SCL SOCIETY OF CONSERVATIVE LAWYERS

'A GLORIOUS REVOLUTION'

BILL OF RIGHTS CONSULTATION

Response by certain members of
The Society of Conservative Lawyers

About the authors

Harry Gillow is a barrister at Monckton Chambers specialising in areas of public and commercial law. He is currently instructed on an ongoing appeal to the UNHRC on the question of the compatibility of whole-life sentences with the International Covenant on Civil and Political Rights.

William Knatchbull is the Society's current Lyell Scholar. He is about to embark on the Bar Course. After First Class honours with Dean's commendation in PPE at the University of Exeter, he passed the GDL at University of Law (Exeter) with Commendation and Distinctions.

Lord Sandhurst QC is the current Chair of Research of the Society of Conservative Lawyers. He practised from One Crown Office Row under his family name as Guy Mansfield QC and was Chair of the Bar Council in 2005. He retired from practice on 31 March 2019. He now sits as an excepted hereditary peer on the Conservative Benches.

Anthony Speaight QC practised at 4 Pump Court until retirement in 2021. He was Chair of Research of the Society of Conservative Lawyers from 2016 to 2020. He was a Commissioner on the Commission for a UK Bill of Rights between 2010 and 2011.

Andrew Warnock QC practises at 1 Chancery Lane. He was Chair of Research of the Society of Conservative Lawyers from 2013 to 2016. He specialises in the liability of public authorities in tort and under the Human Rights Act.

London, March 2022

FOREWORD

The authors of this paper include the current chair and two previous chairs of research of the Society. One of them was a Commissioner on the Commission for a UK Bill of Rights between 2010 and 2011 and another was Chair of the Bar Council. They have produced a stimulating and detailed response to the Government's Consultation on a Bill of Rights.

The appalling Russian invasion of Ukraine and the tragic events accompanying it have highlighted the importance of the values of liberal democracy which are fundamental to British peopleand which we share with like-minded nations across the world. The European Convention on Human Rights is a significant document embodying many of those values. But as the authors explain there are plenty of legitimate criticisms that can be made of the jurisprudence of the European Court of Human Rights' and its effect on the governance of the United Kingdom. In this country, we have a vibrant democracy, a strong independent judiciary and Parliament is or should be sovereign.

While the authors warmly support the Government's policy of the United Kingdom continuing to adhere to the European Convention on Human Rights, they point out rightly that there is work to be done to keep the balance between Parliament and the courts. They remind us of our common law heritage and urge recognition of a single right, namely, "*the right to act in any way which is not prohibited by law*". They remind us that the purpose of the Human Rights Act 1998 was to provide a remedy in a domestic court if and when a party would otherwise secure a remedy at Strasbourg, not to change in any other way the disposal a case would have received under domestic law.

The authors endorse the Consultation paper's general approach and its proposal to amend s.3 of the HRA so that the interpretative role of Convention rights comes into play only if there is a genuine ambiguity. They point to the often disproportionate burdens faced by public authorities in meeting claims and make valuable suggestions for mitigating this effect.

They urge revision of s.12 to enhance the right of free expression. They rightly point to the unfortunate and uncalled for judgments of the Strasbourg court in giving the Convention inappropriate extraterritorial effect.

These and other recommendations in this innovative paper mark it as a significant response to the Consultation and I commend it to all who believe in the rule of law and the sovereignty of Parliament.

Sir Bob Neill MP
Chair of the Justice Committee of the House of Commons
Chair of the Executive Committee of the Society of Conservative Lawyers

EXECUTIVE SUMMARY

We welcome the Consultation Paper and applaud the Government's readiness to tackle the problems of the Human Rights Act. In general terms we completely endorse its analysis of the excessive activism of both the Strasbourg court and judges in our own senior courts.

We warmly support the Government's policy of the United Kingdom continuing to adhere to the European Convention on Human Rights. This is a moment in history for the unity of the West in upholding European values.

We have taken notice of developments in the case-law over the last decade. The Strasbourg court appears to be paying greater respect to a national margin of appreciation, following the Brighton Declaration of 2012 and the recent coming into force of the 15th Protocol. Over the same period the UK Supreme Court initially embarked on a period of more "expansive" jurisprudence marked by a readiness to find breaches of Convention rights where Strasbourg would not have done; but very recently a series of judgments delivered by Lord Reed and unanimously agreed by all other members of the court have signalled a conservative approach to the Human Rights Act and the Convention. The most important of all is the *Elan-Cane* decision which was delivered after the publication of the Consultation Paper.

The report of the Independent Human Rights Act Review chaired by Sir Peter Gross sets out at length the views of its majority who favoured limited change, but unfortunately presented no minority report from the member who apparently favoured more reform. However, one idea of value from all its members is the codification of the principle found in Supreme Court judgments that courts should look to domestic case-law in priority to Strasbourg cases. We do welcome the Gross amendment to s.2 HRA and the introduction of suspended quashing orders in line with those being introduced by the Judicial Review Bill.

Reflecting on all the current circumstances we offer the following proposal:

- There should be enacted a UK Bill of Rights in two parts. A draft is annexed.
- Part I would contain principles of our domestic heritage of rights and freedoms, whilst Part II would be an amended version of the Human Rights Act.
- Rather than provide a list of rights in the same or similar terms to the Convention re-labelled as UK rights, we propose that a more accurate reflection of our heritage would be the recognition of a single right, namely,

  "the right to act in any way which is not prohibited by law"

- That right leads to the recognition of a range of fundamental freedoms – freedom of speech, freedom of association, freedom from arbitrary arrest and so on. This analysis points up an underlying difference from the continental heritage where citizens have been regarded as enjoying only such rights as specifically granted. We would affirm the role of jury trial as an ultimate protection against tyranny.
- Our central suggestion for the Part of the Bill containing an amended Human Rights Act is to build on the Gross report's idea of codification of Supreme Court principles by enacting further principles, especially from the recent cases *SC*, *AB* and *Elan-Cane*. These include the following:
  - The purpose of the Act is to provide a remedy in a domestic court if and when a party would otherwise secure a remedy at Strasbourg; but it is not the purpose to change in any other way the disposal a case would have received under domestic law (*Elan-Cane*).

- Any doubt as to whether Strasbourg would find a breach of Convention rights should be resolved against granting a domestic remedy, since a claimant can pursue a case to Strasbourg if the domestic court's interpretation is too limited, but if the court finds a breach where Strasbourg would not, the Government is unable to appeal to Strasbourg to correct the mistake (*AB*).
- The domestic court cannot find a breach of Convention rights if Strasbourg would have held the matter to be within the national margin of appreciation (*Elan-Cane*).
- In considering what is "necessary in a democratic society", a court or tribunal should seek to reconcile the rule of law with the principle of the separation of powers, and therefore accord appropriate respect to legislative choices made by Parliament and to executive decisions made by (and on behalf of) ministers answerable to a legislature, especially in the field of social and economic policy, and in respect of the allocation of resources (*SC*).

The principal specific reforms which we propose to the HRA part of the new statute are:

- We warmly support the Government's proposal to amend s.3 so that the interpretative role of Convention rights comes into play only if there is a true ambiguity. This overrules the troubling dicta in *Gaidan v Godin-Mendoza* that Parliament intended unreasonable interpretations.
- We would remove from the scope of s.6 a judge performing a judicial function: this feature has had limited real role but has been used by activist judges to justify expansive judgments.
- We would introduce an additional hurdle for a claim under s.7 that the claimant must have suffered a significant disadvantage (unless there are exceptional reasons). This is to bring domestic practice into line with that of Strasbourg under the 14th and 15th Protocols which postdate the Act of 1998.
- In respect of awards of damages under s.8, we would require courts always first to exhaust remedies under domestic causes of action. If proceeding to consider damages for breach of a Convention right, we would enact a list of factors to which a court should have regard. This includes the extent to which the Claimant has fulfilled his relevant responsibilities.
- We suggest a revised wording of s.12 to enhance the right of free expression.

We would reject the International Humanitarian Law of the Geneva Conventions being supplanted by rights under the Convention.

We are greatly concerned by the Supreme Court decision in *Ziegler* that protesters blocking a public road should be acquitted of any offence on the ground they were exercising their right of peaceful assembly. We would enact that an argument that a decision to prosecute has been incompatible with Convention rights can be raised only in judicial review and cannot be run as a defence in a criminal trial.

Almost all these reforms to the Human Rights Act address developments since 1998 and justify the description as updating that Act.

INTRODUCTION

We warmly welcome the Government's Consultation Paper. Many Conservatives will be deeply grateful for the courage of the Government in its willingness comprehensively to grapple with this topic.

We appreciate the fact that the Consultation Paper addresses to some extent all the six weaknesses in the present situation which we developed in our evidence to Sir Peter Gross' review. These in summary were:

- The lack of British ownership of our rights inherent in a statute which is wholly based on a cut-and-paste from an international treaty.
- The prominence given to European Convention rights has drained attention away from our own rich and much older domestic heritage of rights.
- The concentration on the case-law of the European Court of Human Rights at the expense of many courts in various parts of the common law world.
- The treatment of the Human Rights Act by many senior British judges as an invitation to judicial activism.
- The fostering of a rights culture at the expense of civic responsibilities.
- The absence of recognition of important rights which are not mentioned in the European Convention on Human Rights, such as jury trial.

We present our answers to the Consultation Paper's specific questions later below. First, however, we set out some general observations, which underlie our specific answers.

Western values and European values: the European Convention on Human Rights

The appalling Russian invasion of Ukraine occurred during the period in which our group was working on our response. These tragic events have highlighted the importance of the values of liberal democracy which are fundamental to British people. The European Convention on Human Rights is a significant document embodying many of those values. We warmly support the Government's policy of continuing to adhere to the Convention.

It does not detract from the genuineness of the support of British Conservatives for the Convention that many of us have serious criticisms of some European Court of Human Rights' decisions. We are pleased to see a government for perhaps the first time setting out an intelligently argued critique of Strasbourg jurisprudence.

Similarly, it does not detract from the genuineness of support for the Convention to point out that the UK does not have an international obligation to follow all Strasbourg case-law. Our international obligation is that set out in art 46 of the Convention:

> *"The High Contracting Parties undertake to abide by the final judgment of the court in any case to which they are parties."*

In other words, our obligation is to abide by decisions to which the UK is a party – which are not numerous. It is, of course, (as the Strasbourg Court has made clear) the case that participation in the Convention carries with it the obligation to take account of the view of the ECtHR. Indeed, it is obviously sensible for the UK to take good notice of established trends in decisions from the Grand Chamber in cases relating to other countries, if our own national context is sufficiently similar that it is likely that the same approach would be taken to a case from the UK. But it has done no service to promoting domestic support for the Convention to exaggerate its impact.

Ultimately, the UK Supreme Court may depart from decisions of the ECtHR when it is appropriate: see Lord Phillips in *R v. Horncastle* (2009):[1]

> *"The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court, applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the*

[1] [2009] WL 424 8612

Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court, the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court."

Further, we remind readers of the speech of Lord Scott in *Secretary of State for the Home Department v F* (2009)[2]:

"The courts should also take into account treaty obligations by which the United Kingdom is bound under international law, and assume, unless the language of the statute compels the contrary conclusion, that the legislature intended the statute to be consistent with those treaty obligations."

*… "**It is, of course, open to Parliament to enact legislation that is incompatible with one or more Convention rights the ability to do so is inherent in the constitutional role of a Parliament.**"*[3] [emphasis added]

Indeed, we endorse and adopt the approach made by the former Lord Chief Justice, Lord Judge[4] that section 2 should be amended:

"To express (a) that the obligation to take account of the decisions of the Strasbourg Court did not mean that our Supreme Court was required to follow or apply those decisions, and (b) that in this jurisdiction, the Supreme Court is, at the very least, a court of equal standing, to the Strasbourg court."

Cited at para 115 of the Consultation Paper.

The ground has now shifted a little further in a welcome direction, giving wider scope to Parliament to amend the HRA and to the Courts to apply the amended statute and other legislation in accordance with the true intent of Parliament. Protocol 15 to the ECHR came into force on 1 August 2021, following its ratification by all 47 states parties. This recognises that the primary responsibility for protecting human rights under the European Convention on human rights is on each individual state party. Article 1 of Protocol 15 is in these terms:

"At the end of the preamble to the Convention, a new recital should be added, which shall read as follows:

*'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and **that, in doing so, they enjoy a margin of appreciation**, subject to the **supervisory** jurisdiction of the European Court of Human Rights established by this Convention'."* [emphasis added]

Nonetheless, in the new phase of European tension into which we have entered we are pleased to be making a suggestion in this paper for a version of a UK Bill of Rights in which the concept of "Convention rights" would remain one feature and in which reference to the Convention would be retained.

Time to update the Human Rights Act 1998

The Conservative Party Manifesto for the 2019 election proposed to "update" the Human Rights Act. The principal changes which we proposed in this paper well match that description:

- Reflecting the 14th and 15th Protocols to the Convention, which strengthened the national margin of appreciation, and introduced the criterion therein of "significant disadvantage". These Protocols postdated the Act of 1998.
- Bringing Human Rights Act remedies into line with the suspended quashing order being enacted by the Judicial Review Bill currently before Parliament.
- Codifying the Supreme Court principle of reliance on domestic case-law first, which corrected earlier excessive reference to Strasbourg decisions.

[2] [2009] UKHL 28, para 91

[3] Para 93

[4] *Constitutional Change: Unfinished Business*, lecture at University College London (4 December, 2013).

- Codifying today's Supreme Court principle that the role of the Human Rights Act is confined to providing a remedy domestically when it is clear that otherwise there would be a Strasbourg remedy, as opposed to the more expansive role claimed by which some earlier judgments.
- The exclusion from the scope of "public authority" of judges when performing a judicial function. This has been relied upon in *re G* (2011) and other cases to justify the excessive judicial activism which recent Supreme Court decisions have criticised – it was a wrong direction in our case-law which needs to be corrected.
- Rectifying the proposition from the House of Lords in *Gaidan v Godin-Mendoza* (2004) that Parliament had intended s.3 to authorise unreasonable interpretations of primary legislation.
- Rejecting the assertion in recent years that the Convention should supplant the carefully worked out and widely accepted International Humanitarian Law of the Geneva Conventions.
- Bringing the costs of Human Rights Act litigation into line with the principles of Sir Rupert Jackson's costs review.

