INDEPENDENT HUMAN RIGHTS ACT REVIEW

RESPONSE

BY

THE FACULTY OF ADVOCATES

Theme One: The Relationship between the Domestic Courts and the European Court of Human Rights (ECtHR)

[1] The Faculty of Advocates considers that the relationship between the domestic courts and the ECtHR works well and does not require reform.

Specific questions:

(a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there any need for amendment of section 2?

[2] We do not consider there is any need to amend section 2.

[3] The duty is only to take the jurisprudence into account, not to slavishly follow it. This allows for the domestic courts to reach a different outcome in a particular case than the ECtHR may do. By and large the domestic courts have adopted an approach of "no more and no less than Strasbourg" and have generally not departed from clear and consistent jurisprudence of the ECtHR.

[4] Examples of the domestic courts adopting a clear line of jurisprudence from the ECtHR, particularly where it emanates from the Grand Chamber, include the following:

[5] The recent case of *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] 2 WLR 1152 concerned Article 3 as it applied to medical cases in relation to immigration. The UK Supreme Court agreed that in light of, and taking account of, the Grand Chamber's decision of *Paposhvili v Belgium* [2017] Imm AR 867 there should be a modest adjustment to the previous case law in terms of how medical issues should be assessed in immigration cases.

[6] Similarly, in relation to Article 6, in *Cadder v HMA* 2011 SC (UKSC) 13, relating to the provision of legal assistance to those being interviewed by the police, the Supreme Court followed the decision of the Grand Chamber in *Salduz v Turkey* (2009) 49 EHRR 19, effectively overturning the decision of 7 judges of the High Court of Justiciary.

[7] Examples of the domestic courts departing from the jurisprudence of ECtHR can also be found. These include *Animal Defenders International* case 2008 UKHL 15, then at Strasbourg (2013) 57 EHRR 21. In that case, the ECtHR accepted the reasoning of the UK court (which had arguably departed from earlier ECtHR jurisprudence) as being within the margin of appreciation.

[8] Similarly, in relation to the admissibility of hearsay evidence in criminal trials, the domestic courts did not follow the line of ECtHR jurisprudence which had found such evidence to be in violation of Article 6(3)(d) and Article 6(1). The approach of the domestic courts, over a series of cases, persuaded the ECtHR that the English system had sufficient procedural safeguards to allow the admission of such evidence to be in compliance with Article 6 (contrast *Al Khawaja* (2009) 49 EHRR 1(violation) with *Horncastle v UK* (2015) 60 EHRR 31 (no violation)).

(b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

[9] The doctrine of the margin of appreciation allows the ECtHR to take into account cultural, historical and philosophical differences between the ECtHR and the particular national authority, which means that the Convention may be interpreted differently at a national level.

[10] In the UK, the domestic courts have recognised that while the margin of appreciation is not unlimited, it is real and important. Different approaches should be permitted, especially for politically sensitive issues (*R (Agyarko) v SSHD* [2017] 1 WLR 823, [46]).

[11] Domestic courts have also recognised that in certain circumstances and to a certain extent, other public authorities are better placed to determine how individual and community interests should be balanced (*Axa General Insurance Ltd v Lord Advocate* 2012 SC (UKSC) 122, [131]). Accordingly domestic courts have linked the margin of appreciation to the assessment of proportionality. However, domestic courts use a different degree of restraint in order to reflect national traditions and institutional culture (*Bank Mellat v HM Treasury (No.2)* [2014] AC 700, [71]-[76]). In doing so, domestic courts have considered, amongst others, the following contextual factors:

a. Whether the issue lies within the core expertise of the courts (e.g. liberty, discrimination, fair trial rights) or not (socio-economic policy);
b. The nature of the Convention right; and
c. The limits of judicial competencies

(see Reed and Murdoch: Human Rights in Scotland, 4th ed., para 3.147-3.152)

[12] While there have been notable exceptions, such as the supervision of prisoners' voting rights, in our view the use of the margin of appreciation has generally respected the principles of subsidiarity and democratic pluralism. The Supreme Court caselaw has provided useful guidance which has strengthened legal certainty in judicial decision-making.

