The Rt. Hon. Lord Reed
President of the Supreme Court of the United Kingdom

Response to a Call for Evidence
produced by
the Independent Human Rights Act Review

Introduction

1. I am grateful for the opportunity to respond on behalf of the Supreme Court to the call for evidence produced by the Independent Human Rights Act Review.

2. It would not be appropriate for a serving judge to comment on the issues of public policy which are involved in this review, or on the judicial decisions on the interpretation of the Human Rights Act 1998 ("HRA") which are relevant to those issues. My intention, instead, is to provide objective factual evidence which may assist the Independent Review in its task.

3. I note that the Independent Review is proceeding on the footing that the UK will remain a signatory to the European Convention on Human Rights ("ECHR"), and is not considering changes to the substantive Convention rights set out in the ECHR and in Schedule 1 to the HRA. It will therefore remain open to individuals who believe that their Convention rights have been violated to complain to the European Court of Human Rights ("ECtHR") if the violation is not remedied at the national level.

4. I focus my response on the two themes set out in the call for evidence, namely, the relationship between domestic courts and the ECtHR, and the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

5. In summary, the key points that I wish to make are as follows:

a. The relationship between the domestic courts and the ECtHR appears to me to have developed in the way in which Parliament intended when it enacted the HRA. The HRA was designed to provide a means for violations of Convention rights to be remedied within the domestic legal system. Since the HRA came into effect, the number of cases going to the ECtHR from the UK has fallen and is now the lowest by population of all 47 contracting states. Cases in which the UK has been held to have violated the ECHR have become rare: an average of only 2.5 per year in the period 2017-2020.

b. In my view, there is an appropriate and effective degree of dialogue between the domestic courts and the ECtHR. The ECtHR jurisprudence has been increasingly influenced by domestic decisions, especially those of the Supreme Court.

c. The HRA has had an effect on the relationship between the judiciary, the executive and the legislature because it requires domestic courts, including the Supreme Court, to give legal rulings on the impact of Convention rights on legislation and Government decisions. In applying the HRA, as in public law more generally, the courts are concerned solely with the question whether the measures adopted by public bodies comply with legal standards (in the context of the HRA, standards laid down in the HRA), and not with their political aspects. To a substantial degree, the application of Convention rights turns on an assessment of whether particular legislative or executive measures are proportionate means of achieving a legitimate aim. I have made clear in my own judgments that a key element of this assessment is the exercise of appropriate restraint by the courts, based on recognition of the constitutional role of the judiciary and respect for the constitutional roles of the democratically accountable branches of government.

d. The domestic courts have generally considered that they should not press the application of Convention rights further than the ECtHR would go. However, there are cases in which domestic judges have interpreted and applied those rights in a more expansive way than the ECtHR, where contracting states enjoy a margin of appreciation.

e. The interpretative obligation imposed on the courts by section 3(1) of the HRA requires them to depart from their usual approach to statutory interpretation, and the way in which section 3(1) was interpreted by the House of Lords has given it a particularly strong effect. However, a weakening of that obligation would be liable to result in an increase in the number of declarations of incompatibility made under section 4 of the HRA, and an increase in the number of cases taken to the ECtHR.

f. If the HRA were to be amended in a way which reduced the ability of domestic courts to satisfy Convention rights to the standard required by the ECtHR, that would be liable to result in an increase in the flow of cases from the UK to the ECtHR, and an increase in the number of complaints which were upheld there.

