INDEPENDENT HUMAN RIGHTS ACT REVIEW

Response to call for evidence on behalf of the
Constitutional and Administrative Law Bar Association

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INTRODUCTION

1. ALBA is the professional association for barristers in England and Wales practising in public law, which includes administrative law, constitutional law, judicial review, and other areas of practice concerned with regulating the exercise of public powers.

2. ALBA's members are predominantly self-employed barristers in England and Wales, but also include employed barristers working in the UK Government Legal Service, local authorities, businesses, and campaigning organisations and other NGOs. ALBA's wider membership includes (as associate members) judges, solicitors, legal academics, law students, and lawyers in other jurisdictions.

3. One of ALBA's principal objectives is to provide a forum for exchanges, between practising lawyers, judges and academic lawyers, of knowledge and ideas about the development of public law, including developments in public law jurisprudence and practice across the common law world and within the European Union. Every year ALBA responds to a number of consultations by the Ministry of Justice and other organisations about matters affecting public law.

4. The working group that has prepared the present response includes Queen's Counsel and junior barristers with experience of acting for both claimants and local, devolved, and central government in cases involving the Human Rights Act 1998 ("HRA"), and includes members and former members of the Attorney General's and the Welsh Government's panels[1].

[1] The working group was chaired by Tim Buley QC, Jonathan Moffett QC, and George Peretz QC: other members were Richard Clayton QC, Steve Broach, Thomas Francis, Richard Honey, Joshua Jackson, Ollie Perse, Santhi Sivakumaran, Anton Van Dellen, Gordana Balac, and Tabitha Hutchison.

THEME ONE: THE RELATIONSHIP BETWEEN DOMESTIC COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR).

5. Question a) asks how the requirement on domestic courts and tribunals under section 2 of the HRA to "take into account" the judgments, declarations and advisory opinions of the ECtHR has been applied in practice, and if there is any need to amend section 2.

6. ALBA considers that, as reflected in domestic case law, the duty functions so as to require the UK courts to "take into account" the jurisprudence of the Strasbourg Court, where it is "clear and constant"[2], but does not go so far as to impose on domestic courts an obligation to follow such jurisprudence in all cases.

7. UK courts cannot set aside primary legislation even where the court has found that a provision of such legislation is incompatible with human rights. As such the duty under section 2 neither offends such principles as parliamentary sovereignty or the 'separation of powers' nor does it function to require domestic courts to rule in a manner that would exceed the UK's obligations under the ECHR.[3] Accordingly, ALBA considers that there is no need for any amendment of section 2 HRA, which ALBA regards as working as intended.

8. The default position under section 2, as espoused by Lord Slynn in *R. (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295, and as clarified by Lord Bingham in *R. (ex parte Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 (the '*Ullah*' or 'mirror' principle), is as above: an obligation to "*take into account*" the judgments etc. of the ECtHR, including "*keep[ing] pace with the Strasbourg*

[2] *R. (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [26].

[3] *R. (Nicklinson & Anor.) v Ministry of Justice* [2014] UKSC 38, [2015] 1 AC 657.

jurisprudence as it evolves over time"[4], but not (necessarily) to follow it and certainly not to treat it as binding. However, in cases where there is no directly relevant decision of the ECtHR, or where the ECtHR has left open a wide margin of appreciation as to how to accommodate ECHR rights with competing interests, there is authority that the domestic courts are free to determine for themselves that an ECHR right applies, as part of the development of the ECHR[5].

9. In appropriate circumstances UK courts have, in the light of subsequent contrary rulings by the ECtHR, departed from domestic precedents – see, e.g., *Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 All ER 586; *R. (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2020] A.C. 51; Re P [2008] UKHL 38, [2009] 1 AC 173; and *Rabone v Pennine Care NHS Foundation Trust* [2010] UKSC 2, [2010] 2 A.C. 534. It is the view of ALBA that this is again evidence of section 2 working as designed – "*keep[ing] pace*", per Lord Bingham, with the jurisprudence of the ECtHR as it changes over time. (Giving the leading judgment, Lord Kerr observed in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] A.C. 196 at [78] that it was "*inescapably correct that the UK courts had retreated somewhat from the 'mirror principle'*" but did not seek in that case to go beyond the ECtHR case law.)

10. At the same time, the duty under section 2 affords to domestic courts a level of discretion in deciding whether or not to follow Strasbourg jurisprudence. This can be seen in decisions where the domestic courts have, as required, given consideration to the jurisprudence of the ECtHR but not necessarily arrived at the same result – see, e.g., the judgment of Lord Philips for a unanimous UK Supreme Court in *R. v Horncastle & Others* [2009] UKSC 14, [2010] 2 All ER 359.[6] ALBA considers that this too is evidence of section 2 working as intended.

[4] *Ullah* at [20], following *Alconbury*.

[5] See per Lord Kerr in *Nicklinson* at [70] and *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435 at [128]

[6] See also *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, [2017] 3 All ER 1065.

11. Similarly, in *R. (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] A.C. 279, the UKSC (Lord Mance JSC giving the leading judgment) opted to follow domestic precedent notwithstanding a contrary decision of the Strasbourg court (*Allen v United Kingdom* [2013] 7 WLUK 424, (2016) 63 E.H.R.R. 10), finding that the latter decision was part of an inconsistent or incomplete body of authority (and thus not "*clear and constant*", per *Alconbury*). This is also a demonstration of section 2 functioning as intended: no more (but certainly no less) than "taking into account" the judgments etc. of the ECtHR as relevant.

