Response to the Independent Human Rights Act Review (IHRAR) call for evidence

Introduction

1. Young Legal Aid Lawyers ('YLAL') is a group of aspiring and junior lawyers committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. We have around 3,500 members including students, paralegals, trainee solicitors, pupil barristers and qualified junior solicitors and barristers throughout England and Wales.

2. We believe that the provision of good quality, publicly funded legal assistance is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

3. Many of our clients rely on the Human Rights Act 1998 ('HRA') to access justice and enforce their rights. To inform our response to the Independent Human Rights Act Review ('IHRAR'), YLAL hosted a virtual roundtable on 27 January 2021 featuring a range of junior human rights practitioners and policy professionals. Our panellists were: Aarif Abraham, Garden Court North; Alice Cullingworth, Rook Irwin Sweeney; Donnchadh Greene, Doughty Street Chambers; Zehrah Hasan, Garden Court Chambers; Mark Hylands, Deighton Pierce Glynn; Jessica Jones, Matrix Chambers; Barbara Likulunga, Bristol Law Centre; Emma McClure, Swain and Co and YLAL committee; Stephanie Needleman, JUSTICE; Bethany Shiner, Middlesex University; Eilidh Turnbull, British Institute of Human Rights; Katy Watts, Liberty; and Siân Pearce, Asylum Justice. Whilst the discussion at this event has informed our submission, and the submission may refer to their contributions, this submission is from YLAL and not attributable to any of the individual panellists or any organisation of which they are a member.

4. YLAL's position is that the HRA generally strikes a fair balance between the rights of the individual and duties on the State. In our view, there is no evidence to suggest that the reform envisaged in the IHRAR's terms of reference and call for evidence is either necessary or desirable. As such, YLAL's position is reform of the HRA should not be a priority for the Government. Instead, the Government should focus resources on addressing the crisis in the justice system which has arisen from sustained underfunding by successive governments.

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

5. YLAL's position is that the relationship between domestic courts and the ECtHR functions well.

6. The call for evidence asks how the duty to 'take into account' ECtHR jurisprudence has been applied in practice and whether there is a need for any amendment of s2 HRA.

7. Section 2 of the HRA is in relation to the interpretation of Convention rights and provides that when determining a question which has arisen in connection with a Convention right, a court or tribunal must take into account, amongst other things, any judgement, decision, declaration or advisory opinion of the ECtHR, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

8. In YLAL's view, s2 operates effectively and does not need to be amended. Domestic courts follow clear and consistent ECtHR jurisprudence to the extent that it is relevant to the matters at hand. However, in applying s2, domestic courts have departed from ECtHR jurisprudence where it has been deemed appropriate. In particular, where there is no clear and consistent line of authority, where the facts are materially different or where domestic courts consider that the ECtHR has misapplied or failed to understand an aspect of domestic law.***[1]***

9. The default position regarding the duty to take into account ECtHR case law was summarised by Lady Hale in *R. (on the application of Hallam) v Secretary of State for Justice****[2]***:

> *'In general, where it is clear that the European Court of Human Rights would find that the United Kingdom has violated the Convention in respect of an individual, it is wise for this court also to find that his rights have been breached. The object of the Human Rights Act 1998 was to "bring rights home" so that people whose rights had been violated would no longer have to go to the Strasbourg court to have them vindicated.'*

10. However, domestic courts have been clear that they can depart from ECtHR jurisprudence under s2 HRA. For example, in *R (Saunders) v Independent Police Complaints Commission****[3]*** it was held that:

> *'Decisions of the European Court of Human Rights on the facts of a particular case ought not to be treated as a binding precedent, even in a case where the material facts appear to be similar. The only authoritative parts of a judgment are the statements of principle which it expounds.'*

11. This 'practical' approach to s2 HRA was endorsed by the UK Supreme Court in *Manchester City Council v Pinnock (No 1),****[4]*** where Lord Neuberger held**:**

> *'This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in a constructive dialogue with the European court which is of value to the development of Convention law. …Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle …it would be wrong for this court not to follow that line.'*

12. The call for evidence also asks whether, 'when taking into account the jurisprudence of the ECtHR, domestic courts and tribunals have approached issues falling within the margin of appreciation permitted to States under that jurisprudence, and whether any change is required.'