Theme One: the relationship between domestic courts and the ECtHR

General comments

6. The relationship between domestic courts and the ECtHR appears to me to have developed in the way in which Parliament intended when it enacted the HRA. As explained in the White Paper which preceded it,[1] the HRA was intended to provide a means for complaints of violation of Convention rights to be remedied within our domestic legal systems, and to reduce the need for individuals to complain to the ECtHR. By population, the UK now has the fewest applications of all the 47 contracting states.[2] The number of cases going to the ECtHR from the UK for a full hearing has also fallen over the 20 years in which the HRA has been in force.[3] Cases in which the UK has been held by the ECtHR to have violated the ECHR have fallen from an average of 22 per year in the period 2001-2004 (when pre-HRA cases were working their way through the system in Strasbourg) to an average of 2.5 per year in the period

[1] *Rights Brought Home: The Human Rights Bill,* October 1997, Cm 3782.
[2] Ministry of Justice, *Responding to human rights judgments, Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020,* December 2020, CP 347, p 9, https://www.gov.uk/government/publications/responding-to-human-rights-judgments-2019-to-2020. In 2017 UK cases comprised 0.2% of the ECtHR's case load (the corresponding figure ten years earlier was 1.7%): see the evidence of the Bingham Centre for the Rule of Law to the Joint Committee on Human Rights (24 September 2018), para 5, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/twenty-years-of-the-human-rights-act/written/90241.htm. The UK comprises 8% of the population of the contracting states.
[3] Between 2010 and 2019, the number fell by 87%: see the Ministry of Justice report cited at fn 2, p 9.

2017-2020.[4] As explained below, ECtHR decisions have been increasingly influenced by Supreme Court decisions and are better informed by the UK domestic context.

(i) The duty to "take into account" the case law of the ECtHR

7. The duty under section 2 of the HRA to "take into account" the case law of the ECtHR enables domestic courts to adopt a nuanced approach which seeks to reconcile two objectives. First, since the essential aim of the HRA is to implement the ECHR in our domestic law, and only the ECtHR can give an authoritative interpretation of the ECHR, domestic courts have generally proceeded on the basis that they should be guided by the case law of the ECtHR. Secondly, however, domestic courts have not thought it desirable that they should automatically follow every ECtHR judgment, bearing in mind that some judgments may be subject to criticism, and may not ultimately be endorsed by the Grand Chamber.

8. The courts have therefore adopted a general principle, in applying section 2 of the HRA, that in interpreting and applying the Convention rights in the HRA the domestic courts should ordinarily, but not invariably, follow the interpretation and application of the ECHR by the ECtHR. The principle is often known as the *Ullah* principle, after the decision of the House of Lords in which it was set out by Lord Bingham (*R (Ullah) v Special Adjudicator*),[5] and it has been affirmed in many later cases at the highest level. As held in the unanimous judgment of a bench of nine Supreme Court Justices in *Pinnock v Manchester City Council*:

> "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 constructive dialogue with the European court which is of value to the development of Convention law: see eg *R v Horncastle* [2010] 2 AC 373. Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. But we are not actually bound to do so or (in theory at least) to follow a decision of the Grand Chamber. As Lord Mance

[4] These figures are taken from the statistics for ECHR Violations by State on the ECtHR website, www.echr.coe.int.
[5] [2004] UKHL 26; [2004] 2 AC 323.

> pointed out in *Doherty v Birmingham City Council* [2009] 1 AC 367, para 126, section 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."[6]

(ii) Issues falling within the margin of appreciation

9. On some occasions, however, domestic judges have considered that they should interpret and apply Convention rights in a more expansive way than the ECtHR would interpret and apply the ECHR if it had to address the same question. This issue has arisen in contexts where the ECtHR allows a contracting state a margin of appreciation in the application of a Convention right, with the result that it would find no violation, but domestic judges have not accepted that they should allow an equivalent margin of appreciation or discretionary area of judgment to the relevant public authority. The leading example is the decision of the majority of the House of Lords in *Re G (Adoption: Unmarried Couple)*,[7] which concerned legislation in Northern Ireland which prevented the adoption of children by unmarried couples, at a time when it was unclear whether such a ban would be held by the ECtHR to violate the ECHR. A similar approach was followed in some later judgments.[8] In such cases, the domestic court has been prepared to find that a Convention right has been violated, although the ECtHR would not find that there was any breach of the ECHR.

