

## FACING FACTS: JUDICIAL APPROACHES TO SECTION 4 OF THE HUMAN RIGHTS ACT 1998

The issuing of a declaration of incompatibility under section 4 of the Human Rights Act 1998 (HRA) was once likened by Jack Straw to an “unexploded bomb” landing in a minister’s room.<sup>1</sup> It is therefore unsurprising that a low number of declarations of incompatibility have been made.<sup>2</sup> But the traditional judicial approach to section 4 is unsatisfactory and unduly deferential to the executive.<sup>3</sup> In particular, courts should consider looking beyond the instant case when deciding whether to make a declaration of incompatibility to look at the impugned legislation more generally.<sup>4</sup> Although a victim is required to launch an action against a public authority under the HRA,<sup>5</sup> nothing in the text of the HRA requires an actual victim’s rights to be violated for a section 4 declaration to be made.<sup>6</sup> Indeed, sections 3 and 4 apply to *all* litigation, even if no public authority is involved.<sup>7</sup> The courts’ current approach logically involves the consideration of the instant case as a potential example of incompatibility. If an incompatibility is found, the legislation will then be declared incompatible on its face—and it will follow that the present applicant’s rights have been violated, although no remedy will be forthcoming.<sup>8</sup> A difficulty arises where the instant case is not thought to be especially compelling despite flaws in the legislation becoming apparent—under what circumstances, if

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<sup>1</sup> House of Lords Select Committee on the Constitution, *Judicial Appointments Process*, Oral and Written Evidence Q.133 (2011).

<sup>2</sup> At the time of the last Ministry of Justice report (December 2014), 29 declarations had been made since the HRA came into force on 2 October 2000, of which 20 declarations had become final: Ministry of Justice, *Responding to Human Rights Judgments*, Cm. 8962 (2014), at p.5. The reports are usually produced annually, but the report for 2014–15 has been overdue since December 2015. Two of the declarations made since the 2014 report was published are discussed in this paper: *R. (on the application of Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6; [2016] 1 W.L.R. 1505 and *R. (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56; [2016] 3 W.L.R. 1267.

<sup>3</sup> Although the powers of the HRA apply to senior courts UK-wide, in the interests of space, this paper will largely concentrate on the position in England and Wales.

<sup>4</sup> See also R. Buxton, “The Future of Declarations of Incompatibility” [2010] P.L. 213, especially at 215.

<sup>5</sup> HRA s.7(1).

<sup>6</sup> Because s.7 only applies to the regime under HRA ss.6–8 on public authorities. See further below.

<sup>7</sup> That much is clear enough from the terms of the HRA itself, but for confirmation, see J. Wadham, H. Mountfield, E. Prochaska and R. Desai, *Blackstone’s Guide to the Human Rights Act 1998*, 7th edn (Oxford: Oxford University Press, 2015) (subsequently “Blackstone’s Guide”), at para.3.04.

<sup>8</sup> HRA s.4(6) and cf. the discussion of *Miranda* below.

any, should a declaration still be made? While courts have to consider the particulars of the instant case when using the section 3 interpretation duty, or when deciding whether to give a remedy under section 8, the instant case should not necessarily be the end of the story where section 4 is concerned. Domestic traditions as well as comparisons with other courts—particularly the US courts and the European Court of Human Rights—have combined to cause a reluctance to use section 4. Against the background of the UK courts’ traditional approach, two recent (and somewhat related) cases will be used as case studies to show the (different) wrong turns the courts have taken recently: *Beghal v D.P.P.*,<sup>9</sup> and *R. (on the application of Miranda) v Secretary of State for the Home Department*.<sup>10</sup>

Of course not all courts have the power to make declarations of incompatibility,<sup>11</sup> and a court has no duty to make a section 4 declaration—as is well known, the section explicitly says that a court “may” make a declaration if it finds that a provision is incompatible with a Convention right.<sup>12</sup> And a court cannot make a declaration on a whim—the Crown must receive 21 days’ notice in cases where the court is considering making a declaration.<sup>13</sup> A party alleging a Convention breach must therefore give notice as to whether a section 4 declaration is being sought and must set out in a statement of case why the legislation is apparently incompatible.<sup>14</sup> But, assuming that notice has been given and whilst respecting the courts’ discretion, they could, and should, be more robust in making declarations.

The courts have been said to be reluctant to make judgments beyond the instant case in front of them.<sup>15</sup> That is to say, if the court is not convinced that there has been a breach of *potentially* incompatible legislation in the instant case, the court will usually (but not always)

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<sup>9</sup> [2015] UKSC 49; [2016] A.C. 88.

<sup>10</sup> [2016] EWCA Civ 6.

<sup>11</sup> The courts with the power to make such declarations are listed in HRA s.4(5).

<sup>12</sup> Which can be contrasted with the mandatory interpretation provision in HRA s.3, where the court “must”, so far as possible, read and give effect to legislation in a way which is compatible with Convention rights.

<sup>13</sup> HRA s.5(1) and Civil Procedure Rules (CPR) 19.4A(1).

<sup>14</sup> CPR Practice Direction 16, para.15.1.

<sup>15</sup> D. Bonner, H. Fenwick and S. Harris-Short, “Judicial Approaches to the Human Rights Act” (2003) 52 I.C.L.Q. 549 at 568.

choose not to make a declaration of incompatibility. That reluctance is understandable given that the courts are used to working on a case-by-case basis. But that traditional approach is not necessarily appropriate for the very different task, given to the courts by section 4 of the HRA, of reviewing legislation more generally, beyond its application in an individual case. Section 4 is vague in its terms. To make a declaration, the court must be “satisfied that the provision is incompatible with a Convention right”. But does that mean that the provision must be incompatible across all its applications, or incompatible only in this particular case, or potentially incompatible in certain other cases? The courts have tended towards the answer that the legislation must be incompatible across all its applications,<sup>16</sup> and that an incompatibility should be demonstrated in the instant case, thus restricting the use of section 4. But as has been argued elsewhere, taking a case-specific approach, rather than looking at the general terms of the legislation, “diminish[es]” the effect of the HRA and makes case law “significantly less predictable”.<sup>17</sup> Where the courts have looked beyond the instant case, such as in *Miranda*, the beginnings of a better approach can be seen. That case, however, showed a court unsure of how to follow such an approach, as we will see later. Unusual cases such as *R. (on the application of Johnson) v Secretary of State for the Home Department* may arise, where a declaration was made despite not being required for the instant case, although a breach was established.<sup>18</sup> Coupled with *Miranda*, a possible “expository justice approach” is emerging, the suggested parameters of which are set out in this article.<sup>19</sup> The courts’ legitimacy in resolving rights issues is usually “strengthened by being grounded in the actual

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<sup>16</sup> At least in relation to certain groups—see further below.

<sup>17</sup> A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 6th edn (Oxford: Hart, 2016) (subsequently “Simester and Sullivan”), at sec.2.5(i)(b).

<sup>18</sup> [2016] UKSC 56. For a summary of the facts, see A.L. Young, “Towards an Expository Justice Approach to Human Rights Adjudication?” U.K. Const. L. Blog (October 25, 2016) (subsequently “Towards an Expository Justice Approach?”).

<sup>19</sup> Young, “Towards an Expository Justice Approach?”. See also, for earlier examples of s.4 as a method of expository justice, A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford: Oxford University Press, 2012), at pp.108–110 (subsequently *Beyond Disagreement*).

experience of litigants”.<sup>20</sup> Judicial legitimacy may therefore be called into question in cases where declarations are not required to decide the instant case. Provided, however, that the courts limit themselves to cases where future incompatibilities will very clearly arise, without too much conjecture, legitimacy can be maintained.

The approach recommended here would result in a modest increase in section 4 use. Given that section 3, rather than section 4, is the section which has been accused of “undermin[ing] Parliamentary sovereignty”,<sup>21</sup> the approach endorsed here should be workable in practice without unduly raising political eyebrows (or hackles), for reasons which will be further developed in this paper. The argument advanced here is also likely to survive any changes to our human rights architecture, since nothing in the Conservative Party’s plans for a Bill of Rights so far suggests that a section 4-type power would be removed.<sup>22</sup> It is the section 3 power, given its controversy, that faces being watered down to “[p]revent our laws from being effectively re-written through ‘interpretation’”.<sup>23</sup>

It is impossible to tell how many extra declarations might be made if the approach endorsed here were followed. It may lead to more declarations being sought, although the lack of remedy in the instant case must surely limit the likely number of applicants, most of whom seek a declaration as a “fallback” or “booby prize”.<sup>24</sup> More declarations would likely be issued, but a declaration would not be issued in every case in which it is sought. Certain challenges to Acts will undoubtedly be unsuccessful, either because the legislation is genuinely compatible, or because the court would have to strain too hard to find a potential incompatibility. It is likely that the issuing of declarations of incompatibility will increase

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<sup>20</sup> K. Roach, “Remedies for Laws that Violate Human Rights” in J. Bell, M. Elliott, J.N.E. Varuhas and P. Murray (eds.), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016), p.269 at p.290.

<sup>21</sup> Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), at p.4 (subsequently *Protecting Human Rights in the UK*).