12. In *Alconbury*, Lord Slynn had ruled that the UK courts should follow the "clear and constant" jurisprudence of the ECtHR unless there is some "special circumstance" indicating that such jurisprudence should not be followed. The judgment of the UKSC in Hallam (and others) highlights several circumstances in which domestic courts may, in appropriate circumstances, differentiate the cases before them from analogous cases in the jurisprudence of the Strasbourg court, namely:

    (1) non-correspondence or inapplicability of the facts;

    (2) unsettled authority (i.e. not "clear and constant"); and

    (3) the *Horncastle* 'principle', whereby a decision of the ECtHR may be departed from where it is found that such decision misunderstood, misapplied or failed to consider some fundamental aspect of UK law.

13. In *Pinnock*, Lord Neuberger had indicated that absent one of the three circumstances above "it would be wrong" for the domestic courts not to follow the decisions of the ECtHR; ALBA considers that none of the above methods of 'departure' is support for the view that section 2 is not functioning as intended.

14. It should be remembered that a result of any widespread failure of the domestic courts to apply Convention rights is circumstances where ECtHR case-law had

found them to apply would be that there would be an increase in the number of applications from the United Kingdom to Strasbourg. That the level of such applications has remained low indicates that UK courts are generally "keeping pace" with Strasbourg jurisprudence.

15. Question (b) asks how, when taking into account the jurisprudence of the ECtHR, domestic courts and tribunals have approached issues falling within the margin of appreciation permitted to States under that jurisprudence, and whether any change is required.

16. The 'margin of appreciation' in Strasbourg jurisprudence refers to the deference given to the State in its executive, legislative or judicial actions.

17. The Strasbourg doctrine recognises that States '*by reason of their direct and continuous contact with the vital forces of their countries*'[7] are better placed than the ECtHR to determine whether there has been an infringement of Convention rights. The breadth of the margin of appreciation in Strasbourg jurisprudence is context sensitive. There is a narrower margin of appreciation where, inter alia, a case concerns an intimate aspect of an individual's private life,[8] race discrimination[9] or where there is a significant degree of consensus on an issue among Member States. By contrast, a wider margin of appreciation is given in matters of national security,[10] socio-economic policy,[11] or where there is no consensus on an issue.[12]

18. However, domestic courts have adopted an approach which is analogous to the margin of discretion, which accords appropriate weight to the institutional

[7] *Handyside v United Kingdom* [1979] 1 EHRR 737at [48]

[8] *Dudgeon v United Kingdom* [1981] 4 EHRR 149

[9] *D.H. v the Czech Republic* [2008] 47 EHRR

[10] *Klass v Germany* [1979] 2 EHRR 214

[11] *Hatton v United Kingdom* [2003] 37 EHRR 28

[12] *Evans v United Kingdom* [2008] 46 EHRR 34

competence of the executive and, in particular, the legislature. As set out by Lord Mance in *Re Recovery of Medical Cost for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, SC at [54]:

> *'…domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis.'*

19. The factors that inform the breadth of the discretionary area of judgement afforded by domestic courts broadly mirror those applied by the Strasbourg court. In particular, domestic courts have been reticent about interfering with 'political questions'. For example, in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 the Judicial Committee of the House of Lords adopted '*the unintrusive approach of the European court*' [29] and held that:

> *'The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions*.'

20. In short, domestic courts have adopted an approach that is similar to the margin of appreciation that is applied by Strasbourg margin of appreciation doctrine, and apply it to accord a discretionary area of judgement to 'political bodies', i.e. the domestic executives and legislatures.

21. Question (c) asks if the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permits domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK, and how such dialogue can best be strengthened and preserved.

22. The current approach to judicial dialogue does satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence, but this approach can be strengthened and improved in a number of respects.

23. The importance and value of the judicial dialogue has been recognised by the Supreme Court in, for example, *Horncastle* at [11], *Pinnock* at [48], and *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 at [27]. This is a process of judicial dialogue conducted through judgments in decided cases, and therefore taking place within the procedural limits of formal litigation. Domestic courts are able to initiate judicial dialogue with the ECtHR by declining to follow its case law and giving reasons why they think the ECtHR is wrong on any particular point.

24. Judicial dialogue arises, broadly, in three circumstances:

    (1) where domestic courts consider a key or determinative judgment of the ECtHR is wrong (in practice, this has most often occurred in the context of Article 6, eg *Horncastle* and *Al-Khawaja* discussed below);

    (2) in relation to the margin of appreciation (*In re P*); and

    (3) where there is a lack of clarity or inconsistency in the ECtHR's jurisprudence.

25. As the House of Lords and subsequently the UK Supreme Court has developed its application of the ECHR domestically under the HRA 1998, the Strasbourg court has been more able and inclined to adopt the analysis of the UK court's analysis and reasoning. In this way, the UK's courts are increasingly influencing the case law of the ECtHR, both as it applies to the UK and more widely. Writing in 2012, Philip Sales pointed out that if "*the ECtHR thought the domestic courts applied their own distinct interpretation of the domestic Convention rights, it would be only too easy for it to avoid confronting the domestic case law when making its own*

rulings under the ECHR" ('Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine' [2012] PL 253).

26. In *Horncastle*, Lord Phillips at [108] invited the Strasbourg Court to take account of his reasons for not following its previous case law and Lord Brown at [117-118] invited the Grand Chamber to overrule its previous decision. This led to the Grand Chamber modifying its position in *Al-Khawaja v United Kingdom* (2012) 54 EHRR 807, with Judge Bratza acknowledging at [O-I2] the "*judicial dialogue*" which had occurred (see also the Opinion of Judges Sajó and Karakaş at [O-II1]: the invitation from the Supreme Court deserves "*due consideration to enable a bona fide dialogue to take place*"). The ECtHR adjusted its position to address the criticism expressed by the House of Lords. This is a good example of how domestic courts can raise concerns about ECtHR jurisprudence relating to the UK and get Strasbourg to reconsider its position.