[13] We do not consider any change is required.

(c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

[14] The relationship develops through dialogue by way of judgments. It is also developed through the engagement of the respective judiciaries in discussing matters of mutual interest (for example in the seminar which follows the opening of the legal year at the ECtHR, as well as through bilateral meetings). We consider that domestic courts are well able to raise concerns as to the application of ECtHR jurisprudence.

[15] We have already provided the examples of *Animal Defenders International* and the line of cases from *Al Khawaja* to *Horncastle* to illustrate effective dialogue between domestic courts and the ECtHR through judgments.

[16] Another example of that dialogue in action can be seen in the English cases relating to whole life sentences. In *Vinter v UK* (2016) 63 EHRR 1, the ECtHR held that there had been a violation of Article 3 in relation to the imposition of a whole life order on the basis that it was not *de jure* and *de facto* reducible.

[17] In *R (McLoughlin)* [2014] EWCA Crim 188, the Court of Appeal declined to follow *Vinter* relying in part on the margin of appreciation afforded to States to determine what constitutes a just punishment for particular offences. The Court also noted that it considered the ECtHR had misunderstood the domestic position in concluding that a whole life order was irreducible. The Court of Appeal concluded that the whole life order was compatible with Article 3.

[18] The ECtHR was persuaded by the Court of Appeal's reasoning and in *Hutchison v UK* (57592/08) the Grand Chamber concluded that a whole life order was reducible and there was no violation.

[19] While the issue may not be finally resolved in relation to the specific issue of whole life orders and Article 3, the series of cases provides a useful example of judicial dialogue in action between the national and international jurisdictions.

Theme Two: The Impact of the HRA on the Relationship between the Judiciary, the Executive and the Legislature

[20] It is our view that under the HRA as presently enacted the roles of the courts, government and Parliament have been carefully balanced and we do not consider that a case is made out for any significant change.

[21] The issues raised in the present review were fully considered during the drafting of the HRA, with much consideration being given to achieving the correct balance between the respective roles of the courts, government and Parliament.

[22] As noted, for example, by the then Lord Chancellor (Lord Irvine of Lairg), when presenting the Human Rights Bill for its second reading at the House of Lords on 3 November 1997:

> *"Our critics say the Bill will cede powers to Europe, will politicise the judiciary and will diminish parliamentary sovereignty. We are not ceding new powers to Europe. The United Kingdom already accepts that Strasbourg rulings bind. Next, the Bill is carefully drafted and designed to respect our traditional understanding of the separation of powers. It does so intellectually convincingly and, if I may express my high regard for the parliamentary draftsman, elegantly.*"

[23] The HRA recognises that it is for government to formulate policy, for Parliament to enact legislation and for the courts to interpret and apply the law. When human rights issues arise in cases before the courts, judges are not acting as policy makers but, instead, are simply fulfilling their proper judicial function of determining disputes in accordance with the law.

[24] Although some human rights cases may be more controversial and attract more publicity than other cases, that is not an indication that the courts are being unduly drawn into matters of policy. It simply reflects the potentially difficult nature of the subject matter. Those relying on human rights are often among the most vulnerable members of society. Examples include children at risk, immigrants, refugees, those with mental health difficulties, those who are homeless or live in sub-standard accommodation, those living on benefits or in poverty, people who hold particular religious or political opinions, and offenders.

[25] In a democracy governed by the rule of law, minorities in society are just as entitled to the protections afforded by human rights as the majority. Indeed they are often in most need of that protection. As noted by Baroness Hale:

> "*Democracy is about more than respecting the views of the majority. It is also about safeguarding the rights of minorities, including unpopular minorities.*"
> (*R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [88])

[26] No matter the public or political controversy which may surround the subject matter, judges decide human rights cases on the basis of the law, not on the basis of politics or policy.