<sup>22</sup> There is no mention of section 4 whatsoever in *Protecting Human Rights in the UK*.

<sup>23</sup> *Protecting Human Rights in the UK*, at p.6.

<sup>24</sup> T. Hickman, “Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model” [2015] N.Z.L.R. 35 at 56.

anyway if the section 3 power is narrowed as the current nascent Bill of Rights plans suggest. It is possible, then, that coupled with the approach endorsed here, section 4 (or its Bill of Rights equivalent) could become more controversial than it is at present. But declarations should not be controversial. They do not give undue power to the judiciary. Shying away from making declarations of incompatibility in fact shows undue deference to the executive at the expense of parliamentary intention. Despite plans to curb section 3, the executive find declarations of incompatibility to be more publicly embarrassing than the “subterranean method” of interpretation.<sup>25</sup> We might also hope that any increase in declarations is offset by a reduction caused by pre-HRA statutes being increasingly replaced by post-HRA statutes.<sup>26</sup>

## THE LIMITED UTILITY OF COMPARISONS WITH OTHER COURTS

Before looking at the domestic approach, it is worth pausing to consider some comparisons with other courts because such comparisons may have caused misapprehensions as to the proper role of our domestic courts.

### *European Court of Human Rights (ECtHR)*

Under section 2 of the HRA, the UK courts have a duty to take Strasbourg jurisprudence into account in determining cases dealing with Convention rights. The UK courts have interpreted this provision according to the so-called “mirror principle”, meaning that they should do “no more, but certainly no less” than Strasbourg.<sup>27</sup> But a comparison with Strasbourg may not always be appropriate. The section 2 duty, and particularly how it has been interpreted by the UK courts, may be hampering our domestic courts from being more robust in exercising their

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<sup>25</sup> A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009) (subsequently *Constitutional Review*), at p.230.

<sup>26</sup> Despite, of course, Convention-compatibility not being guaranteed: HRA s.19.

<sup>27</sup> *R. (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 at [20] per Lord Bingham.

power to make section 4 declarations. The Strasbourg court must limit itself to a case-specific approach because applicants have to be “victims” within the meaning of Article 34 of the European Convention on Human Rights (ECHR). But our domestic courts’ section 4 power is very different, as will be demonstrated in this paper. Domestic courts should not, therefore, shy away from making declarations of incompatibility, even if they suppose that the ECtHR would not have found a breach in the instant case, if they are convinced that the legislation more generally has the potential to breach Convention rights. Criticism of the mirror principle in recent years is, therefore, to be welcomed.<sup>28</sup> In particular, Lord Brown’s dicta in *Rabone v Pennine Care NHS Trust* about the rationale behind the mirror principle should be noted carefully:<sup>29</sup>

“[W]hat the *Ullah* principle importantly establishes is that the domestic court should not feel driven on Convention grounds unwillingly to decide a case against a public authority (which could not then seek a corrective judgment in Strasbourg) unless the existing Strasbourg case law clearly compels this.”

In other words, the mirror principle was designed to alert domestic courts to the dangers of going further in protecting Convention rights than is warranted. A decision that goes too far, once it reaches the Supreme Court, is irreversible because core public authorities cannot themselves be victims under the HRA/ECHR and therefore cannot appeal to Strasbourg. Because a declaration of incompatibility has no effect in law, and does not impact on a public authority without parliamentary acceptance of the declaration by way of amending legislation, the rationale of the mirror principle is not applicable to section 4 cases. A section

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<sup>28</sup> See, for example, Lord Kerr in *Ambrose v Harris* [2011] UKSC 43; [2011] 1 W.L.R. 2435 at [126]–[130] and *Sugar v BBC* [2012] UKSC 4; [2012] 1 W.L.R. 439 at [59] per Lord Wilson and [113] per Lord Mance. For a summary of other sources of criticism, see A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart, 2013), at pp.230–231.

<sup>29</sup> [2012] UKSC 2; [2012] 2 A.C. 72 at [112].

4 declaration does not move the law on in any irreversible way and should not necessarily, therefore, be exercised with an eye on Strasbourg. Furthermore, because declarations have no immediate legal effect, they threaten neither legal certainty nor judicial legitimacy because they cannot have “unforeseen consequences” for parties beyond the instant case.<sup>30</sup> Declarations which are not required for the instant case are therefore not necessarily problematic because they do not affect the law without further action.

### *US courts*

Comparisons with US courts have been drawn by various commentators.<sup>31</sup> In American constitutional jurisprudence, the terms “facial challenge” and “as-applied” challenge are widely used. The terms are not well-known in the UK jurisdictions. That is understandable—they in fact have limited use for reasons which will become clear. The terms are, however, worth exploring for the limited use they do have, and for confusion which they may cause if a transplant into the UK is attempted.

In a facial challenge in the US courts, an Act (or a provision) is struck down if it is thought to be unconstitutional across all its possible applications. It is difficult for the applicant to succeed because she must “must establish that no set of circumstances exists under which the Act would be valid”.<sup>32</sup> In an as-applied challenge, an Act (or a provision) may have its application limited if it is deemed to be unconstitutional in certain circumstances i.e. as against an individual or a group.<sup>33</sup> The US courts have claimed that facial challenges are, and should be, rarely successful, although this claim has been

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<sup>30</sup> Young, “Towards an Expository Justice Approach?”.

<sup>31</sup> See, for example, Simester and Sullivan, at sec.2.5(1)(b); and Kavanagh, *Constitutional Review*, at pp.291–293.

<sup>32</sup> *US v Salerno* 481 U.S. 739 at 745 (1987), except in First Amendment cases where the “overbreadth” doctrine applies (where the Act is said to have *too many* unconstitutional applications).

<sup>33</sup> See R.N. Pine, “Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights” (1988) 136 U. Pa. L. Rev. 655 at 701.

questioned (both empirically and normatively) by writers such as Fallon.<sup>34</sup> Reasons which can be advanced for the rarity of facial challenges in the US do not apply in the UK jurisdictions. For starters, the UK courts have no strike down power. Declarations of incompatibility can be made more readily since they have only political, not legal, implications. Any reluctance of the US courts to use (or at least admit to using) such a drastic measure do not apply to the UK's less drastic alternative.<sup>35</sup> Linked to that is the fact that the UK courts need not worry about impinging on parliamentary sovereignty when they make a section 4 declaration. In making such a declaration, the courts are only doing what they have been tasked to do by Parliament under the terms of the HRA. That Act was (although certain politicians, and even some commentators,<sup>36</sup> would no doubt disagree) drafted carefully so as to ensure the continuing sovereignty of Parliament.<sup>37</sup> As Lord Woolf has said, when exercising their powers under the Human Rights Act, the courts are “only doing what they have to swear to do on appointment and that is to give a judgment according to law”.<sup>38</sup> The judges therefore act “in support of Parliament not otherwise” when they make declarations of incompatibility.<sup>39</sup> The US courts' strike down power, stemming as it does from the common law,<sup>40</sup> has far more implications for sovereignty, not just in its operation but in its very existence. It is therefore more natural to assume that the US courts could feel cautious about

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<sup>34</sup> R.H. Fallon, “Fact and Fiction about Facial Challenges” (2011) 99 *California Law Review* 915 at 917–918 and generally (subsequently “Fact and Fiction”).

<sup>35</sup> Cf. Kavanagh, *Constitutional Review*, who argues that the declaration of incompatibility mechanism is “a considerably stronger judicial tool than is often assumed” and not very different from a strike down power given its effect: at p.289. See too Lord Hoffmann, “Human Rights and the House of Lords” (1999) 62 M.L.R. 159 at 159–160. The strength of these arguments is weakened by the fact that, since they were made, we have an example of legislation not being amended after a declaration of incompatibility: see below.

<sup>36</sup> See, for example, Bogdanor's assertion that “[i]n practice, the principle of the rule of law, as embodied in the Human Rights Act, may be coming to supersede the doctrine of the sovereignty of Parliament”: V. Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), at p.74, and ch.3 generally. See also Kavanagh's view that “the HRA only preserves the doctrine of parliamentary sovereignty in formal terms”: *Constitutional Review*, at p.336 and ch.11 generally.

<sup>37</sup> In relation to s.4, see HL Deb., vol.584 col.1294 (January 19, 1998) (Lord Chancellor (Irvine)); *Rights Brought Home: The Human Rights Bill*, Cm. 3782 (1997), at para.2.13.

<sup>38</sup> Lord Woolf, “The Impact of Human Rights” in Lord Woolf (ed. by C. Campbell-Holt), *The Pursuit of Justice* (Oxford: Oxford University Press, 2008), p.209 at p.219.

<sup>39</sup> Woolf, “The Impact of Human Rights”, at p.219.

<sup>40</sup> *Marbury v Madison* 5 U.S. 137 (1803).

exercising that function. It appears from the cases discussed below that the UK courts too feel uncomfortable, but they should not feel shy about using a power which was granted to them by Parliament. Section 4 is, after all, merely part of the “healthy democratic dialogue” between the courts and the executive and legislature set up by the HRA.<sup>41</sup> It is because of the dialogic nature of declarations of incompatibility that they are primarily a form of expository, rather than adjudicative, justice.<sup>42</sup> In other words, as we will see later, the function of declarations is not merely to “determine disputes ... but generally to expound the law”.<sup>43</sup> It is therefore entirely constitutionally proper for declarations to be made where they are not required for the instant case.

