ILPA's response to the Independent Human Rights Act Review (IHRAR)

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Introduction

In the Introduction to the Call for Evidence, it states that "*the panel wants to consult widely and encourages the widest possible range of views from the public and interested parties in its consultations, across all four nations of the UK.*" The Review has not been designed to encourage "*the widest possible range of views from the public*". It is drafted in a highly technical and academic way that renders it inaccessible to many people who have something to say regarding the importance of their ability to enforce their rights under the Human Right Act. We are aware that the British Institute of Human Rights and others have been working to address this but it is a failure on the part of the Review that other organisations have had to intervene in this manner.

Further, the Call for Evidence downplays the significance of what *is* being considered by stating that "*The Review is limited to consideration of the domestic HRA framework. Issues falling outside that framework, including consideration of potential changes to the operation of the Convention or European Court of Human Rights, or changes to the substantive rights themselves, are not within the scope of the Review*". While there may not be any proposals to amend the substantive rights, what is being considered are changes to how individuals are able to enforce those rights, and instead to shift

the balance of power even more towards the government. This is obviously of critical importance and the fact that this has not been made clear and that the "headline" is that nothing will change will also have acted as a disincentive for people to respond. It creates a misleading impression of what the consultation is about. It is artificial to suggest that there are no "changes" to "substantive rights themselves" when fundamental changes to the *enforcement* of those rights is proposed. The enforcement and the content of substantive rights are inextricably linked.

As with other recent consultations arising from the Ministry of Justice, we are concerned about the lack of any evidential basis to support the need for proposed changes. The Terms of Reference state that "*There is a perception that, under the HRA, courts have increasingly been presented with questions of "policy" as well as law*." The use of the word 'perception' here is instructive and concerning, as it appears to be an acceptance that there is actually no evidence at all to support such a perception, otherwise the call for evidence would be referring to such evidence rather than a vague 'perception'. Any such perception is completely inaccurate, so it is a matter of enormous concern that this Review has been predicated on this basis. The panel comprises judges, lawyers and academics, all of whom we expect will share our concern about the lack of evidence for such a perception, and will seek to interrogate this point further before recommending any changes that may make it more difficult for people to enforce their rights, or weaken their ability to challenge the Government in any way.

Therefore, our overall submission is that the Review is deficient due to the lack of an evidence base to support the need for the proposals and its failures to engage with the wider public and to highlight the potential effect of the changes. Notwithstanding that we have provided responses to most of the questions below, please note that the length or lack of response to any specific question should not be taken as support by ILPA for any of the proposed changes.

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

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Our view is that the current approach is the correct one. We do not believe that ECHR decisions should bind UK courts, and they do not, therefore no change is required.

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?

The duty for the domestic courts to "take into account" ECtHR jurisprudence as set out in section 2 of the Human Rights Act is already a weak obligation, as the domestic courts are not formally bound by the decisions or judgments listed. This is borne out in practice, as courts do not treat themselves as bound. It is plainly useful to consider relevant jurisprudence where Convention rights have been considered, where they exist and may assist the courts. There is no reason for section 2 to be amended, and no need to do so.

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?

As stated above, we believe that the section 2 duty is being used appropriately. The doctrine of the margin of appreciation has taken on a particular and highly contested meaning in the domestic context. ILPA does not consider that it would be appropriate for this to be the subject of any legislative proposals from the review. It is best left to the courts to resolve given it is primarily a concept developed gradually as a way for courts to resolve the difficult issues raised in particular cases. No change is required.

Theme Two: The Impact of the Human Rights Act on the Relationship between the Judiciary, Executive and Legislature

While the Terms of Reference state that this review is neutral, the suggestion in the Call for Evidence that "the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy" is anything but neutral. We have read Sir Stephen Sedley's submission to the Review and note that he also refutes this, with reference to the case of *R (Quila) v Secretary of State for the Home Department* (a case concerning the ability of a British citizen to bring their spouse to the UK when one or both or the parties was aged under 21), which he heard when in the Court of Appeal.

As we have discussed above, we reject any assertion that there is an issue of "over-judicialising" and we note that there is no evidence to support this, which is presumably why the Terms of Reference instead refer to a "perception". We would expect to see a solid evidential basis for any changes, and our submission is that this simply does not exist.