10. There are, however, other authorities in the case law of the House of Lords and the Supreme Court which have sought to emphasise that care should be taken not to press the

[6] [2010] UKSC 45; [2011] 2 AC 104, para 48.
[7] [2008] UKHL 38; [2009] 1 AC 173.
[8] In some of the judgments in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657, which concerned legislation prohibiting the assistance of suicide; by a majority of the court in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27; [2018] HRLR 14, which concerned the law of abortion in Northern Ireland; and in *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1, which concerned discrimination on the basis of sexual orientation.

application of Convention rights further than one can be reasonably confident the ECtHR would go: see, eg, *Ambrose v Harris*,[9] *Smith v Ministry of Defence*[10] and *Kennedy v Charity Commission*.[11]

(iii) Judicial dialogue

11. The perception of the Supreme Court is that there is an appropriate and effective degree of dialogue with the ECtHR, both formal and informal, regarding the application of Convention rights in the circumstances of the UK. At a formal level, the approach set out in *Pinnock*[12] has three relevant consequences. First, by generally following ECtHR case law, domestic courts minimise the number of well-founded complaints to the ECtHR, and instil confidence in that court that the ECHR has been faithfully applied at the domestic level. As its confidence has grown that domestic courts are applying Convention rights in accordance with its own standards and in the light of its own case law, the ECtHR's stated position is now one of respect for the decisions of national courts when they apply Convention rights and find they have not been violated. As it said in the case of *Ndidi v United Kingdom*, in relation to the deportation of a foreign criminal:

> "… the court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so …"[13]

Secondly, domestic courts subject the case law of the ECtHR to a rigorous and critical analysis. The judgments of the Supreme Court, in particular, are studied by the ECtHR, and this in itself

[9] [2011] UKSC 43; [2011] 1 WLR 2435, paras 14-20 (Lord Hope), 73 and 86 (Lord Brown), and 101-105 (Lord Dyson).
[10] [2013] UKSC 41; [2014] AC 52, para 43.
[11] [2014] UKSC 20; [2015] AC 455, paras 145-148.
[12] Para 8 above.
[13] (App No 41215/14), judgment of 14 September 2017, [2017] 9 WLUK 231 para 76.

has an influence on its decisions. Thirdly, when UK courts decline to follow the case law of the ECtHR, and explain in their judgments their reasons for doing so, their concerns are considered with a corresponding degree of seriousness. The cases of *Al-Khawaja v United Kingdom*,[14] *Animal Defenders International v United Kingdom*[15] and *S v Denmark*[16] are examples.

12. In addition to dialogue through the medium of judgments, there are also well established dialogues at an informal level between senior UK judges and the judges of the ECtHR. There is an annual meeting, held alternately in Strasbourg and in one of the three jurisdictions of the UK, at which recent developments in the case law of the ECtHR, and difficulties arising from its case law, are discussed. These annual discussions are supplemented by other meetings between senior members of the ECtHR and senior UK judges.

13. The Government's nomination of domestic judges to sit on the ECtHR on an ad hoc basis is also valuable in promoting mutual understanding and respect.[17] In addition, the UK judge on the ECtHR plays an important role in ensuring that the domestic legal systems, and the relevant social and political context, are understood.

14. The dialogue between domestic courts and the ECtHR, exemplified in the cases I have mentioned, is most likely to be preserved and strengthened if domestic courts are seen by the ECtHR to be seeking to apply Convention rights in the same way as they would be applied by the ECtHR, with due allowance for local conditions. If domestic courts and the ECtHR are not speaking the same language in terms of the application of Convention rights, dialogue between them is unlikely to be effective.