27. The Supreme Court in *McDonald v McDonald* [2016] UKSC 28 at [34] recognised that "Pinnock *represented the resolution of a protracted inter-judicial dialogue between the House of Lords and the Strasbourg court*". In *Aster Communities v Akerman-Livingstone* [2015] UKSC 15 at [20] the Supreme Court also commented it was "*the culmination of a long process of dialogue between the highest courts in the United Kingdom and the European Court of Human Rights in Strasbourg*".

28. The case of *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 is another example of effective judicial dialogue. The House of Lords had declined to apply Strasbourg authority, a position which was subsequently vindicated by the Grand Chamber.

29. The Supreme Court makes it clear when it thinks that the Strasbourg court needs to think again, as it did in *Poshteh v Royal Borough of Kensington & Chelsea* [2017] UKSC 36 (eg at [33, 36-37]) and *Hallam*. In *Hallam*, whilst Lord Wilson considered at [94] that it was "*over-optimistic*" to suggest there was "*room for further constructive dialogue between this court and the ECtHR about the extent of the*

application of article 6(2)" (see also Lady Hale at [77] and Lord Reed at [173]), Lord Mance at [73] disagreed. Lord Reed observed at [172]:

> *"dialogue has proved valuable on some occasions in relation to chamber decisions of the European court, where this court can be confident that the European court will respond to the reasoned and courteous expression of a diverging national viewpoint by reviewing its position".*

30. The domestic courts have been increasingly willing to criticise the reasoning and decisions of the ECtHR. This is important for the process of judicial dialogue. Judge Nicholas Bratza has noted that if domestic courts adopt "a position of deference" this make it "it is difficult to have an effective dialogue" (EHRLR 2011, 5, 505-512 at 512). He went on to say:

> *"I believe that it is right and healthy that national courts should continue to feel free to criticise Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices".*

31. The ECtHR appears to be genuinely committed to strengthening dialogue with domestic courts and has shown that it is receptive to changing position in response to judgments of the UK domestic courts.

32. In *Chester*, Lord Mance (with whom Lord Kerr, Lord Hughes and Lord Hope agreed) said that:

> *"The process enables national courts to express their concerns and, in an appropriate case such as* R v Horncastle *[2010] 2 AC 373, to refuse to follow Strasbourg case law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg".*

33. There may come a point, however, where there is "*no prospect of any further meaningful dialogue between United Kingdom Courts and Strasbourg*", because a question has been repeatedly and firmly answered by the Grand Chamber of the European Court of Human Rights and there is "*no realistic prospect that further dialogue with Strasbourg will produce a change of heart*" (*Chester* at [34, 137]).

34. As to how judicial dialogue can be strengthened, we would offer the following suggestions.

35. First, the effectiveness of judicial dialogue is undermined by the scale of the backlog of cases in the ECtHR. This makes it very difficult to have any kind of 'real-time' dialogue between the courts in the formal sense, ie through judgments in decided cases. More should be done to address that backlog.

36. Secondly, the UK should ratify Protocol No 16. This would allow domestic courts to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR. This would greatly facilitate dialogue between the domestic courts and the ECtHR. The process of dialogue has been strengthened through Protocol No 16 since the first opinion was given in 2019. If the UK wishes to strengthen dialogue, it should make use of this process.

37. Thirdly, there should be more informal dialogue between domestic and Strasbourg judges. In speeches and lectures, UK Supreme Court judges have spoken of the importance of mutual trust and goodwill between the two courts. This can be enhanced by closer personal relations between judges of the two courts. In a paper entitled 'The conversation between Strasbourg and national courts - dialogue or dictation?' (Irish Jurist 2009, 44, 1-12 at 12), Lord Kerr said:

> "*The exchange of views and ideas should not be confined to the adjudicative process. I am firmly of the view that contact between the judges of the ECtHR and national judges outside the sometimes narrow confines of judicial decision making should be put on a more structured level. A greater appreciation of the problems that we create for each other might be, if not eliminated, at least better understood.*"

38. There should be more working meetings and seminars between domestic judges and judges of the ECtHR, in order to strengthen the actual but informal dialogue which takes place between judges of the two sets of courts. The UK domestic courts should also maximise the opportunities presented by membership of the

ECtHR's Superior Courts Network, which is intended to facilitate judicial dialogue[13], and take advantage of the annual "Dialogue between Judges" seminar organised by the ECtHR[14].

39. Finally, ALBA notes that if it were to be suggested that the duty under s 2 of the HRA should be modified, or that the domestic courts should extend to the domestic executives and/or the legislatures a discretionary area of judgement which went materially beyond the doctrine of margin of appreciation at the Strasbourg level, that would raise real questions as to whether the HRA would remain an effective vehicle for enforcing Convention rights in the domestic sphere. In particular, if the domestic courts were required to adopt a materially different approach at the domestic level, that would only increase the likelihood of individuals having to go to Strasbourg to vindicate their rights. Further, and importantly, it would risk creating a concept of Convention rights which would be unique to the United Kingdom, thereby achieving indirectly that which the Government appears to have committed not to do directly, in that it would in practice alter the substance of the ECHR rights that would be enforceable in the domestic sphere.

