CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

CAJ Response to the Ministry of Justice Consultation 'Human Rights Act Reform: A Modern Bill of Rights'

March 2022

Introduction

This response is filed on behalf of the Committee on the Administration of Justice (CAJ). CAJ is an independent human rights non-Governmental organisation with cross community membership in Northern Ireland and beyond. It was established in 1981, campaigns on a broad range of human rights issues and is a member of the International Federation of Human Rights (FIDH). CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its international human rights obligations.

We wish to make it clear that we object to the proposals in this consultation and the proposed Bill of Rights to replace the Human Rights Act 1998 (HRA), which in our view would greatly reduce the protections currently in place. It is our view that the underlying tone and content of this consultation misrepresents the positive impact of the HRA to wider society and the important role it has in ensuring accountability from public authorities. It is a further attempt to reduce access to justice and to interfere with the separation of powers, which does not have the support of civil society in Northern Ireland.

It is of concern to CAJ that the particular circumstances of the Northern Ireland devolved administration, like that of Scotland and Wales, is addressed in one question of this 123 page consultation. In relation to Northern Ireland, we remind the Ministry of Justice that the incorporation of the European Convention on Human Rights (ECHR), through the HRA, was a central tenet of the peace settlement. We consider any amendment or weakening of these protections to be in breach of the Belfast/Good Friday Agreement (GFA), which could lead to a potential undermining of one of the most successful underpinning elements of our hard-won peace process. The GFA commits the UK to incorporation of the ECHR into NI law in a way that will ensure 'direct access to the courts' and 'remedies' for breaches of ECHR rights.[1] The current consultation proposes measures that will impede direct access to the courts and remedies.

The GFA also provided that these protections should be complemented and enhanced through a Bill of Rights for Northern Ireland.

Whilst this is a 'Bill of Rights' consultation, it is highly unusual in that its main aim appears to be to reduce the level of protection for human rights. It has to be contrasted with efforts in the devolved jurisdictions where there are proposals and debates about significantly expanding the protection of rights by giving greater effect to more rights than are found in the ECHR and HRA. The UK Government has taken a court case in order to stymie one of those initiatives (*Reference by the Attorney General and the Advocate General for Scotland* [2021] UKSC 42). That this consultation does not have the aim of expanding rights

[1] GFA "RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY section, paragraph 2: " The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency."

protection is apparent from the fact it is proposing adding only one right, the right to a jury trial, and even there the proposal has not been thought-through.

CAJ responded[2] to the Independent Review of the Human Rights Act (IRHRA), chaired by Sir Peter Gross QC, which resulted in a 580-page report published on 14 December 2021 at a considerable cost to the public purse. It is clear however, that the government has significantly departed from its findings. While it is asserted that this consultation is in response to the finding of the IRHRA the Ministry of Justice launched this current consultation on the same day as the IRHRA report was published, which raises questions about how much consideration was given to the work and recommendations of the panel of experts of the IRHRA. As Sir Peter Gross has indicated in his evidence to the House of Commons Justice Committee[3], he had expected an actual response to this substantial piece of work, but now does not expect to receive it. Instead, we have a potentially far-reaching consultation, which ignores many of the findings made by the IRHRA.

Political backdrop

As we have previously noted in our response to the IRHRA there have been many attempts by Conservative Governments to weaken or entirely scrap the HRA and this consultation is the most recent attempt to do so. As the 2015 Conservative Party Manifesto outlined:

> 'The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.'[4]

The 2019 Conservative Party Manifesto committed to updating the Human Rights Act and Administrative Law:

> '…to ensure that there is a proper balance between the rights of individuals, our vital national security and effective Government. We will ensure that judicial review is available to protect the rights of the individuals against and it is not abused to conduct politics by another means or to create needless delays.'[5]

At the same time, we have also witnessed an apparent willingness to weaken the rule of law amongst members of the current Government. As well as attacks on 'leftist lawyers' from the most senior levels of Government, namely the Prime Minister and Home Secretary[6]. We have had also witnessed a false 'witch-hunt' narrative relating to historic offences in Northern Ireland, including the official assertion that prosecutorial decisions have been

[2] https://caj.org.uk/wp-content/uploads/2021/03/CAJ-Response-to-the-Independent-Human-Rights-Act-Review-Mar-21.pdf

[3] https://parliamentlive.tv/Event/Index/b5b2be72-41d2-46aa-b4ab-59c9106941c1

[4] See page 60: http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf

[5] See page 48: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf

[6] https://www.theguardian.com/law/2020/oct/06/legal-profession-hits-back-at-boris-johnson-over-lefty-lawyers-speech

'vexatious' ,[7] fundamentally undermining the constitutional principles of the rule of law and the separation of powers: key cornerstones of a democratic society.

This consultation also takes place against the background of other measures undermining the rule of law by the present Government. In relation to Northern Ireland a UK Command Paper[8] proposes a sweeping unconditional amnesty for all 'Troubles-related incidents' in the form of a statute of limitations. These proposals to legislate to end all meaningful investigations and legal proceedings provide for an irrefutably broad, unconditional amnesty even more expansive than that introduced by General Pinochet in Chile.[9] UN special procedures experts have raised 'grave concerns' about these proposals as they place the UK in 'flagrant violation of its international obligations'[10] and would lead to 'impunity'.[11]

The Government has also legislated for the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which allows the intelligence and security services, as well as a range of other public authorities, to issue criminal conduct authorisations for agents.[12] The Act places no express limits on the crimes that can be authorised, including murder and torture, and reverses the reforms of the NI peace process by bypassing the independent role of the prosecution service in relation to criminal offences committed by informants, instead rendering such crimes 'lawful for all purposes'.

The Internal Market Bill, now Act, also, in its original form, explicitly broke international law - as was openly conceded by the NI Secretary of State - by disregarding Northern-Ireland related provisions of the treaty with the EU, signed only nine months before.