Yet, as in America,<sup>44</sup> there is an uneasiness in the UK jurisdictions about determining constitutional (including human rights) issues in “concrete disputes between parties”.<sup>45</sup> All cases start off as “as-applied” cases because a specific person is saying that a law is unconstitutional as applied against her.<sup>46</sup> Courts do not typically like to anticipate future questions as opposed to limiting themselves to the instant facts in front of them, including in constitutional matters.<sup>47</sup> A section 4 declaration has the result that the affected legislation is incompatible across all its applications. But that is quite different from mandating that the court has to ascertain that there are no possible ostensibly compatible ways to apply a piece of legislation. The difference will be explained further below. The US method of “facial challenge” is not therefore an appropriate transplant into the UK jurisdictions.<sup>48</sup> Equally, we

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<sup>41</sup> Blackstone’s Guide, at p.vi. See also G. Marshall, “The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?” [2003] P.L. 236 at 243 and F. Klug, “Judicial Deference under the Human Rights Act 1998” (2003) 2 E.H.R.L.R. 125. Cf. T. Hickman, “Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998” [2005] P.L. 306 and Kavanagh, *Constitutional Review*, at pp.409–410.

<sup>42</sup> J. Miles, “Standing under the Human Rights Act 1998: Theories of Rights Enforcement & The Nature of Public Law Adjudication” (2000) 59 C.L.J. 133 at 164 (subsequently “Standing under the HRA”).

<sup>43</sup> Miles, “Standing under the HRA” at 153.

<sup>44</sup> See K.L. Karst, “Legislative Facts in Constitutional Litigation” [1960] *The Supreme Court Review* 75 at 77 and 98.

<sup>45</sup> Fallon, “Fact and Fiction” at 923.

<sup>46</sup> Fallon, “Fact and Fiction” at 923.

<sup>47</sup> Fallon, “Fact and Fiction” at 929.

<sup>48</sup> Cf. Simester and Sullivan, at sec.2.5(i)(b).

may use the term “as-applied” to suggest that the court has considered the individual circumstances of the case.<sup>49</sup> But in America, as-applied challenges mean that the legislation may be disapplied only in certain circumstances. That disapplication will undoubtedly be based on the instant case. But it does not necessarily follow that the UK courts, in looking at the facts of a specific case, make a declaration only in respect of a certain category of people. The issue tackled in this paper is the courts taking a case-specific approach, regardless of whether any declaration impugns the whole provision, or is more restrictive.<sup>50</sup> For those reasons, the term “case-specific” rather than “as-applied” is used in this paper to refer to cases where the question of compatibility is determined based on the instant facts, rather than looking more broadly at the legislation.

### THE TRADITIONAL RELUCTANT APPROACH

The courts famously view declarations of incompatibility as “a measure of last resort”.<sup>51</sup> In one sense, the courts have to take such a view, given the relationship between sections 3 and 4 of the HRA.<sup>52</sup> That well-known relationship is not examined in depth here. Instead, the central consideration is whether, having discounted section 3, the courts should always limit themselves to the facts of a particular case when deciding whether to make a declaration. That question should be answered in the negative.

It may not always be easy to tell whether the court is taking a case-specific or a broader approach, or whether the court thinks that incompatibility must be established in all possible circumstances or only in certain circumstances. Frequently the court will not explain explicitly that it is taking either path. Indeed the difference only really matters when, on the facts of the case before it, the court decides not to make a declaration, whilst still finding a

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<sup>49</sup> This appears to be the meaning given in *Simester and Sullivan*, at sec.2.5(i)(b).

<sup>50</sup> For an example of a somewhat restrictive declaration, see the discussion of *Miranda* below.

<sup>51</sup> *R. v A. (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45 at [44] per Lord Steyn.

<sup>52</sup> *Kavanagh, Constitutional Review*, at p.124.

flaw with an Act. If the court makes the declaration, it should not matter whether they concern themselves only with the instant case, or with the legislation more generally.<sup>53</sup> Likewise, if legislation truly is compatible then it makes no difference which approach is taken. It only makes a difference when the facts of the case are not compelling enough to convince the court to issue a declaration,<sup>54</sup> despite the fact that the legislation, in certain other applications, is thought to be more problematic.

There are certain examples of the courts looking beyond the instant case when making a declaration of incompatibility. One such example is *R. (on the application of Anderson) v Secretary of State for the Home Department*,<sup>55</sup> in which the Home Secretary's role in setting tariffs for convicted murderers was declared incompatible with Article 6 of the ECHR because the non-independent Home Secretary was fulfilling a judicial function in making sentencing decisions "even if he does no more than confirm what the judges have recommended".<sup>56</sup> The fact that this particular case was especially compelling (because of the Home Secretary's departure from the judicial recommendation) does not appear to have affected the court's decision. There were, however, no circumstances in which the Home Secretary's power could be exercised in a Convention-compliant way. The situation is more difficult, and less clear, when the legislation can be exercised in both compatible and incompatible ways.

Take, for example, *Percy v D.P.P.*<sup>57</sup> *Percy* concerned a conviction under section 5 of the Public Order Act 1986, a provision which criminalises a wide range of activity. Section 5 makes it a crime to use "threatening or abusive words or behaviour, or disorderly behaviour" or to display "any writing, sign or other visible representation which is threatening or

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<sup>53</sup> Unless a somewhat restrictive declaration is made, such as in *Miranda*, as discussed below.

<sup>54</sup> Or are compelling but do not require the issuing of a declaration as in *R. (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56.

<sup>55</sup> [2002] UKHL 46; [2003] 1 A.C. 837.

<sup>56</sup> *Anderson* at [28] per Lord Bingham.

<sup>57</sup> [2001] EWHC Admin 1125; (2002) 166 J.P. 93.

abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby”.<sup>58</sup> A section 4 declaration was sought to the effect that the appellant’s conviction was incompatible with her freedom of expression under Article 10 ECHR. Ms Percy was a protestor at an American airbase who defaced and trampled upon the American flag. The court held that section 5 of the Public Order Act 1986 in general did not violate Article 10 of the ECHR because not *every* section 5 conviction would engage Article 10. It was held that where there is only the *possibility* that the enforcement of a provision will infringe a Convention right, sections 6–8 of the HRA should be used in a case-specific way.<sup>59</sup>

As noted above, sections 6–8 of the HRA deal with the breach of Convention rights by public authorities. Public authorities will be held to have breached Convention rights unless such a breach was unavoidable as a result of primary legislation, or if the public authority was merely giving effect to primary or secondary legislation “which cannot be read or given effect in a way which is compatible”.<sup>60</sup> The crucial question to consider therefore is when legislation can be read in a way which is compatible. According to the court in *Percy*, the answer is that legislation can be read in a way which is compatible unless *every* operation of the legislation would breach Convention rights. That is to say that sections 3 and 4 should only be used where the decision-maker has no discretion to allow the legislation to operate compatibly. Where the court thinks (as it did in *Percy*) that such discretion does exist, it will consider sections 6–8 of the HRA instead. This approach is arguably appropriate in *Percy*—given the wide scope of the relevant legislation, much discretion for the decision-maker exists. But this approach poses problems if applied to other cases. It may not always be easy (or indeed possible) to ascertain whether *every* possible invocation of a statute will breach

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<sup>58</sup> At the time of this case, “insulting” words, behaviour or visual representations were also included in the statutory definition, but were removed by the Crime and Courts Act 2013 s.57(2).

<sup>59</sup> In this case, her conviction was found to be incompatible with Article 10. For further explanation, see D. O’Brien, “Judicial Review under the Human Rights Act 1998: Legislative or Applied Review?” (2007) 5 E.H.R.L.R. 550 at 557–559 (subsequently “Legislative or Applied Review?”).

<sup>60</sup> HRA s.6(1) and (2).

Convention rights and thus the court may shy away from making the declaration. Public authorities must constantly be vigilant as to whether a particular exercise of their powers will be Convention-compliant. Basing section 4 decisions on specific cases rather than the legislation as whole may make legislation even more difficult for decision-makers to navigate. Furthermore, the choice between sections 3–4 and sections 6–8 will not be available in all cases, since not all cases involve a public authority. In certain circumstances, then, the courts should move away from case-specific reasoning altogether and simply examine the legislation on its face. This argument will be substantiated later in the paper in relation to the *Beghal* case.

Is it possible for a court to make a declaration where there is no “victim” under section 7 of the HRA? On this issue, the courts have sometimes expressed hesitation. In *R. (on the application of Rusbridger) v Attorney General*<sup>61</sup> the editor of a national newspaper sought clarification of Victorian legislation which made it a crime to advocate republicanism, and a declaration of incompatibility under section 4 of the HRA if necessary. The court stated that there was no need for a person to be a “victim” in order to rely on section 4 of the HRA.<sup>62</sup> In this case there was no victim since no charges had been brought, although articles “which unambiguously advocated republicanism” had been published.<sup>63</sup> But it was equally clear that “victimless” cases may often be doomed to fail, as this one was, the court holding that:<sup>64</sup>

“[I]t is not the function of the courts to keep the statute book up to date ... sections 3 and 4 of the Human Rights Act 1998 are not intended to be an instrument by which the courts can

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<sup>61</sup> [2003] UKHL 38; [2004] 1 A.C. 357.