[27] In our experience, judges are acutely aware of the fact that they fulfil a judicial rather than a policy role, and they properly recognise and observe the demarcation between issues of law – which are for the courts to determine – and matters of policy, which are for the government and Parliament. We refer, for example to the words of Lord Nicholls that: *"This House sitting in its judicial capacity is keenly aware, as indeed are all courts, of the importance of the legislature and the judiciary discharging their own constitutional roles and not trespassing inadvertently into the other's province"* (*Wilson v First County Trust Ltd, (No.2)* [2003] UKHL 40, [54]; see also Lord Hope at [111]).

[28] We are aware that the Scottish Government, through the National Task Force on Human Rights, is currently giving active consideration to expanding the list of justiciable human rights in devolved areas to include economic, social and cultural rights with the possibility of additional remedies being available through the courts or other accountability mechanisms. These might traditionally be thought of as being matters of policy for government and Parliament.

[29] We note that work, not to make comment upon it, but rather to illustrate, firstly, that there will always be a range of opinion on what should be the proper role for the court on matters of human rights, and secondly, that a balance requires to be struck. As already noted, in our view the balance struck by the HRA in respect of Convention rights is the correct one. It is well recognised and given effect by the courts.

[30] One example of the way in which the HRA already recognises and respects the proper constitutional roles of the courts and Parliament is section 4 (declarations of incompatibility). The 1997 White Paper accompanying the then Human Rights Bill made it clear that consideration was given to whether the courts should be given a "strike down" power. The view was taken that the UK courts should not be given that power as to do so would not be compatible with the principle of Parliamentary sovereignty or supremacy.

[31] In summary, we are of the view that the balance originally struck by the HRA was the correct one. From our experience, working with the legislation on a daily basis in the courts, the regime set out in the HRA works reasonably well in practice and is not in need of significant change.

[32] We would be concerned at any piecemeal changes to the HRA. The Act was designed to work as a whole and there is a risk of unintended consequences, not just in the application of the HRA, but also in other legislation that refers to Convention rights (i.e. the legislation creating the devolved administrations in Scotland and Wales). We note, and respectfully endorse, the view of the late Lord Rodger in *Wilson v First County Trust Ltd (No.2)* supra, that:

> "*The 1998 Act is beautifully drafted. Its structure is tight and elegant…The presence or absence of particular features in the Act is therefore unlikely to be due to oversight.*"

Specific questions:

(a) Should any change be made to the framework established by sections 3 and 4 of the HRA?

[33] We do not consider that any change should be made to sections 3 and 4 of the HRA. We consider that these provisions work well in practice and strike the correct balance between the respective roles of courts, government and Parliament.

(i) Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

[34] When applying section 3, the courts are respecting and giving effect to the intention of the UK Parliament, i.e. it was Parliament's intention by enacting the HRA to make human rights directly enforceable in the UK courts and it was Parliament's intention (in enacting s3) that the courts should, where possible, interpret UK legislation in such a manner as is compatible with Convention rights.

[35] The approach in section 3 is consistent with the well-known presumption to the effect that Parliament intends both primary and secondary legislation to comply with the international obligations of the UK (the presumption being capable of being rebutted by express words or necessary implication).

[36] Where the courts apply section 3, no matter the outcome, Parliamentary sovereignty is at all times preserved. If Parliament does not agree with the court's interpretation or conclusion, then Parliament is free to pass legislation to overturn the decision.

The courts are fully aware and respectful of the parameters of their role in relation to section 3. Again, in the words of Lord Nicholls (*In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [37] to [40]):

> "*[37] Section 3(1) provides: 'So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights. This is a powerful tool whose use is obligatory … [38] But the reach of this tool is not unlimited. Section 3 is concerned with interpretation. This is apparent from the opening words of section 3(1): 'so far as it is possible to do so' … [39] In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament … [40] Up to this point there is no difficulty. The area of difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem … What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate*."