A UK Bill of Rights and the Union

Amongst the reasons for our welcome of the Government's adoption of the concept of a UK Bill of Rights is its potential role in strengthening the Union. Recognition of shared values should contribute to the unity of the four territories of the UK. That was the assessment of a distinguished Independent Commission under the chairmanship of Sir Jeffrey Jowell established by the Bingham Centre of the Rule of Law.

The centrepiece of the Commission's report, *A Constitutional Crossroads: Ways Forward for the United Kingdom*[5], published in May 2015 was a proposal for the enactment by Parliament of a statute entitled the Charter of Union. The Charter contained 11 principles of what it called "union constitutionalism", which would be an interpretative tool, and a benchmark against which legislation of both the Westminster Parliament and devolved legislatures could be assessed. We commend to the Government the entire proposal of the Jowell Commission, but in this context are concerned only with its 4th principle, which was in these terms:

> *"Shared commitment to personal liberty and human rights*
>
> *The United Kingdom as a whole and each of the legal systems in force within it, is committed to the protection of personal liberty and human rights"*

RECOMMENDATION: We propose that the Jowell Commission's exact wording should be enacted in an introductory part of the new statute which the Government envisages.

The report of the Independent Human Rights Act Review

We have read the 580-page report of the Review chaired by Sir Peter Gross with admiration for the industry of its authors. As a contribution to learning on the law in this field it will prove of value for years to come. In particular, it contains an impressive analysis of the growth of extra-territoriality of the European Convention on Human Rights and the temporal scope of Convention rights. However, we have some reservations about the report as a guide to Government action now.

It is unfortunate that whilst the report sets out at length the views of the majority of the panel, who broadly speaking favoured no change, there is no minority report by the dissentient member who favoured more reform. The reader is told only that one unnamed member disagreed in respect of the margin of appreciation issue, and that the rejection of reform of s.3 was by a majority. In consequence readers can be left with a feeling of having heard only one side of the story. This is in striking contrast to the report of the Government Commission on a UK Bill of Rights under the

[5] published by the Bingham Centre for the Rule of Law in May 2015. The membership of the Independent Commission was: Prof Sir Jeffrey Jowell, Prof Linda Colley, Gerald Holtham, Prof John Kay, Sir Maurice Kay, Prof Monica McWilliams, Prof Emerita Meehan, Philip Stephens, Prof Adam Tomkins, Prof Tony Travers, Alan Trench

chairmanship of Sir Leigh Lewis in 2012, which contained a minority report by two dissenting members and other signed individual essays.

We also have had some difficulties on occasions with the report's summaries of the present state of the law. By way of one example, the report recognises just two phases in the development of domestic law on the relationship with Strasbourg case-law – the first being the "mirror principle", and the second what the report calls a more "expansive" approach since about 2011 reflected in cases such as *re G* (2009)[6] and Nicklinson (2014). In our opinion, that second phase has been followed by a third, marked by the unanimous Supreme Court decisions in *R (AB) v Secretary of State* in which the "mirror principle" has been reinstated.

The authors of the report clearly like the expansive approach, which they praise as "careful and nuanced"[7], whilst dismissively saying of *AB* that "with respect to the statements of judicial high authority supporting *Ullah* (2004)[8]" (with a foot note indicating that they are there referring to Lord Reed's judgment in *AB*) the principle of *Ullah* is supported by neither the wording of the Act nor the parliamentary debates[9]. The authors are, of course, entitled to their opinion that both *Ullah* and *AB* were bad decisions; but to disregard recent, unanimous Supreme Court authority may provide an insecure foundation for policy advice, especially when this has a direct relevance to the "margin of appreciation" issue on which the Panel was, in fact, divided.

Another example can be found in the section of the report discussing the courts' approach to the application of s.3. The report uncontroversially identifies the House of Lords decision in *Gaidan v Godin-Mendoza* (2004)[10] as a, if not the, leading case. This is another decision of which the authors approve, describing it variously as "sensible" and "considered". They quote Lord Nicholls, Lord Rodger, and also Lord Millett (who dissented as to the result but not the principles). Curiously, they omit any such mention of the judgment of Lord Steyn, who was part of the majority, and whose judgment in that case conservatives quote more often than any other in the whole run of 20 years Human Rights Act jurisprudence as illustrative of what is wrong: this is the judgment, discussed in the Society's evidence to Sir Peter Gross's panel, in which Lord Steyn contended that Parliament had deliberately authorised the courts to act unreasonably.

Accordingly, we consider that the government has been correct not simply to accept the core recommendations of the Gross report.

That said, we welcome two features of the report. The first is its introduction of the principle of amending the Human Rights Act so as to codify decisions of the Supreme Court. The second is its specific recommendation to amend the Act to indicate a priority of approach to rights, looking first at the common law, and only thereafter, if necessary, to Strasbourg jurisprudence.

Recent developments

There has been one significant case-law development since the publication of the Consultation Paper. This is the Supreme Court's unanimous decision in *R (Elan-Cane) v Secretary of State* (2021)[11]. Lord Reed carried further his approach in *AB* by mounting a comprehensive and explicit demolition of *re G*. He said that if a situation was held by the Strasbourg court to be within the national margin of appreciation it was up to the member state to decide whether it breached Convention rights. In that situation Lord Reed said the case did NOT breach the Convention. Of course, a member state could pass its own primary legislation if it wished to prohibit the matter in question. But that would simply be a matter of normal domestic statute law. The Convention could not mean different things in different

[6] *re G (Adoption: Unmarried Couple)* [2009] 1 AC 173. Confusingly, when the House of Lords handed down judgment, the case was called *re P (a child); R v Ministry of Justice (Nicklinson & Ors)* [2014] UKSC 38

[7] IHRAR report para 76 of chapter 2

[8] *R (Ullah) v Special Adjudicator* [2004] UKHL 54 at [20]

[9] para 116 of chapter 2

[10] [2004] 2 AC 557

[11] [2021] UKSC 56

countries. If the Strasbourg court holds that a matter is within the national margin of appreciation, it does not mean that the court is declining to determine whether there is a breach of the Convention but means that the court is deciding that there is no breach of the Convention.

Lord Reed went on to say that the expression "Convention rights" in the Human Rights Act meant the international rights under the Convention. There could be no separate and different "Convention rights" under UK law.

Finally, Lord Reed was unambiguous in stressing the importance of respect for Parliament. He said that the dicta in *re G* would undermine the constitutional principle of Parliamentary sovereignty, and also legal certainty. He added that any different interpretation of the Human Rights Act would be difficult to reconcile with the many dicta that the purpose of the Act was to provide at home the remedy which a claimant would otherwise have to obtain from the Strasbourg court[12].

A UK Bill of Rights or an amended Human Rights Act?

A fundamental question is whether the Government's project is one to create a free-standing UK Bill of Rights, or is one to improve the Human Rights Act. The plan outlined in the Consultation Paper has elements of both. On the one hand, the suggested new clauses use the terminology "this Bill of Rights". On the other hand, the Paper says, "The rights as set out in Schedule 1 to the Human Rights Act will remain".

For years many conservatives have argued for the replacement of the Human Rights Act with a fresh UK Bill of Rights. On the other hand, the recent unanimous Supreme Court judgments do seem to herald a more restrained approach from our senior judiciary, so as to make the continuation of the Human Rights Act, albeit in an amended form, and with some addition British rights and features, a possibility which could also address the six weaknesses of the status quo which we listed at the beginning of this paper. Without in any way rejecting the full-scale free-standing UK Bill of Rights option, we proceed to elaborate how the latter option might be developed.

If this amended Human Rights Act route were to be taken, it would be natural for the statute to have two parts. One would be the existing Human Rights Act with appropriate modifications, the other part containing the material drawn from our domestic heritage of rights and freedoms. The Government's idea of elevating the institution of jury trial by its inclusion in a Bill of Rights would be something which would more naturally fall into the British heritage part, as it might be thought inelegant at the very least to tack on at the end of art 2 of the Sixth Protocol to the Convention (which is the last item in Schedule 1 to our 1998 Act).

The idea of a UK Bill of Rights which was an "ECHR-plus" was a unanimous suggestion from the Joint Parliamentary Committee on Human Rights in 2008. That all-party Committee stated in a report, *A Bill of Rights for the UK?*, that there existed an unusual cross-party consensus about the need for a British Bill of Rights and that this appeared to reflect a wider consensus among the public. However, that Committee was against diluting the existing machinery of the Human Rights Act. Whilst in our view, in common with the Government, some modest adjustment of the mechanisms is now required by reason of developments in the way in which the Act has worked over the years, the concept of "ECHR-plus" may be considered to apply to the Government's proposals; we certainly see it as applying to the proposals which we are advocating now.

We append elements of a draft Bill to illustrate how this option might be implemented.

Codification of Supreme Court principles

We mentioned above our welcome for the Gross Review's idea of codification of Supreme Court judgments. In the appended draft Bill, we have set out a number of such codified principles. In each case our Explanatory Notes quote the source for the principle, which in all cases is a judgment of our most senior court, usually either in a unanimous judgment, or a dictum often subsequently cited with approval. In our opinion

[12] at [92] and [94]

the incorporation of such codified principles is an essential feature of retaining the main bones of the 1998 Act in an amended statute.

The principle of priority of rights, and "cause of action shopping"

The second welcome element from the Gross Report, namely the principle of priority of rights, is a theme which runs through many of the suggestions in our response. That is the principle that a remedy for an infringement of a right recognised by our domestic law, should be considered before a breach of a right under the European Convention on Human Rights; and that if a remedy is available under domestic law, consideration of a Convention right case need never be undertaken. For this purpose, a breach of a domestic law right embraces both a cause of action which exists under the common law of England and Wales, under Scots law, or under the common law of Northern Ireland, and also under new UK rights introduced by the new Bill of Rights statute

We are concerned at a phenomenon which might be called "cause of action shopping". By this expression we refer to the practice of bringing a claim as one under the Human Rights Act rather than under a cause of action known to domestic law, such as false imprisonment, malicious prosecution or wrongful arrest. A related practice is seeking Human Rights Act damages in preference to aggravated or exemplary damages at common law. Lord Irvine as Lord Chancellor encouraged these practices at the outset of the Human Rights Act by exercising powers taken under the Access to Justice Act 1999 so as to place rights cases against public authorities in one of the most favoured categories for the grant of legal aid, whilst some other categories such as personal injury were wholly excluded. The Government should ensure that there are no such incentives under an amended statute. A proper public awareness of our own heritage of rights should be enhanced by encouraging the use of that heritage where it is available in preference to jurisprudence from an international treaty.

The domestic heritage part of a Bill of Rights

In respect of the section covering our domestic heritage we would be tempted to eschew setting out a list of common law rights, as in our understanding the fundamental principle of the common law is that everybody has the right to do whatever they wish, provided it is not prohibited by law. In this respect the British tradition starts from the opposite direction from that of some other national traditions: in Britain citizens do not require, for example, a right of free speech, or a right to gather for a demonstration or march, to be conferred on them from on high, because marching and protesting is part of acting as one chooses, and subject only to specific and properly defined prohibitions, such as that regulating protests in Parliament Square. Professor Sir Jack Beatson et al write in *Human Rights: Judicial Protection in the United Kingdom*[13]:

> *"Three other doctrines of the common law undoubtedly played a significant part in the protection of civil liberties and human rights in this country. First, the principle that the individual is free to do whatever he or she pleases unless there is a rule of law which prohibits it: we do not in this country, as in some, in general need a licence to do something."*

As Dicey notes in *The Law of the Constitution*, the rights of ordinary citizens in the UK were the product of the common law tradition and created through the decisions of judges.[14]

---

[13] *Beatson and Others*, Sweet & Maxwell 2008, ch. 1-10 2 See A. V. Dicey: *An Introduction to the Study of the Law of the Constitution*, 10th edn. (1959), ed. E. C. S. Wade (Macmillan), page 195. 'Dicey's third principle was that the unwritten constitution in the UK could be said to be pervaded by the rule of law because rights to personal liberty, or public meeting resulted from judicial decisions, whereas under many foreign constitutions such rights flowed from a written constitution.' Paper by Professor Paul Craig: *The Rule of Law*, Section 2, https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm#note175

[14] *Arlidge, Eady & Smith on Contempt,* 5th ed. at 2-153 to 154 explains matters thus:

'The "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of the constitution,

Therefore, we suggest consideration be given to opening the British Part of the statute with a section stating,

> *"All persons have the right to act in any way which is not specifically prohibited by a law."*

That might be entitled the "*fundamental individual right*". One might hope that if Parliament so enacts it could begin to assist the British to appreciate the limitations of a continental-style declaration of positive rights in the context of our heritage.

The statement of the fundamental individual right may be assisted by some elaboration in respect of specific topics, such as free speech, freedom of assembly and so on – see later, our answer to Question 4. In order to get away, where possible, from the continental modality of specific rights granted to people, the aspects of the British heritage may in many cases be better stated as freedoms.

We offer suggestions in the appended draft statute.

Contents of domestic rights

We consider that there are a number of rights, which are not mentioned in the European Convention on Human Rights, but which ought to be recognised in a UK Bill of Rights. These include some rights mentioned in the EU Charter of Fundamental Rights, whose application in the UK, has recently been lost by Brexit.