<sup>62</sup> *Rusbridger* at [21] per Lord Steyn.

<sup>63</sup> *Rusbridger* at [10] per Lord Steyn.

<sup>64</sup> *Rusbridger* at [36] per Lord Hutton. See also Lord Rodger at [58] and Lord Walker at [61].

chivvy Parliament into spring-cleaning the statute book.”<sup>65</sup>

The obsolete legislation was not causing any mischief in practice, and pressures on parliamentary time are great. But “spring-cleaning” (here taken to mean repealing a provision without a replacement enactment) could easily be swept up in the Law Commissions’ regular Statute Law (Repeals) Bills. Many declarations of incompatibility, however, cannot reasonably be described as “spring-cleaning” given that they are designed to prompt new legislation to be drafted and enacted. In such cases, a lack of parliamentary time is unlikely to be an appropriate shield to hide behind given that a fundamental human right is at stake. In addition, as will be argued further below, declarations open up the option to use section 10 of the HRA to amend legislation with minimal parliamentary time.

As Buxton has correctly pointed out, the effect of a declaration in a particular case clearly must be “secondary” to section 4’s “role as a machinery for purging the statute book of non-conforming provisions” because section 4 provides no remedy for the applicant.<sup>66</sup> In *Rusbridger*, given that the court said it was “unreal” to suggest that the impugned provision could survive post-HRA,<sup>67</sup> why not just make the declaration? Perhaps, in addition to practical concerns about parliamentary time, the court felt too shackled by its traditional role, but section 4 is a different power which requires a different approach.

Similarly, in *Lancashire C.C. v Taylor*, the court decided that, although technically a victim is not needed, making a declaration where there was no victim would go against section 7 of the HRA.<sup>68</sup> The court stressed the fact that it would not entertain “purely hypothetical” arguments.<sup>69</sup> Given the “desirably flexible approach to the grant of

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<sup>65</sup> The reference to s.3 is especially peculiar since use of s.3 cannot be described as any sort of “chivvying” of Parliament.

<sup>66</sup> R. Buxton, “The Future of Declarations of Incompatibility” [2010] P.L. 213 at 214. See HRA, s.4(6).

<sup>67</sup> *Rusbridger* at [28] per Lord Steyn.

<sup>68</sup> [2005] EWCA Civ 284; [2005] 1 W.L.R. 2668 at [44] per Lord Woolf.

<sup>69</sup> *Lancashire C.C.* at [43] per Lord Woolf.

declarations”,<sup>70</sup> the court is perfectly entitled to decide not to issue a declaration. It is a discretionary remedy, but discretion must be properly exercised and, in this case, undue reliance was placed on section 7. As already established, the need for a victim clearly only bites in relation to actions by public authorities.<sup>71</sup> In other words, section 7 only provides “the mechanism for bringing proceedings in reliance on s.6”;<sup>72</sup> it has no relevance where section 4 is used instead. In *Lancashire C.C.*, counsel for the Secretary of State (acting as intervenor) argued successfully that:<sup>73</sup>

“If the issue had arisen otherwise than under primary legislation, [the appellant] would not rank as a victim under section 7(1) HRA and could not therefore advance any such claim under the Convention. The same ... must be true under section 4 HRA.”

But this argument is a non sequitur—what applies to the scheme under sections 6–8 of the Act does not necessarily (and does not in fact) apply to sections 3 and 4. Counsel also argued successfully: (i) that section 4 was not an *actio popularis*; and (ii) that its application could only be argued in an otherwise “tenable” case.<sup>74</sup> But it is possible to accept that section 4 is not an *actio popularis* whilst still holding that a declaration may be made in an otherwise unsuccessful case. That is to say that whilst a case must be brought by someone with standing<sup>75</sup> and not based on a completely hypothetical argument, there is nothing in the wording of the HRA to prevent the court from granting a declaration in a case which has been

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<sup>70</sup> *Lancashire C.C.* at [44] per Lord Woolf.

<sup>71</sup> HRA ss.6–8.

<sup>72</sup> Annotation to HRA s.7 on Westlaw UK. See also Blackstone’s Guide, at para.4.79; B. Dickson, *Human Rights in the UK Supreme Court* (Oxford: Oxford University Press, 2013), at p.73; A. Lester, D. Pannick and J. Herberg, *Human Rights Law and Practice*, 3rd edn (London: LexisNexis, 2009), at para.2.7; and Sathanapally, *Beyond Disagreement*, at p.108.

<sup>73</sup> *Lancashire C.C.* at [28].

<sup>74</sup> *Lancashire C.C.* at [28].

<sup>75</sup> Based not on victimhood but on the more generous standing rules of the Senior Courts Act 1981 s.31(3).

brought by an applicant in good faith that she has a tenable argument, but the court being less convinced.

Readers will of course be familiar with the text of section 4, but it is worth looking at the precise wording closely:

“(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.”

In addition, of course, section 4(6) provides no remedy for the instant party. Section 4 makes no mention of a victim, nor for the need for a breach in the instant case. The terms of section 4 put the provision, not the applicant, centre stage. As Buxton has argued, litigation between two specific parties is only the “necessary context” for declarations of incompatibility because of the English courts’ inability to act “of [their] own motion”.<sup>76</sup> Similarly, in a US-context, Spann has said that dispute resolution is a “charade” which hides the courts’ true purpose of “tell[ing] us how to conform our behavior to our fundamental values”.<sup>77</sup> It has long been recognised that public law judgments can have “extended impact” far beyond the parties to a particular case.<sup>78</sup> Specifically, “[d]eclarations of incompatibility always have the potential to touch on circumstances not before the court given that legislation often has a broad application”.<sup>79</sup> Declarations are therefore always at least partially expository in nature.<sup>80</sup>

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<sup>76</sup> Buxton, “The Future of Declarations of Incompatibility” at 214–215.

<sup>77</sup> G.A. Spann, “Expository Justice” (1983) 131 U. Pa. L. Rev. 585 at 585.

<sup>78</sup> A. Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89 Harv. L.R. 1281 at 1297. See also Miles, “Standing under the HRA” at 153.

<sup>79</sup> Young, “Towards an Expository Justice Approach?”.

<sup>80</sup> Miles “Standing under the HRA” at 137; Sathanapally, *Beyond Disagreement*, at pp.110–111.

During the passage of the Human Rights Bill, an amendment (number 103) was proposed to add a clause 4(2A) to the Bill.<sup>81</sup>

“(2A) A court may not make a declaration of incompatibility unless it is necessary for the purpose of determining the matter before it.”

The amendment was defeated,<sup>82</sup> on the basis that:<sup>83</sup>

“The purpose of a declaration is to draw attention to a legislative incompatibility with the convention and to act as a trigger for a remedial order under ... [section 10]. A declaration of incompatibility has no effect on the case before the court ... Amendment No. 103 would prevent a declaration from being made unless that were specifically necessary to determine the case in question, yet the kinds of cases where the issues are likely to arise will almost inevitably be complex and involve different issues, each of which will have to be resolved by the court ... Amendment No. 103 ... has no place in the scheme that we have established in ... [section 4]. The Government believe that this group of amendments [of which amendment number 103 was one] is fundamentally misconceived.”

This defeated amendment makes it clear—once section 4 is on the table, the court may look beyond the present case at the impugned legislation more generally. In *R. (on the application of Nasser) v Secretary of State for the Home Department*, Lord Hoffmann stated that, given the very great discretion afforded to the court in section 4 cases, he would “not ... wish to exclude” the possibility of a declaration being made where the public authority was not

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<sup>81</sup> HC Deb., vol.313 col.437 (June 3, 1998) (Alan Haselhurst). A related unsuccessful amendment was proposed to add to the end of clause 4(2) the words “setting out the nature and extent thereof in so far as arises from the nature of the case before the court”. The proposed amendment was designed, amongst other things, to “give judges a clear indication that declarations of incompatibility should not be issued unless required to resolve a particular case before the court”: HC Deb., vol.313 col.451 (June, 3 1998) (Anne McIntosh).

<sup>82</sup> By 320 votes to 128: HC Deb., vol.313 cols 461–464 (June 3, 1998).

<sup>83</sup> HC Deb., vol.313 col.460 (June 3, 1998) (Geoff Hoon).

acting incompatibly in the instant case.<sup>84</sup> Such cases would, however, be “rare”, and *Nasseri* was not one of them.<sup>85</sup>

Overall, the courts have shown reluctance to make declarations where the instant case is not compelling. But, compared to the unthreatening legislation considered in *Rusbridger*, is the same true even when the court sees real dangers lurking in the legislation? *Beghal* provides the answer.