Successive UK Governments have also shown a lack of respect for the ECtHR in refusing to implement its judgments relating to the legacy of the conflict in Northern Ireland since 2001. CAJ has carriage of a number of relevant cases and has a general brief to combat impunity in dealing with our conflicted past. The Council of Europe's Committee of Ministers, continues to supervise the (non) implementation of a number of the *McKerr Group of Cases*[13] from two decades ago concerning the actions of the security forces in cases where the UK was found to have violated Article 2 ECHR. A number of these cases have been the subject of further domestic litigation and findings of Article 2 ECHR violations in the Northern Ireland Courts and by the UKSC, which reflects the central importance of the HRA in addressing the legacy of the Northern Ireland conflict in the absence of an

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[7] For a deconstruction of the 'Witch-hunt' narrative see pp 8-15 'Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland' CAJ/Queens University Belfast School of Law Model Bill Team, April 2020. https://www.dealingwiththepastni.com/project-outputs/project-reports/prosecutions-imprisonment-and-the-stormont-house-agreement-a-critical-analysis-of-proposals-on-dealing-with-the-past-in-northern-ireland

[8] https://www.gov.uk/government/publications/addressing-the-legacy-of-northern-irelands-past

[9] See: 'Model Bill Team Response to the UK Government Command Paper on Legacy in NI' September 2021 https://www.dealingwiththepastni.com/project-outputs/project-reports/model-bill-team-response-to-the-uk-government-command-paper-on-legacy-in-ni

[10] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27371&LangID=E&utm_source=miragenews&utm_medium=miragenews&utm_campaign=news

[11] https://www.coe.int/en/web/commissioner/-/northern-ireland-legacy-proposals-must-not-undermine-human-rights-and-cut-off-victims-avenues-to-justice

[12] This legislation is in response to the 'Third Direction' litigation taken by CAJ, The Pat Finucane Centre, Reprieve and Privacy International, which challenged the ECHR compatibility of M15 Guidelines to authorise criminal offences by informants. https://privacyinternational.org/legal-action/third-direction-challenge

[13] https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22004-2202%22]}

overarching transitional justice mechanism. This is another example of a contempt for the rule of law.

The Judicial Review and Courts Bill is another example of the move to limit access to justice and effective remedies and the Police, Crime, Sentencing and Courts Bill with its extremely wide scope and extraordinary police powers is a clear attack on the rights to freedom of expression and assembly.

The Nationality and Borders Bill is another example of the attempts by the current Government to roll back on access to justice, human rights and equality. The impact of this Bill is so severe that the UNHCR has publicly opposed it, stating that it will undermine the UK's obligations under the Refugee Convention. UN human rights experts have stated:

> 'The bill instrumentalises national security concerns, increasing risks of discrimination and of serious human rights violations, in particular against minorities, migrants and refugees.'[14]

The Joint Committee on Human Rights found that the bill fails to meet the UK's human rights obligations[15] and the Bill has been publicly rejected by both the Scottish and Welsh devolved legislatures.[16] Despite the unanimous response to this bill, it continues to proceed through the legislative process.

This current consultation is a further attempt to weaken and limit judicial oversight of Government policy and actions. The rule of law applies to all in society including, especially, the Government. It is of note that despite the length of this consultation it does not at any stage to ask whether there is support for a UK Bill of Rights to replace the HRA. In Northern Ireland there is civil society support for the NI Bill of Rights that would supplement and provide additional rights to the ECHR, as committed to in the GFA, rather than for a regression in current protections.[17]

We reject any plans to dilute or replace the HRA.

Misinformation

A lack of public understanding and sense of ownership of the HRA, combined with misrepresentation of human rights cases and issues by elements of the tabloid press has contributed to the misunderstanding and hostility to the HRA and the role of the ECtHR. Sensationalist reporting that the HRA is a 'criminals' charter' and a disproportionate focus on extradition and deportation cases has led to the UN High Commissioner for Human Rights condemning 'decades of abuse' of targeting migrants. The European Commission against Racism and Intolerance has called upon all political parties to take a firm stand

[14] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28027&LangID=E#:~:text=%22The%20bill%20instrumentalises%20national%20security,to%20reverse%20these%20proposed%20measures.%E2%80%9D

[15] Legislative Scrutiny: Nationality and Borders Bill (parliament.uk)

[16] https://www.forbes.com/sites/freylindsay/2022/02/23/scotland-joins-wales-in-rejecting-uk-anti-refugee-bill/?sh=406e7997c5f4

[17] That there is no compelling case for changing the Human Rights Act is also the view of the Joint Committee on Human Rights: Joint Committee on Human Rights *Third Report - The Government's Independent Review of the Human Rights Act* (House of Commons, 2021) HC 89 / HL Paper 31.

against intolerant discourse and also noted that hate speech 'in some traditional media continues to be a serious problem, notably as concerns tabloid newspapers'.[18]

Human rights are universal and apply to everyone including those facing criminal charges, extradition or deportation and those convicted of crimes. The misinformation about the Human Rights Act and the ECHR obscures the fact that all members of society benefit from HRA/ECHR protections. This includes victims of domestic abuse,[19] opposite-sex couples seeking civil partnership status,[20] people with disabilities and their families,[21] same-sex couples seeking access to marriage rights in Northern Ireland,[22] women seeking access to safe terminations in Northern Ireland,[23] the survivors of unmarried couples seeking access to a widow's benefit[24] and pensions.[25]

We endorse the recommendation of the IRHRA that serious consideration should be given to developing an effective programme of civil and constitutional education in schools, universities and adult education, focusing on human rights.

The following responds to questions in the questionnaire attached to the consultation.

I. Respecting our common law traditions and strengthening the role of the Supreme Court

Interpretation of Convention rights: section 2 of the Human Rights Act

Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

We reject the illustrative draft clauses. The framing of this question is misrepresentative as these draft clauses propose weakening the connection between the European Court of Human Rights (ECtHR) and the UK. Perversely, this could lead to a greater number of cases being taken to the ECtHR and more findings of violations by the ECtHR. This would be the antithesis of 'bringing rights home' and potentially weaken the enforcement of rights domestically.