The ideal course would be for a charter of such fundamental constitutional significance as a UK Bill of Rights to emerge with a wide degree of support from a broadly based dialogue. Unfortunately, by the time of the Government Commission on a UK Bill of Rights under Sir Leigh Lewis in 2011–12 it had become clear that the attitude of a section of the thinking community, represented by organisations such as Justice and Liberty, had become so luke-warm, if not at times outright hostile, to the concept of a UK Bill of Rights that serious and constructive discussion on the actual drafting of the list of rights in a UK Bill of Rights was difficult. This attitude seemed to be motivated by a belief that the Human Rights Act status quo, with the activist jurisprudence outlined by the Consultation Paper, could be best preserved by a policy of non-engagement in detailed discussion of an alternative. We suspect that if and when the Parliament actually enacts a Bill of Rights that section of the community may become willing, if not eager, to engage in meaningful dialogue about the list of rights in a UK Bill of Rights.

Therefore, at present we would largely concur with the Government's plan that the only UK addition to the Convention rights should be jury trial, but we would see this as no more than a temporary situation. We propose that shortly after the enactment of a Bill of Rights such as proposed by the Government or our paper, a Commission of some form be established with a view to seeking a broad consensus on an expanded list of UK rights.

Mechanisms in respect of the domestic heritage freedoms and rights

Our provisional thinking is that there should be two mechanisms, namely an interpretative provision applicable in cases of ambiguity, and a ministerial statement of compatibility. At present we are not proposing an equivalent of ss.6-8 Human Rights Act in respect of domestic rights and freedoms, as in many instances remedies are available under free-standing causes of action; but this, too, could be considered more deeply in the course of the

---

the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land. This passage from Dicey's *Introduction to the Study of the Law of the Constitution*, p. 296 has exerted a significant influence on the development of the common law, and the perception of judges as to how rights should be defined and protected. The approach has been that "rights" are thought of as being "residual". A person can do or say what he pleases, unless and until the law provides otherwise. This was considered by Dicey (and others before him, such as Bentham) as the most efficacious method of protecting rights. Written constitutions and bills of rights were considered to be capable of being all too readily suspended or set aside. The common law, weaving as it does a whole fabric of liberties, protected through a system focusing on remedies rather than rights, is much more difficult comprehensively to suspend.'

work of a broadly-based Commission in the early years of the statute which is now envisaged.

Mechanisms in respect of the Convention rights

If the statute is divided into two parts in line with the suggestion above, then the options for s.2 proposed by the Government would not be appropriate: in that situation we would be happy with the Gross Review's amended formulation, which is to very similar effect to the suggestion made by the Society in its evidence to the Review. On the other hand, if there is not such a division, then we would support the Government's Option 2.

Few aspects of domestic human rights law have troubled Conservatives more than Lord Steyn's suggestion in *Gaidan v Godin-Mendoza* that by s.3 Human Rights Act Parliament had intended to authorise the making by the courts of interpretations of primary legislation which are *unreasonable*. He said[15],

> *"Parliament specifically rejected the legislative model of requiring a reasonable interpretation."*

This heresy is long overdue for rectification. Not only is it inherently surprising that our courts should act in an unreasonable way, but it is directly contrary to what the Home Secretary suggested when introducing the Human Rights Bill in 1998[16].

We regard amendment of section 3 as of the highest importance and would support either of the Government's two options.

"Significant disadvantage"

The expression "significant disadvantage" was introduced into Art 35(3) of the Convention by the 14th Protocol an additional threshold criterion for declaring an application inadmissible. This Protocol, which was signed in 2004, post-dated the Human Rights Act.

Therefore, quite naturally, whilst the concept that a claimant must be a "victim" finds explicit expression in the 1998 Act in s.7(1) – the word "*victim*" being in Art 34 of the Convention, and one whose meaning has been developed by the Strasbourg court as an autonomous concept – the "significant disadvantage" test does not.

The wording of the 14th Protocol contained a reference in a final limb to a requirement for a domestic consideration whose meaning and effect was somewhat unclear, and in practice proved of no assistance. That final limb was removed by the 15th Protocol. Following the coming into force of the 15th Protocol on 1st August 2021, the text requires an application to the European Court of Human Rights to be declared inadmissible if,

> *"the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."*

The court has issued a *Practical Guide on Admissibility Criteria*[17]. The Guide provides that "significant disadvantage" hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. Severity is relative and depends on all the circumstances of the case[18]. Lack of significant financial impact has been found in cases where the amount in question was equal or inferior to 500 euros.[19] Lack of significant disadvantage has also been found where redress has been provided at domestic level which does not fall significantly short of what would have been considered adequate under the court's case law[20].

It is clear from the development outlined above that "significant disadvantage" adds something to the requirement that an applicant be a "victim". In other words, it is possible for a person who has suffered something less than significant disadvantage to be a "victim". It follows that the Human Rights Act, as it stands, is allowing persons to pursue claims under the Act in the UK whose claims would be struck out as inadmissible at Strasbourg. Here, then, is a good example of where the Human Rights Act now requires

[15] [2004] AC 557 at [44]

[16] HC Deb 3 June 1998, vol 313, col 422-3

[17] Updated on 1 August 2021

[18] Guide para [320]

[19] Para [332]

[20] Para [324]

updating. We consider that introduction of "significant disadvantage" test in domestic law would be consistent with the approach of the Strasbourg Court and would bring some benefit to public authorities in weeding out unmeritorious and trivial cases, saving cost to both the public authority and the applicant

Granted that, as we have already pointed out, Supreme Court case-law has now clarified that the purpose of the Human Rights Act is only to provide a domestic remedy to parties who would otherwise be entitled to a remedy at Strasbourg, it would be logical to ensure that remedies under the Act are available only to those who would pass the "significant disadvantage" threshold.

The most satisfactory way to achieve this would be to add a new s.7(1A) in terms such as these:

> *"7 (1A) For the purpose of this Part of this Act, a person shall only be considered a "victim" if either,*
>
> *(a) the person has suffered significant disadvantage; or*
>
> *(b) the court or tribunal finds, and records, exceptional reasons why respect for Convention rights requires consideration of the claim, notwithstanding that the victim's disadvantage is not so great as to be significant."*

The "Ziegler" problem: the undermining of our criminal law and procedure

Before proceeding to explain the amendment which we advocate to s.6 Human Rights Act we wish to explain the potential problems which have arisen for criminal law and procedure from the recent Supreme Court decision of *DPP v Ziegler* (2021) [21].

A group of demonstrators opposed to the arms trade decided to block a slip road leading to a commercial building where a trade fair was being held. They lay down in the road and attached themselves to lock boxes with pipes sticking out making it difficult for police to remove them. After 90 minutes during which the access road had been completely blocked the police started to remove them. They were charged under s.137 Highways Act which creates an offence of wilfully obstructing free passage along a highway "without lawful ... excuse". There was case law that "lawful excuse" embraces reasonableness[22].

Surprisingly a district judge acquitted them. He accepted their defence that their actions amounted to a reasonable exercise of their rights of "freedom of expression" under art 10 and "freedom of peaceful assembly" under art 11. A Divisional Court upon an appeal by case stated held that the District Judge's assessment of proportionality had been wrong and substituted a conviction.

What happened next was even more surprising than the original acquittal. In *DPP v Ziegler* the Supreme Court in June 2021 by a 3-2 majority held that not only had the Divisional Court overreached itself by substituting a conviction – a perfectly understandable outcome in view of the limited scope of appeal by case stated which is essentially limited to a point of law – but also that the acquittal was a correct assessment as a matter of proportionality. Lord Sales, with whom Lord Hodge agreed, dissented from the latter part of that outcome, but even he accepted a troubling analysis of the impact of the Human Rights Act upon these simple criminal proceedings.

That analysis had been postulated by Singh LJ in the Divisional Court and the Supreme Court, including Lord Sales, expressly approved it, namely:

(1) S.3 requires that the words "without lawful excuse" to be construed compatibly with the Convention.

(2) S.6 makes it unlawful for either the police or the court to act in a way which is incompatible with articles 10 and 11.

(3) Therefore, in circumstances where the police would be violating the protesters' Convention rights, the police will be acting unlawfully for the purposes of s.6 by moving them or arresting them.

[21] [2021] UKSC 23, [2021] 3 WLR 179

[22] *Nagy v Weston* [1965] 1 WLR 280

(4) As a corollary, the lawful exercise by protesters of Convention rights will amount to a lawful excuse.

That last step is in one sense unremarkable. At any time over the last 100 years a court would have been likely to acquit protestors who, for example, held a march on the carriageway of a road such as the access road in question, even if the moving body of pedestrians on the carriageway caused some interference with traffic: holding a protest march would have been likely to be regarded as a reasonable excuse. In the first cases after the Human Rights Act much the same approach was taken: the exercise of freedom of expression was a consideration which went to reasonableness. For example, in 2002 Gray J held,

> *"... the exercise of the right to freedom of expression conferred by article 10 is a significant consideration when assessing the reasonableness of any obstruction to which the protest gives rise"*[23]

However, Singh LJ explicitly held that it was necessary to go further than Gray J's approach:

> *"... the Convention rights are not merely a significant consideration but that any interference with them must be shown to be proportionate."*[24]

He even went so far as to say that if the Convention rights were regarded as simply a significant consideration there would be a breach of Convention rights[25]. The investigation into what is proportionate involved posing five questions, the last of which itself required posing four sub-questions. The final sub-question was:

> *"Did the arrest and removal of the protesters strike a fair balance between the rights and interests at stake?"*[26]

The outcome of this complex intellectual exercise was, Lord Sales recognised, that the commission of an offence of obstructing the highway involved the criminal court in "what would otherwise be an issue of public law regarding the duty of a public authority such as the police". That in turn, he said, meant that,

> *"... it will be for the prosecution to prove to the criminal standard that the defendant did not have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to section 6(1) of the HRA in taking action against him or her".*[27]

The dicta in *Ziegler* at Supreme Court and Divisional Court level have encouraged suggestions that the prosecution in a criminal trial has the burden of proving not only the ingredients of the offence but also that the decision to prosecute was proportionate in terms of Convention rights. Indeed, press reports have suggested that the judge in the Colston statue trial at Bristol so directed the jury.

There is an important issue here about legal certainty. As Lord Bingham reminds us

> *"The law must be accessible and so far as possible, intelligible, clear and predictable"*[28]

If the plain words of a statute do not mean what they are meant to, but have to be interpreted through such a series of intellectual gymnastics, how is a citizen to know what the law is? And be confident of how it will be applied?

In addition to that worry, and the sheer intellectual complexity of this supposed public law issue which criminal courts will be required to address under the *Ziegler* principles, there are also other disturbing novelties in the judgment. It is no defence to a criminal offence under our law that a police officer may have been heavy-handed at the point of arrest, or even may have made an arrest where there is no power to do so. It is not always for the prosecution to prove the non-existence of an exception which will take a defendant out of the circumstances which will generally amount to an offence. Where a defendant seeks to assert a lawful excuse to avoid the commission of an

---

[23] *Westminster City Council v Haw* [2002] EWHC 2073 at [24]

[24] *DPP v Ziegler* [2019] EWHC 71 (Admin) at [84]

[25] at [94]

[26] Lord Sales at [126]

[27] Lord Sales at [127]

[28] Tom Bingham *The Rule of Law*, Ch. 3, p.37, Penguin Law 2011

offence, there can be a legal burden on him to prove its existence on the balance of probabilities[29].

Finally, it is regrettable that Lords Hamblen and Stephens and Singh LJ said that all cases on obstruction of the highway prior to the Human Rights Act needed to be reviewed in the light of that Act. The explanation that the reasonableness of an obstruction brings in consideration of the rights to free speech and free assembly, which can be found both in cases prior to the Act and from Gray J subsequently show a seamless continuum of authority. It is disappointing to hear senior judges showing such little respect for our common law heritage as to speak as if free speech and free assembly were not properly recognised before 1998.

Some of the problems thrown up by *Ziegler* may require the offence of obstructing the highway to be redrafted to include a non-exhaustive list of factors which are, and are not, relevant to lawful excuse; but other problems are so fundamental that they need to be addressed in amendments to the Human Rights Act itself. One is to clarify that a challenge to the decision to prosecute is not to constitute a defence in a criminal court. There is clear supporting authority for that proposition from the Court of Appeal in *DPP v James* (2019)[30]. So again, what we suggest is a codification of existing authority. But since it is authority which seems to be being overlooked in some quarters, such codification would perform a useful service.

There is no Strasbourg case-law which requires the UK to allow a defence to go to a jury that the decisions either to arrest or prosecute were disproportionate. The existing reasonableness criterion in the highway offence allows a criminal court to take into account rights of free speech and freedom of assembly, which are in any event deeply embedded in our domestic heritage.

This is the second occasion so far in this paper – *re G*[31] being the first – on which we have observed members of a senior court treating the mention of the "court" in section 6 as a step in reasoning towards an unfortunate conclusion. Accordingly, we suggest that section 6 be amended so as to exclude a "judge or other judicial officer when performing a judicial function" from the definition of a "public authority".

Claims against public authorities

As we have mentioned immediately above, we would propose the amendment of s.6 to provide that a "judge or other judicial officer when performing a judicial function" is NOT a public authority."

Damages and other remedies

We propose that s.8 of the Human Rights Act be amended to clarify that a court may take into account a failure on the part of a claimant in respect of his or her own responsibilities. This is not a new departure, since the Act already requires domestic courts to follow Strasbourg principles, and the Strasbourg Court does take bad conduct by an applicant into account in determining whether to award financial compensation, and, if so, how much. But as in other respects, an explicit statement should contribute to a greater awareness of this factor on the part of domestic courts.

Consistent with our general principle of the priority of rights, we propose that courts should always first consider the availability of a remedy for a domestic cause of action. This should include the possibility of aggravated or exemplary damages at common law. It ought to be the exception, rather than the norm, for there to be any scope for Human Rights Act damages in addition to common law damages.

We are including a draft of a significantly amended s.8.

Proportionate costs: fixed costs and costs proportionate to what is at stake, moderate damages

As addressed under Questions 10 and 11 below, there are real issues caused by the often disproportionate expense for defendants in

[29] *Attorney-General's Reference no 1 of 2004* [2004] 1 WLR 2111.