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

The regime created by sections 3 and 4 of the HRA seems to function well at present. In recent years the operation of the HRA in immigration law has attracted a great deal of attention, particularly with regards to which individuals may be removed or deported from the UK and on what grounds. Parliament has, via the Immigration Rules and other instruments, sought to provide guidance as to its view of how the various Convention Rights should be applied and interpreted.

Consideration of any part of the immigration law regime demonstrates that for Parliament's intention to be enacted it must be easily understood, and it may be suggested that the lack of clarity currently noted in the UK's immigration law[1] creates a greater difficulty than the HRA in interpreting legislation in a manner consistent with the intention of Parliament, as well as making it difficult to consider whether that intention has been given effect in later analyses. In light of this it is further suggested that general policy trends provide the best indication, such as that regarding the control and removal of Foreign National Offenders, which has been the subject of a number of policy initiatives and substantial case law in the last decade. To aid clarity this consideration will only look at how the courts have considered cases involving deportation of non-EEA nationals, (though it is acknowledged, that EEA nationals have now been brought into the general deportation system due to Britain's exit from the EU[2]).

Whilst Parliament has clearly always had an interest in maintaining immigration control and the safety of the British Public, it may be thought that a policy trend can be identified beginning in 2005, but gaining momentum in 2014 subsequent to the publication of the Report by the Chief Inspector of Borders and Immigration: *An Inspection of the Emergency Travel Document Process*.[3] Since then a number of statutory provisions have been passed to demonstrate Parliament's intention as to how

[1] Law Commission, *Simplification of the Immigration Rules: Report*, 2019.
[2] For crimes committed subsequent to 31 December 2020.
[3] Independent Chief Inspector of Borders and Immigration, *An Inspection of the Emergency Travel Document Process May- September 2013* (London: HM Government, 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546968/An-Inspection-of-the-Emergency-Travel-Document-Process-March_2014.pdf.

key concepts such as the public interest should be interpreted in conjunction with the rights of the European Human Rights Convention – in particular Article 8. Most importantly perhaps is section 117C of the Nationality, Immigration and Asylum Act 2002, inserted by the Immigration Act 2014.

It would be helpful to be able to analyse the effect of these provisions on the gross deportation 'win rate' for appellants, however, such statistics are not available bar a small sample 'deep dive' study considering 40 appeals decided between August 2018 and October 2019 quoted in a report by the Chief Inspector of Borders and Immigration.[4] However, this does seem to show a rise in win rates, attributed by the Home Office to *"changes in case law"* – which has been interpreted to mean the lines of reasoning by the courts following *KO (Nigeria)* [2018] UKSC 53.[5]

KO is a technical judgment which includes careful consideration of the provisions of the Nationality, Immigration and Asylum Act 2002. Whilst the Court does not agree with the position of the Secretary of State for the Home Department as put in that matter it does not follow that this was a *prima facie* interference with the enactment of the will of parliament, nor we suggest should the failure of any government in the Courts be seen as an inherent attack on the will or sovereignty of Parliament. Parliament is sovereign, however the executive is not. As noted by A. V Dicey the Executive Branch – the Government of the day - is considered as a matter of constitutional law to be bound by the statute law *as interpreted by the Courts*[6] so preserving the sovereignty of parliament over the executive branch. Parliament's sovereign status was again considered recently in the case of *Binaku* [2021] UKUT 34 (IAC). Where Parliament's intention and ability to make law was clearly acknowledged as superior to the powers of the Secretary of State to make secondary legislation, as bestowed by Parliament.[7] It is therefore clear that the Courts continue to give great weight to the will of Parliament when interpreting legislation – including the will of Parliament in passing the Human Rights Act.

Further, the Courts have shown great adherence to enacting the will of Parliament in extremely emotive circumstances – such as *LE (St Vincent and the Grenadines) v SSHD* [2020] EWCA Civ 505,

[4] Independent Chief Inspector of Borders and Immigration, *Inspection of the Home Office Presenting Officer Function: (November 2019 - October 2020)*, 2021, pg 45.
[5] Colin Yeo, 'Rare Statistics Show Rise in Number of Deportation Orders Upheld on Appeal', Free Movement, 13 January 2021, https://www.freemovement.org.uk/rare-statistics-show-rise-in-number-of-deportation-orders-upheld-on-appeal.
[6] Albert Dicey, *Introduction to the Study of the Law of the Constitution*, ebook (Indianapolis: Liberty Fund Inc, 1982), pg 271.
[7] Binaku (s. 11 TCEA; s. 117C NIAA; para 399D) [2021] UKUT 34 (IAC) (27 January 2021), accessed 28 February 2021, para 89

concerning the deportation of an individual who had served in the Royal Marines in Afghanistan, noting at paragraph 36:

> *Similarly, whatever one's own opinion as to the fairness or appropriateness of deporting a man who endured danger serving in this country's Armed Forces for fourteen years, the statutory regime is clear. Unless one or other of the Exceptions can be satisfied, the public interest in deporting foreign criminals will only be outweighed if the appellant can show "very compelling circumstances". Once it is accepted, as it rightly is by Mr Karnik, that military service without more will not always amount to such circumstances, one has to look at the circumstances of this appellant, his military service and family and personal life to determine whether they are very compelling. However regrettable it is for the appellant, in my judgment nothing in his particular life or military service amounts to such very compelling circumstances. That conclusion is not altered by the existence of the Covenant. Whilst it recognises the stresses imposed on family life by military service, it is silent about non-UK ex-service personnel who have committed criminal offences. Parliament has not created any statutory exception for foreign criminals who have served in the Armed Forces and the clear wording of the statute cannot be overridden by any general duty to ex-service personnel and their families contained in the Covenant. In all the circumstances, this appeal must be dismissed.*

Therefore, there is no evidence that the HRA is causing the courts to have difficulty enacting the will of Parliament in deportation cases, however the immigration law regime and its reliance on a combination of statute and secondary legislation tends to cause complexity and associated difficulties in interpretation.

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)?

We do not believe that there are any such instances. It is unclear why the amendment or repeal of section 3 is being proposed given this ensures that legislation is read and given effect to in a way that is compatible with Convention rights, and the Review states that

"The review will not consider the scope of the substantive rights scheduled to the Human Rights Act"[8]. It is difficult to see how changes to section 3, let alone its repeal, would not undermine the substantive rights protected by the Act. Section 3 should not be amended or repealed.

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

As stated above, section 3 should be neither amended nor repealed. It is unclear whether the government has identified the extent of what is being proposed here, which appears to be retrospective law making, however it is difficult to see how doing this would result in anything other than chaos.

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?

Between August 2019 and July 2020 there was one declaration of incompatibility made.[9] There have been a total of 43 in the 20 years since the HRA came into force in October 2000.[10] Again, this is a proposal without any evidence to support an assertion that there is a problem here. Further, of the 43 declarations of incompatibility that have been made:

• the government successfully appealed nine declarations with no further appeal possible

[8] https://www.gov.uk/guidance/independent-human-rights-act-review
[9] 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020 CP 347 December 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf page 29
[10] Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020 CP 347 December 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf page 30

• the government appealed but subsequently withdrew the appeal in *K (A Child) v SSHD* [2018] EWHC 1834 (Admin)

• the government successfully appealed another declaration of incompatibility in *The Secretary of State for the Home Department v R (on the application of) Joint Council for The Welfare of Immigrants* [2020] EWCA Civ 542.[11] Notably, given the assertions made in respect of "over-judicialising", in upholding the SSHD's appeal the Court of Appeal stated at paragraph 128 that: "*in the field of human rights, our courts have recognised that certain matters involving controversial issues of social and economic policy are by their nature more suitable for determination by the democratically-elected Parliament or the democratically-accountable executive than by the courts, such that, unless manifestly without reasonable foundation, their assessment should be respected (see, e.g., R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16; [2015] 1 WLR 1449 at [92]-[93] per Lord Reed JSC)*." The matter is currently under appeal to the Supreme Court.

Thirty of the declarations relate to provisions that have been amended by primary legislation, secondary legislation (including remedial orders).

A declaration of incompatibility is obviously useful, however it takes time and is often not an effective remedy for the individual claimant because of the operation of section 4(6). The effect of such a declaration is to acknowledge that human rights have been breached but to deny the individual claimant the meaningful protection of those rights. It does this to give effect to the sovereignty of Parliament. So while it is unclear how the "initial process of interpretation" would work in practice, it appears that it would operate to deprive individual claimants of the opportunity to assert their rights against a government that may be acting in breach of those rights. We therefore do not agree with the proposal.

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?