### CASE STUDY 1: *BEGHAL*

*Beghal v D.P.P.*<sup>86</sup> concerned the wife of a convicted terrorist who was stopped at East Midlands Airport when she was returning from visiting her husband.<sup>87</sup> She was stopped under schedule 7 of the Terrorism Act 2000 which allows for stopping, questioning, searching and detaining at ports and borders. Under paragraph 2(4) of that schedule, such stops can be made regardless of whether the “examining officer”<sup>88</sup> has a reasonable suspicion that that person is a terrorist. Paragraph 18 of the same schedule makes it a criminal offence to fail wilfully to comply with an examining officer’s request. Mrs Beghal was charged with the paragraph 18 offence for refusing to answer most of the examining officer’s questions. She sought to challenge the compatibility of the relevant legislation. Notably, her arguments were “not confined to the facts of [her] case” but comprised a “general challenge to the compatibility of the Schedule 7 powers” with the various ECHR rights.<sup>89</sup> The court, however, (with the exception of Lord Kerr) took a distinctly case-specific approach and declined to make a declaration of incompatibility, despite making several criticisms of the legislation in question. In other words, the court thought there was no incompatibility in this particular

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<sup>84</sup> [2009] UKHL 23; [2010] 1 A.C. 1 at [20].

<sup>85</sup> *Nasseri* at [20].

<sup>86</sup> [2015] UKSC 49.

<sup>87</sup> For a full summary of the facts, see S.W. Stark, “Suspicion-less Minds: Anti-terrorism Powers at Ports and Borders” (2016) 75 C.L.J. 8.

<sup>88</sup> A constable, immigration officer or customs officer: Terrorism Act 2000 sched.7, para.1(1).

<sup>89</sup> *Beghal v D.P.P.* [2013] EWHC 2573 (Admin); [2014] Q.B. 607 at [32]–[33].

case, but that the legislation had the potential to be incompatible in other, more extreme cases.<sup>90</sup> *Nasseri* was not cited, and Lord Hoffmann's possibility of making a declaration despite the instant facts was not explored.

Article 8 was engaged but not breached because the interference was "in accordance with the law" under Article 8(2). The court noted the different expectations we have at airports as opposed to when we are "anywhere in the street".<sup>91</sup> When we enter an airport we are aware that we must consent, if we wish to go ahead with our travel plans, to inspections of our body, documents and luggage. Only Lord Kerr applied a facial test to the legislation. The upper limits of schedule 7, he noted, are not things that a person would normally think she is consenting to when entering an airport. For example, to be detained for six hours,<sup>92</sup> to have items of property seized for up to seven days,<sup>93</sup> or to have documents or other data (for example, phone or computer records) copied and retained "for so long as is necessary".<sup>94</sup> None of those things happened to Beghal, but for Lord Kerr that was rightly irrelevant. But the majority held that Beghal's detention was a proportionate restriction on her Article 8 rights to pursue the legitimate aim of fighting terrorism because, in particular, no data on her had been kept. The court did suggest, however, that where such data was kept beyond an initial investigatory period, the intrusion into privacy was more "considerable".<sup>95</sup> Lord Hughes therefore recommended that such retention should be based on a reasonable suspicion, which does not need to be made out for the person to be stopped and have the data taken from them in the first place.<sup>96</sup>

In terms of Beghal's Article 5 argument, it was relevant that she had only been

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<sup>90</sup> Whether the court was expressing a view that the legislation was potentially incompatible or merely being critical is debatable, but the strongest suggestion of incompatibility is perhaps in terms of the six-hour detention period at [54].

<sup>91</sup> *Beghal* at [38] per Lord Hughes, with whom Lord Hodge agreed.

<sup>92</sup> Terrorism Act 2000 sched.7, para.6A(3).

<sup>93</sup> Or longer, if the item is needed as evidence: Terrorism Act 2000 sched.7, para.11.

<sup>94</sup> Terrorism Act 2000 sched.7, para.11A.

<sup>95</sup> *Beghal* at [57] per Lord Hughes, with whom Lord Hodge agreed.

<sup>96</sup> *Beghal* at [57]–[58]. See also [72] per Lords Neuberger and Dyson.

questioned for around 30 minutes.<sup>97</sup> The court found that there was therefore no breach of Article 5 because her detention was justified under Article 5(1)(b)—to secure the fulfilment of an obligation prescribed by law—and because it was no longer than necessary. But the court hinted that at its upper reaches (six hours) the legislation could be more problematic.<sup>98</sup>

In addition to the short duration of her detention and the fact that no items were taken from her or copied, we may also have limited sympathy for Mrs Beghal because her husband was a convicted terrorist. Perhaps, therefore, the examining officer did have genuine cause to stop her. But the possible discriminatory operation of schedule 7, where no reasonable suspicion of terrorist activity is needed to stop someone, is evident. Although the legislation does not appear to be used excessively,<sup>99</sup> or in a discriminatory fashion,<sup>100</sup> risks nevertheless exist. As Lord Kerr noted, it should not matter that the powers were not used in a discriminatory fashion in this case, or indeed that they are generally not used in that fashion. The important thing is that they *could* be so used.<sup>101</sup> He also noted that the Code of Practice for the use of schedule 7 mandates that ethnicity or religion cannot be the *only* reason for stopping someone—the fact that the Code legitimises either of those features as being *one* possible reason to stop someone is troubling.<sup>102</sup> A Home Office circular was issued to examining officers in the light of *Beghal* instructing that, pending revisions to the Code, race, ethnicity or religion should only be taken into account “if present in association with factors which show a connection with the threat from terrorism”.<sup>103</sup> Respectfully, it is not clear what (if anything) such revisions actually change.

In a sense, therefore, it is true to say that the court did review the legislation on its

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<sup>97</sup> In total she was delayed at the airport for around two hours, but part of that time was for prayer at her request.

<sup>98</sup> *Beghal* at [54].

<sup>99</sup> According to the independent reviewer of terrorism legislation, 0.014% of people travelling through British ports in 2014–15 were stopped under schedule 7: D. Anderson, *The Terrorism Acts in 2014: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (2015) (subsequently “Terrorism Acts Report 2015”), at para.6.3.

<sup>100</sup> Terrorism Acts Report 2015, at para.6.11.

<sup>101</sup> *Beghal* at [93].

<sup>102</sup> *Beghal* at [104].

<sup>103</sup> Home Office Circular 001/2016: Schedule 7 to the Terrorism Act 2000 (2016).

face by looking beyond the four corners of *Beghal*'s case. The court was evidently not convinced that the legislation posed too much of a problem in practice (similar to the court in *Rusbridger*), given the lack of evidence of discriminatory use. Had *Beghal*'s case been more compelling, however, it is clear that the court might have been tempted to make a declaration. Despite evidently looking at the Schedule 7 powers more generally, the court specifically mentioned that certain aspects must "await a case in which they are directly raised".<sup>104</sup>

Further inspection of the decision in *Beghal* reveals difficulties. As noted above, previous cases, such as *Percy*, have held that in order to use section 4, legislation must necessarily and systematically breach human rights, at least against certain groups. In other words, legislation may be incompatible even if certain applications do not breach anyone's Convention rights, if it will always breach someone else's rights.<sup>105</sup> But legislation will be compatible if the decision-maker can exercise her discretion in such a way as to avoid an incompatibility. As Baroness Hale of Richmond said in *M.H. v Secretary of State for the Department of Health*, if legislation can be operated compatibly "[i]t follows that the section itself cannot be incompatible, although the action or inaction of the authorities under it may be [incompatible]".<sup>106</sup> Under schedule 7 of the Terrorism Act 2000, the examining officer can exercise discretion in various ways. She can decide, for example, whether to stop a person, for how long to detain her, which questions to ask her and which documents or other data (if any) to retain or copy. If we assume, as is arguably implied in *Beghal*, that the upper reaches of the legislation are incompatible with Convention rights, then the statute merely *permits*, but does not *mandate*, a breach of Convention rights. Sections 3 and 4 therefore (if the court is to be consistent with *Percy and M.H.*) cannot be used because a breach is not mandated—an examining officer can, in line with *Beghal*, stop a person for only 30 minutes, rather than

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<sup>104</sup> *Beghal* at [58], in relation to the indefinite retention of data.

<sup>105</sup> See, for example, *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 A.C. 467; *Re McR's Application for Judicial Review* [2002] NIQB 58; [2003] N.I. 1.

<sup>106</sup> [2005] UKHL 60; [2006] 1 A.C. 441 at [32].

six hours, and can decide not to take and keep any data. The court should then, in line with *Percy and M.H.*, consider whether there has been a breach of section 6 of the HRA. But this approach reveals a problem. The statute *permits* examining officers to stop people for six hours and it *permits* data to be retained for so long as is necessary. Examining officers already have to make difficult decisions as to how to exercise their powers, and cases like *Beghal* make such decisions even more difficult. The Home Office Circular mentioned above gives some guidance on *who* to stop, but that is as far as it goes. How is an examining officer to know whether it is acceptable to hold a person for three, four hours, or five hours—where is the line to be drawn? How is she to know on what criteria she is permitted to take or copy relevant data? For how long and in what circumstances can such copies be kept? The current approach exacerbates grey areas in the law which necessarily follow from the uncertain scope of each Convention right. Governmental or internal policies are increasingly required, and they shift rule-making from Parliament (i.e. the Act itself) to the executive or unelected public officials via court decisions.