[30] [2016] 1 WLR 2118

[31] The inclusion of a "court" in s.6 was a significant part of Baroness's Hale's reasoning in *re G* for her conclusion as to the wide scope of the Human Rights Act.

addressing and responding to claims for HRA damages. This should not continue in a new form in respect of claims under the Bill of Rights.

This problem arises either because a claim is ill-founded (and fails), or it adds little if any to a claim for damages in tort, or because the resources and expense to be deployed in the litigation are disproportionate to what has occurred and the remedy sought. We remind the reader of two important points which appear from many decisions of the Strasbourg court:

- it is not uncommon for the ECtHR even when it has found a breach of Convention rights, to make no award of damages/compensation, saying instead that the finding itself constitutes just satisfaction;
- levels of compensation awarded by that court even in respect of quite serious breaches, are relatively modest.

We suggest that valuable changes can be introduced. We set these out in answer to Questions 9 and 10.
In summary:

- the costs awarded to a claimant, save where they are determined by a scheme of Fixed Recoverable Costs should be proportionate to the sums claimed – the fact that it was time and resource consuming to establish should not *ordinarily* be relevant;
- in the event the claimant establishes a breach, the primary remedy should be a declaration, which should stand as an award of just satisfaction;
- damages for rights' breaches should:

– only be awarded where the claimant has suffered a significant disadvantage not addressed by any tortious damages and/or a finding of breach and declaration to that effect;

– even then, be modest and take account of the measure and value of any damages awarded in tort.

It must be stressed that egregious breaches of rights will usually be part and parcel of a tort claim. A finding of e.g., false imprisonment may result in damages comprising the ordinary measure plus an add-on for personal outrage by way of aggravated damages and, in appropriate cases, a top up award of exemplary damages – see *Kuddus v Chief Constable of Leicestershire Constabulary* (2001)[32], Per Lord Hutton:

> *"In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."*

The conduct had to be 'outrageous' and to be such that it called for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law.

What need (we ask) will there be for a top up award beyond such tortious measure if a declaration of breach is made by way of just satisfaction?

Where the matter does not justify aggravated damages, then the case for limiting the remedy to a declaration is all the stronger.

Costs and damages: proportionate awards: just satisfaction: assessment at the outset of proceedings of likely measure of damages

To be proportionate to what is at stake, the provisions for costs should, subject to certain limitations, apply to claims for breaches of human rights as much as to any other litigation. In all claims, whether to include damages over and above damages in tort, including where the claim is only for a declaration or the quashing of regulations, the court should at the outset set a budget for the costs recoverable the end of the action as it would in any other proceedings. This is of course in accordance with current practice and principle. But costs budgeting needs to be made more effective.

[32] [2001] UKHL 29

Ordinary claims for personal injuries, breach of contract and many other matters of considerable importance to the individuals concerned are conducted on the basis that the litigation must not be given free rein. Costs and time must be controlled. Thus, there are the small claims and fast track courts. In the Business Court, too, there are real constraints on the disclosure process.

Many claims for human rights' remedies will, if made out, result in relatively modest damages, but the costs may be disproportionate. For an example which highlights the imbalance and the need for new controls in this field see the case of *Seddon* referred to answer to Question 11.

We elaborate our position further in our answers below to Questions 8 and 9.

Application of new principles

As we indicate in our response to Questions 10 and 11, situations where disproportionate costs are incurred are not abnormal. We think that should cease. The tenor of this submission applies to all litigation (not just HRA claims). We note that there have previously been proposals to introduce fixed recoverable costs in all claims up to £250,000. The mechanism we propose is that save in exceptional cases, the recoverable costs should not exceed the value of the award of damages. In other words, if the claimant is awarded damages under the HRA in the sum of £15,000, s/he should not ordinarily be entitled to an award of costs exceeding £15,000. So too, to ensure equality and fairness, the successful defendant in such a case should not ordinarily be entitled to recover costs exceeding the amount of the damages claimed. To ensure that the parties know where they are at the outset, the court should, at a very early stage require a claimant to state the amount of damages claimed. Any temptation to overbid on the claimant's part can be met by a rule that it is the damages claimed which sets the ceiling for recoverable by the defendant if the claim fails.

Where the value of the claim is in the court's eyes no more than a given figure, The court should insist that is the prima facie ceiling for assessing each party's recoverable costs. Having fixed this, the court should then give strict directions as to the appropriate level and nature of disclosure and the length and manner of the hearing.

Where the additional damages claimed for Convention breaches are modest, then as a general rule it should either not be allowed to proceed, or the costs cap should apply unless the court anticipates exceptional circumstances will be shown to have operated.

Most claims (but not, of course, all) for human rights damages do not involve complex legal submissions. They can and should be dealt with under the fast-track procedure in the County Court. We support the policy which the Government announced in September 2021 to introduce Fixed Recoverable Costs for almost all cases under £100,000. This ought to apply to the great majority of claims for damages for breach of Convention rights. Such provisions should make a valuable contribution to controlling the costs in such litigation. However, we are sorry to see that the Government is considering excluding actions against the police from Fixed Recoverable Costs. Whilst the proposed exclusions for asbestos disease and clinical negligence cases are justifiable in view of their reliance on expert evidence, we see no such justification in claims against the police, which are usually simply disputes as to fact. We see no reason for treating litigation which citizens bring to protect their homes or livelihoods as less important than suing the police.

There will, of course, be claims where some truly important point of principle and law is at stake and in those circumstances, rules of court should provide that the normal limits will not apply, and the matter transferred to the High Court. Even then, the High Court should be astute to budget the costs.

We believe that there will be much to benefit claimants and defendants alike in ensuring simple and swift proceedings.

To the extent that claims under the HRA are considered by the court to add little of substance to an underlying claim for say, wrongful arrest or false imprisonment, or a claim against a public authority for damages for personal injuries, the rules should provide that the appropriate remedy in

such a case is a declaration and no more on top of the conventional award of damages in tort. Rules of court should provide that in such cases, there should be a cap on costs attributable to the HRA claim. There should be a fixed figure on the costs in such cases. That should be modest. The court would after trial be entitled to depart from this only in exceptional circumstances.

Such provisions will ensure that claims for breaches of human rights are dealt with proportionately. The public interest lies in ensuring balance: findings of breaches where necessary, but not hunting down every error. Such findings should not be pursued at inappropriate cost in time and money at the expense of good administration, which flows from diminishing resources, under weight of litigation.

ANSWERS TO QUESTIONS

Question 1 and Appendix 2

We agree with the principle that domestic courts should be able to draw on a range of law when addressing human rights issues, and that domestic law should be considered before Strasbourg case-law. The amendment suggested by the Gross Review to section 2 is very similar to that which the Society's working party proposed in its evidence to that Review. Our current suggestion is to adopt the amendment proposed in the report of the Gross Review. We include this in our suggested amendments to sections 1 to 8 and 12 of the HRA.

In the event that the Government introduce a Bill of Rights in which the concept of Convention rights no longer features, we would prefer, and would welcome, Option 2 (p.97) in the Consultation Paper. We welcome the speech of Lord Reed in *R (Faulkner) (FC) v Secretary of State for Justice*[33] at para [29], where he said that while it will remain necessary to ensure that our law does not fall short of Convention standards, we should have confidence in our own case law to have developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source.

Question 2

We support the Government's proposal to make clear that the UK Supreme Court is the ultimate arbiter of our laws. We suggest that this proposition be enacted in an introductory part of the new Bill of Rights statute: this is part of our proposed draft.

Question 3

We endorse the approach whereby a qualified right to Jury Trial should be recognized in the Bill of Rights. This is addressed at sections 1D and 1E of our draft Statute below.

Proposals for inclusion of jury trial in a British Bill of Rights have a distinguished heritage:

- In 1988, one of the objectives of "Charter 88" was a Bill of Rights enshrining inter alia jury trial.
- 1991 Liberty published "A People's Charter" which proposed a Bill of Rights which included jury trial.
- In 2008, the Parliamentary Joint Committee on Human Rights published a report "A Bill of Rights for the UK" which proposed the enactment of a Bill of Rights in addition to the Human Rights Act and recommended the inclusion of jury trial in this Bill of Rights.
- The Government Commission on a UK Bill of Rights in 2012 consulted on the possibility of including jury trial in a Bill of Rights. The majority of respondents supported the idea, including the Law Society of England & Wales

It must, of course, be recognized that jury trial exists in varied ways in the different jurisdictions of the UK. In England the "right" depends on the classification of an offence, and offences can be, and have been, moved out of the scope of the right to jury trial, for instance low value criminal damage; where there is a serious risk of jury intimidation and also in cases of very complex fraud there can be a trial for serious offences without a jury[34]. In Scotland there is not a "right" in the same way as in England, although the institution of the jury certainly exists and plays a central role in Scottish criminal justice. And in Northern Ireland there are special arrangements for terrorist offences[35].

Freedom of Expression: striking the balance

Question 4

As referred to elsewhere in this submission, there was never an absolute right to freedom of expression in the common law; instead, under the fundamental principle that "everybody is free to do anything, subject only to the provisions of the law" there was an assumed or residual freedom of

[33] [2013] UKSC 23 at para [29]

[34] Section 44, Criminal Justice Act 2003

[35] Section 1, Justice and Security (Northern Ireland) Act 2007

expression.[36] Nonetheless the underlying importance of freedom of expression is recognised at common law, including in cases that developed the law of defamation.[37] Lord Hoffman subsequently referred to *Derbyshire CC v Times Newspapers Ltd* (1990) as a case exemplifying the application of freedom of speech as an 'underlying value' supporting the creation of a specific rule, rather than itself a 'legal principle'.[38]

The incorporation of the European Convention on Human Rights signalled a shift in approach by giving domestic effect to both freedom of expression and privacy as qualified rights. Fears were expressed by the press, that the horizontal application of Article 8 would unacceptably limit freedom of expression and press freedom. Particular concern was articulated that the courts would have to issue injunctions relating to stories for which there is a public interest in publication.

Section 12 of the Human Rights Act was drafted to allay these fears. During the second reading of the Human Rights Bill in the Commons the Home Secretary Jack Straw said that the Government wanted to reflect "*that the European Court has given much greater weight to article 10 rights of freedom of expression than to article 8 rights to privacy*"[39]. The inclusion of section 12 to the Human Rights Act has not had that "greater weight" effect on the jurisprudence of domestic courts.[40]

In this submission, we will briefly focus on a line of cases leading to the current authority on the effect of section 12(4) of the Human Rights Act. Analysing the line of cases is useful in exposing the reasoning for the constrained view of section 12.

In *Douglas v Hello! Ltd* (No.1) (2001)[41] at paragraph 133, Sedley LJ said that the "Convention right" of freedom of expression triggers the section through sub-section 12(1) and benefits from the effect of the other provisions in the section. He then opined that the Convention right refers to Article 10 of the Convention, inclusive of Article 10(2). This contains some of the qualifications to the right to freedom of expression, such as "the protection of the reputation or rights of others" and the prevention of "disclosure of information received in confidence".[42] The effect of this is, in Sedley LJ's words that "you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8"[43]. On this reading all that is required by the provision in section 12(4) that "the court must have particular regard to the importance of the Convention right to freedom of expression", is to undertake a neutral balancing act.[44]

Following this reasoning (whatever Jack Straw may have had in mind) it may be impossible to give priority to one qualified Convention right over another. This is consistent with the jurisprudence of the European Court of Human Rights. Whilst the Court has acknowledged the essentiality of freedom of expression for democratic society[45], in *Axel Springer AG v Germany* (2012) it confirmed the principle that rights under Articles 8 and 10 "deserve equal respect".[46] So considerations of freedom of expression do not without more (per Strasbourg) outweigh those of privacy under Article 8. This implies the balancing exercise must be neutral.

In Douglas (No.1) (2001) Sedley LJ expounded further that a bland application of section 12(4) to establish a simple priority of the freedom to publish over other Convention rights could not have been

[36] *See Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283F

[37] See the judgment of Lord Coleridge CJ in *Bonnard v Perryman* [1891] 2 Ch 269, at 284; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, at 551F.

[38] See *Wainwright and Another v Home Office* [2003] UKHL 53, at [31].

[39] HC Deb 16 February 1998, vol 306, col 777.

[40] J Wadham, H Mountfield, E Prochaska and R Desai, *Blackstone's Guide to The Human Rights Act 1998* (7th edn, Oxford University Press, Oxford 2015), [3.82], [7.451-7.453].

[41] [2001] QB 967

[42] ECHR Article 10(2)

[43] [2001] QB 967, 1003G [133].

[44] HRA S12(4)

[45] See *Axel Springer AG v Germany* [2012] E.M.L.R. 15. 322 [78]; *Handyside v UK* [1976] ECHR 5493/72, at [49]; *Mosley v UK* at [126]-[130].

[46] *Axel Springer AG v Germany* [2012] E.M.L.R. 15. 322 [87].

"Parliament's design".[47] The reasons for this were, as already set out, the logic of section 12, ECtHR jurisprudence and the court's obligation under section 3 of the Act to interpret domestic legislation in a way which is compatible with Convention rights.[48] Domestic legislation of course includes the Human Rights Act itself.

The approach of Sedley LJ is cited with approval by both Lord Hoffman (part of the minority) and Lord Hope (part of the majority)[49] in *Campbell v Mirror Group Newspapers Ltd*[50](2004), which set the tone of the judicial approach to section 12 of the Act. I*n re S (A Child) (Identification Restrictions on Publication)*[51] at paragraph 17 Lord Steyn derived from *Campbell* four propositions on the effect of section 12(4):

> *"First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."*[52]

This remains the position, having been cited in two recent cases of the Supreme Court.[53]

Cream Holdings Ltd v Banerjee[54](2004) is the authority at the highest UK which explains the effect of section 12(3). At paragraph 22 Lord Nicholls said:

> *"The effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', **the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial**."*[55] *[emphasis added]*

This established a general approach and an effective presumption as to the threshold required though the court may adopt a lower threshold in exceptional circumstances. For instance, where Article 2 (right to life) is engaged and the potential adverse consequences of publication are very high.