The IRHRA has examined section 2 and the interplay between UK courts and the ECtHR proposing a minor amendment to section 2 to clarify when UK courts could consider other laws. The draft clauses in Appendix 2 go far beyond the IRHRA proposals and there is no evidence base to support them. The section 2 duty to 'take account' of ECtHR jurisprudence, in so far as it is relevant, has been applied appropriately in Northern Ireland and we do not

[18] https://news.un.org/en/story/2015/04/496892-un-rights-chief-urges-uk-curb-tabloid-hate-speech-end-decades-abuse-targeting
[19] *JD and A v United Kingdom* App no 32949/17 and 34614/17, ECtHR.
[20] *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, [2020] Appeal Cases 1.
[21] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.
[22] *Close's Application for Judicial Review* [2020] NICA 20.
[23] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27.
[24] *McLaughlin's Application for Judicial Review* [2018] UKSC 48.
[25] *Brewster v Northern Ireland Local Government Officers' Superannuation Committee* [2017] UKSC 8.

believe that it is necessary or would be practical to amend this section in a manner which would diminish this duty.

The position of the Supreme Court

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

Again, it is our view that this question is misleading and is not supported by evidence and the proposal is unnecessary. There is no ambiguity on the role of the UK Supreme Court as the highest court within the UK and the final arbiter of laws in the UK and there is no need to reform this. CAJ agrees with the finding of the IRHRA that UK courts have demonstrated 'judicial restraint' and that reform in this area is not necessary.

When the ECtHR issues a judgment finding the UK in breach of the ECHR, the UK Government, not UKSC, is responsible for ensuring implementation of that judgment under the supervision of the Council of Europe's Committee of Ministers. Regrettably it has failed to demonstrate full compliance with Article 2 ECHR violation findings in 2001-2003 judgments arising from the Northern Ireland conflict and they continue to remain under enhanced supervision.[26]

Trial by Jury

Question 3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.

The jury has been a long-standing feature of the UK legal system. CAJ supports the right to a jury trial but this consultation does not present a well thought out proposal. The consultation has a short two-paragraph discussion of the right to a jury trial

The Convention does not provide for a right to a jury trial (*Twomey and Cameron v United Kingdom*).[27] Strasbourg case law recognises that jury trials are consistent with the Convention. The Convention does require that trials be fair and this may have implications for the operation of any trials, with or without a jury (*Sander v United Kingdom* App no 34129/96, (2001) 31 European Human Rights Reports 1003).

The consultation suggests that the right to a jury trial should be as prescribed by the different legislatures (the Welsh Parliament, the Scottish Parliament and the Northern Ireland Assembly). Since restrictions on jury trials seem likely to be achieved by legislation, this suggests the effect of any such new right would be largely symbolic.

We do not believe that this proposal would provide any enhanced protection .In Northern Ireland there remains a specific separate regime for non-jury trials under the Justice and Security (NI) Act 2007. We note the UN Human Rights Committee and UN Committee against Torture have raised concern about the use of non-jury trials in Northern Ireland. While the use of non-jury trials in Northern Ireland is asserted to be a 'temporary measure' their use continues to be renewed and is subject to Parliamentary review every two years. We draw attention to the submission of the NI Human Rights Commission to the most

[26] Ibid 8

[27] App no 67318/09 and 22226/12, (7 June 2013)

recent review of these provisions.[28] The NI Human Rights Commission had also recommended incorporation of a 'right to trial by jury for serious offences and the right to waive it' as part of the NI Bill of Rights.[29]

Freedom of Expression

Question 4: How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

It does not need to be. This is a vague question framed in a misrepresentative manner without any evidence to support it. The consultation provides contradictory statements on freedom of expression and has failed to provide evidence to demonstrate that section 12, which provides enhanced protection for freedom of expression is not operating properly. There is no need to alter the current position under section 12 given that the HRA already provides guidance on how to balance freedom of expression and when it can be interfered with.

A Private Member's Bill is currently before the Northern Ireland Assembly given that Northern Ireland does not have equivalent protections as those under the Defamation Act 2013.[30]

Question 5: The Government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

Freedom of expression is protected under Article 10 ECHR. As a qualified right it can be interfered with if the interference is prescribed by law, necessary in a democratic society and proportionate to legitimate aims. Article 10(2) states that this right may be restricted in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The consultation proposals suggest further restriction of the circumstances when this right can be interfered with, creating legal uncertainty. Once again, no evidence has been provided to support the proposition that courts need clearer guidance on the application of this right.

Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

Journalists play a vital watchdog role in society in holding Government and public authorities to account. This has been of particular importance in post conflict Northern Ireland. No evidence has been provided to support the claim that stronger protection is

[28] https://nihrc.org/publication/detail/nihrc-response-to-the-public-consultation-nonjury-trial-provisions
[29] NIHRC 'A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland', 10 December 2008,
[30] http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/non-executive-bill-proposals/defamation-bill/

needed for journalistic sources. The Contempt of Court Act 1981 and Article 10 ECHR provide such protections.