In cases like *Beghal*, it should not matter that *Beghal*'s situation could have been worse—that she was not held for very long, that she had no data kept and that the legislation was not being used in a discriminatory fashion. The court is tasked with reviewing the legislation, and reviewing its application in relation to *Beghal* is secondary to that. It does not matter that she was only held for 30 minutes. It does not matter that she had no data retained. It does not matter that she was not stopped for discriminatory reasons. The fact that she *could* have been held for six hours, that she *could* have had data retained and that she *could* have been stopped for discriminatory reasons is all we need to know. If legislation permits action which is incompatible with Convention rights, even if only at its upper limits, then every operation of it, even if less egregious, will be a breach of the Convention. It cannot be right that it would be the examining officer's fault (under section 6 of the HRA) if she is still

following the legislation. If *Beghal* had been held for six hours, rather than 30 minutes, it would have been the legislation at fault, not the examining officer. Schedule 7 is overbroad and, if it is declared to be incompatible, then applicants like *Beghal* have had their rights breached since the legislation as a whole is incompatible. It should not be unfortunate, and a missed opportunity, that *Beghal*'s detention was not longer, or that data was not copied or retained, or that she was not discriminated against. We should not have to wait for another person to be detained for a longer period of time (for example) before making a declaration. The terms of the HRA do not envisage that we should do so.

In terrorism-related cases, a court's critical words in the absence of a declaration will usually be picked up by the Independent Reviewer of Terrorism Legislation in one of his reports.<sup>107</sup> That may well mean that the court's words are heeded by the executive and Parliament, but the Independent Reviewer's success rate (although good) is not quite as impressive as the success rate when section 4 is used. His recommendations may be rejected outright, or may simply not be given the same priority which is afforded to declarations of incompatibility.<sup>108</sup> For non-terrorism related cases, however, the courts' suggestions are more likely to wither on the vine.<sup>109</sup>

An alternative danger lurks in judgments where a declaration is not made, but where the relevant legislation is criticised—the executive might rely unduly on suggestions made by the judiciary, often without the involvement of Parliament. For example, after it was held in *Secretary of State for the Home Department v J.J.* that a control order imposing an 18-hour per day curfew was a breach of Article 5 of the ECHR,<sup>110</sup> no curfews of longer than 16 hours

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<sup>107</sup> For example, *Beghal* is referred to extensively in the Terrorism Acts Report 2015: see especially paras.6.33–6.39. The dialogue in fact works both ways since the court in *Beghal* made references to earlier Terrorism Act Reports: see, for example, *Beghal* at [19]–[26].

<sup>108</sup> Terrorism Acts Report 2015, at paras.1.5, 1.9–1.11 and 11.1 and, on the success of declarations of incompatibility, see below.

<sup>109</sup> See, for example, *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] A.C. 657 on assisted dying, where the court declined to make a declaration in the unrealised hope that their analysis could be used by Parliament to amend the law.

<sup>110</sup> [2007] UKHL 45; [2008] 1 A.C. 385.

were imposed by the Home Secretary,<sup>111</sup> despite the legislation (the Prevention of Terrorism Act 2005) not mentioning any specific limit. More worryingly, certain curfews of shorter durations were increased to 16 hours on the basis of Lord Brown of Eaton-Under-Heywood's dicta that 16 hours was the maximum he thought a curfew should last.<sup>112</sup> The executive relied on that statement despite other judges in *J.J.* stating that it would be "inappropriate" to set a fixed period of time beyond which a curfew would breach Article 5.<sup>113</sup> The new system under the Terrorism Prevention and Investigation Measures Act 2011 provides for overnight curfews only.<sup>114</sup> It would have been preferable for the court in the control orders cases<sup>115</sup> to have made a declaration of incompatibility to allow the Government to rethink the entire area of law,<sup>116</sup> rather than allowing the Government to simply give effect to the court's specific criticisms.<sup>117</sup> The control orders cases "provided the government with an opportunity to resist political pressure to liberalise the control order regime".<sup>118</sup> For that reason, the proposals made here actually better preserve proper checks and balances than the judiciary's current preference for making criticisms rather than declarations, by allowing the ball to be put firmly back into the executive's court for further reconsideration by them, and then, importantly, by Parliament.

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<sup>111</sup> D. Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012), at para.3.29.

<sup>112</sup> K.D. Ewing and J.-C. Tham, "The Continuing Futility of the Human Rights Act" [2008] P.L. 668 at 691; *J.J.* at [105].

<sup>113</sup> *J.J.* at [16] per Lord Bingham. See also [63] per Lady Hale and [84] per Lord Carswell.

<sup>114</sup> Terrorism Prevention and Investigation Measures Act 2011 sched.1, para.1.

<sup>115</sup> Three control order cases were heard together: *J.J.*; *Secretary of State for the Home Department v E.* [2007] UKHL 47; [2008] 1 A.C. 499; and *Secretary of State for the Home Department v M.B. & A.F.* [2007] UKHL 46; [2008] 1 A.C. 440.

<sup>116</sup> A declaration of incompatibility was only sought in *M.B. & A.F.* For further criticism see Ewing and Tham, "The Continuing Futility of the Human Rights Act" generally and especially at 681–682.

<sup>117</sup> Granted the outcome might have been the same in any event since the Government may do the "minimum necessary" to comply with a declaration of incompatibility (Ewing and Tham at 684) but that cannot be known for certain.

<sup>118</sup> Ewing and Tham, "The Continuing Futility of the Human Rights Act" at 691.

## CASE STUDY 2: *MIRANDA*

*R. (on the application of Miranda) v Secretary of State for the Home Department*<sup>119</sup> looks, at first sight, like a step in the right direction. The court issued a declaration of incompatibility against the offending legislation regardless of the facts of the instant case. Yet the curious (and, it is argued, inconsistent) conclusion was reached that there had been no breach of Mr Miranda's rights.

Miranda was, like *Beghal*, detained and questioned under schedule 7 of the Terrorism Act 2000. In contrast to *Beghal*, however, Miranda was detained for nine hours (the maximum allowed under the legislation at the time, since reduced to six hours)<sup>120</sup> and he had encrypted storage devices retained. Miranda, the husband of journalist Glenn Greenwald, was carrying encrypted data originally obtained by Edward Snowden which was intended to be used in Greenwald's journalistic activity. The court found Miranda's detention to be proportionate because national security concerns outweighed his rights "on the facts of this case".<sup>121</sup> Notwithstanding that fact, the court went on to make a declaration of incompatibility of paragraph 2(1) of schedule 7 with Article 10 ECHR in respect of "journalistic material".<sup>122</sup> The court was concerned that the powers to seize and copy data under schedule 7 gave no effective protection of journalists' Article 10 rights, thus undermining confidentiality and having a "chilling effect" on journalism.<sup>123</sup>

It seems odd that the court decided to make the declaration late in the judgment, almost as an afterthought, when we know from cases such as *Beghal* that the legality of the

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<sup>119</sup> [2016] EWCA Civ 6.

<sup>120</sup> Terrorism Act 2000 sched.7, para.6A inserted by the Anti-Social Behaviour, Crime and Policing Act 2014 sched.9, para.2.

<sup>121</sup> *Miranda* at [84] per Dyson M.R. To emphasise the point, the exact phrase appears twice in the same short paragraph.

<sup>122</sup> Defined rather circuitously by the Police and Criminal Evidence Act 1984 s.13(1) as "material acquired or created for the purposes of journalism".

<sup>123</sup> *Miranda* at [113] per Dyson M.R.

legislation itself is a prior test to issues such as proportionality.<sup>124</sup> Indeed the court's findings in *Miranda* are contradictory. The court could have held that Miranda's detention was lawful and made the declaration at the same time if it had held that he was not carrying "journalistic material". There was at least a question mark over that issue since Miranda is not a journalist and did not claim when stopped to be carrying such material.<sup>125</sup> The court held, however, that the police and examining officers ought to have erred on the side of conducting themselves on the basis that Miranda was, or might have been, carrying such material.<sup>126</sup> The court could also have held that Miranda's detention was lawful and made the declaration if the declaration had been restricted to journalistic material which could identify a confidential source (which was not a factor in the present case—the source was well known).<sup>127</sup> But having found that Miranda's case fell squarely under the facts based on which the legislation was being declared incompatible, the court ought not to have found that Miranda's own detention was justified. The only sense in which Miranda's detention was lawful is in the sense that the examining officer was entitled to act as he did under primary legislation.<sup>128</sup> Indeed, public authorities continue to act lawfully under incompatible legislation until governmental action is taken.<sup>129</sup> But the court did not give any of those reasons for Miranda's detention being lawful. The court said that Miranda's detention was lawful because it was *proportionate*. Incompatible legislative provisions cannot be used proportionately. Having held that schedule 7 was incompatible insofar as journalistic material was concerned, and having held that Miranda was carrying journalistic material, the court should have held that Miranda's rights were breached (albeit that the only difference in outcome for Miranda would

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<sup>124</sup> *Beghal v D.P.P.* [2015] UKSC 49 at [33] per Lord Hughes, with whom Lord Hodge agreed.