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[14] (2012) 54 EHRR 23. In this case, the Grand Chamber (an enlarged formation of the ECtHR in which it takes its most important decisions) departed from the approach which had been adopted by the ECtHR to UK legislation designed to enable hearsay evidence to be admitted in criminal proceedings where witnesses are unable to give evidence in person, for example as a result of their death or intimidation. The Grand Chamber did so in the light of the criticisms of the ECtHR's reasoning which had been made by the Supreme Court in *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

[15] (2013) 57 EHRR 21. In this case, the Grand Chamber modified its approach to political advertising in the light of the House of Lords' decision in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312.

[16] (2019) 68 EHRR 17. In this case the Grand Chamber revisited the ECtHR's approach to preventive detention, in a case brought against Denmark, expressly in the light of the Supreme Court's critique of its case law in *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9; [2017] AC 256. The ECtHR later applied its revised approach to dismiss a complaint against the UK arising from the Supreme Court's decision: *Eiseman-Renyard v United Kingdom* (2019) 68 EHRR SE12.

[17] I sat on the ECtHR most recently in 2018, and Lady Dorrian, Scotland's second most senior judge, sat there during 2019.

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

15. The particular questions asked by the Independent Review are matters of legislative policy on which the Supreme Court is neutral. However, it may assist the Independent Review if I give an indication of the perspective of the Supreme Court where it has been aware that the HRA has had an impact on the relationships between Parliament, the Government and the courts. I would identify six areas.

(i) The interpretative obligation under section 3 and the boundary between section 3 and section 4 (declarations of incompatibility)

16. The HRA is carefully framed to respect Parliamentary sovereignty. It does not give the courts power to set aside or disapply primary legislation. By section 3(1) the courts are only given a power to read and give effect to primary legislation so as to make it compatible with Convention rights so far as it is "possible" to do so. If that is not possible, they are required to treat the legislation as having full force and effect, even if they consider it incompatible with Convention rights; and that is what they do.

17. However, in enacting section 3(1) of the HRA, Parliament has imposed upon the courts an approach to statutory interpretation which departs from their usual approach, which is based on ascertaining what Parliament intended when it enacted the provision in question. In doing this, it has created a system under which domestic courts are required to review primary legislation to check that it complies with legal standards which Parliament has defined by reference to the ECHR. Section 3(1) has been interpreted as imposing an especially strong interpretative obligation. The leading authority is the decision of the House of Lords in *Ghaidan v Godin-Mendoza.*[18] As interpreted in that case, section 3(1) gives the court latitude to read in words or read down the language used in a statute to produce an interpretation compatible with Convention rights, unless to do so would contradict a fundamental feature of the legislative regime. It can do so in the absence of any ambiguity. The court is therefore authorised by section 3(1), as so interpreted, to "construe" legislation so as to produce a result

[18] [2004] UKHL 30; [2004] 2 AC 557.

which is compatible with Convention rights, even if the result is not what Parliament intended when it enacted the legislation in question. A construction arrived at in this way may have significant consequences of a general nature, but is the result of legal argument in the particular case which is before the court. It should be added that the Government, as a litigant, usually invites the court to apply section 3(1) in this way, if necessary,[19] rather than have a declaration of incompatibility made against it, and have to consider the legislative amendment of the provision in question.

18. To decide whether the interpretative obligation under section 3(1) comes into play, the court first has to decide what the meaning of the statutory provision is according to ordinary canons of construction; then it has to compare that meaning with what Convention rights would require in that particular context; and if there is a mismatch, it has to decide whether a conforming interpretation is "possible" pursuant to section 3(1). If a conforming interpretation is not "possible", the court gives full effect to the statute as law, but may issue a declaration of incompatibility under section 4.[20] If a declaration of incompatibility is made, that triggers the procedure under Schedule 2 to the Act whereby a Minister may make a remedial order (by laying it before Parliament) to amend legislation to remove the incompatibility. In other words, the boundary between section 3 and section 4 is the boundary between judicial "interpretation" of a statutory provision to produce a construction which is not what Parliament intended but is compatible with Convention rights, and amendment of an incompatible statutory provision via the political process. Of course, if pursuant to section 3(1) a court produces a construction of a statutory provision which the Government regards as unacceptable, it can seek to change this by introducing amending legislation in Parliament.