(ii) If section 3 should be amended or repealed, should that change be applied to the interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

[37] As noted above, we do not consider that section 3 should be amended or repealed.

[38] If section 3 is amended or repealed, it should apply to all legislation whenever enacted. That would provide clarity and consistency.

[39] Nothing need be done in relation to previous section 3 interpretations adopted by the courts because the courts will require to decide all future cases on the basis of whatever version of section 3 is in force at the time (and previous decisions, based on superseded versions of section 3, are unlikely to be followed).

(iii) Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

[40] We are not certain what is intended by the suggestion that declarations of incompatibility could be considered as part of the initial process of interpretation.

[41] In any event, and more importantly, Parliamentary sovereignty or supremacy is already recognised and given effect to in the HRA in that:

- Under section 3, the courts can only interpret legislation in accordance with Convention rights "so far as it is possible to do so". If, for example, Parliament expressly stated in legislation that its intention was to pass legislation that was not compatible with Convention rights then the courts could not read it down using section 3 and they would have to give effect to the legislation.
- Under section 4, the courts do not have power to "strike down" legislation that is incompatible with Convention rights and, instead, may only issue a declaration of incompatibility (and only the highest courts in the UK are given the power to make a declaration of incompatibility). If a declaration of incompatibility is made it is then a matter for the government and, ultimately, Parliament whether to amend the legislation in question to make it compatible with Convention rights or to leave the legislation as it is (even if it does not comply with Convention rights).

(b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

[42] We consider the exiting provisions of the HRA are adequate and no changes are required.

(c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

[43] A provision in subordinate legislation that is incompatible with Convention rights will not be given effect by the courts, unless the incompatibility is the result of primary legislation, in which case the court may only make a declaration of incompatibility.

[44] We are of the view that this approach properly recognises the principle of Parliamentary sovereignty and no change is required.

[45] We also noted and agree with the following statement in the 1997 White Paper:

> "*The courts can already strike down or set aside secondary legislation when they consider it to be outside the powers conferred by the statute under which it is made, and it is right that they should be able to do so when it is incompatible with the Convention rights and could have been framed differently.*"

(d) 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?

[46] Article 1 of the Convention provides that contracting parties "shall secure to everyone within their jurisdiction" the rights and freedoms defined in the Convention. A State's jurisdictional competence under article 1 is primarily territorial (*Al-Skeini v United Kingdom* (2011) 53 ECHR 18, [131]). In other words, the HRA, in general, only applies to acts of public bodies within the United Kingdom.

[47] There are, however, certain recognised exceptions where there may be extra-territorial jurisdiction, namely: state agent authority and control (e.g. diplomatic staff working overseas); effective control over an area (e.g. where the UK government exercises some or all of the public powers ordinarily exercised by the government of that area); and the Convention legal space

(e.g. where the UK detains a foreign national overseas and holds them in a facility controlled by them).

[48] In relation to the last category of exception, for such persons the State is under an obligation to secure some of the detainee's core or minimum Convention rights (e.g. right to life and prohibition of torture), but not others (e.g. right to respect for family life or right to freedom of association etc). In other words, the "package" of Convention rights can be tailored to fit the particular circumstances.

[49] UK soldiers on active service abroad have been held to be under the control and authority of the UK State and, therefore, under its jurisdiction, with the result that they can rely upon certain of their rights under the HRA (*Smith v Ministry of Defence* [2013] UKSC 41).

[50] In summary, the present approach of the UK courts in this area seems appropriate and is consistent with the approach of the European Court of Human Rights, and we do not consider that change is required.

(e) Should the remedial order process, as set out in section 10 and schedule 2 to the HRA, be modified, for example, by enhancing the role of Parliament?

[51] We have no comment or suggestions on this matter.