THEME TWO: THE IMPACT OF THE HUMAN RIGHTS ACT 1998 ON THE RELATIONSHIP BETWEEN THE JUDICIARY, THE EXECUTIVE AND THE LEGISLATURE

40. ALBA considers that the HRA strikes an appropriate balance between the judiciary, legislature, and executive. The HRA in its current form preserves parliamentary sovereignty by: preventing courts from setting aside primary

[13] For an account of the working of informal dialogue between domestic courts and the ECtHR, see the evidence of the President of the ECtHR and Judge Eicke to the Joint Committee of Human Rights https://committees.parliament.uk/writtenevidence/22906/pdf/, at Q5.

[14] See, e.g., https://www.echr.coe.int/Documents/Dialogue_2010_ENG.pdf (at which Arden LJ spoke).

legislation;[15] permitting Parliament to legislate incompatibly with the ECHR;[16] and preserving the role of the executive and the legislature in domestic human rights protection through sections 4, 10 and 19 of the HRA.

41. The existing HRA framework has increased the role of domestic courts in human rights protection. That is inevitable given its stated purpose of "bringing rights home[17]" the whole purpose of which was to enable domestic courts to rule on issues that would otherwise be dealt with by an international court, the ECtHR. So ALBA submits this is justified on the grounds that:

    (1) It provides necessary checks and balances on legislative and executive powers. This is an important safeguard which ensures appropriate scrutiny of secondary legislation, government decision-making, and the acts of public authorities. This also enables human rights considerations, which may not have been apparent when legislation was passed, to be addressed without necessarily requiring legislative amendment.

    (2) It provides individual victims with access to effective remedies where public authorities have violated their Convention rights. For example, the HRA was critical in enabling families of those lost in the Hillsborough disaster to have a second inquest and setting its scope in accordance with the investigatory obligations of *Article 2 ECHR*.[18]

    (3) It is also appropriate given the premise that the United Kingdom will remain a party to the ECHR with a right of individual petition to the ECtHR. The effect of the HRA is to enable individuals to obtain, in

[15] *R* v *DPP, ex p Kebilene* [2000] 2 AC 326, 367[a].

[16] *SHD v AF (No.3)* [2009] UKHL 28 [93]; *R v Lyons* [2002] UKHL 44 at [58].

[17] See e.g. the White Paper, "Rights brought home: The Human Rights Bill", CM 3782, October 1997.

[18] *Attorney General v HM Coroner for South Yorkshire (West)* [2012] EWHC 3783 (Admin) [28].

their own courts, more quickly, and at less cost, relief that they would previously only been able to achieve in the ECtHR.

42. Whilst the courts' role in reviewing executive policy has increased under the HRA, courts have not been *unduly* drawn into such matters. We consider that both parliamentary *and* judicial control are necessary to ensure that executive policy is compatible with the UK's human rights obligations. In any case, the role of the courts in reviewing policy remains solely that of reviewing questions of legality and human rights compliance, and *not* reviewing the merits or political desirability of executive policies. We also note that domestic courts have in recent years become increasingly cautious about encroaching on matters of public policy, and the role of the courts in reviewing policy should not be overstated.[19] In view of the above, ALBA therefore considers that domestic courts play an important and proper role in scrutinising policy and they do so in a proportionate and legitimate manner.

43. ALBA highlights that, in comparison with other jurisdictions, the role of domestic courts within the British constitution remains limited.[20] British courts cannot set aside primary legislation where it is incompatible with human rights and are limited to using their interpretative powers under section 3 and making non-binding declarations of incompatibility under section 4 of the HRA. This measured approach recognises the centrality of parliamentary sovereignty in the British Constitution and balances it with the imperatives of human rights protection and maintaining the UK's compliance with its international obligations under the ECHR.

[19] *SC & Ors, R (on the application of)* v *The Secretary of State for Work and Pensions & Ors* [2019] EWCA Civ 615.

[20] For example: The Constitution of Ireland, Article 15(4)(2); The Constitution of the Kingdom of the Netherlands, Article 94; The Constitution of the Republic of South Africa, Article 172.

44. Question (a) asks whether there should be any change to the framework established by sections 3 and 4 of the HRA. It proceeds to ask how sections 3 and 4 have been used, and how the framework could be amended or repealed.

45. ALBA does not consider there should be any such change. The current framework strikes an appropriate balance between the powers of the judiciary, executive, and Parliament, while ensuring victims of human rights violations have access to effective remedies.

46. Question (a)(i) asks whether domestic courts have used section 3 to interpret legislation in a manner inconsistent with Parliament's intention and, if so, whether section 3 should be amended or repealed.

47. The answer as to whether section 3 enables courts to interpret legislation in a manner inconsistent with Parliamentary intent depends on the perspective with which one views Parliamentary intent. It is, of course, important to recognise that one cannot necessarily conflate the intention of Parliament with the intention of the government which promoted the relevant legislation.

48. On one hand, section 3 does – to a limited extent – enable courts to interpret legislation in a manner inconsistent with the intention of the enacting Parliament of an individual piece of legislation. The House of Lords thus observed in *Ghaidan v Godin-Mendoza* [2004] UKHL 30:

> *"30. [...] section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3."* [21]

[21] See also: *Gilham v Ministry of Justice* [2019] UKSC 44 [39].

49. As the passage in *Ghaidan* suggests however, section 3 does not give courts untrammelled powers to interpret inconsistently with the intention of Parliament and there are inherent limitations to courts' section 3 powers.