19. Before a declaration of incompatibility is made, by virtue of section 5 notice has to be given to the Government so that it has an opportunity to appear in the proceedings to argue that no such declaration should be made, either because there is no mismatch between the ordinary meaning of the statute and Convention rights or because any such mismatch can and should be corrected by application of the interpretative obligation in section 3(1). There is no equivalent

[19] *Ghaidan* was itself an example of the Government's adopting this approach. Another well-known example is *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, concerned with control orders.

[20] During the 20 years since the HRA came into force on 2 October 2000 until the end of July 2020, 43 declarations of incompatibility have been made, of which 9 have been overturned on appeal, and another 5 related to provisions which had already been amended by primary legislation at the time of the declaration: see the Ministry of Justice report cited at fn 2, p 30. Three of those declarations of incompatibility were made by the Supreme Court: pp 33-34.

requirement to give notice before a conforming interpretation is sought pursuant to section 3(1). However, in cases at the level of the Supreme Court, the relevant government department is given permission to intervene if some significant issue of interpretation arises by reason of the potential application of section 3(1).

20. Three points emerge from this explanation of the scheme of sections 3 and 4. First, pursuant to section 3, the courts are required to become involved in a process of what is, in substance, the modification of a statutory provision. If, instead, a declaration of incompatibility is made, the question of amendment is addressed within a political and Parliamentary process. This highlights the role which the strength of the interpretative obligation in section 3(1) plays in setting the boundary between judicial proceedings and the political process for the amendment of legislation which is not compatible with Convention rights. It is a matter for Parliament where that boundary should be set and I express no view about that. A range of different models is available regarding how strongly the interpretative obligation is set. It may be observed, for example, that in *Ghaidan*, Lord Steyn contrasted the interpretative obligation under section 3(1) with the somewhat weaker interpretative obligation under the equivalent New Zealand human rights legislation.[21]

21. In considering the merits of different models for section 3(1), however, it is necessary to bear in mind the international dimension. The ECtHR has held that a declaration of incompatibility does not constitute an effective remedy for the purposes of the requirement under article 35(1) of the ECHR that domestic remedies must be exhausted before an application can be made to the ECtHR: see the judgment of the ECtHR Grand Chamber in *Burden v United Kingdom*,[22] and the Chamber judgment in *MM v United Kingdom*.[23] Therefore, if the interpretative obligation in section 3(1) is made less strong, thereby leading to more cases having to be dealt with by declarations of incompatibility under section 4, the effect is likely to be that domestic courts may more often be cut out of the process of considering the application of Convention rights within the domestic legal system. Lawyers acting for individuals who complain about breach of their Convention rights will more readily be able to advise that their only remedy at national level is a declaration of incompatibility, and on that basis complaints may be made directly to the ECtHR.

[21] [2004] UKHL 30; [2004] 2 AC 557, para 44.
[22] (2008) 47 EHRR 38.
[23] (App No 24029/07), judgment given 13 November 2012, [2012] 11 WLUK 360.

22. Secondly, it may be that a more effective procedural mechanism could be put in place to ensure that government departments have the opportunity to be involved from the outset in cases where section 3(1) is to be invoked, and can provide the court with better information about the policy ramifications of what it is being asked to do under that provision. It may be possible to extend the notice requirement in section 5 from applications to invoke section 4 to include also applications to invoke section 3. However, I should point out that this could be cumbersome. The range of cases in which section 3(1) is invoked in legal argument is very wide, and it is not always possible to anticipate when resort to it may or may not be required to produce a particular interpretation of a legislative provision. If a notice requirement were introduced, government departments might find themselves burdened with notices issued by claimants on a precautionary basis. Such a procedural mechanism might also have the effect of slowing down litigation and the resolution of cases to a considerable, and potentially unacceptable, degree.