The need to amend Section 12

It is our submission that section 12(4) of the Human Rights Act does not give priority to freedom of expression. Whatever Jack Straw may have expected. It does however reflect the Strasbourg Court's approach. It provides sufficient certainty in its application. But we draw attention to the view of Sedley LJ in *Douglas (No. 1)* that section 12(4) which requires a neutral balancing act possibly weakens section 12(3) by making it more likely that a claimant will succeed at trial.[56]

What can realistically be achieved by a section 12 type provision is currently highly constrained due to the structure of the Human Rights Act and Strasbourg jurisprudence. Some of these constraints would be removed by amendments to the Human Rights Act such as the suggestion for Section 3 elsewhere in this submission.

---

47 [2001] QB 967, 1004 [135].

48 See 2001] QB 967, 1004 [135].

49 The majority and minority were agreed on the overall approach to section 12 HRA.

50 *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22

51 [2004] UKHL 47

52 [2004] UKHL 47, at [17].

53 See *Bloomberg LP v ZXC* [2022] UKSC5, at [58]; *PJS v News Group Newspapers Ltd* [2016] UKSC 26, at [51].

54 [2004] UKHL 44

55 [2004] UKHL 44, at [22].

56 [2001] QB 967, at 1004 [134].

We suggest that section 12 of the Human Rights Act should be amended by replacing references within sub-sections 1 and 4 to "*the Convention right to freedom of expression*", with references to "***the fundamental freedom of expression***".

The first clause of section 12(4) of the Act should be amended to read:

"Where qualified Convention rights are in tension with the fundamental freedom of expression (as defined in Section 1D (a) of the XXXX Act), the court must balance the two giving particular weight to the fundamental freedom of expression… and..".

This would strengthen the protection which section 12 affords to the underlying value of freedom of expression. This approach would be compatible with the fundamental tenets of Strasbourg jurisprudence, as the courts will still be engaged in a balancing exercise where there is no trump card. If the matter fell to be litigated in the ECtHR, the UK could pray in aid the terms of Article 1 of the 15th Protocol (see above).

Further, section 12(4)(a)(i) should be amended to reflect the reality of the modern world to read:

"the material has, or is about to, become available to the public either directly, or indirectly and via any format; or …".

This amendment would reflect the reasoning of Lord Toulson's dissenting view in *PJS v News Group Newspapers Ltd* (2001), at paragraph 89 where he said:

> *"The evident underlying purpose of the subsection is to discourage the granting of an injunction to prevent publication of information which is already widely known. If the information is in wide, general circulation from whatever source or combination of sources, I do not see that it should make a significant difference whether the medium of the intended publication is the internet, print journalism or broadcast journalism. The world of public information is interactive and indivisible."*

The above cited underlying policy purpose merits emphasised attention in the statute. However, though we note again this amendment would not provide a trump card. It would give guidance on the relative weight of different factors, but with an important change of emphasis, particularly if supported by a *Pepper v Hart* statement from the minister when introducing the Bill.

Finally, we suggest that section 12(4)(a)(ii) should be amended to read:

"its publication is, or would be, justified by the public interest".

This should be followed by a new section 12(4)(a)(iii) stating that

"the public interest in publication may be outweighed by other public interest concerns, or exceptionally strong claims of private rights."

These changes would reflect that generally where there is a public interest in publication it should be upheld apart from in established, or principled exceptions where the public interest in some other thing requires publication to be restrained. We envisage that this would include information that was obtained by criminal means, this would deal with concern in light of the phone hacking scandal, that any protection afforded to freedom of expression would encourage or condone activities that interfere with individuals right to privacy by criminal or illegitimate means.

The new section 12 would read as follows:

12 Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the ~~Convention right to freedom~~ fundamental freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) ~~The court must have particular regard to the importance of the Convention right to freedom of expression~~ Where qualified Convention rights are in tension with the fundamental freedom of expression the court must balance the two giving particular weight to the fundamental freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), the court must give particular weight to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public either directly or indirectly and via any format; or

(ii) its publication is, or would be, justified by ~~in~~ the public interest ~~for the material to be published~~;

(iii) the public interest in publication may be outweighed by other public interest concerns, or exceptionally strong claims to private rights;

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

Question 5

We believe that any express approach to deriving guidance from foreign jurisdictions or international frameworks should be cautious. Without a substantive investigation it is difficult to know what the effect of adopting features from foreign jurisdictions would be, though we comment that the potential for unintended consequences is significant. At the level of fundamental approach pre-Human Rights Act and early HRA period, judicial comments suggest the English and Welsh approach is most closely aligned to European approaches.

In *Attorney General v Observer Ltd and Others*[57] (1990) [the "*Spycatcher*" case], Lord Goff said that he could

> *"See no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world"*[58].

His speech was to the effect that information will not be confidential where:

(i) it has entered the public domain. Information enters public domain where it is so generally accessible it can no longer be said to be confidential;

(ii) it is trivial.

This shows that both England & Wales and Convention rights have since well before the HRA been engaged in some variety of balancing exercise.

In *Douglas (No.1)* (2001) Sedley LJ observed:

> *"The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not – and could not consistently with the Convention itself - give article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts."*[59]

These two comments exemplify that the approach of English law to the interaction of privacy and freedom of expression has long been more closely aligned with the Strasbourg court's approach and less with that of the USA. The risk to legal certainty of deriving guidance from the USA is high.

Additionally, litigants are already free to cite authorities from a range of foreign and common law jurisdictions during hearings at the Supreme Court.

---

[57] *AG v Observer Ltd and Others* [1990] 1 A.C. 109.

[58] *AG v Observer Ltd and Others* at 283E-F.

[59] [2001] Q.B. 967, at 1004F

Question 6 Protection of journalists' sources

The ECtHR has consistently interpreted the Convention as requiring strong protection of journalistic sources as a constituent element of a free press required by the interest of democratic society. This was first reflected in the Grand Chamber decision in *Goodwin v UK*[60] where it was said that:

> *"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms".*[61]

In *Goodwin* the Grand Chamber further set out the high standard of protection afforded to journalistic sources and the reasoning underlying it, saying that:

> *"Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom,* ***such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."***[62] [emphasis added]

We take from the Grand Chamber judgment that the public interest and the democratic necessity of protecting journalistic sources, enabling a free press to perform their role as a public-watchdog is generally of overriding importance. This being so it cannot be set aside by the assertion of a solely private right; it requires also that there is a public interest in the disclosure such as the prevention of criminal activity or the preservation of confidential relationships. However, in the case of preservation of confidential relationships, the ECtHR in *Goodwin* indicated that generally this can be dealt with by the issuing of an injunction prohibiting publication, making it unnecessary to ascertain the source of information.

Goodwin was followed by the House of Lords in *Ashworth Security Hospital v MGN Ltd*[63] and thereafter by the ECtHR, most recently by the Grand Chamber in *Big Brother Watch and Others v UK*[64]. The court reiterated the general principle relating to journalistic sources[65] that:

> *"An interference with the protection of journalistic sources cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest"*[66]

The decision also cited from *Sanoma Uitgevers B. V*.[67] the important principle which we endorse that any interference with the protection of journalistic sources must be regulated by legal procedural safeguards. The Grand Chamber held that:

> *"First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not."*[68]

On this issue, we see here no conflict with the UK courts' approach.

Protecting journalistic sources takes in concerns of the upmost importance on both sides of the

---

[60] *Goodwin v UK* App No. 17488/90, [1996] ECHR 16, (1996) 22 EHRR 123

[61] [1996] ECHR 16, at [39]

[62] [1996] ECHR 16, at [39]

[63] [2002] UKHL 29

[64] B*ig Brother Watch and Others v the UK* [2021] ECHR 439

[65] *Sanoma Uitgevers B. V. v Netherlands* [2020] 1884

[66] B*ig Brother Watch* at [444]

[67] paragraphs 88-89

[68] *Big Brother Watch* at [444]

argument. Issues occurring in exceptional circumstances, arguably necessitating disclosure of sources include the prevention of terrorism, effective prosecution of criminal activity, theft of commercial secrets and individuals' loss of privacy. These must be set against the role of a free press, able to carry out effective investigation and expression of stories in the public interest and to be the 'safe' recipient of confidences in future. The contribution a free press makes to freedom of expression is of significant value as a necessary precondition of any thriving democracy.

Part of a free press is that journalists must be able to protect the identity of sources, so that they can be reasonably confident that confidential information disclosed will not be traced to them. The question of when exceptional circumstances mean that public interest concerns justify departing from the general protection afforded to journalistic sources is not susceptible to a generic answer. It necessarily must be answered in relation to the facts as they occur in a specific case, within the bounds of existing case law guidance.

As we write, the UK authorities are seeking an order that the well-known journalist and former MP, Chris Mullin, disclose unredacted notes of interviews with a person who is said therein to be named and to admit to a notorious IRA bombing. Plainly, there is a strong public interest in investigating with a view to prosecuting that person. This brings the matter into sharp focus. We consider that the approach hitherto adopted of weighing the competing public interests is the right one. We doubt that a new statutory provision will assist. The strong Strasbourg jurisprudence is now embedded in the English common law jurisprudence on this topic and is not inconsistent with Common law traditions.

On this issue we suggest that the protection of journalistic sources is a matter of trial and error on the facts and the weighing of competing interests, which the courts are well placed to carry out – evidence can if necessary be heard in private and so on. We do not have any suggestion to make for further legislation.

Question 7

Our submissions relating to the freedom of expression point a way forward consistent with the Convention. This will set the tone in relation to the weighting that the fundamental freedom of expression must receive. The introduction of a Bill of Rights with a fundamental freedom of expression (among other such fundamental freedoms coupled with an amended Section 12) will give greater weight to freedom of expression. We make no further suggestions as to the protection of freedom of expression in the new Bill of Rights. As earlier in this Response, to the extent that the adjustments we have suggested are found to conflict with the approach of the ECtHR in Strasbourg, we note that the High Contracting Parties to the Convention have adopted the 15th Protocol. Article 1 of which makes it clear that the High Contracting Parties are primarily responsible for securing the rights and freedoms of the Convention and in doing so are afforded a margin of appreciation.

Question 8 Significant disadvantage

As explained above (where we recommend a new section 7 (1A)), we suggest that in order to maintain the HRA's original policy of the threshold for a claimant being in line with that of the Convention, the Act be brought in line with the 14th and 15th Protocols by a requirement that a claimant normally must have suffered a significant disadvantage.

It would then follow that damages for rights' breaches would normally be recoverable only by claimants who have suffered a significant disadvantage. We also propose that courts should in the first instance always consider whether a claimant is entitled to an adequate remedy under a domestic cause of action, particularly in tort, and only consider the possibility of a remedy for breach of a Convention right if there is no such entitlement.

Damages for rights' breaches should

(i) only be awarded where the claimant has suffered a significant disadvantage not addressed by any tortious damages and/or a finding of breach and declaration to that effect;

(ii) and take account of the measure and value of any damages awarded in tort and whether a claim for compensation is or was available under the Criminal Injuries Compensation Scheme or indeed any non-statutory schemes.

Question 9

In many cases a declaration by way of just satisfaction will suffice. In such an event, where damages in tort are awarded in the same case, there should be no additional award of costs over and above those referable to fighting the claim in tort, or none save in exceptional circumstances.

Question 10 (Remedies)

We agree that human rights should not be misused to provide a fall-back route to compensation on top of other private law remedies. In *R (Greenfield) v Secretary of State for the Home Department*[69] (2005) Lord Bingham said that the Human Rights Act 1998 is not a "tort statute". Yet, over the years, it has come to resemble one, leading Baroness Hale to comment in *Rabone v Pennine Care NHS Foundation Trust*[70] that the claim for damages against the health trust in that case was "more in the nature of a claim in tort than for judicial review". We are concerned that it devalues the concept of fundamental human rights and freedoms to regard them as simply a means of supplementing or filling in perceived and often contested gaps in domestic tort law.

In the event the claimant establishes a breach, the primary remedy should be a declaration, which should stand as an award of just satisfaction. As Lord Bingham went on to state in the *Greenfield* case:

> *"Even in a case where a finding of a violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound by international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officers or classes of officials".*[71]

We have explained above [paragraphs 72 to 75] the approach to exemplary damages approved in *Kuddus v of Leicestershire Constabulary* (2001), Per Lord Hutton, and why it should be the model for awards of damages under section 8.

It follows that we agree with the proposal to amend s8 (3) to require applicants to pursue any other claims they have first, so that either a rights-based claim would not be necessary or to allow the courts to consider whether the private law claims already provide adequate redress.

An additional matter we would suggest including is whether a claim for compensation is or was available under the Criminal Injuries Compensation Scheme or indeed any non-statutory schemes. The CIC scheme provides compensation to the victims of crime (subject to certain qualifications concerning their own behaviour). The levels of compensation payable are intended to balance the needs of the individual with the wider costs and resource implications for society.

Where compensation from the state has been provided for a victim of a crime at a rate which Parliament has deemed appropriate, it is not obvious why a further remedy (over and above a declaration) by way of damages from the state for the consequences of the same crime should be necessary or appropriate. Under the CICA scheme, where damages are recovered from another person in respect of the crime, the applicant is required to repay the criminal injuries compensation. Thus, the bringing of proceedings, where they succeed, has the effect of moving money from one arm of the state to another, but with the interposition of substantial legal costs.

A declaration should suffice and would be an adequate remedy which we suggest will not conflict with the Strasbourg court's own approach in many cases. It is a commonplace that the

[69] [2005] UKHL 15 at [19]

[70] [2012] UKSC 2

[71] Greenfield, para [19]

ECtHR often awards no financial remedy additional to its finding, and where it does, the damages awards are often modest.