We are concerned however about the wider threat to journalism and the chill factor resulting from challenges such as that taken ex parte by the PSNI under the Police and Criminal Evidence (NI) Order 1989, Theft Act (NI) 1969 and Official Secrets Act 1989 against two award winning Northern Ireland journalists Trevor Birney and Barry McCaffrey. The PSNI obtained search warrants in respect of journalistic material provided by an anonymous source, used in the documentary 'No Stone Unturned' which addressed collusion in the Loughinisland Massacre in which 6 men were murdered by a loyalist paramilitary group in Northern Ireland. The Northern Ireland Court of Appeal in quashing the warrants, relied on *Goodwin v UK* and the protection of freedom of expression of journalists and found that the application for such warrants did not meet the requisite standard of fairness:

> 'on the basis of the material that has been provided to us we see no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources in this case'. [31]

We are also particularly concerned about the proposed reform of the Official Secrets Act including an attack on 'unauthorised disclosures' or leaks of sensitive information which will criminalise and seriously undermine the ability of investigative journalism and other public watchdogs and human rights defenders to hold Government to account.[32] In the Government's Command Paper proposals to address the legacy of the Northern Ireland Troubles there is no reference to the setting aside of Official Secrets Act offences. This could result in former members of the security forces being liable to prosecution if they provided statements to the information recovery body, deterring disclosure of information and thwarting the right to truth for victims and survivors.

Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

No. As outlined above we are however concerned about the proposed reform of the Official Secrets Act and the impact it will have on freedom of expression. We also note with concern the infringement on the right to protest under the Police, Crime, Sentencing and Courts Bill in England and Wales.

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

Question 8: Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.

We object to the additional permission stage of 'significant disadvantage' being added and the use of the term 'genuine human rights matters', which is not supported by any evidence. This is a further attempt to restrict access to justice and to ensure that public

[31]https://www.judiciaryni.uk/sites/judiciary/files/decisions/Fine%20Point%20Films%20and%20Birney,%20McCaffrey%20and%20PSNI%20and%20Durham%20Constabulary%20Applications.pdf

[32] https://thedetail.tv/articles/official-secrets-act-reform-could-target-journalists-exposing-state-failings-in-troubles-killings

authorities are not held to account. Such proposals are likely to increase the number of applications made to the European Court of Human Rights, which already has a backlog of cases, claiming violation of Article 13 ECHR (the right to an effective remedy).

While this proposal purports to replicate the ECtHR admissibility criteria under Article 35 of the ECHR it is important to note that the EctHR does not apply the 'substantial disadvantage' test in Article 2, 3, 5 ECHR and does so cautiously in cases concerning other rights.

The Human Rights Act and court system already provides sufficient safeguards to ensure that admissible cases, where the victim test under section 7 HRA, has been met, will proceed. This proposal is a further attempt to limit access to justice for those seeking to hold Government and public authorities to account.

In the context of Northern Ireland, it is our view that including such an additional permission stage will breach the GFA unqualified commitment that:

> '2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.'

There is no qualification to events in Northern Ireland nor an arbitrary cut of date as to when this commitment will apply.[33]

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

We object to the inclusion of a 'significant disadvantage threshold' and note that the proposed second limb of 'overriding public importance' for exceptional cases does not go far enough to protect against this interference with access to justice. As above, there is no evidence to support the claim that there are non-genuine human rights cases. This proposal would lead to courts being asked to consider the merits of an application to decide on admissibility which would require the hearing of arguments reserved for the substantive hearing. We believe that such a proposal will also be in breach of the GFA on the same grounds as we outlined above and undermines the right to an effective remedy, Article 13 ECHR.

Judicial Remedies: section 8 of the Human Rights Act

Question 10: How else could the Government best ensure that the courts can focus on genuine human rights abuses?

As above. No evidence has been provided to support the claim that non-genuine human rights cases are before our courts and we object to this suggestion. As outlined above, there are a number of measures including under section 7 HRA which provide adequate protections. It should be a focus on Government taking all necessary steps to best ensure

[33] Page 16, the Rights, Safeguards and Equality of Opportunity section of the GFA, The Belfast Agreement - GOV.UK (www.gov.uk)

that human rights violations are eliminated, not attempting to limit access to justice for those entitled to seek remedies.

Positive obligations

Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

The consultation has failed to provide evidence that compliance with positive obligations and 'costly human rights litigation' is impacting public service priorities and we reject the proposal that human rights claims should be reduced.

Positive obligations are an intrinsic part of the ECHR to ensure the protection of individual rights and the discharge of public functions. In the context of the legacy of the Northern Ireland conflict this has been of particular significance in relation to the Article 2 ECHR duty to protect life and Article 3 ECHR right to be free from torture, and to carry out effective investigations into any interferences. The tone of this question reflects a similar approach to the current Government proposals to shut down investigations into Troubles-related deaths in Northern Ireland and to provide an amnesty for human rights abuses: failing to comply with its human rights obligations and viewing victims as an imposition and barrier to be overcome despite criticism from the international human rights community.

The consultation's discussion of the positive obligations doctrine is largely abstract focusing on general principles. It gives few examples of the alleged problems associated with the doctrine. One concrete example given is the *Rabone*[34] case where the courts held there as a positive obligation to protect life in respect of a psychiatric patient who took his own life while on leave). The consultation critiques this case law claiming it leaves the legal situation 'uncertain'.

The doctrine of positive obligations has been instrumental in offering protection to many individuals. For instance, two victims of John Worboys were successful in a court case alleging that the police had failed in their positive obligations to investigate allegations of breaches of Article 3 ECHR (the right to freedom from torture, inhuman and degrading treatment)[35]. The doctrine of positive obligations requires effective investigations of allegations of human trafficking in breach of article 4 ECHR (*MS v Secretary of State for the Home Department)*[36]*.* The doctrine of positive obligations requires state agencies to protect children who are victims of child neglect (*Z. v United Kingdom*).[37]

The reasons offered for reviewing the case law on positive obligations are weak. The consultation refers to the need for parliamentary oversight but of course Parliament always has the possibility to legislate if it judges that the case law needs correction. The consultation also refers to the legal uncertainty allegedly created, but it is the role of the courts to gradually clarify the law and from the evidence that is what they have been doing.

[34] Rabone and another v Pennine Care NHS Trust [2012] UKSC 2
[35] Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents) [2018] UKSC 11
[36] [2020] UKSC 9)
[37] App no 29392/95 (2002) 34 European Human Rights Reports 97

If the doctrine of positive obligations is limited in some way this will result in more findings in Strasbourg that the UK has violated the Convention.

