QUB Human Rights Centre

Evidence to the Independent Human Rights Act Review

February 2021

Introduction

1. This evidence is submitted on behalf of the Human Rights Centre (HRC) of the School of Law at Queen's University Belfast. The Centre has existed since 1989. Its members teach human rights law to undergraduate and postgraduate students, conduct research into the protection of human rights around the world and organise conferences, talks and other events at which human rights issues are discussed. This submission was compiled by a small group of HRC members[1] but has been endorsed by a number of its other members.[2]

2. Our answers to the questions posed in the Review's Call for Evidence are, where appropriate, focused on our knowledge and experience of the operation of the Human Rights Act (HRA) in Northern Ireland, but they also take account of how the Act has operated elsewhere in the United Kingdom. We begin our submission with a series of points centred around the importance of the HRA to the maintenance of the Belfast (Good Friday) Agreement of 1998 and of related subsequent agreements, most of the content of which has been transposed into primary legislation such as the Northern Ireland Act 1998, the Police (NI) Acts 2000 and 2003 and the Justice (NI) Acts 2002 and 2004.[3] The remainder of our submission is structured in accordance with the questionnaire contained in your Call for Evidence: we have answered each of the ten questions posed. A concluding paragraph sums up our overall position on the task facing you.

3. There is an important preliminary point that applies to our analysis as a whole. We do not necessarily agree with the decisions and judgments of all the cases we discuss subsequently. We do not see our role as being to attempt to distinguish

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[2] Dr Anna Bryson, Ms Sarah Craig, Dr Lauren Dempster, Dr Cheryl Lawther, Professor Louise Mallinder, Professor Kieran McEvoy and Dr Alice Panepinto.

[3] This part of our submission is substantially the same as the response the Human Rights Centre has already submitted to the Call for Evidence made by Parliament's Joint Committee on Human Rights for its own submission to your review and for its parallel inquiry into the HRA.

decisions and judgments we approve of from those we do not. Nor do we consider that this is a role that the Review should take on. Rather, on the basis of the decisions we analyse, we have sought to identify whether there are any structural or institutional problems with the current Human Rights Act that would echo the scepticism (not to say, apparent hostility) manifest in some political and media circles towards the Act such as to justify widespread changes. We do not consider there are such problems.

The importance of the HRA in Northern Ireland

4. Our strong view is that the Review you are conducting into the workings of aspects of the HRA presents significant potential risks to stability and peace in Northern Ireland. It is widely perceived here as the latest in a long line of developments calling into question the Government's commitment to human rights and its willingness to retain the ECHR at the centre of the UK's constitution. We suggest that changes in the operation of the HRA in Northern Ireland are neither necessary nor desirable. Indeed, the debate in Northern Ireland is currently focused on the potential *extension* of human rights, rather than their diminution. We have seven arguments in support of this conclusion.

5. First, the UK's continued ratification of the ECHR is a significant part of the Northern Ireland constitutional settlement that resulted in the Belfast (Good Friday) Agreement, which contains an important section dedicated to the protection of human rights and equality. A crucial element of these guarantees is the effective delivery of ECHR rights in Northern Ireland domestic law: the HRA is seen in part as the mechanism that delivered on the Agreement's promises in this respect. The HRA therefore has a constitutional function in Northern Ireland that is unique in the UK. Tinkering with it risks upsetting a delicate constitutional balance.

6. Anyone with any knowledge of the Northern Ireland peace process will appreciate that this is not a theoretical point. The HRA, in its present form, has been fundamentally important to at least two key elements of that process. As regards policing, the Act has been central to the progress that has been made by the Police Service of Northern Ireland (PSNI) in securing its broader confidence of the vast majority of the people of Northern Ireland. Successive Chief Constables have

stated categorically that the main purpose of the PSNI is to protect everyone's human rights. The PSNI's Code of Ethics is replete with references to international human rights standards and the NI Policing Board has a statutory duty to produce an annual report assessing how well the PSNI is complying with its human rights obligations.[4] In addition, the HRA has been at the centre of ongoing attempts to deal with the past in Northern Ireland, with two cases having reached the Supreme Court in this area as recently as 2019.[5] The HRA has enabled several new investigations to take place into unsolved murders, some of which have led to successful prosecutions. It has led to a series of coroners' inquests being held into unexplained deaths, many of which have produced significant information for loved ones of the deceased and, on occasions, apologies from organisations or institutions which were in some way involved in the deaths. Several miscarriages of justice have been brought to light as a result of the application of Article 6 of the ECHR. Put simply, the HRA has been, and should remain, absolutely integral to the sustainability of the Northern Ireland peace process.