<sup>125</sup> *Miranda* at [65], although the argument that he was in fact carrying journalistic material was later central to his case.

<sup>126</sup> *Miranda* at [67] per Dyson M.R.

<sup>127</sup> *Miranda* at [107].

<sup>128</sup> C. Gardner, "The Self-contradictory *Miranda* Appeal Ruling" Head of Legal Blog, January 19, 2016.

<sup>129</sup> Gardner, "The Self-contradictory *Miranda* Appeal Ruling"; HRA ss.4(6) and 6(2).

have been the “satisfaction” of being able to say that “*his* human rights” had been breached).<sup>130</sup>

*Miranda* shows the court using a case-specific approach and a broader approach at the same time, with inconsistent consequences. If the legislation is incompatible, then it is incompatible for everyone caught under it. A breach must go hand in hand with a declaration, unless, as is explained further below, the applicant was not actually caught under the impugned legislation. *Miranda* shows the court, then, getting it half right. Gone is the reluctance to make a declaration without a victim as in *Lancashire C.C.* and *Beghal*. But, sadly, in its place stands a new mistake—a glaring inconsistency.

## TOWARDS A BETTER APPROACH

During the Human Rights Bill’s passage through Parliament, Lord Irvine (then Lord Chancellor, and architect of the Bill) said that declarations of incompatibility would be unnecessary “in 99 per cent. of cases that will arise”.<sup>131</sup> Such statements have set the tone for judicial caution around section 4,<sup>132</sup> and what has been criticised as overreliance on section 3.<sup>133</sup> But why did the Lord Chancellor feel the need to all but strangle section 4 at birth? His explanation for the lack of importance of section 4 was that reliance could be placed on section 3 and the public authority provisions (sections 6–8) instead. But those provisions have limitations. Section 3 has proved controversial,<sup>134</sup> and cannot be used where it would constitute “judicial vandalism”.<sup>135</sup> Use of section 3 would not, for example, have been appropriate in *Beghal* where there were numerous potential incompatibilities each with

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<sup>130</sup> Gardner, “The Self-contradictory *Miranda* Appeal Ruling”, emphasis in original.

<sup>131</sup> HL Deb., vol.585 col.840 (February 5, 1998) (Lord Chancellor (Irvine)).

<sup>132</sup> Irvine’s words were quoted by Lord Steyn to affirm that a declaration of incompatibility was a measure of “last resort” in *R. v A. (No.2)* [2001] UKHL 25 at [44].

<sup>133</sup> See, for example, D. Nicol, “Statutory Interpretation and Human Rights after *Anderson*” [2004] P.L. 274.

<sup>134</sup> See the discussion above of the Conservative Party’s Bill of Rights plans.

<sup>135</sup> *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at [30] per Lord Bingham.

numerous possible remedies. For example, judges should not decide what the maximum period of detention of six hours should be reduced to (would four hours be appropriate? Or two?) The question of striking the balance between a person's Convention rights and the need for the examining officer to gather information is not a question for a judge to resolve. In addition, encouraging reliance on the public authority provisions is also problematic. Those provisions will not kick in in every case.<sup>136</sup> Even where they do, as was argued above, public authorities should not be held to blame for operating within the parameters of perfectly valid legislation.

Of course not every court can make a declaration of incompatibility and so the approach recommended here cannot be followed on every occasion an incompatibility is present. County courts should, however, bear in mind (and be encouraged to use) their ability to transfer a case to the High Court if the question of a declaration of incompatibility comes up.<sup>137</sup>

The Supreme Court should be particularly robust in making section 4 declarations. Declarations of incompatibility have the advantage of opening up the speedy procedure for amending the offending legislation under section 10 of the HRA. Section 10 is only available once all appeals have been exhausted or abandoned. It has been argued that the Government responds too slowly to declarations of incompatibility, taking around two or three years to remedy the defect.<sup>138</sup> Part of this process, however, is frequently the lengthy process of appeal, which is surely unavoidable. Of more concern is undue delay once the decision has become final (or, of course, where the incompatibility is not removed at all as in the well-known prisoners' voting saga).<sup>139</sup> Section 10 offers the opportunity for a speedier resolution

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<sup>136</sup> See, for example, the discussion of *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 below.

<sup>137</sup> CPR 30.3(2)(g).

<sup>138</sup> Blackstone's Guide, at para.4.82.

<sup>139</sup> See *Smith v Scott* [2007] CSIH 9; 2007 S.C. 345 and Ministry of Justice, *Responding to Human Rights Judgments*, Cm. 8962 (2014), at p.46 (subsequently "Responding to Human Rights Judgments").

than remedial legislation having to be passed by Parliament, as well as not unduly clogging up precious parliamentary time.

Being a prospective Henry VIII power,<sup>140</sup> however, section 10 itself is not immune from criticism.<sup>141</sup> Such legislation can be seen as threatening sovereignty by allowing the executive to amend primary legislation whenever enacted. It is contended here, however, that section 10 is an appropriate power for the reasons persuasively advanced by Barber and Young.<sup>142</sup> Namely, section 10 orders are an appropriate form of constitutional self-defence, protecting “one part of the Constitution ... the citizen, against Parliament”.<sup>143</sup> Furthermore, remedial orders made under section 10 receive substantial parliamentary scrutiny (including from the Joint Committee on Human Rights) thus mitigating against the dangers often inherent in secondary legislation.<sup>144</sup> As the Lord Chancellor said during the Human Rights Bill’s passage:<sup>145</sup>

“We recognise that a power to amend primary legislation by means of a statutory instrument is not a power to be conferred or exercised lightly ... So we have built in as much parliamentary scrutiny as possible. In addition, the power to make a remedial order may be used only to remove an incompatibility or a possible incompatibility between legislation and the convention. It may therefore be used only to protect human rights, not to infringe them.”

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<sup>140</sup> That is to say, a power to amend primary legislation passed after the parent Act (in this case, the HRA) by way of secondary legislation.

<sup>141</sup> For recent criticism of Henry VIII powers (but which does not mention HRA s.10 specifically) see Lord Judge, “Ceding Power to the Executive; the Resurrection of Henry VIII” King’s College London Lecture, April 12, 2016.

<sup>142</sup> N.W. Barber and A.L. Young, “The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty” [2003] P.L. 112.

<sup>143</sup> Barber and Young at 126.

<sup>144</sup> See HRA sched.2.

<sup>145</sup> HL Deb., vol.582 col.1231 (November 3, 1997) (Lord Chancellor (Irvine)).

Although the section 10 procedure has been used rarely,<sup>146</sup> more advantage could be taken of it,<sup>147</sup> whilst respecting the need for “compelling reasons” for its use.<sup>148</sup>

Section 4’s use as a remedy of last resort is at odds what could be perceived as its weaknesses.<sup>149</sup> In other words, since section 4 is not a drastic remedy like a strike down power, why use it so sparingly? In particular, section 4 could be criticised as not being an effective remedy because of the discretion afforded to the executive in deciding whether to remedy the breach or not. For that reason, the ECtHR does not require a section 4 declaration to have been sought in order for it to deem that all national remedies have been exhausted.<sup>150</sup> If section 4 really is (necessarily, it might be said) that weak, it could be asked why increased use of it is advocated here. The answer is that, so far, the system of making declarations of incompatibility has worked reasonably well, and the argument in this paper would allow it to be even more effective. It may not be perfect, but then neither is our constitution. And the imperfect solution fits perfectly into its imperfect landscape. Breaches of the Convention flagged up to Government by way of declarations of incompatibility have been remedied in all but one case.<sup>151</sup> Jack Straw’s “unexploded bomb” analogy makes it clear that declarations are not readily ignored, but also that too many of them would be seen as a judicial attack on the executive. If declarations were much greater in number, we cannot be sure that they would be so well respected, nor that judicial/executive relations would not be strained. Others have noted the possibility that greater use of section 4 could leave declarations “ignored and

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<sup>146</sup> Only three of the 20 final declarations made by December 2014 were rectified by use of HRA s.10: Responding to Human Rights Judgments, at p.32.

<sup>147</sup> A view shared, at least at one stage, by the Joint Committee on Human Rights: *Monitoring the Government’s Response to Court Judgments Finding Breaches of Human Rights*, HL 128, HC 728 (2007), at para.119.

<sup>148</sup> HRA s.10(2).

<sup>149</sup> See e.g. T. Hickman, “The New Zealand Bill of Rights Act: Going Beyond Declarations” (2014) 10(4) *Policy Quarterly* 39 and “Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model” [2015] N.Z.L.R. 35.

<sup>150</sup> *Burden and Burden v United Kingdom* (2008) 47 E.H.R.R. 38. Before launching a case at Strasbourg, an applicant must have exhausted all national remedies under ECHR Art.35(1).