Question 11

The ECtHR has interpreted the convention rights as containing obligations on the state authorities to take measures, at an operational level, to protect citizens from harms caused not by the state itself, but by other individuals[72]. It has also found positive duties to investigate crimes by third parties where the impact on the victim could be said to fall within the categories of harm protected by the Convention.[73] Honest but careless mistakes are sufficient to found liability.[74]

Breaches have been marked by the making of orders for compensation. Given the wide definition of "*inhuman and degrading treatment*" applied by the ECtHR under art. 3[75] and the broad interpretation of what constitutes servitude under art. 4, the scope for claims is enormous. Social service departments and police forces in particular have found themselves at the sharp end of large numbers of the claims, which are often settled not least because of the costs' risks involved in defending them. Local authorities have found themselves sued in many cases for not removing children quickly enough from their parents and in others for removing them too quickly[76].

Police forces have been sued both for failures to prevent a crime from happening in the first place and for not being sufficiently expeditious in investigating crimes which have already occurred. Recently, claims have been commenced by individuals who as juveniles were involved in drug supply, but now allege that the police and social services should have recognised them as victims of widely defined modern slavery or trafficking in need of protection rather than perpetrators.

The litigation is often factually complex and pursued at great expense, in many cases out of all proportion to the amount of any monetary compensation award likely to be made[77]. Claims may be made not just by the direct victims, but by their close relatives[78]. It is a striking feature that many of these claims would not succeed under the common law, which does not as a general rule impose tortious liabilities on private or public bodies for acting ineffectively to protect a person from the criminal acts of a third party, or choices freely made by an individual him or herself, let alone impose such a duty to the relatives of the person directly affected.

At first, the positive obligations were tightly defined, so as to arise on only exceptional cases. In *Osman v UK* (1998)[79], a teacher developed an obsession with a pupil, which culminated in him shooting both the pupil and his father (who died). The pupil and his mother claimed that the police had failed to protect them from the attack. The police had been made aware, among other matters, of: the obsession; that the assailant had changed his surname to that of the victims; that the claimants' home had been vandalised on a number of occasions with the assailant as the suspect; that

---

[72] *Osman v United Kingdom* (1998) 29 EHRR 245; *Z v United Kingdom* (2002) 34 EHRR 3; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, to name but a few.

[73] *MC v Bulgaria* 40 EHRR 20

[74] See the review of the authorities in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 2.

[75] See the discussion of the case law by Lord Hughes at para 128 of *Commissioner of Police of the Metropolis v DSD*

[76] *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373; *AB v Worcestershire* [2022] EWHC 115.

[77] The case of *Seddon v Thames Valley Police* heard in the Central London County Court in 2018 involved a police pursuit of a vehicle flagged on the PNC which refused to pull over and drove off at speeds of over 100mph in a 40mph. The uninsured driver who was not wearing a seatbelt eventually lost control and was killed. The police were held liable for not protecting him from a real and immediate risk to his life under article 2 because the officer pursuing him should have abandoned the pursuit according to police guidelines. Mr Seddon's mother and girlfriend were awarded a total of £8,800 in damages; their costs were £326,327. The extensive disclosure exercises involved in claims involving social services and the police, along with the cost of expert evidence, means that the costs of litigating such claims is frequently disproportionate to the amount of any damages award recovered.

[78] See e.g., *Rabone v Pennine Care NHS Trust*. The term "victim" is not defined in the Convention and the ECtHR has applied it broadly.

[79] (above)

the assailant had spread offensive rumours about the relationship between the pupil and another pupil and had written obscene graffiti about him; and that the assailant had driven his car into a van in which the mother of the other pupil was a passenger. The European Court of Human Rights held that these facts were not sufficient to put the police on notice of a real and immediate risk to the victims' lives. At para 116, the Court said:

> *"For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.*
>
> *In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."*

Over time, the test of what constitutes a "real and immediate" risk has been watered down by the courts. In *Rabone v Pennine Care NHS Trust* (2012)[80], the Supreme Court held that there was a danger in using other words to explain the ordinary meaning of a word like "*immediate*", but that the phrase "*present and continuing*" caught the essence of it. The risk of suicide was "*real*" because it was "*substantial and significant*" as opposed to "*remote or fanciful*". It was "*immediate*" because it was "*present and continuing*".

R (TDT) v Secretary of State for the Home Department (2018),[81] was a case concerning an immigrant whom it was suspected had been trafficked. Upon release from a detention centre, he disappeared, the suspicion being that he had been re-trafficked. The Court of Appeal held that the fact that there was general material (not specific to the individual) available to the Home Office showing that young Vietnamese nationals trafficked to the UK were at high risk of falling back into the control of their traffickers if released from detention was sufficient to give rise to a real and immediate risk of re-trafficking under article 4. The Court of Appeal considered *Rabone* and held that in the context of that article 4:

> *"also a 'real' risk does not connote a likelihood, or 'fairly high degree' of probability; and that 'immediate' does not necessarily mean 'imminent'."*

In *Traylor v Kent and Medway NHS Social Care Partnership Trust* (2022)[82], the High Court judge found the "real and immediate risk" test met in a case where a psychiatric patient living in the community, whose condition had been well-controlled whilst he took his medication, suffered a relapse and attacked his daughter when he stopped taking his medication and lied to clinicians about having done so. The judge held that a real risk is "simply a risk that is not fanciful" and an "immediate risk" was not required to be one which was only engaged where the risk was likely to immediately materialise; it was enough for the risk to be "present and continuing".

---

[80] [2012] UKSC 2

[81] [2018] EWCA Civ 1395

[82] [2022] EWHC 260. The case failed on its fact because having found that there had been a real and immediate risk, the Judge concluded that the health trust had taken reasonable steps to address it.

In reality, the "real and immediate" risk test has begun to resemble the common law test for negligence, yet the common law does not recognise a cause of action in the vast majority of situations in which it is applied, because the common law has restrained the liability of both private citizens and public authorities for failures to protect people from harms which they did not themselves create. As Lord Toulson said in *Michael v Chief Constable* (2015) [83]:

> *"It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensation a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law."*

In his judgment in *Commissioner of the Police of the Metropolis* Lord Hughes said:

> *"It is one thing to say that a state must take seriously its protective obligation, must put in place structures which enforce the law and must not then ignore them. It is quite another to say that by way of the Convention every police investigation should be examined in detail to see whether it should have been done better, and that compensation should be paid out of the limited police resources, at the expense of other necessary expenditure on current cases, if the decision is that it should have been. These important public considerations have nowhere been examined or put into the balance in any of the Strasbourg cases on the second gloss, from MC v Bulgaria 40 EHRR 20 onwards[84]."*

Policy: a matter for the legislature, not the courts

To consider that compensation ought to be payable for failures in the delivery of public services is a respectable position, but so is the contrary view as encapsulated in Lord Hughes' dictum. It might be thought that whether it is desirable for public authorities to be liable in damages for failings in the delivery of protective and regulatory services which have been funded by the public is a question which involves policy choices, primarily between compensating individuals for the mistakes of the past and protecting the budgets and services of the present. We would suggest that such policy choices ought to be a matter for democratic legislatures, able to look beyond the facts of the individual case when considering the resource implications of a far-reaching duty, rather than the courts. The consequence of elevating the issue to one of fundamental and inviolable human rights is to close down the debate.

The diversion of resources is not just financial. Front line police officers and social workers rather than concentrating on present cases, are required to spend time raking over past files, giving witness statements, attending legal conferences and then (if the case gets that far) attending court. (One) of the authors of this response has witnessed how demoralising this is for those whose intention was to try and help others, or do their duty to the general public, within the limited resources available to them.

Given that the positive obligations, together with rights for remedies in damages if they are breached, are firmly established in the ECtHR case law, solutions to this problem are not straightforward. Removing or amending the basis of liability at a domestic level may simply lead to successful petitions to the Strasbourg court by disappointed litigants.[85]

In *DSD*, Lord Hughes proposed that liability for failures by the police to investigate past harms should arise only in cases where the failings of a public authority were structural in nature, ruling out claims for mere carelessness by officials in the carrying out of their investigation. He proposed a test of "*whether the state has a proper structure of legal and policing provision designed to punish*

[83] *Michael v Chief Constable of South Wales* [2015] UKSC 2 at [114].

[84] [2018] UKSC 11, para 134

[85] A point made by Lord Sumption in his 2015 James Wood Lecture at the University of Glasgow *The right to a court: Article 6 of the Human Rights Convention*, cited at paragraph 153 of the Consultation.

[crime] when it occurs and has administered that structure in good faith and with proper regard for the gravity of the behaviour under consideration."[86] The majority of the Supreme Court rejected that approach as not representing the current state of ECtHR jurisprudence and rejected opening a "dialogue" between the UK Supreme Court and the Strasbourg court on the issue because they considered that a positive duty to investigate would be of little value if confined to structural errors.[87]

It might be possible for Parliament to take a different view from the majority of the Court in *DSD* and start a "dialogue" (as suggested by Lord Hughes) by modifying the test for liability, having considered the competing policy considerations, in respect of both failure to investigate and failure to protect claims, but given that the positive obligations are now deeply entrenched in the European Court of Human Right's jurisprudence there must be, at the least, considerable doubt as to whether such an approach would succeed. There may also be dangers in reframing Convention rights to give them a distinctively domestic meaning at a time when the Supreme Court has unanimously concluded that the rights are international in their nature[88], a development which we welcome as potentially restraining unwarranted judicial activism.

We consider, that as with extra-territoriality, this is an issue which needs to be addressed at an international level.

Question 12: Section 3

We favour Option 2A – replacement rather than repeal of Section 3. We agree that the right approach is to provide that where the court finds that there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner consistent with the wording and overriding purpose of the legislation. We would add that there is not normally available to a court as much information on the context, or the implications of possible policies, as is available to Parliament and to ministers.

Question 13

Parliament's role in engaging with and scrutinising Section 3 judgments might be enhanced if the Joint Committee on Human Rights were given a bigger role. One option would be to give the JCHR the first response when a declaration of incompatibility is made and it then being for Government to decide whether to follow the recommendation or take some other course. This would mean that Parliament had the first say to which the Executive would have to respond.

Question 14

We agree there should be a database created to record all judgements that rely on Section 3 in interpreting legislation.

Questions 15 and 16

These answers are made on the assumption that Clause 1 of the Judicial Review and Courts Bill is enacted in the form currently before Parliament. It is important to understand the reasoning of Lord Faulks' panel.

That panel concluded that suspended quashing orders would bring benefits. It identified concerns that in certain cases the courts have overstepped constitutional boundaries in ruling against secondary legislation. Such concerns would have been substantially allayed had the remedy in those cases consisted of a suspended quashing order. That is because a suspended quashing order could have indicated that the impugned exercise of public power would be automatically quashed at a fixed point in the near future unless parliament legislated in the meantime to ratify the exercise of that power.

Such a suspended order would acknowledge the supremacy of parliament in resolving conflicts between the executive and the courts as to how public power should be employed.

Such orders will go further than issuing a mere declaration that a Secretary of State has acted

---

[86] DSD, para 127.

[87] See Lord Neuberger's judgment at paras 92-93 in DSD.

[88] *R (Elan-Cane) v Secretary of State* (2021)

unlawfully. This approach is appropriate where to quash regulations would cause undue and unmerited disruption.

A suspended quashing order could indicate that regulations will be quashed within a certain time from the date of judgment unless the Secretary of State in the meantime has properly performed his statutory duties and considered in the light of that exercise whether the regulations need to be revised.

As the panel found, there are plenty of cases where a finding that public power was exercised unlawfully does NOT lead to the inevitable conclusion that the exercise of that power was always null and void.

So, the courts will be free to decide whether or not to treat an unlawful exercise of public power as having been null and void from the outset. Their discretion will not be unduly fettered. The ability to make such orders will be especially useful:

- in high profile constitutional cases where it would be desirable for the courts explicitly to acknowledge the supremacy of parliament, and
- in cases where it is possible for a public body, given time, to cure a defect that has rendered its initial exercise of public power unlawful.

Question 15

In our view it would be inappropriate to provide that declarations of incompatibility are the only remedy available in respect of secondary legislation. Much secondary legislation is not generally subjected to careful review or consideration by Parliament. Only some SIs are made under the affirmative procedure. The constitutional considerations which require deference to the making of Acts of Parliament do not apply with the same force. The courts have long been able to quash unlawful regulations. That power should continue.

Question16

However, adopting the reasoning of Lord Faulks' Panel set out above we see a strong case for suspended and prospective quashing orders. As the Bill currently stands, there is to be a presumption in favour of a prospective order only. But it is a presumption only. The fact that the secondary legislation has breached the Bill of Rights should not mean that it must be quashed retrospectively. The courts should carry out the same balancing exercise as they would if it was not founded on a breach of such nature but will be entitled to add to the scales the nature of the breach, while weighing against that arguments for leaving it as a prospective remedy only.

Question 17 Remedial Orders

The current remedial powers contained in s.10 HRA are a form of Henry VIII power. We are not in general supportive of Henry VIII powers which are now inappropriately included more and more often in statutes. To give the Minister the power to make a corrective amendment to legislation without parliament scrutiny is unappealing, even if the motivation is good. The proper course is to bring it swiftly to parliament. It will not have happened overnight and Government should have been preparing for the eventuality during the litigation.

If there is a serious breach which requires legislation to be amended then this should be done properly.

Question 18 Statement of Compatibility

We consider the current procedure unexceptionable and a good discipline on Ministers. We see no good reason to cease it. If a Minister (the Executive) wishes to depart from Convention Rights, this should not take place by a side wind.

Question 19 Different legal traditions within the UK

We would hope that a Bill of Rights which retains the Convention rights set out in the Human Rights Act but supplements them with a recognition of the fundamental constitutional right (of freedom, subject to specific legislative restraint, which includes enactments by the devolved legislatures) is something which would reflect the histories, interests and legal traditions of all parts of the UK.

Question 20 Definition of public authorities

For the reasons given above we would change the definition to exclude from the definition of a public authority a judge or judicial officer when performing a judicial function. We would retain 'court administrative services' within the definition.

If it is felt that there should be a statutory route to compensation for such rare events[89] as a judge wrongly committing to prison for contempt, then a provision could be considered within the Senior Courts Act.