13. YLAL's position is that if any change of approach is required it is for courts to be less deferential and to recognise that domestic courts are well-placed to determine issues in which Strasbourg confers a wide margin of appreciation.

14. It is important to note that the 'margin of appreciation' in ECtHR jurisprudence refers to the deference provided to the State, which includes domestic courts, rather than just a State's executive and legislature.

15. As set out in *Handyside v United Kingdom*, a State's courts and legislative and executive bodies are '*by reason of their direct and continuous contact with the vital forces of their countries*'***[5]*** more capable of assessing whether ECHR rights have been violated.

16. The breadth of the margin of appreciation afforded by the ECtHR is context sensitive. In cases concerning an intimate aspect of an individual's private life,***[6]*** race discrimination***[7]*** or where there is a significant degree of consensus on an issue among States, the ECtHR has adopted a narrower margin of appreciation. However, greater deference is shown to States in issues of national security,***[8]*** socio-economic policy,***[9]*** and where there is divergent practice among States.***[10]***

17. YLAL notes that domestic courts have (wrongly) applied the margin of discretion as a doctrine of deference to the executive and the legislature. As set out by Lord Mance in *Re Recovery of Medical Cost for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, SC at [54]:

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

18. The factors that inform the breadth of the margin of appreciation shown by domestic courts reflect those of the ECtHR. Domestic courts have shown particular deference where there are 'political questions' and have adopted *'the unintrusive approach of the European court'.**[11]***

19. The call for evidence further asks whether the approach to 'judicial dialogue' between the domestic courts and ECtHR is effective. YLAL's view is that while both domestic courts and the ECtHR recognise the importance of robust judicial dialogue, stronger mechanisms are required to ensure its efficacy.

20. Judicial dialogue most commonly arises where domestic courts consider the ECtHR to have erred on a significant issue of interpretation of Convention rights or the breadth of the margin of appreciation or where domestic courts would welcome greater clarity and consistency from the ECtHR's.

21. Judicial dialogue is a 'two-way' process and has been effective to the extent it has been practically possible. For example, in *Horncastle*, the UK Supreme Court invited the ECtHR to revisit its approach to hearsay evidence under Article 6 ECHR. Subsequently, the Grand Chamber of the ECtHR in *Al-Khawaja v United Kingdom **[12]*** adopted the UK's approach, with Judge Bratza crediting the '*judicial dialogue*" between domestic courts and the ECtHR for this shift.

22. However, the mechanisms for judicial dialogue need strengthening. First, the UK should ratify Protocol No 16. This would provide for a mechanism whereby the ECtHR could give advisory opinions on questions of principle relating to the interpretation or application of the ECHR. This would allow real-time judicial dialogue which cannot presently happen. Second, the ECtHR needs greater resources from States to address its significant backlog of cases which inhibit effective judicial dialogue. Third, there should be more opportunities for informal dialogue between domestic courts and the ECtHR. This happens to some extent with high level meetings between judges and international organisations as well as through extrajudicial speeches and writing. However, more resource should be dedicated to creating forums for this discourse.

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

23. It is YLAL's view that the HRA strikes the appropriate balance between the judicial, executive and legislature, and strengthens the principle of Parliamentary sovereignty.

24. The call for evidence asks whether there should be any changes to the framework established by ss 3 and 4 HRA. In YLAL's view no changes should be made.

25. S3(1) HRA provides that '*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'.*

In *Ghaidan v Godin-Mendoza*, the House of Lords noted that the extent the s3 interpretative duty is context sensitive: [13]

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

26. However, the House of Lords in *Ghaidan* was clear about the boundaries of s3 HRA:

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

27. It is worth noting that a significant volume of legislation that is interpreted by domestic courts through the lens of s3 HRA pre-dates the HRA. Parliament's intention in passing the HRA was to 'bring rights home' and the s3 interpretative obligation allows domestic courts to ensure an HRA compliant reading without requiring Parliament to revisit a vast body of legislation to ensure its compatibility with the ECHR.