Ultimately, the consultation proposal to 'address the imposition and expansion of positive obligations' risks reducing the protection offered to victims of crime, sexual abuse, human trafficking and child neglect and others without providing a convincing justification.

III. Preventing the incremental expansion of rights without proper democratic oversight

Respecting the will of Parliament: section 3 of the Human Rights Act

Question 12: We would welcome your views on the options for section 3.

<u>Option 1</u>: Repeal section 3 and do not replace it.

<u>Option 2</u>: Repeal section 3 and replace it with a provision that where 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 that is consistent with the wording and overriding purpose of the legislation.

We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

We do not agree with any of these proposals and note that the IRHRA reported that contrary to assertions, there is no evidence that section 3 is not being used properly. The IRHRA recommended no significant change on this point.

We agree with the IRHRA's finding that:

> 'notwithstanding the degree of feeling sometimes injected into the debate, there is no substantive case that UK Courts have misused section 3 or 4, certainly once there had been an opportunity for the application of the HRA to settle down in practice. There is a telling gulf between the extent of the mischief suggested by some and the reality of the application of sections 3 and 4.'[38]

The IHRA points out that the 2004 House of Lords case *Ghaidan v Godin-Mendoza*[39] provides 'clear and sensible guidance' on how to use section 3 and that it is difficult to identify any case since then when the courts have used these powers in a way Parliament did not intend.[40]

Section 3 together with section 4 represents a balance between the two main principles of the constitution: respect for the rule of law (including human rights) and parliamentary sovereignty. The drafters of the Human Rights Act avoided the position that exists in the US, Germany, South Africa or Ireland whereby the courts can disapply or strike down primary legislation if inconsistent with constitutional rights. These models give greater weight to the imperative to protect the rule of law and human rights. The Human Rights Act drafters also rejected the Canadian compromise whereby courts can strike down legislation, but the legislatures have the possibility to pass legislation explicitly stating it applies

[38] Pg 249, The Independent Human Rights Act Review 2021 (publishing.service.gov.uk)
[39] [2004] UKHL 30
[40] Pg 207, The Independent Human Rights Act Review 2021 (publishing.service.gov.uk)

'notwithstanding' the rights in the Canadian Charter of Rights and Freedoms. The Human Rights Act approach is already more deferential to the legislature than any of these models.

In applying the Human Rights Act, the courts are giving effect to the intention of Parliament that legislation should be interpreted compatibly with Convention rights in so far as it is possible to do so. We are not aware of any Northern Ireland decisions where legislation has been interpreted inconsistently with the intention of Parliament and do not consider it necessary to amend or repeal section 3.

We reject the options provided in this question as to significantly amend or repeal section 3 would be to remove one of the fundamental aims of the HRA, which is to provide that the whole corpus of law should be interpreted, as far as possible, in a way compatible with basic human rights. In our view, there is no evidence of a problem that requires to be fixed. In those circumstances, any change, which diminishes the impact of section 3, would be a deliberate regression from human rights protection.

Question 13: How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

The Joint Committee on Human Rights has been established to examine human rights matters including engaging and scrutinising section 3 judgments. The provision of additional resources and the expansion of its terms of reference as recommended by the IRHRA, would enable it to discharge this work in a better way.

Question 14: Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

We endorse the IRHRA recommendation that a database of section 3 judgments and increasing the role of the Joint Committee on Human Rights would assist in providing greater parliamentary scrutiny.

When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act

Declarations of incompatibility

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

This question is misleading as we are not aware of any problems arising in relation to the application of section 4 of the HRA. We endorse the recommendation of the IRHRA that there should be no change to the contents of section 3 and 4.

This proposal could breach the important safeguard, contained in the GFA, that courts have the power to strike down legislation of the Northern Ireland Assembly if it is incompatible with the ECHR. It would also be important, as the GFA states, for the same power to exist in relation to any Bill of Rights for Northern Ireland. The GFA was, in many ways, a promise to create a rights-based society and the enforceable requirement that all legislation in the new Assembly be compatible with human rights was an important part of that.

While the consultation emphasises the role of Parliament and democratic principles, this proposal seems to have the aim of insulating secondary legislation from being invalidated if in breach of Convention rights. Secondary legislation does not have the same levels of democratic legitimacy as an act of parliament. Given that subsidiary legislation frequently

suffers from a lack of detailed parliamentary oversight, the ability of the courts to quash secondary legislation, which is incompatible with human rights, is an important protection.

Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

We note that the Judicial Review and Courts Bill containing the same provision has received much criticism given that it restricts rights and access to justice. We object to these proposals which will interfere with the remedies available where there has been a breach of the ECHR.

Remedial orders

Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:

a) **similar to that contained in section 10 of the Human Rights Act;**
b) **similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;**
c) **limited only to remedial orders made under the 'urgent' procedure; or**
d) **abolished altogether?**

Please provide reasons.

No evidence has been provided to support these proposals and we object to any change to section 10 HRA as we indicated in our submission to the IRHRA.

Statement of Compatibility – Section 19 of the Human Rights Act

Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

We object to any amendment to Section 19. It performs an important function, as it requires Government to state whether legislation is compatible with the HRA and to explain this. It assists in ensuring good governance and accountability demonstrating that Government has considered the human rights impact of its proposals.

Application to Wales, Scotland and Northern Ireland

Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

These proposals will not address the particular circumstances of Northern Ireland or comply with the GFA commitment that ECHR incorporation be complemented and supplemented by a Bill of Rights for Northern Ireland.[41]

An Ad Hoc Committee on a Bill of Rights for Northern Ireland has been appointed and recently reported[42] on its series of stakeholder events which found that an overwhelming

[41] Ibid. See pages 21-21, Rights, Safeguards and Equality of Opportunity, Human Rights
[42] http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/minutes-of-proceedings/2020-2021/summary-of-stakeholder-events.pdf

majority of people feel that a Bill of Rights for Northern Ireland is both very important and long overdue. The narrowly framed questions in this consultation are a missed opportunity to extend protections for economic, social and environmental rights to reflect the approach of devolved jurisdictions including Northern Ireland.