50. Firstly, section 3 allows the Courts to *interpret* legislation, not to amend it or to create new legislation.[22] This interpretive power is qualified by what is "possible", as set out in section 3(1) of the HRA:

> *"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."*

51. The effect of this is that Courts cannot adopt interpretations under section 3 that are contrary to a fundamental feature or the plain legislative intent of the legislator on the point at issue, or that go against the grain of legislation.[23] Parliamentary intention thus remains supreme, as confirmed in *Ghaidan*:

> *121. " [...] using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."*

52. Secondly, where courts use their powers under section 3, they must only adopt the minimum necessary interpretation to secure compliance with Convention rights.[24]

53. Thirdly, Parliament retains the power to expressly legislate incompatibly with Convention rights and legislate to overrule section 3 interpretations.[25] Indeed,

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[22] *McDonald v McDonald* [69]: "*there is a difference between interpretation, which is a matter for the courts and others who have to read and give effect to legislation, and amendment, which is a matter for Parliament*."; *R (Wright) v SS for Health* [2009] UKHL 3 [39]; *WB v W District Council* [2018] EWCA Civ 928 [35].

[23] *R v Lambert* [2001] UKHL 37 [79]; *R(Anderson) v SSHD* [2002] UKHL 46 [59]; *R v Shayler* [2002] UKHL 11 [52]; *Smith v Lancashire Teaching Hospitals NHS Trust* [2017] EWCA Civ 1916 [96]; *Gilham v Ministry of Justice* [2019] UKSC 44 [39].

[24] *R (Middleton) v West Somerset Coroner* [2004] UKHL 10 [34].

[25] *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28 [2010] 2 AC 269 [93]

Parliament can legislate retroactively, enabling it to reverse the effect of the Courts' decision entirely, if it so chooses.[26]

54. Yet fundamentally, section 3 is itself an expression of Parliamentary intent. Parliament chose to grant courts their interpretative powers under section 3 with the express purpose of "bringing rights home" and reducing the number of applications to the ECtHR. This is confirmed in *Hansard* and in the White Paper, *Rights Brought Home*.[27] From this perspective, ALBA submits that the courts' use of their section 3 powers is entirely consistent with Parliamentary intent as expressed in the HRA itself.

55. In any event, ALBA submits that there are no compelling grounds to repeal or amend section 3. The reasons for this submission are manifold.

56. Firstly, section 3 strikes an appropriate balance between Parliamentary sovereignty and human rights protection. On one hand, there is an inbuilt respect for Parliamentary intent within the limitations to section 3 (see above) and the courts' powers under that section are just one part of the ecosystem of human rights protection established in the HRA, which preserves a key role for the executive and Parliament. On the other hand, the courts' role in this ecosystem is critical, for while the legislature and the executive are elected, the courts are independent and unencumbered by political considerations. They are uniquely placed to protect fundamental rights and provide checks and balances on other branches of Government. In the words of Simon Brown LJ: "*The court's*

[26] See: The War Damage Act 1965, enacted in the aftermath of the case of *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75.

[27] Secretary of State for the Home Department, *Rights Brought Home,* Cm 3782, October 1997, para. 2.7: "*[The interpretative obligation] goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so*."

role under the [HRA] is as the guardian of human rights."[28] Section 3 is integral for the courts in fulfilling this role for the reasons outlined below.

57. Secondly, section 3 secures access to effective remedies for claimants who would otherwise have no remedy under section 4. Whilst declarations of incompatibility may precipitate parliamentary action, the individual claimant will not receive reparation. This is discussed further in paragraphs 75ff below.

58. Thirdly, section 3 has provided an invaluable tool in bringing other areas of law into line with Convention rights through the doctrine of horizontal effect. For example, in *X v Y* [2004] EWCA Civ 662 [59], it was held that a dismissal will be unfair within the meaning of section 94 of the Employment Rights Act 1996 where the dismissal constitutes an unjustified interference with a Convention right.[29]

59. Fourthly, narrowing courts' interpretative powers under section 3 would increase the volume of applications to the ECtHR and run contrary to the principle of subsidiarity as set out in the Brighton Declaration by increasing the role of the ECtHR relative to domestic courts in human rights protection.[30] We also note that the UK has a positive obligation under the ECHR to ensure that its courts interpret domestic legislation compatibly with the ECHR.[31] Narrowing section 3 interpretive powers would place the UK at risk of being in breach of that obligation with increasing frequency.

60. Fifthly, section 3 is beneficial to the Government and Parliament. In enacting the HRA, Parliament intended to bring all legislation into compliance with the ECHR, including pre-HRA legislation. Section 3 allows the Courts to implement

[28] *R (International Transport Roth GmbH) v Secretary of State for the Home Department* [2002] EWCA Civ 158 [2003] QB 728 [27]

[29] See also: *Q v Secretary of State for Justice* (2020) UKEAT/0120/19/JOJ [51]-[57], [80].

[30] Brighton Declaration, para. 11

[31] *Pla and Puncernau v Andorra* (App No. 69498/01, 13 July 2004) [60]-[63].

this intention without burdening Parliament with the task of identifying and amending all provisions of pre-HRA legislation that are not compliant with the ECHR or having to amend contemporary legislation which is unintentionally incompatible with Convention rights. The Courts' evolutive interpretations also allow legislation enacted in previous Parliaments to adapt to social and technological changes. In other words, the judiciary assists Parliament by: (1) bringing to their attention provisions which are incompatible with the ECHR; (2) directly rectifying these discrepancies insofar as they are able; and (3) enabling the United Kingdom's human rights framework to remain reactive and flexible.

61. ALBA also notes that judicial interpretation under section 3 may present less of a political cost than a declaration of incompatibility under section 4. Declarations of incompatibility attract more public attention to the Government's human rights failings than section 3 interpretations, and they avoid the Government having to intervene on sensitive matters into which it might not wish to be drawn.