23. Thirdly, in view of the process of reasoning explained above, it is difficult to see how any alteration in the strength of the interpretative obligation under section 3 would, in principle, remove discussion of the effect of Convention rights from the courts. The courts would continue to have to produce judgments which discussed the effect of Convention rights in order to see whether there was any mismatch between those rights and primary legislation which might call for the application of section 3 or for a declaration of incompatibility under section 4.

(ii) Domestic applications of Convention rights

24. A particular impact on constitutional relationships has arisen where domestic courts have reviewed the compatibility of legislation and other measures by reference to the Convention rights applied in a more expansive way than they would be applied by the ECtHR if it had to address the same question - a topic already mentioned above under Theme One, with reference to *Re G (Adoption: Unmarried Couple)* and other cases. This affects the interpretation of legislation pursuant to section 3, its compatibility with Convention rights under section 4, and the scope of the duties of public authorities under section 6.

(iii) Extra-territorial effect of the HRA

25. In *R (Al-Skeini) v Secretary of State for Defence*[24] the House of Lords held that the usual presumption restricting the effect of statutes to the territory of the UK was not applicable to the HRA, and that the Act should be taken to have the same geographical application as the ECHR has by virtue of the concept of jurisdiction on which it is based. Subsequent to the *Al-Skeini* decision, the ECtHR developed its case law so as to expand the concept of jurisdiction in ways which it is doubtful Parliament could have expected when it enacted the HRA. One example of the effect of these two developments has been to lead the domestic courts to become involved in litigation based on the HRA relating to the conduct of the armed forces in carrying out operations overseas. This means that the HRA has had a considerable impact on the relationship between the judiciary and the executive in a particularly sensitive area of policy and state action.

26. In considering the policy implications of these developments, it should be borne in mind that if the territorial effect of the HRA were to be restricted so as to prevent domestic courts from making decisions of the nature discussed, litigants would remain able to take their cases to the ECtHR instead.

(iv) Temporal effect of the HRA

27. In *Re McKerr*[25] the House of Lords held that the Convention rights, as introduced into domestic law by the HRA, did not have effect in domestic law prior to the HRA coming into effect in 2000. This was significant in relation to allegations of violations of Convention rights before 2000. Since that judgment, however, the case law of the ECtHR has developed to seek to afford remedies to some degree for historic violations of Convention rights. The domestic courts have then adopted a similar approach in relation to violations of Convention rights which preceded the HRA. This has had the effect of drawing the courts into reviewing difficult and sensitive decisions of the Government, coroners and the police, with significant resource implications, regarding the investigation of allegations of historic violations of Convention rights. This effect has been particularly noticeable in relation to Northern Ireland: see eg *McQuillan*[26] and *McGuigan & McKenna*.[27] However, the point mentioned in para 26 above also applies in this context.

[24] [2007] UKHL 26; [2008] 1 AC 153.
[25] [2004] UKHL 12; [2004] 1 WLR 807.
[26] [2019] NICA 13.
[27] [2019] NICA 46.

(v) Proportionality analysis

28. The HRA has required domestic courts to become more closely involved in reviewing decisions taken by the Government and other public authorities in order to ensure that they meet Convention standards. Put shortly, Convention standards of lawfulness generally require that restrictions or interferences with Convention rights must be a proportionate means of achieving a legitimate aim. It is usually straightforward for the Government and other public authorities to establish that they are pursuing a legitimate aim, so most cases focus on the test of proportionality. That test requires courts to carry out a more intensive review of such decisions than is generally required elsewhere in the law, where the default standard of review is the less demanding test of reasonableness. If that review were not carried out by domestic courts, however, it would instead be carried out by the ECtHR in Strasbourg, as it was before the HRA was enacted. The HRA was intended to enable a similar exercise to be carried out by domestic courts, which were both more convenient for the parties concerned and more familiar with the relevant UK context, and whose decisions might then be accepted by the ECtHR.