The incorporation of the ECHR was a basic ingredient of the human rights protections for Northern Ireland through GFA. It was regarded as so important that the Agreement also committed the Irish Government to incorporate the ECHR under the 'equivalence' provisions. This was done through the passing the European Convention of Human Rights Act 2003 in Ireland. In our view, any amendment to the HRA insofar as it has effect in Northern Ireland would constitute a breach of the Agreement and potentially destabilise the peace settlement. It is our view that it is not necessary or appropriate to change the operation of the HRA in Northern Ireland and we note that the IRHRA has warned about such impacts which do not appear to have been considered in this consultation.

The GFA, in addition to being overwhelmingly approved by referendum, in Ireland, North and South, was also incorporated as a treaty between the UK and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705). Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement, which correspond to its competency. Paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement set out this commitment.[23] This commitment was given legislative effect through the HRA 1998 and the Northern Ireland Act 1998.

The GFA also commits to safeguards to ensure the Northern Ireland Assembly, or public authorities, cannot infringe the ECHR. Any interference with this safeguard takes away a significant pillar of the human rights architecture, both of the Agreement and Northern Ireland society. It threatens the whole basis of trust in the new institutions that has been painstakingly built up since 1998.

It is also of particular importance to note that any amendment of the HRA necessitates a process of review between the UK and Irish Governments in consultation with the NI Assembly parties. Paragraph 7 of the section 'Validation, Implementation and Review' of the Agreement makes this clear:

> 'Review procedures following implementation .... 7. If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction.'[43]

In relation to other key provisions of the peace settlement, the HRA 1998 is, for example, also vital to the framework for the human rights compliance of policing in Northern Ireland. One of the key functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998. The PSNI Code of Ethics, provided for under s52 of the same Act, is also designed around the framework of the ECHR as provided for by the HRA 1998. Again, the full impact of this legislation involves both the letter of the Convention and its jurisprudence, as we argue below. The Justice (Northern Ireland) Acts 2002 and 2004 were also introduced following peace settlement commitments. Of particular note is the power conferred upon

[43] Ibid, See page 31 & 32 - Validation, Implementation and Review section

the Attorney General for Northern Ireland under s8 of the 2004 Act to issue and revise human rights guidance for criminal justice organisations which they must give regard to.[44]

In relation to previous debated on the future of the HRA the then Chief Constable of the PSNI made it clear that the threatened removal of the HRA would be 'hugely detrimental to both confidence in policing and the confidence of the police to make difficult decisions' and that 'Human Rights have been incorporated into our policy and it has become the norm for human rights to guide the decisions we make and the operations activity we undertake'.[45]

Also of particular importance is Article 2 of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement, which provides for 'no diminution' of certain GFA rights, including the incorporation of the ECHR as a result of Brexit. Whilst the current Review of the HRA is also part of a broader trend, its linkage to Brexit is clear, not least in its timing. It also stems from a similar cultural and political attitude towards external influence on domestic law. Nonetheless, any diminution of the relevant GFA rights, including the incorporation of ECHR rights that follow and relate to Brexit will be unlawful under the domestic incorporation of Article 2(1) of the Protocol. Should Government manage to successfully convince a court that a diminution of ECHR incorporation in NI law as an outworking of this review of the HRA is nothing to do with Brexit (despite taking place just after Brexit, and after significant conflation of the EHCR and EU during the whole Brexit process and, at times, a 'twin' campaign against EU and ECHR membership) we would nevertheless face an absurd political scenario in which GFA rights that the UK has steadfastly legally guaranteed not to diminish as a result of Brexit, given their importance, are diminished anyway for another reason.

Breaking or weakening the link with ECtHR jurisprudence, or in other ways restricting the application of the HRA, could well trigger the attention of the 'dedicated mechanisms' set up under the Protocol to protect rights.[46]

The current direction of debate is towards enhancing rights protections rather than weakening them. In the 'New Decade, New Approach' document, which was the basis of the re-establishment of the democratic institutions at Stormont, as alluded to earlier a Bill of Rights Ad Hoc Committee of Members of the Legislative Assembly was established.[47] It has now reported on its brief is to examine the case for a Bill of Rights that builds on and surpasses the protection in the ECHR. Again, any significant amendment of the HRA,

[44] https://www.attorneygeneralni.gov.uk/human-rights-guidance

[45] 'The Impact of the Human Rights Act in Northern Ireland: Conference Report', 2017. The Chief Constable of the PSNI was keynote speaker at this Conference. http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-Northern-Ireland-Conference-Report-1.pdf

[46] See, for e.g. CAJ evidence to the Northern Ireland Affairs Committee on its inquiry into 'Citizenship and Passport Processes in Northern Ireland', February, 2021: https://committees.parliament.uk/writtenevidence/22343/html/ and CAJ briefing note EU-UK future relationship cliff edge: Outstanding issues around access to EU and human rights in the Northern Ireland context, August 2020: https://caj.org.uk/wp-content/uploads/2020/08/Rights-and-the-EU-future-relationship-Aug-20.pdf

[47] http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/ http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/

especially in regard to weakening the link with ECtHR jurisprudence, would go against this direction of debate.

It is our view that incorporation of the ECHR as committed to by the British Government in the GFA cannot just mean repeating the text of the ECHR (or most of it) in a UK statute. It also involves 'bringing in' the institutions of the Convention and the jurisprudence developed by the Court and other Convention bodies. This view of incorporation is currently completely recognised by the HRA. Section 1 of the HRA lists Convention rights as those in (most of) the ECHR. Section 2 'Interpretation of Convention Rights' says, in effect, that the convention rights must be interpreted 'taking account' of ECtHR jurisprudence and the positions of other Council of Europe institutions:

'A court or tribunal determining a question which has arisen in connection with a Convention right 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 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.' (Sec 2(1))'.