Question 21 Liability of public authorities

176. See answers to questions 16 and 26.

Question 22 Extraterritoriality

This is a complex issue which was reviewed in depth and with clarity in the report of the IRHRA at Ch.8. The Grand Chamber of the ECtHR arrived at an unprincipled and unsatisfactory decision in *Al Skeini*.

The effect of the Strasbourg decisions is that the article 2 procedural duty has extra-territorial effect, including outside the Convention's legal space, where there is a jurisdictional link between the Convention state and the area outside its national territory where a death occurred.

A jurisdictional link can arise where the Convention state starts a criminal investigation into the death or if no such investigation has commenced and there are special features that create the link.

The article 2 procedural duty can also arise where the Convention state had effective control over the area where the death took place or where it had state agent control over the individual killed.

It is important to note that Lord Bingham in *Al Skeini*[90] would have held that:

> *"the HRA has no extra-territorial application. A claim under the Act will not lie against the Secretary of State based on acts or omissions of British forces outside the United Kingdom. This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they commit under the three service discipline Acts already mentioned, no matter where the crime is committed or who the victim may be. They are triable for genocide, crimes against humanity and war crimes under the International Criminal Court Act 2001."*

We are impressed by the reasoning of the IRHRA Report. There is a strong argument that the development of extraterritorial jursidiction is inconsistent with the Vienna Convention. There is an equally strong argument that the application of the living instrument principle to these issues was unjustified. The expansion lacks both predictability and clarity and that the way in which the Convention's extra-territorial jurisdiction had been developed in that case by the majority had stretched "*the detachable nature of the procedural obligation to investigate beyond breaking point, by abandoning any connection with an underlying substantive Convention obligation under Article 2*."

We agree with the Report that ideally, the resolution of the specific concerns about the HRA's extra-territorial and temporal application would be dealt with through a careful, clarificatory, reform of the Convention. It would not be beneficial for the UK to act unilaterally. Such a reform could be achieved through the UK initiating with the other Convention states a process, the aim of which would be to develop a new Protocol to the Convention, setting out a clear, logically coherent, well thought out approach to its territorial and temporal scope, together with the Convention's relationship with IHL.

Question 23 Proportionality

The Strasbourg principle of proportionality raises one of the most difficult issues in the whole field of human rights. As they stand, we all support the principles embodied in the qualified and limited Convention rights. In many situations the acceptability of commonplace arrangements, which can be said to contravene the opening

---

[89] For an example of a Strasbourg case where part of the "breach" resulting in damage was by a court, see *VC v Italy* (2019) 69 EHRR 13

[90] Para 24

proposition in these rights, for example freedom of peaceful assembly, hinges on whether the restriction is "necessary in a democratic society". The Strasbourg court has interpreted that formula, which features in articles 8, 9, 10 and 11, as meaning that the restriction must be proportionate to the legitimate aim pursued. On several occasions the court has said that proportionality ultimately turns on a "balancing exercise". That case-law was clearly in the mind of Singh LJ in his complex formulation discussed earlier about the offence of wilful obstruction of the highway.

Of its nature a balancing exercise presupposes a situation in which the factors are not all one way. Since some of the relevant factors will tend in one direction and others in another, there is scope for reasonable people to disagree about the resolution. Different people will weigh the factors differently and may arrive at varying conclusions. So, the outcome of a balancing exercise depends on who is doing the balancing.

Therefore, when a document sets as a criterion what is "necessary in a democratic society" it becomes critical to know whose opinion is intended to be determinative of necessity – or, in the alternative formulation, whose opinion is to be determinative of what is proportionate. In our opinion the text gives a clear enough indication of the answer. It lies in the word "democratic". In democratic societies political decisions are taken by elected legislatures, or by an executive which is in power by reason of having the confidence of the democratic legislature (or, in a few countries, by a directly elected executive).

However, that respect due for the political institutions of a liberal democracy has in recent decades repeatedly been challenged by judges who have ruled on cases on the basis of their own opinion of what is "necessary" or "proportionate". The Consultation Paper illustrates its discussion of the problem by reference to *R (Quila) v Secretary of State*[91]. The case concerned a change made by the Home Secretary in 2008 to the Immigration Rules to raise the minimum age of a person entitled to be granted the right to settle by reason of marriage from 18 to 21. The aim of the change was to deter forced marriages. The majority of the Supreme Court found a violation of art 8 on the ground that the change interfered with family life and was not proportionate. The scope for more than one view was illustrated by the fact that the Home Secretary's policy was supported by 50% of the respondents to a government consultation and by the largest NGO concerned with the evil of forced marriages.

The Consultation Paper invites comment on two possible wordings of a clause to steer courts away from a finding of disproportionality in such situations. We sympathise with the aim but doubt that the suggested wordings will quite achieve the aim. The Consultation Paper provisions would apply only to primary legislation and to statutory instruments subject to the affirmative resolution procedure. So, they certainly would have applied to *Quila*, which concerned the Immigration Rules[92]. And within primary and affirmative procedure SIs one rarely, if ever, encounters a statement saying that Parliament or the Secretary of State considers XYZ "necessary in a democratic society". In practice cases usually concern the exercise of a discretionary power conferred on a minister.

We consider that a more effective steer will be given by the combination of three of the Guiding Principles which we have suggested to be codified. The first is that the court should not find a violation of the Convention in respect of a matter within the national margin of appreciation. The second is that if there is any doubt as to the view which the Strasbourg court would take, the doubt must be resolved against a finding of a violation by the domestic court. Those principles would have seen off the claimants in *Quila*, because there was no Strasbourg case-law on the issue, and the court was told that in several other European countries the relevant age was 21. As we have shown in the explanatory notes, both of those codified principles are based on strong Supreme Court dicta.

[91] [2012] 1 AC 621

[92] The Immigration Rules are not technically delegated legislation at all; under s.3(2) Immigration Act 1971 they are laid before Parliament and can be subject within 40 days to a resolution disapproving them.

The third of our Guiding Principles of relevance here is that on the separation of powers. This might be expressed in terms such as these:

> *"In considering for the purpose of applying any Convention right what is necessary in a democratic society a court or tribunal should seek to reconcile the rule of law with the principle of the separation of powers, and accordingly accord appropriate respect to legislative choices made by Parliament and by the devolved legislatures, and to executive decisions made by ministers answerable to a legislature, especially in the field of social and economic policy, and in respect of the allocation of resources."*

That principle is based on dicta of Lord Reed in a judgment with which all other members of the court agreed in *R (SC) v Secretary of State*[93]:

> *"... the administrative economic law test of unreasonableness is generally applied in contexts such as policy and social policy with considerable care and caution; and the same is true of the Convention test of proportionality. Both tests have to be applied in a way which reconciles the rule of law with the separation of powers."*

We hope that the Government may find these suggestions of assistance in relation to a policy aim which we warmly support.

Question 24 Deportations

This is a discrete topic of great interest and importance. However, we believe it is best left to a separate and specific review and we do not provide an answer.

Question 25 Illegal and Irregular Migration

This is a discrete topic of great interest and importance. However, we believe it is best left to a separate and specific review and we do not provide an answer.

Question 26 Factors to be considered when awards made

We agree that the factors listed in this Question should be taken into account when a court is considering whether damages should be awarded and how much; and we have included them in the text of our proposed amended statute. In addition to the Government's suggestion, we would add two further factors which a court should take into account:

(1) The extent to which support is available to a victim of a violation from the public authority in question or other organs of the state, such as the Criminal Injury Compensation Scheme.

(2) The factors which Lord Hughes in *DSD* suggested (see answer to Question 11 above). To avoid an outright divergence with Strasbourg case-law we are not going so far as to adopt Lord Hughes' proposal that they might result in there being no liability; rather we are suggesting that they could be taken into account, if and in so far as a court in its discretion considered appropriate, in the decision as to damages remedy.

Under the common law, the courts have held that a victim of a tort is entitled to choose a private care regime, at the expense of a tortfeasor, rather than rely upon provision made by the state[94]. This has resulted in very large claims, each running to many millions of pounds, against the NHS in particular. It is unclear whether the courts would take a similar approach to a claim under the Human Rights Act. Whilst of course it is right that victims of wrongs are properly compensated, funding private care regimes diverts resources, focusing them on individuals able to demonstrate a failing on the part of the state, at the potential expense of those with similar needs who cannot.

Where the state will meet a need caused by a violation of a human right, we see no reason why it should have to pay for that need to be met privately at greater expense. Such a change will not only reduce the level of damages but will simplify greatly the litigation process and reduce materially the time and costs involved. It will

[93] [2021] UKSC 26

[94] *Peters v East Midlands SHA* [2009] EWCA Civ 145.

remove the parties' need to prove/defend what can be complex and lengthy disputes about the detail of necessary future care and its cost. Such disputes can involve numbers of expensive expert witnesses, the drafting by lawyers of lengthy schedules of future loss and the knock-on costs and delay from all this activity.

Question 27 Conduct

At common law, a claim may be barred if founded on illegal conduct.[95] In *Al Hassan-Daniel v Revenue and Customs Commissioners* (2010)[96], the Court of Appeal held that there was no similar defence to human rights act claims. That case concerned a claim under the Human Rights Act 1998 by family members of a person who had died in custody, following the ingestion of drugs for the purposes of concealing them. An application by the defendant to strike out the claim on the basis that it was founded on the deceased's own criminal conduct failed.

The courts do take conduct into account in assessing damages under the Convention, but in the vast majority of cases conduct reduces rather than extinguishes damages. The existing case law would appear to reflect Option 1.

In *Makaratzis v Greece* (2004)[97], an award of 15,000 euros was made by the ECtHR to a driver who was shot in the arm by police after he had gone through a red traffic light near the American embassy and drove at high speed through Athens to evade capture at a time of heightened concern about terrorism. The award was said to be made on an "equitable basis", taking account of all the circumstances of the case.

In *Neville v Commissioner of the Police of the Metropolis* (2018)[98], the family of man who died during a police restraint sued for a breach of article 2. The deceased had taken cocaine which precipitated an acute psychotic reaction. He had threatened and terrified a support worker. He smashed property. The High Court Judge (Martin Spencer J) found that the restraint was lawfully executed and hence there was no violation of article 2. However, notwithstanding the deceased's own part in bringing about his restraint, the judge said (obiter) that if he had found for the claimants (who were the deceased's father, mother and brother) he would have awarded each of the three claimants £10,000 each, that being a reduction from the £20,000 each he would have awarded them had the deceased not contributed to his own death by taking cocaine thereby inducing his state of psychosis.

In the *Central London County Court case of Seddon v Chief Constable of Thames Valley Police* (2018 unreported), the judge awarded £8,800 in total to the girlfriend and mother of Mr Seddon who had been engaged in driving at speed, without a seatbelt or insurance, to evade being stopped by the police, the sums awarded reflecting a 60% reduction because of his own behaviour. (The judge found that the way in which the police pursuit was conducted contravened both the force's own policies and the Human Rights Act).

In this context, we draw attention to the fact that such a finding of 'contribution' is not founded on statute[99]. The courts have introduced it by way of common law or equitable 'mitigation'. In our view any bar to recovery or apportionment would best be addressed expressly in statute.

We do not consider that Option 1 would change the current position. Option 2 is likely to raise difficulties of definition, fairness and much scope for litigation.

---

[95] *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43.

[96] [2010] EWCA Civ 1443

[97] (2004) 41 EHRR

[98] [2018] EWHC 20

[99] In tort claims. a defence is available where it is proved that the claimant's own negligence contributed to its loss or damage. The Law Reform (Contributory Negligence) Act 1945 provides for apportionment of loss where the fault of both claimant and defendant have contributed to the damage. "Fault" is defined in the Act as "negligence or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence" (section 4). A claim for damages will be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in responsibility for the damage. The Act was designed for the tort of negligence but can be applied to cases of contractual breaches where the defendant's liability in contract is the same as his liability in negligence.

We suggest a specific statutory provision to achieve a result akin to that with which courts are familiar under the Law Reform (Contributory Negligence) Act 1945, by providing that in considering an award of damages for breach of Convention rights the court should consider,

> *"the extent, if any, to which the claimant has contributed to such significant disadvantage as he relies upon to substantiate his claim"*

Appendices I and II contain the Draft Statute with text for a UK Bill of Rights and amendments to the HRA 1998.

APPENDIX I
DRAFT/UK BILL OF RIGHTS

We propose that what is currently the Human Rights Act 1998 be amended by the insertion at the beginning of new clauses to form a new Part I as set out below.

(NEW) PART I

Fundamental constitutional principles

1A. (1) The fundamental constitutional principles of the United Kingdom are,

(a) the sovereignty of Parliament; and

(b) the rule of law.

(2) The ultimate judicial arbiter of the law in the United Kingdom is the United Kingdom Supreme Court.

UK's shared commitment to personal liberty and human rights

1B. The United Kingdom as a whole and each of the legal systems in force within it, is committed to the protection of personal liberty and human rights

The fundamental individual right

1C. All persons have the right to act in any way which is not specifically prohibited by law.

The Principles of Fundamental Freedoms

1D All persons within the realm of the United Kingdom, save in so far as in specific situations law provides otherwise:

(1) are free to express any opinion, to impart any information, and to conduct any academic research;

(2) are free to practise any religion, and free not to do so;

(3) are free from arbitrary arrest and detention;

(4) are free to travel along any public highway, and free to remain in their own private property;

(5) are free peacefully to assemble with any others, to protest and demonstrate, and free to form associations with others;

(6) are free to engage in political activity;

(7) are free to leave the United Kingdom;

(8) are free to hold and peacefully to enjoy their possessions.

Jury trial

1E. It is hereby reaffirmed that the institution of trial by jury, in its various forms in the different territories of the United Kingdom, is a fundamental feature of the constitution of the United Kingdom as an ultimate protection against tyranny.

1F. Any person charged with a serious criminal offence has the right to be tried by a jury in accordance with the laws made by Parliament, and, where applicable, devolved legislatures.