62. The Government is already aware of these benefits and has demonstrated a willingness for the courts to rectify violations through section 3, rather than making a declaration of incompatibility. Indeed, counsel for the Government will often be instructed to argue in favour of section 3 interpretations in order to avoid a potential incompatibility.[32]

63. Finally, the prospect of the application of section 3 encourages "best practices" in Parliament. In the first instance, it provides Parliament with an incentive to ensure that legislation is compatible with the ECHR. Further, it facilitates Parliamentary scrutiny and democratic accountability by ensuring that, where the Government wishes to propose legislation that is incompatible with

[32] *R (Hammond) v Secretary of State for the Home Department* [2005] U.K.H.L. 69 [17], [29].

Convention rights, the legislation is clear and transparent in its intent. This is in line with Lord Hoffmann's legality principle.[33]

64. In summary, ALBA does not consider that section 3 should be amended or repealed. Section 3 is an integral part of an ecosystem of human rights protection which strikes an appropriate balance between the roles of Parliament, the executive, and the courts. Repealing or amending section 3 would dilute the Courts' role: removing valuable checks and balances, increasing Parliamentary workload, reducing victims' access to remedies, and ultimately weakening human rights protection in the United Kingdom.

65. As to sub-paragraph (ii), if section 3 were to be amended or repealed, we strongly disagree with the suggestion that any such change should apply to the interpretation of legislation enacted before it takes effect.

66. Retrospectively changing the interpretative regime that applies to pre-existing legislation would cast doubt on the status of post-1998 judgments that had relied upon section 3 and would create legal uncertainty. Where it is not possible to apply section 3, the Courts turn to section 4. However, if amendment or repeal of section 3 were to have retrospective effect, we would be left with a volume of legislation which would lose its section 3 interpretation and become incompatible with Convention rights but would also lack a declaration of incompatibility. This would create a lacuna in human rights protection. The burden will fall on Parliament to pass and amend legislation on a wide range of matters to ensure that this gap is filled.

67. Further, there is no clear dividing line between section 3 interpretations and other interpretations. Section 3 is often used to reach a conclusion which could have been reached through other canons of interpretation.[34] It would require an

[33] *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33.

[34] Similar interpretative principles apply to constitutional principles, as Lord Browne-Wilkinson observed in *R (Modaresi) v Secretary of State for Health* [2013] UKSC 53 at [14]: *"A power conferred by*

individual analysis of each decision to unpick whether a judgment relied primarily on section 3 and whether it could have been similarly decided on other grounds.

68. In ALBA's view, the points made above raise a real practical issue that would have to be considered before there was any amendment or repeal of section 3: unless it were possible to identify with reasonable certainty the precise effect that the amendment or repeal has in each case where the courts have used section 3 to interpret legislation, it would introduce significant uncertainty into the law, which would be inimical to the rule of law.

69. Subparagraph (iii) asks whether declarations of incompatibility should be considered as part of the initial interpretation process rather than as a matter of last resort, so as to increase the role of Parliament in addressing incompatibilities.

70. ALBA does not consider that declarations should be brought into the initial interpretation process.

71. Firstly, this would render the framework established between sections 3 and 4 unworkable. Section 4 is a subsidiary provision, in that it is only engaged where "*the court is satisfied that the provision is incompatible with a Convention right*", and a provision will only be incompatible where it cannot be interpreted compatibly with a Convention right under section 3. A provision is either compatible – whether as a result of interpretation or otherwise – or it is not. It is unclear how a court could, first, consider a provision to be incompatible so as to issue a declaration of incompatibility and then proceed to interpret a provision as compatible with a Convention right under section 3.

Parliament in general terms is not to be taken to authorise the undoing of acts by the done of the power which adversely affect […] the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament". Likewise, the parallel between section 3 and *Marleasing* interpretations was recognised in *Ghaidan* at [45]-[48], and such interpretations remain valid post-Brexit.

72. Secondly, giving section 4 parity with, or precedence over, section 3 would restrict victims' access to effective legal remedies. Under *Article 13 ECHR*, victims have a right to an effective remedy, and the Government, courts, and public authorities have an obligation to ensure effective domestic remedies are available. A failure to do so would expose the Government to applications to the ECtHR. Whilst *Schedule 1* to the HRA does not incorporate *Article 13* into the HRA, this does not affect the Government's obligations under the Convention itself.

73. Indeed, the reason for non-incorporation of *Article 13* is precisely that the remedies provided within the HRA are assumed to discharge the Government's *Article 13* obligations. In the words of Lord Nicholls in *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] AC 291 at [61]:

> *"The domestic counterpart to article 13 is sections 7 and 8 of the Human Rights Act, read in conjunction with section 6 […] Article 13 guarantees the availability at the national level of an effective remedy to enforce the substance of Convention rights. sections 7 and 8 seek to provide that remedy in this country. The object of these sections is to provide in English law the very remedy article 13 declares is the entitlement of everyone whose rights are violated."*

74. What is left unsaid in this passage is that the remedies in section 8 of the HRA will only be available where it is established that a public authority acted unlawfully under section 6(1), which as per section 6(2) will not be possible where primary legislation cannot be interpreted compatibly with Convention rights. In such circumstances, the "*domestic counterpart*" to *Article 13* is not engaged and the only recourse for a victim is to seek a declaration of compatibility under section 4 or go to Strasbourg.