7. Second, given that the human rights and equality provisions of the Agreement are underpinned by an international treaty between Ireland and the UK, any significant modification of the HRA in Northern Ireland that leads to a diminution of rights will attract international attention and concern. The international reaction to provisions of the Internal Market Bill, which in 2020 sought to override the ECHR and the HRA in particular circumstances in Northern Ireland, is a salutary warning of the potential political fall-out, not least in the United States, to any weakening of the HRA.

8. Third, the Belfast (Good Friday) Agreement provides that the Irish Government will bring forward measures ensuring at least an equivalent level of human rights protection in the Republic of Ireland as pertains in Northern Ireland, leading to the Republic of Ireland introducing its equivalent to the HRA in 2003. There is a, not uncommon, divergence between the legal and political understandings of this

[4] For further information on the background to and importance of this unique monitoring function, see Keir Starmer and Jane Gordon, 'Monitoring the Performance of the Police Service in Northern Ireland for Compliance with the Human Rights Act 1998' (2005) 3 EHRLR 233.
[5] *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7; *In the matter of an application by Hugh Jordan for Judicial Review* [2019] UKSC 9. In both cases the Supreme Court held, reversing the Court of Appeal of Northern Ireland, that Article 2 had not been fully complied with.

provision. Legally, the commitment is only that of the Irish Government, not the UK Government. Politically, however, it is common for the Agreement's provisions to be regarded as containing a commitment to the equivalence of rights throughout the island of Ireland. Significant changes to the way the HRA operates will lead, therefore, to political controversy as to whether this equivalence is being maintained.

9. Fourth, there is a complex relationship between the HRA and the Northern Ireland Act 1998 (NIA). The ECHR is independently incorporated into the devolution arrangements in Northern Ireland via the NIA, which was the main vehicle for the implementation of the Belfast (Good Friday) Agreement, applying the ECHR to limit the powers of the Northern Ireland Assembly and Executive. The NIA refers to compatibility with Convention rights, which are defined as those referred to in the HRA. Although the Terms of Reference of the independent Review do not envisage any change being made to the selection of rights protected by the HRA, only to the way they are protected, this distinction may prove difficult to maintain in practice. Thus, any amendment to the HRA would need to be very clear that it should not affect the way in which the NIA prevents the Assembly and departments from violating Convention rights. Any significant weakening of the HRA would create a gap between the way the ECHR has been delivered through the NIA as compared with how it would be delivered via the amended HRA. Attempting to address this gap by amending the NIA is likely to exacerbate the destabilising effects of the HRA reforms, because the Northern Ireland constitutional settlement will be seen as collateral damage to a review that has little to do with the realities of human rights practice in Northern Ireland.

10. Fifth, there is an even more complex relationship between the ECHR, the HRA, and Article 2 of the Ireland-Northern Ireland Protocol to the EU-UK Withdrawal Agreement, which seeks to limit the damage to the protection of human rights in Northern Ireland resulting from the UK's withdrawal from the EU by providing that there will be no diminution of rights in Northern Ireland. There is some overlap in the protection of rights in Northern Ireland, with both EU law (including the Charter of Fundamental Rights) and the ECHR/HRA playing a significant role. The less protection the HRA provides, the more attention will be given to using Article 2 as

a substitute, and with it even more pressure on the operation of the Protocol which, as you will be well aware, is already under significant pressure in other respects. Resort to Article 2 (which, of course, does not apply elsewhere in the UK) will lead to opening up yet further differences between Northern Ireland and the rest of the UK.

11. Sixth, the potential impact of the human rights provisions of the UK-EU Trade and Cooperation Agreement (T&CA) should not be underestimated. The UK is not free to amend the HRA without attracting attention from the EU. In extreme circumstances, sanctions could be imposed against the UK for reducing human rights protections. Given the political fall-out envisaged above, it would be surprising if efforts were not made to mobilise the European Commission and Member States. In a situation where the UK is increasingly dependent on trade agreements with countries and blocs outside the EU, accusations that the UK is in breach of the T&CA could adversely affect the UK's ability to deliver attractive agreements elsewhere, in particular with the United States.