28. As set out in *Ghaidan,* where courts cannot properly construe a piece of legislation in a Convention compatible way, they will make a declaration of incompatibility under s4 HRA. The call for evidence suggests that the HRA might be reformed to increase the use of s4 and limit reliance on s3 HRA. In YLAL's view, such a reform would be a serious error.

29. YLAL recognises the importance of having s4 as a mechanism for referring Convention incompatible legislation for reconsideration. However, it is well-established that s4 is not an effective remedy. As noted in *Burden v United Kingdom**[14]***

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

30. As s4 is not an effective remedy then this could lead to an increase of applications directly to the ECtHR instead of Convention issues being determined by domestic courts. That would fundamentally undermine the original intention of the HRA to 'bring rights home'.

31. The call for evidence asks about the approach of domestic courts to tribunals when they have established that subordinate legislation is incompatible with the HRA.

32. In YLAL's view, domestic courts and tribunals are too cautious and rarely exercise their powers to quash HRA incompatible subordinate legislation. Instead, they prefer to make declarations about unlawful application of regulations to an individual's case.

33. The reticence of domestic courts in this regard is illustrated in the decision in the landmark case of *Mathieson v Secretary of State for Work and Pensions****[15]***. This case concerned whether the rule which suspends payment of Disability Living Allowance (DLA) to disabled children once they have been in hospital for 84 days breached the human rights of Cameron Mathieson. The Court did not go as far as the Claimant wanted in terms of relief (at [49]):

> *"Mr Mathieson seeks further relief which the Secretary of State energetically opposes. First, he seeks a formal declaration that the Secretary of State violated Cameron's human rights. The First-tier Tribunal had no power to make a formal declaration and it appears that, by virtue of sections 12(4) and 14(4) of the Tribunals, Courts and Enforcement Act 2007, the jurisdiction of the Upper Tribunal and of the Court of Appeal in relation to Mr Mathieson's successive appeals was no wider than that of the First-tier Tribunal. It may well be that this court is not similarly confined but a formal declaration would seem to add nothing to the conclusions articulated in (a) and (c) of para 48 above. Second, more controversially, Mr Mathieson asks this court to discharge its interpretative obligation under section 3 of the 1998 Act by somehow reading the provisions for suspension of payment of DLA in regulations 8(1) and 12A(1) of the 1991 Regulations so as not to apply to children. In my view however it is impossible to read them in that way. Anyway, as the Secretary of State points out, it may not always follow that the suspension of payment of a child's DLA following his 84th day in hospital will violate his human rights. Decisions founded on human rights are essentially individual; and my judgment is an attempted analysis of Cameron's rights, undertaken in the light, among other things, of the extent of the care given to him by Mr and Mrs Mathieson at Alder Hey. Although the court's decision will no doubt enable many other disabled children to establish an equal entitlement, the Secretary of State must at any rate be afforded the opportunity to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children following their 84th day in hospital."*

34. The caution of courts and tribunals in quashing incompatible subordinate legislation is further illustrated in *C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN)*.[16] This case concerned regulations that provide for an exception to the definition of disability under the Equality Act 2010, so that where someone has a disability that has a 'tendency to physical abuse' that does not constitute a disability. The Upper Tribunal adopted the following cautious approach:

> *'Identifying the subordinate legislation which has a discriminatory effect (namely regulation 4(1)(c) of the 2010 Regulations) is a perfectly straightforward task in this case. It follows that, under the provisions of section 6(1) of the Human Rights Act, it would be unlawful for me to do anything other than to decide that that regulation should be disapplied in the circumstances of this case. 101. Accordingly, whether regulation 4(1)(c) is read down under section 3 of the Human Rights Act or whether it is disapplied, given the tribunal's findings of fact, L meets the definition of a disabled person for the purposes of section 6 of the Equality Act.'*

35. Decision-making of courts and tribunals in this context is characterised by judicial deference. There is little evidence of judicial overreach. In the context of the significant volume of subordinate legislation made each year very few challenges to subordinate legislation are brought and of those challenges brought the vast majority are unsuccessful. Courts and tribunals tend to grant the executive a significant degree of flexibility. Successful challenges tend to be of subordinate legislation that is incompatible with the HRA in similar ways.