75. This is concerning given that it is well-established that section 4 declarations do not provide victims with an effective remedy under *Article 13*, given that they are not binding on the parties and the victim will receive no legal remedy or

redress.[35] As observed in *Burden v United Kingdom* (App No. 13378/05, 12 December 2006):

> *"40. The Grand Chamber recalls that the Human Rights Act places no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility and that, primarily for this reason, the Court has held on a number of previous occasions that such a declaration cannot be regarded as an effective remedy within the meaning of Art.35(1). Moreover, in cases such as Hobbs, Dodds, Walker and Pearson, where the applicant claims to have suffered loss or damage as a result of the breach of his Convention rights, a declaration of incompatibility has been held not to provide an effective remedy because it is not binding on the parties to the proceedings in which it is made and cannot form the basis of an award of monetary compensation."*

76. Elevating the position of section 4 relative to section 3 would therefore undermine the presumption that the HRA discharges the United Kingdom's obligations under *Article 13*, contravene the principle of subsidiarity, and further expose the Government to applications to the ECtHR. We are also concerned that eroding victims' access to effective domestic remedies will dissuade victims from exercising their right under section 7 to bring proceedings in the first place. Increasing the frequency with which declarations of incompatibility are made will also increase Parliament's workload. There is thus little to gain by considering section 4 declarations of incompatibility within the initial process of interpretation.

77. Question (b) concerns the remedies that should be available on challenges to domestic derogation orders. ALBA does not consider there to be a case for changing the remedies available to domestic courts when considering challenges to designated derogation orders under section 14(1). The HRA framework should reflect *Article 15 ECHR* to avoid the Government being exposed to further applications to the ECtHR.

[35] *Hobbs v United Kingdom* (App Nos. 63684/00, 63475/00, 63484/00 and 63468/00, 14 November 2006); *Dodds v United Kingdom* (App No. 59314/00, 8 April 2003); *Walker v United Kingdom* (App No. 8374/03, 27 April 2004); *B v United Kingdom* (2006) 42 EHRR 11; *Upton v United Kingdom* (App No. 29800/04, 11 April 2006).

78. Question (c) concerns the way in which courts have dealt with provisions of subordinate legislation which are incompatible with HRA Convention rights. ALBA does not consider that any substantive change is required. The current position is that where subordinate legislation cannot be read and given effect to in a way which is compatible with Convention rights (under section 3), then in an appropriate case it may be quashed or a declaration to that effect may be granted.[36] The possibility of quashing subordinate legislation is expressly recognised in section 10(4) HRA. Further, unless they are mandated by primary legislation, public authorities are required under section 6 to ignore such subordinate legislation to the extent that it is incompatible with ECHR rights.[37] The proviso "*unless mandated by primary legislation*" preserves parliamentary sovereignty.

79. Further, this is entirely consistent both with democratic principle, and with the UK's pre-existing constitutional arrangements. It is well established that UK courts have power to declare subordinate legislation to be unlawful under the *ultra vires* principle, and to strike it down on that basis. That can include that subordinate legislation is inconsistent with rights granted under other primary legislation, or with other fundamental rights, where the enabling legislation does not expressly sanction this (see for example *R v SSHD, ex parte Simms* [2000] 2 AC 115). For the courts to face especial constraints in dealing with subordinate legislation that is inconsistent with the HRA Convention rights would therefore be contrary to general principle. Indeed, the court's power to deal with subordinate legislation under the HRA is in some respects more flexible, and hence less intrusive of executive power, than when dealing with other forms of illegality in subordinate legislation. Under the *ultra vires* doctrine, the higher courts will generally strike down offending provisions of unlawful secondary legislation even if their application to the majority of cases is unproblematic. By

[36] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52 [27]-[29].

[37] *R (W)* v *SSHD* [2020] EWHC 1299 (Admin) [37]; *Mahad* v *Entry Clearance Officer* [2009] UKSC 16 [28]-[30]; *RR* v *Secretary of State for Work and Pensions* [29]-[30]

contrast, under section 6 of the HRA the court is entitled in an appropriate case to grant a remedy by granting an appropriately nuanced declaration, by quashing or by *disregarding* such subordinate legislation in the individual case without striking down the legislation itself (see for example *R (Quila) v SSHD* [2012] 1 AC 621, at [59]). In ALBA's view, therefore, there can be no justification for limiting the court's power to deal with secondary legislation which offends the HRA.

80. ALBA is concerned that, if an amendment were to be made to the HRA to confer upon subordinate legislation the same protection as is accorded to primary legislation, that would potentially act as an incentive to the executive to use the vehicle of subordinate legislation to give effect to its decisions in order to insulate it from challenge under sections 6 and 7 (*cf* section 6(6)(b)). The possibility of this occurring would exacerbated if the protection were afforded to all subordinate legislation falling within the extremely wide definition of that term provided for by section 21(1).

81. Question (d) asks in what circumstances the HRA applies to the acts of public authorities outside the territory of the UK, what are the implications of this approach, and whether there is a case for change.

82. The question concerns the concept of "*jurisdiction*", which delineates the spatial and personal scope of States' obligations under human rights treaties by defining the pool of persons to which a State owes human rights obligations. In this vein, *Article 1* provides: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention*".