12. Finally, it is worth bearing in mind how significantly out of step the debates leading to the establishment of the Independent Review were with debates on human rights in Northern Ireland. There has been a long-standing debate in Northern Ireland about a Bill of Rights, a debate that began with the Belfast (Good Friday) Agreement, with unionist parties (in particular the Democratic Unionist Party) opposing such a development, and nationalist parties broadly in support. In an attempt to address the stand-off, as part of the 2020 'New Decade, New Approach' agreement to restore the power-sharing institutions of government in Northern Ireland, a Committee of the Northern Ireland Assembly was established to consider further a Bill of Rights for Northern Ireland, *building on the HRA*. This ad hoc Committee is composed of political representatives from across the political spectrum in Northern Ireland, including two MLAs from the Democratic Unionist Party. Its recent work programme and method of working represent some progress on an issue that has proven divisive. The terms of reference of the Independent Review cuts across this process.

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

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

13. We do not see a need for any amendment of section 2. We believe that it has been applied sensibly and appropriately to date. Judges in Northern Ireland have taken ECtHR jurisprudence into consideration on countless occasions when ruling on the application of the HRA to the cases before them, but they have faithfully followed the rule laid down by the House of Lords, and since maintained by the Supreme Court, as to what domestic courts should do when they are faced with a domestic precedent that clearly conflicts with a ruling by the ECtHR: they must follow the domestic precedent and leave it to the Supreme Court to follow the ECtHR's ruling if it so wishes.[6] This was exemplified in the case of *In re McCaughey*,[7] on the applicability of Article 2 of the ECHR: the High Court and Court of Appeal of Northern Ireland felt that they were bound by the House of Lords' decision in *Re McKerr*[8] to hold that Article 2 did not apply, but on a further appeal to the Supreme Court it was held that *Re McKerr* did not in fact stand in the way of Article 2 being applied in accordance with the ECtHR's judgment in *Šilih v Slovenia*.[9]

14. Nor do we see any difficulty with the Supreme Court's approach to ECtHR jurisprudence, which is that it will follow the ECtHR's rulings except in 'highly unusual circumstances'.[10] If there is no clear and constant line of jurisprudence emanating from the ECtHR then the Supreme Court, rightly in our view, is prepared to decide the case as the Supreme Court itself thinks best follows the trajectory of ECtHR jurisprudence.[11] Sometimes it is prepared to go beyond the ECtHR's

[6] *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465.
[7] *In re McCaughey* [2011] UKSC 20, [2012] 1 AC 725; the High Court and Court of Appeal decisions are at [2009] NIJB 77 and [2010] NICA 13 respectively.
[8] [2004] UKHL 12, [2004] 1 WLR 649.
[9] (2009) 49 EHRR 37.
[10] *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, [340] per Lord Wilson: 'Our refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances such as were considered in *R (Hallam) and R (Nealon) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279'.
[11] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.

position, as occurred when the House of Lords was dealing with an important case about adoption law in Northern Ireland.[12]

15. Moreover, we think it would be very undesirable, as well as impracticable, to amend section 2 so as to require domestic courts to take no account at all of ECtHR jurisprudence. Were the HRA to be so amended, what if a domestic court chose to take account of, say, a decision of the Irish Supreme Court which itself was influenced by ECtHR jurisprudence? Would the domestic court be precluded from taking such a decision into account? In so far as the position adopted by the ECtHR on a particular point represents one of the possible solutions to the point which the domestic court is asked by counsel to consider (without making any reference to ECtHR jurisprudence), would the court even then be precluded from taking that solution into account? Surely not: it is contrary to the twin principles of judicial independence and the rule of law to prohibit a court from even considering possible answers to a legal question.

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

16. We believe that domestic courts and tribunals have applied their discretion appropriately when dealing with issues which the ECtHR has confirmed are within a State's margin of appreciation. The clearest example of this as far as Northern Ireland law is concerned is the set of Supreme Court judgments in a case on abortion law brought by the Northern Ireland Human Rights Commission. There the Court said, by 4 to 3, that it was a breach of Article 8 of the ECHR (under which the UK has an area of discretion in the way it protects the right to a private and family life) for the law of Northern Ireland to criminalise abortion in situations where the woman has become pregnant through rape or incest; they also said, by 5 to 2, that it was a breach of Article 8 to criminalise abortion if a woman's baby had a fatal foetal abnormality. This is a classic instance of where a situation that was widely perceived as unjust was rectified directly because of the Human Rights Act:

[12] *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173.

the Supreme Court's judgment led to new legislation being introduced to de-criminalise abortion in Northern Ireland. It should also not be forgotten that it took judgments of the ECtHR before the UK Parliament took steps to de-criminalise homosexuality in Northern Ireland in 1982.[13]

17. A further example of a mature and sensible approach to the discretion in question is the Supreme Court's decision in *Re Denise Brewster's Application for Judicial Review*.[14] This involved a challenge to a local authority pension scheme whose terms had already been altered in Great Britain but not in Northern Ireland, where it still prohibited the payment of a pension to a deceased pensioner's co-habiting partner unless he or she had been specifically nominated as the pensioner's survivor. The Supreme Court reversed the Court of Appeal of Northern Ireland and restored the judgment of Treacy J at first instance, by holding that what had occurred was unlawful discrimination. Had it not been for the joint application of two of the Convention rights guaranteed by the HRA,[15] and the adoption of a position within what the ECtHR would call the state's margin of appreciation, the Supreme Court would have been unable to remedy the situation. Lord Kerr, for the Supreme Court, said he was prepared to accept that the test for deciding whether an interference with a right was justified and proportionate was that of 'manifestly without reasonable foundation'.[16] He stressed that 'In the present case, no thought was given to possible difficulties with administration that might arise if the nomination procedure was not included in the new scheme which the 2009 Regulations introduced.'[17] We consider this to be an admirable way in which to approach an assessment of whether seemingly discriminatory conduct by a public authority is justifiable or not.[18]

18. The courts have also exercised judicial restraint in this context. Not all cases in which the domestic courts have considered their discretion when dealing with rights

[13] *Dudgeon v UK* (1982) 4 EHRR 149, which led to the Homosexuality (NI) Order 1982.
[14] [2017] UKSC 8, [2017] NI 326.
[15] i.e. the right not to be discriminated against (Art 14) and the right to peaceful enjoyment of one's possession (Art 1 of Protocol 1).
[16] Ibid, at [55]
[17] Ibid, at [62].
[18] See the comparable Northern Ireland case *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48, [2019] NI 66, where Article 8 of the ECHR was also taken into consideration.

in relation to which the ECtHR has said that States have a margin of appreciation are ones where the courts have adopted an expansive approach. In *In re JR38*, for example, the courts in Northern Ireland and the Supreme Court all held that, as regards the right to a private life guaranteed by Article 8 of the ECHR, it was appropriate to limit the right to privacy of a person under the age of 18 if the police's purpose in publishing his or her photograph was to identify someone who was rioting at the time.[19] Similarly, in the Northern Ireland case of *Makhlouf v Secretary of State for the Home Department*, both the courts in Northern Ireland and the Supreme Court held that it was not a breach of Article 8 of the ECHR to deport a man to Algeria, thereby potentially separating him from his two children (with whom he had had little contact).[20]

19. Even in the realm of Article 6, within which the margin of appreciation doctrine plays a limited role, the Court of Appeal of Northern Ireland and the Supreme Court have been prepared to accept that there are limits to how far the State must go in protecting the right to a fair trial: in the Northern Ireland case of *In the matter of an application by Kevin Maguire for Judicial Review*, both courts held that Article 6 did not mean that a defendant in a criminal trial has the right to demand that he or she be allowed their counsel of choice at public expense, independently of the requirements of the interests of justice.[21]

20. In short, our analysis of UK case law since the Human Rights Act came fully into force in 2000 convinces us that courts in the UK have exercised their discretion appropriately when considering issues which the ECtHR deems to fall within the margin of appreciation doctrine. They have considered the pros and cons of various positions, they have paid close attention to whether the regional or national legislature has recently voted on the issue in question, and they have been very conscious of the need for judges not to take policy decisions which are the preserve of elected politicians. They have pointed out what they have seen as incompatibilities between domestic law and Convention rights, leaving it to the politicians to decide what steps, if any, should be taken to amend the law. The case

[19] [2015] UKSC 42, [2016] AC 1131.
[20] [2016] UKSC 59, [2017] 3 All ER 1; [2014] NICA 86, [2017] NI 127.
[21] [2018] UKSC 17, [2018] NI 102.

of *R (Nicklinson) v Ministry of Justice*, on the issue of assisted suicide, is a good example of how the judges exercise appropriate judgment in this context: five of the nine Supreme Court Justices held that it was appropriate for the Court to consider the compatibility of the domestic legislation with the HRA, but the majority of those judges then found no incompatibility.[22] Even the two Justices who would have issued a declaration of incompatibility did not presume to express a view on what any amended legislation should say. It is clear that the judges preferred this important policy issue to be decided by elected politicians, not by courts.