36. Parliamentary oversight of subordinate legislation is weak, with statutory instruments rarely even being debated. This is especially the case for legislation passed under the negative resolution procedure. Challenges to subordinate legislation are a vital tool to achieve accountability as often the scrutiny subordinate legislation receives when it is challenged is the first substantial scrutiny it has ever received.

37. In YLAL's view, where courts and tribunals have quashed subordinate legislation, this has had greater systemic impact, and has often eventually been recognised as beneficial. For example, in the case of *RF v Secretary of State for Work and Pensions****[17]*** in which subordinate legislation that discriminated against Personal Independent Payment (PIP) claimants with mental health conditions was quashed. The government decided not to appeal this decision. Instead, it decided to implement the judgment and develop PIP in a non-discriminatory way. The Minister for Disabled People, Health and Work confirmed that the DWP would review 1.6 million PIP claims following the judgment.

38. The call for evidence further asks when HRA applies to acts of public authorities taking place outside the territory of the UK and whether the approach should be changed.

39. The HRA applies to acts of public authorities taking place outside the territory of the UK in extremely limited circumstances. The law is set out in *Al-Skeini v United Kingdom; Al-Jedda v United Kingdom.**[18]*** The ECtHR held:

> *'To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts. (para 132) (emphasis added)*
>
> *[…]*
>
> *It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored."' (para 137)*

40. Further, in *M v Denmark*,[19] the ECtHR held that:

> *'.an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention.' (para 1) (emphasis added)*

41. The law is clear and the threshold for application is extremely high. The starting position is that ECHR only has territorial jurisdiction but may apply where UK is exercising effective control over the individual or the decision under challenge or is exercising public powers in lieu of the foreign country.

42. In YLAL's view, there is a strong case for reforming the HRA to broaden its territorial reach. The Government has a policy of treating Article 2 and 3 as applying extraterritorially. However, the Government regularly settles these types of claim to avoid 'unhelpful' case law on this point. YLAL considers that other rights set out in schedule 1 HRA need to apply extraterritorially. For example, Article 4 which prohibits trafficking and forced labour does not currently extend beyond the UK which has created a lacuna in protections for victims of trafficking and modern slavery.

Conclusion

43. It is YLAL's view that there is no case for reforming the HRA in the ways suggested by the terms of reference or the questions in the call for evidence of the IHRAR. In our view, domestic courts have

been too deferential to the executive and the legislature and the UK needs to provide increased resources to the ECtHR to improve its efficacy and to truly 'bring rights home' in the UK.

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References

[1] See *R. v Horncastle & Others* [2009] UKSC 14, [2010] 2 All ER 359

[2] [2019] UKSC 2; [2019] 2 W.L.R. 440 at [76]. See also see *R (Alconbury Developments) v Secretary of State for Transport and the Regions [2001] UKHL 23 [2003] 2 AC 29* at [26].

[3] [2008] EWHC 2372 (Admin) [2009] 1 All ER 379 at [40]

[4] [2010] UKSC 45 [2011] 2 AC 104 at [48]

[5] [1979] 1 EHRR 737at [48]

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

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

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

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

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

[11] *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68

[12] (2012) 54 EHRR 807

[13] [2004] UKHL 30:

[14] (App No. 13378/05, 12 December 2006):

[15] [2015] UKSC 47

[16] [2018] UKUT 269 (AAC) ; [2019] AACR 10

[17] [2017] EWHC 3375 (Admin)

[18] (Application No. 55721/07) (Application No. 27021/08).

[19] (1992) (case no. 17392/90) the ECtHR