In response to this question, we refer to the article on the UK Constitutional Law Association's blog '*Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with*

[11] https://www.bailii.org/ew/cases/EWCA/Civ/2020/542.html

executive law-making'.[12] As detailed in the article, there have been 14 successful challenges to delegated legislation based on the Human Rights Act in past seven years, in the context of the thousands of statutory instruments that are made each year. We agree with the conclusion of the authors, which is as follows:

> *We have seen no clear justification for such an exception in the case of the HRA and it would run against the general recognition in the common law that, if anything, fundamental rights issues ought to attract enhanced judicial scrutiny (see* e.g. R v Ministry of Defence ex parte Smith *[1996] QB 517*). *In our view, the panel considering reform should—without clearer evidence and justification—be extremely wary of any claim that the HRA is a hinderance to delegated law-making. There are serious, well-documented problems with our system of delegated legislation that warrant reformist attention—the role of the courts under the HRA is not one of them.*

Again, there is no evidence to suggest that there is an issue here and our position is therefore that no change is required. The current position reflects the fact that subordinate legislation is made by the executive using powers delegated by Parliament. If the executive misuses those powers to create laws that infringe human rights, then Parliament has mandated that the courts address this through the Human Rights Act. The court's role in these cases is in substance no different from the ordinary application of basic public law principles (which pre-date the Human Rights Act) that secondary legislation must "be so drawn as not to conflict with statutory rights already enacted by other primary legislation" (*R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 293 *per* Waite LJ). As Singh LJ has indicated, "[t]his is simply an example of the fundamental principle that the executive cannot act in a way which is inconsistent with the will of Parliament" (*R (Al-Enein) v Secretary of State for the Home Department* [2020] 1 WLR 1349 at paragraph 28).

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?

[12] J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021) https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/

The UK courts do not appear to be taking any less restrictive approach than the Strasbourg courts, so again there is no case for change here. The UK should uphold human rights regardless of jurisdiction, failing to do so will inevitably result in a loss of authority on the world stage to address the abuses of other States. Therefore, if anything, jurisdiction should be widened in these situations.

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?

The current process is that a draft order is first considered by the Joint Committee on Human Rights, and then must be laid before Parliament and at least 60 days after that date the House of Commons and the House of Lords must approve the draft order. There is provision for urgent matters.

The primary issue with this process is that the remedying of the relevant law is left in the hands of the government to bring to Parliament. The Secretary of State may delay the bringing forward of a remedial order for quite some time. For example, the Secretary of State has accepted that an amendment is necessary to section 50(9A) of the British Nationality Act 1981 since she withdrew her appeal against the declaration of incompatibility in *K (A Child) v SSHD* [2018] EWHC 1834 (Admin) in November 2019. It is now some 16 months later and no remedial order has been brought, although a temporary fix is in place. A similar delay in respect of the British Nationality Act 1981 (Remedial) Order 2019. Part of that Order was to amend the law following the declaration of incompatibility in *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, a case concerning historic discrimination in nationality laws as they related to unmarried parents. The judgment was handed down on 19 October 2016, however the Order only entered into force on 25 July 2019.

The wide discretion conferred on the government to bring forth legislation to remedy the incompatibility identified by the court can also lead to situations where the remedial order is unduly narrow. When the draft version of the British Nationality Act 1981 (Remedial) Order 2019 was presented to Parliament, ILPA raised concerns that it did not remove the requirement that children who are entitled to registration as British citizens are subject to the good character test.[13] ILPA also argued the legislation was not following the spirit of the *Johnson* decision. The Joint Committee on Human Rights, in its first report on the draft Order, noted the variety of issues that needed to be

[13] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/draft-british-nationality-act-1981-remedial-order-2019/written/96914.pdf

addressed that related to the Order and recommended that the government bring forward a Bill to address these issues rather than proceed to do so through the Order. However, the government appeared to take the view that this was unnecessary on the basis of a narrow view of what the courts had required in their declarations of incompatibility while simultaneously acknowledging the concerns raised. Ultimately, therefore, the JCHR recommended the approval of the draft Order notwithstanding that it dedicated a significant amount of time in its second report addressing various issues that ought to have been remedied in the same legislation.[14]

This example shows that the remedial Order process can be a weak tool in meaningfully responding to human rights issues identified by the court. The point of the declaration of incompatibility process is to draw to the attention of Parliament where the laws it has passed have led to the violation of human rights so that Parliament can decide how best to address it. In reality, however, because of the way the Human Rights Act is constructed and because of the dominance of the executive in the passage of delegated legislation, Parliament's role is generally one of rubber stamping rather than of having any material input into responding to the issues identified by the court. This does not represent a good governance model.

3 March 2021

[14] https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1943/194305.htm#_idTextAnchor005