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

21. We consider that the current approach to 'judicial dialogue' works satisfactorily. In situations where the Supreme Court has expressed dissatisfaction with a judgment of the ECtHR because it is allegedly based on a misinterpretation of UK law or lacks clarity, the ECtHR has almost always responded in a cooperative manner. This has occurred on topics such as police or local authority 'immunity' for violation of the rights of certain crime victims,[23] the admissibility of hearsay evidence in criminal trials,[24] and the imposition of whole-life prison sentences.[25] This dialogue has not been a one way street, from the Supreme Court to the ECtHR, but two way. The best example of where, after a long dialogue with the ECtHR, the Supreme Court eventually acknowledged that its position was inappropriate relates to how the right to a private and family life should be applied in the context of the eviction of a tenant from social housing.[26]

22. In short, there has been give and take on both sides, which suggests that the dialogues between the judiciaries are sincere. The current approach to 'judicial dialogue' between domestic courts and the ECtHR does, therefore, satisfactorily

[22] [2014] UKSC 38, [2015] AC 657.
[23] *Z v UK* (2002) 34 EHRR 3.
[24] *Al-Khawaja v UK* (2009) 49 EHRR 1.
[25] *Hutchinson v UK* (2015) 61 EHRR 13.
[26] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, responding to *Connors v UK* (2005) 40 EHRR 9, *McCann v UK* (2008) 47 EHRR 40 and *Kay v UK* (2012) 54 EHRR 30.

permit domestic courts to raise concerns as to the application of ECtHR jurisprudence. We do not consider that this process needs to be strengthened.

23. We do consider that in one respect there is a problem, but it is one that lies at the door of the Government and Parliament, rather than the courts. If the ECtHR holds against the UK, the UK government is under an international law obligation to implement the judgment. The latest Ministry of Justice report on 'Responding to Human Rights Judgment' shows that the UK government's record in implementing ECtHR judgments continues to be relatively good.[27] In implementing the judgment, the UK Government is in a position to explain whatever difficulties it might have in this regard to the Council of Europe's Committee of Ministers, the body responsible for overseeing the implementation of judgments.

24. Unfortunately, the UK has sometimes been extremely tardy in implementing the judgment of the ECtHR. A long time went by before the Government was able to persuade the Committee of Ministers that UK law on prisoners' voting rights had been sufficiently altered in order to comply with the ECtHR's judgment in *Hirst v UK (No 2)*.[28] The two sides got there in the end, although it should be noted that the ECtHR has yet to pronounce on how satisfactory this resolution is. There is, however, a prominent exception to the generally acceptable record of compliance. The *McKerr* group of cases, dating from 2001, remain under the supervision of the Committee of Ministers.[29] Those cases relate to killings in Northern Ireland. In 2020, the Supreme Court, affirming the views of the High Court and Court of Appeal of Northern Ireland in the case, held that there had still not been an Article 2-compliant investigation into the murder of the solicitor Pat Finucane in 1989.[30] Perhaps more attention should be given to these failures, and less to those claimed to arise from judicial interpretation. Motes and beams come to mind.

[27] See e.g. the report for 2019-20 (CP 347) 9-28.
[28] (2006) 42 EHRR 41 (GC).
[29] The Committee of Ministers has in fact formally resolved 'to resume examination of these cases, and all relevant developments' when it meets in March 2021. See CM/ResDH(2020)367, available here: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a097b6. The response of the UK Government, which will be considered by the Committee in March, can also be accessed here: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a13307.
[30] [2019] UKSC 7, upholding the views expressed at [2015] NIQB 57 and [2017] NICA 7.