It is this Section that requires UK courts to 'take account' of European Court decisions (not follow them as binding precedent as some caricatures allege) and it is that link that the previous Government was committed to breaking, and which is called into question in this consultation.

To break with the jurisprudence of the ECHR, and dilute the ability of UK courts to take into account that jurisprudence, would conflict the GFA, a treaty based obligation.

Public authorities: section 6 of the Human Rights Act

Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

We object to any proposed change to the definition of public authorities, which provides certainty and clarity. Any proposed change to the definition of public authorities is likely to result in greater litigation.

Question 21: The Government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.

<u>Option 1</u>: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or

<u>Option 2</u>: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

We do not agree with either proposal. There is no evidence to support the claims in the consultation that there are problems with the application of section 6.

Extraterritorial jurisdiction

Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

As we outlined in detail in our submission to the IRHRA it is our view that the ECHR binds the UK state in general and is not restricted to actions on the territory of the UK or other jurisdictions, which it legally controls. 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.[48]

[48] (2011) 53 EHRR 15 and (2011) 53 EHRR 23 respectively

Qualified and limited rights

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

<u>Option 1</u>: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

<u>Option 2</u>: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

We do not believe there are any issues with the application of the principle of proportionality and note that in its report the IRHRA reached the same conclusion. It is worth recalling, that in reaching this decision in *Animal Defenders International v UK*, the ECtHR gave weight to the domestic legislative and judicial examination of this issue, noting that:

> '115. *The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords. Both courts analysed the relevant Convention case-law and principles, addressed the relevance of the above-cited VgT judgment and carefully applied that jurisprudence to the prohibition.* Each judge at both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary and proportionate interference with the applicant's rights under Article 10 of the Convention.
>
> 116. The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of

crucial public interest debates and, thereby, the undermining of the democratic process.' (emphasis added).'

Similarly, the UK courts already give weight to the fact that Parliament has considered legislation to be necessary and also recognise that some questions are more appropriately decided by the executive.

Deportations in the public interest

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.

Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such/ rights.

Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

We object to the suggestion that the protection of fundamental rights for all persons are a 'frustration'. It is our view that these proposals amount to a weakening of the ability to assert fundamental rights and would undermine the current checks and safeguards on deportations provided by the Human Rights Act. The proposals would also limit the protection of human rights for specific groups of people, which is inherently discriminatory and undermines the fundamental concept of the universality of Human Rights.

The Independent Human Rights Act Review did not identify any issues with deportation and it is clear the Government has proceeded to examine this issue on the basis of its own political and policy positions rather than evidence. The evidence provided to justify the claim that deportations are 'systematically frustrated' through use of Human Rights grounds is not substantiated.

Case X referred to in the consultation document has had the specific details omitted but factually appears to be the same as a 2009 case, which the Government has previously referred to in statements on deportation.[49] If this is indeed the case referred to, the summary fails to clarify that this case is over 13 years old and significant changes to the law were made in 2014 regarding Article 8 cases like this one. There are significant constraints on the use of Article 8 in deportation appeals and the suggestion that courts have expanded the scope for challenging deportation orders under Article 8 is misleading.

The consultation document argues that the discretion left to courts to balance Article 8 grounds against the public interest in deportation cases dilutes the intended impact of the 2014 Act. Only two cases are cited to evidence this claim and key details relevant to the Article 8 grounds are omitted from the case summaries. In *OO (Nigeria)* the appellant was born in the UK and had not visited the proposed country of deportation since he was a child.

[49] https://www.gov.uk/government/news/plan-to-reform-human-rights-act

In *AD(Turkey)* the appellant was married to a British citizen for 31 years and provided key medical care to his son. When making the decision the judge stated:

> '…it can properly be said that there are very compelling circumstances in this case, and that this is one of the rare and exceptional cases where the claimant is entitled to succeed in his appeal as deportation would ultimately amount to a disproportionate interference with his right to respect for his Article 8 ECHR rights.'[50]

The consultation document omits these key facts in order to promote the view that the findings in these cases were not balanced or proportionate. When read in full, it is clear these were exceptional cases and finely balanced judicial decisions.

The only data provided to evidence the claim that human rights grounds are systematically used to frustrate deportations is 'internal Home Office data'. The source for this data is not referenced in the consultation document and the Home Office does not routinely publish public data on deportation appeals. However external searches show limited data supporting the consultation document is available on gov.uk.[51] This data does not provide a breakdown of the jurisdiction in which appeals occurred which prevents any assessment of the impact in Northern Ireland. It is also clear from this data that the number of appeals have been falling since 2017/18.

The evidence provided by the Government fails to demonstrate that there is any widespread or systematic issue in the way that human rights are applied in deportation cases. There is no justification for reforms which would disproportionally impact migrant and minority ethnic communities, undermine protection of fundamental rights and undermine the rule of law.

"Illegal" and irregular migration

Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal [sic] and irregular migration?

We object to the framing that the protection of fundamental rights through the ECHR and HRA as 'impediments'. No clarity or evidence is provided on the so-called challenges posed by 'illegal and irregular migration'. The consultation document refers to the UK's international obligations under instruments such as the Refugee Convention as challenging their ability to 'tackle illegal migration', with reference to arrivals via boats. There is no evidence provided to substantiate these claims, which instead seem based on current political rhetoric concerning immigration.

The consultation document seeks to conflate the arguments concerning deportation of foreign national offenders with the administrative removal of groups such as failed asylum seekers. It suggests that the second and third proposals from Q24 concerning deportations could be applied to administrative removals. We re-assert our submission that these

[50] https://tribunalsdecisions.service.gov.uk/utiac/hu-01512-2019

[51] https://www.gov.uk/government/publications/foreign-national-offenders-appeals-on-human-rights-grounds-2008-to-2021

proposals represent a discriminatory restriction to the protection of human rights and undermines access to justice and the rule of law in the UK.

