWHC 707 (Admin)

The lawfulness of a local authority's policy, under which short term foster carers who were friends or relatives of the child were paid at a very significantly lower rate than other foster carers, was challenged in an application brought by children in care. The High Court held that the policy was unlawful for several reasons, but that even if it was wrong in those conclusions, it would in any event hold that the policy was not compliant with the Convention, as it involved breaches of both Articles 8 and 14. The policy discriminated against short term foster carers who were relatives in a way that was neither necessary nor proportionate.

Article 1 of Protocol 1 - Protection of property

Re Brewster for Judicial Review (Northern Ireland) [2017] UKSC 8; [2017] 1 WLR 519

Denise Brewster and her partner Lenny McMullan had lived together for about a decade before becoming engaged. Sadly, two days after their engagement, Lenny unexpectedly died at the age of 43. Before his untimely death, he had paid into a Local Government Pension Scheme for approximately 15 years whilst employed by a public transport operator.

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009 allowed an unmarried cohabiting partner who survived a member of the scheme to receive a survivor's pension. However, the surviving partner needed to have been nominated by the member of the scheme. Whilst Denise believed that she had been nominated by her partner, she was denied a survivor's pension because the body administering the scheme claimed not to have received such notification. No such notification requirement applied to those who had been married or in a civil partnership.

The Supreme Court held that Denise was entitled to a survivor's pension. A survivor's pension is a "possession" within the meaning of Article 1 of Protocol 1 of the Convention, and Article 14 created an obligation for the state to secure equal treatment of those surviving an unmarried cohabiting partner with those surviving a married partner or civil partner. The discriminatory effect of the nomination requirement could not be justified.

Article 2 of Protocol 1 - Right to education

C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN) [2018] UKUT 269 (AAC); [2019] AACR 10

The parents of a child with autism, anxiety, and Pathological Demand Avoidance, who had been temporarily excluded from school for aggressive behaviour, brought a claim alleging discrimination on the grounds of disability. The claim in relation to the exclusion was dismissed because of the reason for the exclusion: in light of regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010, the child did not satisfy the definition of "disability" and was therefore not protected by the Equality Act.

On appeal, the Upper Tribunal found that the provision which excluded the child from Equality Act protection breached the rights of children who have a recognised condition not to be discriminated against. Such a condition rendered the child "more likely to result in a tendency to physical abuse". The Secretary of State for Education had not justified leaving children whose conduct was a manifestation of a condition out of the scope of protection, particularly when such conditions required special educational provision in the first place. In the context of education, the provision excluding the child from Equality Act protection was therefore contrary to Article 14 read in conjunction with Article 2 of Protocol 1.

Conclusion

57. We conclude by noting that there has been little justification put forward for the necessity of this review. We are aware of reports which imply that the IHRAR was announced because the Government does not agree with the application of certain human rights principles in deportation cases. For example, a Telegraph article which appeared to be the product of exclusive briefing on the announcement of the IHRAR was titled "Exclusive: Review of Human Rights Act could restrict judges' ability to block deportations". The article stated:

> "The move, pledged in Boris Johnson's election manifesto, comes amid a series of clashes between Government and the courts including last week's failed deportation of 23 "dangerous" criminals to Jamaica after last-minute legal challenges by human rights lawyers."[42]

58. However, reform of sections 2, 3 and 4 as implied by the Call for Evidence would not change the law relating to these very specific types of cases. UK judgments show that judges do not apply Strasbourg case law slavishly in deportation appeals,[43] so the questions posed under Theme 1 in the Call for Evidence have little bearing on the issue. Further, Theme 2 appears to have little relevance given that deportation appeals do not rest on the court's interpretive function under section 3 HRA but rather rely on very limited exceptions contained in relevant legislation and immigration rules.

59. In our view, it is unclear as to why this review was needed, and why its particular terms of reference were chosen. We also express our concerns at the prospect of any reform of key human rights protections predicated on a desire to take rights away from specific groups in society. Doing so would undermine the fundamental underpinning of British respect for human rights; if rights are taken away from some, it reduces protection for all.

60. Given the incredibly difficult period that we currently face as a nation, and the critical role of the HRA in protecting the public's lives and other freedoms in times of crisis, we are surprised at the decision to carry out this review.

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[42] Charles Hymas, *Exclusive: Review of Human Rights Act could restrict judges' ability to block deportations Robert Buckland says review will examine whether there should be new limits on how judges interpret European human rights case law,* The Telegraph (6 December 2020).

[43] R (On the Application Of Akpinar) v Upper Tribunal (Immigration and Asylum Chamber) [2014] EWCA Civ 937; [2015] 1 WLR 466.

61. As legal practitioners using human rights law in a range of jurisdictions, from Mental Health Tribunals, to Coroner's Courts, to the criminal justice system, we see every day the ways in which the HRA protects people's lives and liberties.

62. The HRA helps the UK guarantee the rule of law. It successfully establishes the judiciary's role as a protector of fundamental rights without undermining the sovereignty of Parliament. There is no need for its overhaul, merely greater political will to further explain its many virtues and practical benefits. Indeed, reform of the type implied by the IHRAR Call for Evidence risks undermining the effectiveness of the HRA in allowing individuals to enforce their human rights in the UK.

63. Whilst we have chosen to focus on certain aspects of the Call for Evidence in this submission, it is our firm view that the HRA works well to preserve proper accountability for Convention rights, and accordingly does not require amendment or replacement.

64. We are grateful to the HRLA members who contributed to our survey and whose responses have informed this submission.

65. Contributors to our Working Group include: Aswini Weereratne QC, Zehrah Hasan, Telha Arshad, Ciar McAndrew, Rehab Jaffer, Tetevi Davi, Lily Lewis, and Marianne Schönle.

Should you wish to discuss any aspect of this submission with a member of the HRLA, we can be contacted by emailing: administrator@hrla.org.uk