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

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

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

25. We know of no instances where this has occurred as regards decisions taken by any court or tribunal in Northern Ireland. More generally, if it has occurred elsewhere, we do not find it objectionable if the legislation in question was enacted *after* the Human Rights Act, because such legislation would have gone through Parliament on the understanding that it would be interpreted in accordance with section 3. If it has occurred in relation to legislation enacted *before* the Human Rights Act, we know of no instance where the interpretation was obviously contrary to the enacted legislation. In so far as the House of Lords' decision in *R v A (No 2)* seemed to adopt an 'impossible' interpretation of the legislation dealing with cross-examination of victims by alleged perpetrators in sexual assault cases,[31] it seems clear that the guidelines issued by the House of Lords three years later in *Ghaidan v Godin-Mendoza* have greatly lessened the risk of such a step occurring again.[32] We therefore see no need for any amendment to section 3 of the HRA. In particular, we do not think that changing the word 'possible' to 'reasonable' in section 3 – as in New Zealand's Bill of Rights Act 1990[33] – would be acceptable because it would undermine the core purpose of the Human Rights Act, which is to allow individuals in the UK to vindicate their Convention rights in domestic courts without having to take their cases to Strasbourg. Moreover, when the HRA was being debated in the UK Parliament, the New Zealand model was explicitly rejected.

[31] [2001] UKHL 25, [2001] 1 AC 45.
[32] [2004] UKHL 30, [2004] 2 AC 557.
[33] Section 6.

26. Contrary to the implication in your question on this point, the attitude of the Northern Ireland judges towards section 3 of the HRA has, by and large, been helpful and positive. An important example is the decision of the Court of Appeal of Northern Ireland in *Fox, McNulty and Canning's Applications for Judicial Review*,[34] where it was held that stop and question powers conferred on the police by section 21 of the Justice and Security (NI) Act 2007 could not be exercised in the absence of a Code of Practice on how they should be exercised.[35] There was also a strong suggestion that, had the stop and search powers conferred by section 24 of the Act not been amended by the Protection of Freedoms Act 2012, they would have been declared incompatible with the ECHR because the 2007 Act did not provide enough safeguards against abuse of the powers.

27. Section 3 has also been of indirect benefit to the common law throughout the UK. As judges are obliged to interpret legislation, if it is possible to do so, in a way which makes the legislation compliant with the HRA, they have been correspondingly inclined to develop the common law in a way which makes it consistent with the ECHR. For instance, in *R (Osborn) v Parole Board*, which also involved an appeal from Northern Ireland, the Supreme Court ruled unanimously that common law procedural fairness, just like Article 5(4) of the ECHR, requires the Parole Board to hold an oral hearing when prisoners are applying for release on licence.[36] Indeed, as a consequence of their obligation under section 6(3)(a) of the HRA, Northern Ireland courts have sought to develop the common law surrounding non-statutory causes of action in a manner which is ECHR compliant. The Court of Appeal in *King v Sunday Newspapers*, for instance, confirmed that while a tortious claim for misuse of private information is 'not *per se* a claim for breach of a Convention right … the values enshrined in Articles 8 and 10 of the Convention are now part of the action and should be treated as of general application'.[37]

[34] [2013] NICA 19.
[35] Ibid, at [49] and [55]. See, more generally, the blog post by Daniel Holder on 15 May 2014, available at Stop and Search: legal certainty and dodgy consultation outcomes, two judgements of broader note – RightsNI.
[36] [2013] UKSC 61, [2014] AC 1115.
[37] [2011] NICA 8, [2012] NI 1 [18] (Girvan LJ).

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

28. If, contrary to our wishes and expectations, section 3 were to be amended or, worse, repealed, then the question as to whether those changes should be retrospective or prospective only would arise. Making the changes retrospective would risk reversing decisions based on section 3 which were not contentious at the time and would lead to great uncertainty. Fewer problems might be thought to arise if the amendment or repeal was prospective only. Under this approach, previous decisions taken on the basis of section 3 would remain valid precedents unless and until they were formally departed from by a higher court or changed by legislation. We reiterate, however, that we oppose any changes to section 3.

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

29. As far as we are aware, there are only three cases where declarations of incompatibility have ever been issued in Northern Ireland. The first was by Kerr J in 2002, when he ruled that the criminalisation of anal intercourse was a breach of Article 8 (a decision that was not appealed);[38] the second was by Horner J at first instance in the abortion case mentioned above (which was overturned by the Court of Appeal of Northern Ireland but reinstated by the Supreme Court);[39] the third was issued by Treacy J in a successful challenge to the social security entitlements of a widowed parent when viewed next to the requirements of Articles 8 and 14 (the judgment of Treacy J was subsequently overturned by the Court of Appeal, but later approved by the Supreme Court).[40]

[38] *Re McR* [2002] NIQB 58, [2003] NI 1.
[39] *The NIHRC's Application* [2015] NIQB 96 and 102.
[40] *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48, [2019] NI 66; the Court of Appeal decision is at [2016] NICA 53; the High Court decision of Treacy J is at [2016] NIQB 11.