83. As to the scope of jurisdiction under the Convention, jurisdiction is primarily territorial but exceptionally extends beyond a State's territory ("*extraterritorial jurisdiction*").[38] The ECtHR's recognition of extraterritorial jurisdiction accords

[38] *Ilascu and Others v Moldova and Russia* (App No. 487/99, 8 July 2004) [312]; *Al-Skeini v United Kingdom* (App No. 55721/07, 7 July 2011) [131].

with the International Court of Justice, UN human rights bodies, and other regional human rights courts' approach to jurisdiction under other human rights treaties, many of which the UK has ratified.[39]

84. The ECtHR's seminal case on extraterritorial jurisdiction is *Al-Skeini v United Kingdom* (App No. 55721/07, 7 July 2011), which provides at [130]-[141] that acts of a State performed or producing effects outside its territory will constitute an exercise of jurisdiction in the following circumstances:

- where State agents exercise control or authority outside of a State's territory in certain cases, such as: (1) the acts of diplomatic and consular agents;[40] (2) the exercise of public powers, normally exercised by a foreign State, through the consent, invitation of acquiescence of that State;[41] and (3) the use of force by State agents in certain circumstances[42]; and

- where a State exercises effective control of an area outside its territory, including where a State exercises decisive influence over a local administration.[43]

85. The approach of domestic courts *vis-à-vis* the territorial reach of the HRA reflects that of the ECtHR to *Article 1*.[44] If domestic courts regressed from the ECtHR's jurisprudence, this would have the consequence of exposing the Government to additional applications to the ECtHR.

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[39] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [106]-[111]; HRC, *Lopez Burgos v Uruguay* (1981) Communication No 52/1979, UN Doc CCPR/C/13/D/52/1979 [12]; *Saldano v Argentina* (1999) IACommHR Report No 38/99; *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2007) ACommHPR Communication No 227/99.

[40] *X v United Kingdom* (App No. 7547/76, 15 December 1977).

[41] *Al-Sadoon and Mufdhi v The United Kingdom* App no 61498/08 (ECtHR, 30 June 2009).

[42] *Ocalan v Turkey* App no 46221/99 (ECtHR [GC], 12 May 2005).

[43] *Loizidou v Turkey* App no 15318/89 (ECtHR [GC], 23 March 1995); *Ilascu and Others v Moldova and Russia* (App No. 487/99, 8 July 2004) [392].

[44] *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010 [99].

86. The current scope of extraterritorial jurisdiction means that public authorities and officials must respect the human rights of individuals where they exercise authority and control abroad. We consider that this can be justified on a number of grounds.

87. Firstly, it follows from the core premise of human rights law that all persons are equal in dignity and are thus afforded universal rights without discrimination. It is in keeping with this principle that public authorities and officials, acting on behalf of the UK, respect the fundamental rights of persons wherever they are based.[45]

88. Secondly, the current scope of jurisdiction ensures that victims of human rights violations committed by UK public authorities and officials abroad have access to effective remedies. This provides for accountability where abuses are committed and encourages human rights compliant practices, vital to the UK's international reputation.

89. The implications of the UK's extraterritorial jurisdiction should not be overstated, however. It is well-established that the substantive obligations of UK public authorities and officials are tailored to the extent of control they exercise abroad and are interpreted in a manner consistent with the UK's concurrent obligations under international humanitarian law.[46] This reflexive approach to extraterritorial obligations ensures that UK public authorities and officials are not overburdened with duties disproportionate to the control they exercise.

90. For the reasons above, ALBA submits that there is no principled basis for restricting the territorial scope of the UK's obligations under the HRA. That does not however mean there is no case for change. The ECtHR's approach to extraterritorial jurisdiction has at times been inconsistent and arbitrary. The

[45] Universal Declaration of Human Rights, arts 1-2.

[46] *Al-Sadoon* [88]-[89]; *Al-Skeini* [137].

restrictive approach to jurisdiction in *Bankovic v Belgium and Others* (App No. 52207/99) has never been explicitly overruled, creating inconsistency.[47] Recently, policy considerations led to the unconvincing distinction in *Georgia v Russia* (App No. 38263/08, 21 January 2021) that use of force by State agents during the active phase of hostilities in the context of an international armed conflict will not constitute an exercise of jurisdiction, but that it may outside of that context. Further, *Article 56 ECHR* has created an anomalous position where jurisdiction does not extend to "*territories for whose international relations [the UK] it responsible for*" (i.e. British colonial territories).[48] The ECtHR's approach is also limited when compared to other international human rights bodies and regional human rights courts which, for instance, have given clear recognition to the concept of "extraterritorial effects jurisdiction".[49]

91. Building on the above analysis regarding section 2 HRA, ALBA considers that there is an opportunity for domestic courts to go beyond the ECtHR, addressing the above limitations, articulating a coherent doctrine of extraterritorial jurisdiction and improving the ECtHR's approach through judicial dialogue.

92. Question (e) concerns the remedial order process. ALBA does not consider there is a need to modify section 10 and/or Schedule 2 to the HRA (and notes that in some cases, the executive has powers under other legislation to make changes in response to a declaration of incompatibility). It notes however that there are increasing concerns about the extent to which there is adequate Parliamentary scrutiny of secondary legislation and about the increasing use of Henry VIII powers. In general, unless there is a pressing need to act urgently or unless the

[47] Compare *Bankovic* to *Pad and Others v Turkey* App no 60167/00 (ECtHR, 28 June 2007) [54]-[55].

[48] *Chagos Islanders v United Kingdom* (App No. 35622/04, 20 December 2012) [61]-[74]; *Hoareau* [105]-[106].

[49] This refers to the establishment of jurisdiction where there is a causal nexus between State activity and the effects on a victim outside the State's territory. For example, see: HRC, *Munaf v Romania* (2009) Communication No 1539/2006, UN Doc CCPR/C/96/D/1539/2006 [14.2]; *Franklin Guillermo Aisalla Molina v Ecuador* (2010) IACommHR Report No 112/10 [99]-[100]; *Medio Ambiente y Derechos Humanos (Opinión Consultiva)* (2017) OC-23/17 [101]-[103].

change being made is genuinely of minor importance, it is better for the legislative response to a declaration of incompatibility to be made by primary legislation, where there is more debate and scrutiny.

ALBA

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