These proposals represent a baseless attack on migrant and refugee rights such as we have already seen in the National and Borders Bill. There is no justification for these proposals which are discriminatory, undermine protection of fundamental rights and risk breaching the UK's international obligations.

Remedies and the wider public interest

Question 26: We think the Bill of Rights could set out a number of factors in

considering when damages are awarded and how much. These include:

a) **the impact on the provision of public services;**
b) **the extent to which the statutory obligation had been discharged;**
c) **the extent of the breach; and**
d) **where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.**

Which of the above considerations do you think should be included? Please provide reasons.

We reject these proposals which attempt to limit to access to justice and the provision of effective remedies to victims of human rights abuses. Aside from the general objection to this it also, in NI, is in conflict with the GFA commitments to remedies for ECHR breaches . It is correct that independent Courts grant appropriate remedies under section 8 HRA and that it remains unchanged.

IV. Emphasising the role of responsibilities within the human rights framework

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

<u>Option 1</u>: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

<u>Option 2</u>: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

We do not believe that evidence has been provided to support the claims made in the consultation paper and reflects a wider attempt to weaken the universality of human rights.

The Government should however implement the recommendations of the IHRAR that:

> 'Serious consideration should be given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human

rights, the balance to be struck between such rights, and individual responsibilities.'[52]

V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

We consider that the current approach to 'judicial dialogue', both formally and informally, between the domestic courts and ECtHR is effective with good communication and compromise demonstrated on both parts and this does not need strengthened. The relationship between domestic and Strasbourg judges is one founded on dialogue and respect as illustrated by the following example.

In considering the dialogue between the ECtHR and domestically, the decision in *Animal Defenders International v UK* is of particular interest. After deliberating for 13 months, by a slim majority, the Grand Chamber held that the UK ban on paid political advertisements in broadcast media did not violate Article 10 ECHR. Its departure from the case of *Vgt v Switzerland* with near identical facts was of particular surprise to many. It found that:

> '…the applicant NGO's right to impart information and ideas of general interest which the public is entitled to receive with, on the other, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.'
>
> In reaching this decision, it is clear that the ECtHR gave weight to the domestic legislative and judicial examination of this issue.'[53]

An analysis of this case has found that it:

> '…does represent precisely the merits of UK judges scrutinizing the state's arguments in UK courts, in Convention-rights terms and with due consideration of Strasbourg jurisprudence, before the issue travels to Strasbourg for consideration there. The Strasbourg Court not only essentially adopted the reasoning of the UK courts, but in doing so it explicitly rowed back from its own jurisprudence (i.e. the *VgT* case). This is an entirely appropriate form of institutional dialogue, and shows maturity of judgment, the flip side of the much-maligned UK courts' own willingness to apply rules laid down in Strasbourg. The upshot of this is plain: a British Bill of Rights that acted as a substitute for the Human Rights Act 1998 would have destroyed that dialogue, and made the wrong outcome in *Animal Defenders International* more likely.'[54]

It is worth noting that despite very regular dialogue with the Council of Europe, the UK has failed to comply with a number of ECtHR cases on Article 2 ECHR arising from Northern Ireland, as outlined above. This includes the UK obligation to hold an Article 2 ECHR compliant public inquiry into the murder of solicitor Pat Finucane. Despite these cases

[52] Ibid, pg 7 Recommendations
[53] Ibid
[54] https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/

remaining under the enhanced supervision of the Council of Europe's Committee of Ministers - and repeated expressions of concern by the Committee due to the delays and lack of information provided on both the individual and general measures - twenty years after these judgments the UK still has not properly discharged its obligations under Article 46 ECHR.

The British media also critiques the ECtHR, though not always constructively. This has resulted in at least one instance of the ECtHR Registrar issuing a statement as the court was 'concerned about the frequent misrepresentation of its activities in the British media.'[55]

Impacts

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

a) **What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;**
b) **What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and**
c) **How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.**

As we have outlined above we object to the proposals in this consultation and suggested amendments to the Human Rights Act. Incorporation of the ECHR through the HRA was a central tenet of our peace settlement, and we consider any amendment or weakening of these protections to be in breach of the GFA, which could lead to a potential undermining of one of the most successful underpinning elements of our hard-won peace process. More broadly, the HRA, should be viewed as a success story as we have referenced above, and not misrepresented politically or in elements of the press. It is a story of 'bringing rights home' not something that should be unpicked by successors of the first signatory to ratify the ECHR.

The GFA committed to a statutory equality duty, legislated for under Section 75 and Schedule 9 of the Northern Ireland Act 1998, the main GFA implementation legislation. This takes a schemes-based approach whereby public authorities are bound by specific arrangements on consultation and equality impact assessment, where policies are likely to lead to discriminatory detriment ('adverse impact') on a protected characteristic the public authority in question is then required to consider alternative policies and mitigating measures. We would consider the proposed policy if it is proceeded with as risking significant adverse impacts on a number of section 75 groups. There is currently a significant gap in that, unlike the Northern Ireland Office, the Ministry of Justice is not a designated public authority for the NI statutory equality duty. Nevertheless in particular as the current proposals would involve a considerable diminution in rights expressly protected under the GFA itself (codifying the incorporation of the ECHR in NI law) we would urge the MoJ to produce and implement an Equality Impact Assessment (EQIA) that follows the key duties set out in Schedule 9 to consider alternative policies to prevent the regression the proposals will cause, and that the impact assessment follows the requirements for EQIAs set out by the Equality Commission for Northern Ireland. These requirements include a 12 week

[55] https://www.theguardian.com/law/2013/oct/14/european-court-human-rights-attacks-uk-newspapers

consultation on the draft EQIA, and commitments that the consultation responses will be properly considered in the final policy decision.

CAJ, March 2022

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