30. The High Court came very close to issuing a fourth declaration of incompatibility in respect of the law on abortion in Northern Ireland in the context of a judicial review application decided in October 2019.[41] While finding in favour of the applicant as regards some of the human rights arguments underpinning the challenge, Keegan J ultimately postponed the delivery of her decision with respect to the question of relief until further arguments arising from legislative intervention in the form of the Northern Ireland (Executive Formation etc) Act 2019 could be considered. Eventually, the learned judge decided that while the applicant had 'succeeded in relation to the compatibility and standing arguments', the case would be concluded 'without any formal relief' given that the issue before the court was by then 'firmly within the political arena'.[42] We can think of no better illustration of the pragmatic and constitutionally fine-tuned nature of the working relationship between the courts of Northern Ireland and the elected branches of government.

31. In *In re Lorraine Gallagher's Application for Judicial Review* neither the High Court nor the Court of Appeal of Northern Ireland issued a declaration of incompatibility relating to legislation concerning schemes for the disclosure of convictions, but the Supreme Court held that such a declaration was justified.[43]

32. If section 3 were to be amended or repealed it is likely that there would be a rise in the number of declarations of incompatibility issued by courts throughout the UK. Such declarations do not provide a remedy to the litigant(s) in the case and are not an effective remedy for the purposes of Article 13 of the ECHR.[44] If declarations of incompatibility do not lead Parliament to alter the law so as to remove the incompatibilities, it is likely that the number of applications to Strasbourg from the UK will start to rise again and that more judgments finding violations of the ECHR by the UK will be issued by the ECtHR. It would be sensible to avoid the ECtHR's having to issue such judgments by allowing domestic UK courts and tribunals to continue to use section 3 to interpret legislation as compatible with the ECHR if that is possible and to leave it to Parliament to change that interpretation through subsequent legislation if it so wishes.

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[41] *In re Sarah Jane Ewart's Application* [2019] NIQB 88.
[42] *In re Sarah Jane Ewart's Application (Relief)* [2020] NIQB 33.
[43] [2019] UKSC 3; the Court of Appeal decision is at [2016] NICA 42.
[44] *Burden and Burden v UK* (2008) 47 EHRR 38 (GC).

33. A rise in the number of declarations of incompatibility will almost inevitably lead to a rise in the number of remedial orders issued under section 10 of the HRA. But there is often insufficient opportunity for Parliament to comment on, let alone amend, such orders. The net outcome will therefore be a less democratic law-making process, which could in turn produce unsatisfactory legislation.

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

34. We believe that domestic courts should have the power to quash designated derogation orders if they do not meet the criteria set by Article 15 of the ECHR. That is what occurred in the first Belmarsh case, *A v Secretary of State for the Home Department*,[45] but only because the Anti-terrorism, Crime and Security Act 2001 expressly allowed such orders to be challenged in proceedings before the Special Immigration Appeals Commission and on appeal therefrom. Future legislation authorising a derogation may not contain such a provision. We note with some concern, for example, that clause 12 of the Overseas Operation (Service Personnel and Veterans) Bill, which inserts a new section 14A into the HRA, requires the government to consider whether to derogate from the ECHR in relation to 'significant' overseas operations but makes no express provision for any such derogations to be challengeable before domestic courts and for quashing orders to be issued where deemed appropriate.

35. In Northern Ireland we are all too familiar with 'emergency' legislation in relation to which derogations have been lodged in Strasbourg. Our strong feeling is that in almost every instance such derogations represent a failure of imagination regarding law- and policy-making. If derogations are to be made in future (bearing in mind that the security threat level in Northern Ireland has been set at 'severe', the highest level, since 2009) it is vital that opportunities are available for legal challenges to be raised against the derogations and for the challenges, if successful, to lead to the quashing of the orders.

[45] [2004] UKHL 56, [2005] 2 AC 68.