29. In applying the HRA, as in public law more generally, the courts are concerned solely with the question whether the measures adopted by public bodies comply with legal standards (in the context of the HRA, standards set out in the HRA), and not with their political aspects. As explained in para 28, the application of Convention rights generally turns on an assessment of whether particular legislative or executive measures are a proportionate means of achieving some legitimate aim. The law is well settled as to what proportionality analysis involves. The measure should (i) pursue a legitimate aim; (ii) be suitable, in the sense of being rationally connected to the aim; (iii) be necessary, in the sense that a less intrusive measure could not have been used without compromising the achievement of the objective; and (iv) there must be proportionality between the effects of the measure on countervailing rights or interests and the objective that is to be achieved (sometimes called proportionality *stricto sensu*): see eg *R (Aguilar Quila) v Secretary of State for the Home Department*.[28] As regards stage (iv), as I put it in *Bank Mellat v HM Treasury (No. 2)*, the question is "whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure".[29] Stages (i) and (ii) do not pose particular difficulties, but stage (iii) and especially stage (iv) may do.

[28] [2011] UKSC 45; [2012] 1 AC 621, para 45.
[29] [2013] UKSC 39; [2014] AC 700, para 74.

30. Stage (iv) often involves a difficult judgment, weighing up incommensurable factors in order to conclude whether an interference with a Convention right strikes a fair balance between the rights of the individual and the wider interests of the community as a whole. This is a matter on which different judges can reach different conclusions (and sometimes do). On the other hand, the court is aware that this is the sort of exercise which the ECtHR will itself carry out, when an application is made to it. It is because a similar exercise has been carried out by the domestic court that the ECtHR will usually accept its assessment.

31. The key lies in the exercise of an appropriate degree of restraint by the courts, based on recognition of the constitutional role of the judiciary and respect for the constitutional roles of the democratically accountable branches of government. I have made clear in my own judgments the importance of such restraint, for example when dealing with challenges on matters of social or economic importance, and matters of national security.[30] Since the suggestion is sometimes made that the establishment of the Supreme Court has resulted in the judges appointed to that court being less inclined to exercise restraint than those who were appointed to the House of Lords, I should add that that is not borne out by my experience.

(vi) Subordinate legislation

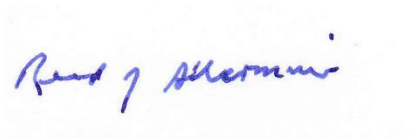
32. A major part of executive action is carried out by the promulgation of subordinate legislation. With Brexit, this is likely to become even more important, as legislative action is taken to ensure the smooth transition from EU law to domestic law with retained EU law elements.

33. Under section 6(2) of the HRA, the duty of a public authority under section 6(1) to act compatibly with Convention rights is removed where the authority is required by primary legislation (as interpreted after due allowance for the interpretative obligation in section 3) to act in a particular way. In that case, the duty of the authority is simply to act as the legislation requires. However, the legislative position is much weaker where subordinate legislation is concerned. Then, according to section 6(2)(b), it is only if a provision of primary legislation

[30] See, for example, *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39; [2014] AC 700, para 129; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657, para 296; *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group and Shelter intervening)* [2015] UKSC 16; [2015] 1 WLR 1449, paras 92-93; and *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27; [2018] HRLR 14, paras 336 and 344.

required subordinate legislation to be promulgated in a form that is incompatible with Convention rights that a public authority is relieved from its duty under section 6(1).

34. It is a matter for Parliament whether this sets the balance between enforcement of Convention rights and enforcement of legislation (this time, in the form of subordinate legislation) in the right place.[31] It is not for the Supreme Court to express a view on this.



[31] A recent study found that during the period 2014-2020 there were 14 cases in which human rights challenges to delegated legislation succeeded, and that the court quashed or disapplied the offending provisions in 4 of those cases: see 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? – UK Constitutional Law Association, 22 February 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/