Priority of Rights

1G. In determining any case in which a party seeks to invoke a fundamental right, a court or tribunal shall first consider how the case would be disposed of apart from this Bill of Rights; next, if

necessary, consider the impact of the rights and freedoms set out in Part I of this Act; and only thereafter, if necessary, consider the impact of the Convention rights under Part II of this Act.

Mechanisms in relation to the constitutional rights

1H. Where the words used in a provision of legislation can be given more than one interpretation which
(a) is an ordinary reading of the words used, and
(b) consistent with the overall purpose of the legislation,

then, subject to section 6, the interpretation to be preferred is the one which is compatible with the rights and freedoms in this Part of this Act.

1I. A Minister of the Crown in charge of a Bill in either House of Parliament must, before the Second Reading of the Bill:

(1) make a statement to the effect that in is view the provisions of the Bill are compatible with the rights and freedoms in this Part; or

(2) make a statement to the effect that, although he is unable to make a statement as aforesaid the Government nonetheless wishes the House to proceed with the Bill.

PART II

The Guiding Principles as to Convention Rights

All the principles set out below are codifications of principles stated in domestic decisions of the highest authority. Sources are in each case set out in the Explanatory Notes.

1J. (1) A court or tribunal exercising powers under, considering a remedy provided by, or involved in the application of, this Part of this Act, shall take into account the following guiding principles:

(a) Under the fundamental constitutional principle of the sovereignty of Parliament, Parliament has the right to make or unmake any law, and no court or tribunal has the right to override or set aside the legislation of Parliament.

As to principle (1)(a), in R (Miller) v Secretary of State [2018] AC 61 at [43] the judgment of the majority at [43] stated:

*"Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to in para 41 above. It was famously summarised by Professor Dicey as meaning that Parliament has '**the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament**" [emphasis added]*

(b) The purpose of this Part of this Act is to enable parties to secure a remedy in a domestic court or tribunal in circumstances where the court or tribunal is satisfied that, in the absence of a domestic remedy, they would secure a remedy from the European Court of Human Rights; but it is not its purpose in any other circumstances to change or modify the disposal which a case would have received under domestic law.

As to principle (1)(b), in R (SB) v Governors of Denbigh High School [2007] 1 AC 100 Lord Bingham said at [29]:

"the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg."

Similarly in R (Elan-Cane) v Secretary of State [2021] UKSC 56 Lord Reed, with whom all other members of the court agreed, said:

"the Human Rights Act has long been construed as having been intended to enable the rights and remedies available in the European court to be asserted and enforced by domestic courts, rather than as being intended to provide a basis for the development of rights of the domestic courts' own creation."

(c) Any doubt as to the decision which would be given on a claim by the European Court of Human Rights should be resolved against disposing of a case in any way different from that which it would otherwise have received under domestic law, bearing in mind that an applicant can pursue a claim to the European Court of Human Rights on the ground that a domestic decision has given too limited an interpretation to a Convention right, whereas the United Kingdom cannot challenge a domestic decision on the ground that it gave to extensive an interpretation.

As to principle (1)(c), in R (Al-Skeini) v Secretary of State for Defence [2008] AC 153, at [106] Lord Brown of Eaton-under-Heywood said:

"There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg."

Those dicta were cited with approval by Lord Reed in a judgment with which all other members of the court agreed in R (AB) v Secretary of State [2021] UKSC 28, where he added:

"As Lord Brown explained, the intended aim of the Human Rights Act—to enable the rights and remedies available in Strasbourg also to be asserted and enforced by domestic courts—is particularly at risk of being undermined if domestic courts take the protection of Convention rights further than they can be fully confident that the European court would go. If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected."

(d) It is not open to a court or tribunal to hold that a matter contravenes a Convention right if the European Court of Human Rights would have held the matter to fall within the national margin of appreciation (although the court or tribunal may hold the matter to contravene the rights under Part I).

As to principle (1)(d), in R (Elan-Cane) v Secretary of State [2021] UKSC 56 Lord Reed, with whom all other members of the court agreed, said:

"The fact that the margin of appreciation doctrine was applied does not mean that the question whether the prohibition violates article 10 of the Convention has been left to the national authorities to decide, with the consequence that the domestic courts might in principle decide under the Human Rights Act that the ban was indeed a violation of article 10. On the contrary, the question of compatibility with the Convention has been decided."

(2) In considering for any purpose in connection with this Part of this Act whether it is satisfied that that a party would secure a remedy from the European Court of Human Rights, a court or tribunal,

(a) should in general follow a clear and consistent line of decisions of the Grand Chamber of the European Court of Human Rights whose effect is not inconsistent with some fundamental substantive or procedural aspect of domestic law, and whose reasoning does not appear to overlook or misunderstand some aspect of domestic law;

(b) in other circumstances should consider whether it would be desirable to deliver a reasoned judgment departing in whole or part from case-law of the European Court of Human Rights in the interests of judicial dialogue;

As to principles (2)(a) and (b), in Manchester City Council v Pinnock [2011] 2 AC 104 , a nine-member constitution of the Supreme Court unanimously stated at [48]:

"This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law: see e.g., R v Horncastle [2010] 2 AC 373 . Of course, we should usually follow a clear and constant line of decisions by the European court: R (Ullah) v Special Adjudicator [2004] 2 AC 323 . But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty v Birmingham City Council [2009] AC 367 ,para 126, section 2 of the 1998 Act requires our courts to "take into account" European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

(3) In considering for the purpose of applying any Convention right what is necessary in a democratic society a court or tribunal should seek to reconcile the rule of law with the principle of the separation of powers, and therefore accord appropriate respect to legislative choices made by Parliament and by the devolved legislatures, and to executive decisions made by (and on behalf of) ministers answerable to a legislature, especially in the field of social and economic policy, and in respect of the allocation of resources.

In R (SC) v Secretary of State [2021] UKSC 26 at [146] Lord Reed PSC, with whom all other members of the Court agreed, said:

"In other words, the administrative law test of unreasonableness is generally applied in contexts such as economic policy and social policy with considerable care and caution; and the same is true of the Convention test of proportionality. Both tests have to be applied in a way which reconciles the rule of law with the separation of powers."

APPENDIX II
AMENDED SECTIONS 1 TO 8B AND 12 OF THE HUMAN RIGHTS ACT 1998

Following the insertion of a new Part I as above, we propose that what is currently the Human Rights Act become Part II of the revised statute, and that sections 1 to 8 be subject to amendment as indicated by text underlined below. There would also be some amendments to later sections, mostly of a consequential character.

1.— The Convention Rights.

(1) In this Act *"the Convention rights" means* the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention, and <u>as read in the light of the Fourteenth and Fifteenth Protocols</u>.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) *"protocol" means* a protocol to the Convention—

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

2.— Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right <u>must first apply relevant UK statutory provisions, common law and UK case law generally and then, if proceeding to consider the interpretation of a Convention right</u>, must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article s 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section *"rules" means* rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

Note: The above suggested amendment is in the wording proposed by the Independent Review chaired by Sir Peter Gross.

2A. International humanitarian law

(1) In any situation in which a court or tribunal may find that Convention rights, as determined pursuant to the other sections of this Part of this Act, differ from international humanitarian law, the court or tribunal shall treat international humanitarian law as constituting Convention rights.

(2) In this section international humanitarian law refers to the Geneva Conventions 1949 and the Additional Protocols thereto.

3.— Interpretation of legislation.

(1) Where the words used in a provision of legislation can be given more than one interpretation which—

(a) is an ordinary reading of the words used, and

(b) consistent with the overall purpose of the legislation,

the interpretation to be preferred is one that is compatible with the Convention rights.

Note: Our suggested amendment to s.3(1) essentially adopts the wording of "Option 2A" in the Government's Consultation Paper.

(2) This section

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4.— Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

iit may make a declaration of that incompatibility.

(5) In this section "*court" means* —

(a) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the Court Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal;

(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Chancellor of the High Court or a puisne judge of the High Court.

(6) A declaration under this section (*"a declaration of incompatibility"*) —

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

(7) Any declaration made under this section shall be reported by the court in question to the Lord Chancellor and to Joint Parliamentary Committee on Human Rights.

5.— Right of Crown to intervene.

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—

(a) a Minister of the Crown (or a person nominated by him),

(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the [Supreme Court]1 against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—

"criminal proceedings" includes all proceedings before the Court Martial Appeal Court; and

"leave" means leave granted by the court making the declaration of incompatibility or by the Supreme Court.

6.— Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section *"public authority" includes*—

(a) the administrative services in connection with a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament, or any judge or other judicial officer when performing a judicial function.

(4) (subsection repealed)

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "*An act*" includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

7.— Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(1A For the purpose of this Part of this Act, a person shall only be considered a "victim" if either,

(a) the person has suffered significant disadvantage; or

(b) the court or tribunal finds, and records, exceptional reasons why respect for Convention rights requires consideration of the claim, notwithstanding that the victim's disadvantage is not of such an order as to be significant

(2) In subsection (1)(a) "*appropriate court or tribunal*" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act and has suffered significant disadvantage only if he would be so regarded in that Court.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "*rules*" means —

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by [the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes,

and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "*The Minister*" includes the Northern Ireland department concerned.

s.7A: We propose no change to the s.7A, which was introduced by the Overseas Operations (Service Personnel and Veterans) Act 2021 in order to establish a new limitation period in respect of claims relating to overseas military operations.

8.— Judicial remedies.

(1) In the event of it being contended by a party before a court that any act (or proposed act) of a public authority has been (or would be) unlawful under this Part of this Act, the court shall first consider

(a) whether there is an entitlement to a remedy, relief or order in respect of any tort, breach of contract, or unlawful act or omission or cause of action other than under this Part of this Act; and,

(b) if so, whether such remedy, relief or order, including any entitlement to aggravated or exemplary damages, taken together with the fact of a court having made such finding, would be likely to be regarded by the European Court of Human Rights as a sufficient domestic remedy in respect of any violation of Convention rights,

in which event the court shall not further consider whether there has, in fact, been any such violation, or any separate remedy in respect thereof.

(1A) If, on the other hand, the court finds that such relief or remedy, or other order, within its powers would not be so regarded as a sufficient domestic remedy, the court shall, if it considers it just and appropriate, but save as provided hereinbelow, proceed to consider whether the violation is established, and, if so, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), including any entitlement to aggravated or exemplary damages, and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(3A) Without prejudice to the generality of the preceding sub-section, no award of damages is to be made in favour of a party who has brought, or could have brought, a claim for compensation under the Criminal Injury Compensation Scheme or equivalent or similar scheme.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account

(i) the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention;

(ii) the extent, if any, to which the claimant has failed to act reasonably and responsibly, and to discharge his civic responsibilities, in relation to any matter connected with the circumstances giving rise to the claim;

(iii) the extent, if any, to which the claimant has contributed to such significant disadvantage as he relies upon to substantiate his claim;

(iv) whether there was a want of good faith on the part of the public authority;

(v) whether there was a failure of the public authority to put in place an adequate system to safeguard the Convention right in issue, having regard to the particular functions vested in that public authority;

(vi) The impact which an award of damages would have on the provision of public services;

(vii) The extent to which the public authority in question had discharged its relevant statutory obligations;

(viii) The extent of the breach;

(ix) Whether the authority in question was trying to give effect to the express provisions or clear purpose, of the legislation in question;

(x) The extent to which support or other compensation is available to the claimant from the public authority in question or other organs of the state.

(5) A public authority against which damages are awarded is to be treated—

(a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section—

"*court*" includes a tribunal;

"*damages*" means damages for an unlawful act of a public authority; and

"*unlawful*" means unlawful under section 6(1).

8A. Suspended quashing orders

(1) In the event of a court finding that subordinate legislation made by a minister is incompatible with Convention rights, the court shall have power to order that with effect from such date as the court may determine the subordinate legislation is to be of no effect (hereinafter referred to as a "quashing order").

(2) In exercising the power to make a quashing order, the court shall select such date as appears to the court to allow sufficient time for the minister and Parliament to make amending subordinate legislation, unless the court finds particular reasons for making an order to come into effect at an earlier date (which may include a date prior to the making of the order).

(3) In the event of a court making a quashing order, the impugned subordinate legislation shall be of full validity and effect prior to the date specified in the order for it to come into effect.

(4) In sub-sections (1) to (3) above "court" has the same meaning as set out in section 4(5).

(5) Save to the extent that the power to make a quashing order is exercised, no court or tribunal shall grant any remedy or relief or make any order on the basis that subordinate legislation is other than valid and in full force and effect, or which is in any other way inconsistent with the validity of the subordinate legislation.

8B. Criminal procedure

(1) It is not a defence to a criminal proceedings that, notwithstanding that the prosecution have proved the ingredients of the offence in respect of which the burden of proof is on the prosecution, the decision to prosecute was made in breach of a Convention right.

(2) Save where under established principles there lies an application to stay a prosecution for abuse of process, a challenge to the decision by a public authority to prosecute on the ground that the decision constituted a breach of the Convention rights of person charged can be brought only by judicial review.

(3) Proof that the decision to prosecute was compatible with the Convention rights of defendant is not an ingredient of any offence.

(4) Save where the lawfulness of an arrest is a specific ingredient of a criminal offence, it is not a defence to criminal proceedings that the defendant's arrest for commission of the offence was in breach of his Convention rights.

Section 9 would become otiose if the proposed amendment is made to s.6.

We would wholly delete section 10 as we do not support a Henry VIII order here.

Section 11 would be unchanged

12 Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the fundamental freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) Where qualified Convention rights are in tension with the fundamental freedom of expression the court must balance the two giving particular weight to the fundamental freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), the court must give particular weight to-

(a) the extent to which—

(i) the material has, or is about to, become available to the public either directly or indirectly and via any format; or

(ii) its publication is, or would be, justified by the public interest;

(iii) the public interest in publication may be outweighed by other public interest concerns, or exceptionally strong claims to private rights;

(b) any relevant privacy code.

For further information on the Society of Conservative Lawyers contact:
The Administrative Secretary, The Lodge, Deaks Lane, Cuckfield RH17 5JB
administrator@conservativelawyers.com
www:conservativelawyers.com

March 2022