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

36. We are not aware of any problems having arisen as a result of how the courts and tribunals of Northern Ireland have dealt with provisions of subordinate legislation that are incompatible with Convention rights. This is so even as regards the handling of Acts of the Northern Ireland Assembly, which are still subordinate legislation for the purposes of the HRA. In the *Lorraine Gallagher* case, mentioned at para 31 above, both the High Court and the Court of Appeal of Northern Ireland were prepared to rule that the secondary legislation in question (relating to what information about previous convictions has to be disclosed) was unlawful and therefore inapplicable. We would not be in support of an amendment being made to the HRA to disqualify the courts from issuing a quashing order. Doing so would create an invidious distinction between the remedies available to a court depending on whether secondary legislation is found to be unlawful on human rights grounds or on grounds such as the *ultra vires* rule.

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

37. We would not be in favour of the HRA being amended in a way which would allow the UK government to derogate from the ECHR in situations where UK military forces are operating overseas. It is not at all clear that Article 15 of the ECHR permits such declarations. To date, no State has ever lodged a notice of derogation with the Secretary General of the Council of Europe in relation to military activities being undertaken by that State overseas. The UK should not become the first State to do so. The law on this matter as set out by the European Court of Human Rights in *Al-Skeini v UK* and *Al-Jedda v UK* should continue.[46]

[46] (2011) 53 EHRR 15 and (2011) 53 EHRR 23 respectively.

38. By the same token we are in favour of the protections provided by the HRA extending to UK military personnel operating overseas, as held to be the law by the Supreme Court in *Smith v Ministry of Defence*.[47] More generally, we are in favour of international human rights law being applied as far as practicable within the setting of international armed conflicts. Such a development would help to render the rules of international humanitarian law (the laws of war) more protective of both civilians and combatants.

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

39. There are two possible changes that might be considered. We consider that the remedial order process should enhance the role of Parliament by creating a presumption that such amendments will be made by Bills rather than by secondary legislation. The government should be placed under a statutory obligation to demonstrate why it is impracticable to proceed by way of a Bill, given that, when required, Parliament is able to pass an Act very quickly.[48] We recognise, however, that this suggestion is not without some difficulties – although in theory Parliament can act quickly, in practice the need to timetable primary legislation might be used to delay the implementation of a court judgment.

40. We also agree with the suggestion that the HRA itself should not be amendable by way of a remedial order, despite this having recently occurred through the Human Rights Act 1998 (Remedial) Order 2020 (to allow courts to award compensation for a person's detention in breach of Article 6 of the ECHR).[49] Although the oversight of the Joint Parliamentary Committee on Human Rights, which considers remedial orders in draft, may provide adequate protection against this risk, we believe such a development is undesirable in principle, since any such amendment may go further than is strictly required by the incompatibility identified by a

[47] [2013] UKSC 41; [2014] AC 52.
[48] As when the European Union (Withdrawal) (No 2) Act 2019 was enacted within six days (4-9 September 2019) and the Early Parliamentary General Election Act 2019 was enacted within three days (29-31 October 2019).
[49] SI 1160.

domestic court or the ECtHR and thereby upset the delicate balance of the HRA, intentionally or otherwise.

41. There is a danger, however, that such changes would become a Trojan Horse, providing political cover for more substantial rebalancing that would end up weakening the Act in practice. We are conscious that the political narrative is one that assumes that a weakening of the Act is needed, an assumption with which we hope it is clear that we disagree. We would be loath to be seen to be supporting any changes in the Act, which are themselves relatively minor and are intended to strengthen rather than undermine the HRA, if thereby we unintentionally provided the opportunity for a weakening of the Act.

Conclusion

42. In summary, with the greatest respect, we consider your Review to be neither welcome nor timely. From a more general human rights perspective, we see no need to diminish in any way the protections that the HRA offers to the people of Northern Ireland. Indeed, had it been within your remit to consider additions to the HRA, we would have had several suggestions to make on that front. At present we confine our suggestions for additions to the Act to the insertion of provisions which would (a) expressly permit the compatibility of designated derogation orders to be challenged under the current rules on judicial review and confirm that courts have the power to quash such orders if they find them to be incompatible with the conditions for derogations set out in Article 15 of the ECHR or elsewhere in the HRA and (b) prevent the use of remedial orders to amend the Human Rights Act itself. More broadly, given the centrality of human rights to the Northern Ireland peace settlement, a weakening of the rights provided for in the HRA threatens that settlement. From the perspective of the need to safeguard peace and ensure stability in Northern Ireland, therefore, any move that would be widely viewed as undermining the Belfast (Good Friday) Agreement and its strong commitment to the advancement and protection of human rights would be highly regrettable.