<sup>151</sup> The prisoners’ voting saga, mentioned above.

insignificant”.<sup>152</sup> But the method proposed here would not result in a huge swell in the number of declarations of incompatibility being made by the courts because a declaration would only be made in cases where an incompatibility can be clearly foreseen, not in cases where the courts must strain too far to predict one. Although numbers are impossible to estimate, it could be guessed that at most a handful of additional declarations might be made each year. Hardly enough to overwhelm or disenchant Government; hardly enough to water down the clout each new declaration has.

The issue of costs is an important practical matter to consider. The courts have discretion in how to award costs in cases where the issue of making a declaration arises. As the Human Rights Bill was going through Parliament, Government rejected a proposal to ensure that the Crown always paid the costs regardless of the applicant’s success. The Lord Chancellor decided that normal costs rules should apply so that the Crown could seek costs from the unsuccessful party.<sup>153</sup> The alternative view is that citizens who have made unsuccessful applications should not always have costs awarded against them so as not to discourage challenges to constitutional rights.<sup>154</sup> Although it may not have been Government’s intention, the current law would allow for the court to make a declaration of incompatibility even if the instant case is not particularly (or at all) compelling—and to award costs as the court sees appropriate in its discretion. This discretion could facilitate the flourishing of a “communitarian” system of human rights enforcement,<sup>155</sup> where applicants are not deterred by the financial risks of litigation. The courts should bear in mind the “broader public interest in lawful government” when exercising their discretion in awarding costs—and indeed when considering whether to make a declaration.<sup>156</sup>

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<sup>152</sup> Sathanapally, *Beyond Disagreement*, at p.105.

<sup>153</sup> HL Deb., vol.593 col.138WA (October 20, 1998) (Lord Chancellor (Irvine)).

<sup>154</sup> *Ahnee v D.P.P.* [1999] 2 A.C. 294.

<sup>155</sup> Miles, “Standing under the HRA” at 136, in the context of standing.

<sup>156</sup> Miles, “Standing under the HRA” at 150.

O'Brien has argued that the courts face a choice between case-specific approaches under sections 6–8 of the HRA (where a public authority is alleged to have acted incompatibly with a Convention right) or reviewing the legislation itself under sections 3 and 4 of the HRA.<sup>157</sup> But, from the summary presented above, the courts do not usually bifurcate their options in that manner. That is to say that the courts largely use a case-specific approach to sections 3 and 4 as well as sections 6–8. As will be explained below, it is perfectly proper that section 3 cases are dealt with on a case-specific basis, but such an approach is not always appropriate with regard to section 4. Furthermore, sometimes a choice between sections 3–4 and 6–8 will not always be available because a public authority will not always be alleged to have acted contrary to a Convention right. Often the issue at stake will simply be a matter of legislative construction. Take the celebrated case, for example, of *Ghaidan v Godin-Mendoza*.<sup>158</sup> Neither party was a public authority in *Ghaidan*, but the actions of the private landlord (Ghaidan) in attempting to evict his tenant (Godin-Mendoza) were regulated by statute,<sup>159</sup> which, under section 3 of the HRA, the court is under a duty to attempt to interpret compatibly with Convention rights in any case before it.

With all of the above in mind, a general step-by-step process for courts to consider can be advanced. First, stage one: the court should look at the statutory wording if a statute is being impugned in the instant case. If there is no statute, stage two can be immediately proceeded to. If there is a statute, the wording of the statute must either be read compatibly under section 3 or a declaration of incompatibility may be made under section 4. In applying the section 3 test, we need to look at the actual circumstances of the case and ask whether there has been a breach of a Convention right or rights in this particular case. This is important in section 3 applications because section 3 directs the court to read and give effect to the legislation in a compatible way. The legislation can only be “read and given effect” to

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<sup>157</sup> O'Brien, “Legislative or Applied Review?”.

<sup>158</sup> [2004] UKHL 30.

<sup>159</sup> Rent Act 1977 sched.1, para.2(2).

if there would otherwise be a breach in the instant case.<sup>160</sup> For example, thinking back to the *Ghaidan* case, the case turned upon whether Godin-Mendoza, whose deceased partner was a protected tenant, was able to become a statutory tenant by succession. If so, he could not be evicted from the property as the landlord sought. To be a statutory tenant, Godin-Mendoza had to be living with the protected tenant as “his or her wife or husband”.<sup>161</sup> The complicating factor was that Godin-Mendoza and the deceased had been in a homosexual relationship, while the statutory language at that time recognised only heterosexual relationships. In the event, the court used section 3 of the HRA to interpret stable, homosexual relationships as falling within the remit of the statutory scheme. If, however, Godin-Mendoza had not been the deceased’s life partner but instead had been his boyfriend of three weeks (“Hypothetical Godin-Mendoza”), there would have been no breach of Articles 8 and 14 of the ECHR (because a heterosexual surviving partner in the same situation would not have been a statutory tenant either) and no application of section 3 in the case of Hypothetical Godin-Mendoza. A case-specific approach must be the correct one in relation to section 3.

If the court decides that section 3 cannot be used, then it must then consider section 4 if it is a higher court with the power to do so. In deciding whether or not to make a declaration, the individual circumstances of the instant case may be of less significance. Of course we must look at those circumstances first of all, not least to determine whether the applicant herself suffered a breach. For example, were a declaration of incompatibility to be made in Hypothetical Godin-Mendoza’s case, he could legitimately (in contrast to *Miranda*) be told that there was no breach of his Convention rights. The situation is different from *Miranda* because we are not saying that Hypothetical Godin-Mendoza’s treatment is proportionate, we are simply saying that he is not caught within the four corners of the

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<sup>160</sup> A. Lester, D. Pannick and J. Herberg, *Human Rights Law and Practice*, 3rd edn (London: LexisNexis, 2009), at para.2.3.4.

<sup>161</sup> Rent Act 1977 sched.1, para.2(2).

statutory scheme. That, however, does not affect the court's ability to make a declaration of incompatibility of legislation that is brought to its attention, even if a breach is not established in the instant case, and/or the legislation is not incompatible in every possible application. Granted, section 3 was used in *Ghaidan* and the present approach advocates a use of section 4 but, as will be argued below, this approach does not preclude the possibility of a later use of section 3 with regard to the same provision.

If, however, the legislation is thought to be compatible, or there is no legislation in the present case, the court must then consider stage two: looking at sections 6–8 to consider whether the case concerns a public authority. If so, the court must consider whether that authority has acted in breach of a Convention right in this particular case, and in a way not permitted by any legislation. In other words, sections 6–8 will only be used where the legislation itself is in order and it is the public authority who have erred. Cases such as *Percy*, discussed above, show this process in operation. Section 5 of the Public Order Act 1986 struck, in the court's opinion, the right balance between a protestor's freedom of expression under Article 10 and the right of onlookers not to be harassed, alarmed or distressed. But that balance had not been struck in the instant case and so *Percy*'s conviction was incompatible with her Article 10 right and was therefore quashed.

*Percy* can be contrasted with *Beghal*, where the examining officer would have been perfectly entitled under the relevant legislation to hold *Beghal* for up to six hours ("Hypothetical *Beghal*"), despite the misgivings the court had about that provision. And if the examining officer had done so, Hypothetical *Beghal* would have had no section 8 claim because the examining officer's approach was sanctioned by legislation. If such a section 8 claim were successful, it would seem unfair to the examining officer who acted as she was entitled to do under the relevant legislation (subject to her acting in line with any governmental or internal policies and believing that such a length of detention was necessary

and proportionate). In addition, for such a challenge to be allowed, it would require the court to hold that the impugned legislation could be read compatibly with Convention rights.<sup>162</sup> Such a decision seems difficult to reconcile with clear parliamentary intention. Continuing with the *Percy* and *Beghal* comparison, the broad and vague terms of section 5 of the Public Order Act 1986 require the court to decide whether an action was “threatening or abusive” and whether it was likely to cause “harassment, alarm or distress”. All of those deliberately open-ended terms will depend upon the context and are open to interpretation by both the decision-maker and the court. It is perfectly possible that the court’s interpretation will differ from that of the decision-maker. To begin to question section 5’s compatibility beyond the instant case would lead the court down a best-avoided murky path of hypotheticals. By contrast, schedule 7 of the Terrorism Act 2000 allows discretion for the decision-maker within defined and clear limits—for example, that items may be retained for seven days,<sup>163</sup> or that persons may be held for up to six hours.<sup>164</sup> Such terms are not vague, and not open to interpretation. If an examining officer decides to hold a person for six hours, for example, the court cannot give the legislation a compatible interpretation and hold that the examining officer acted unlawfully because two hours (for example) is the most a person can be held for. In other words, the court is not looking at a wide range of hypothetical actions like it would have had to do in *Percy*, but can see quite clearly from the face of the statute that an incompatibility will arise in other cases. The court in *Beghal* was faced with legislation which screams its incompatibility, and in such cases the court should not plead deafness. The finding of a declaration would have arisen naturally from the issues discussed in the case without straying off-limits into hypothetical territory. If it can be quite obviously seen that legislation cannot be interpreted compatibly under section 3 of the HRA it should be declared incompatible *regardless of the strength of the present case*.

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<sup>162</sup> See the wording of HRA s.6(2).

<sup>163</sup> Terrorism Act 2000 sched.7, para.11.

<sup>164</sup> Terrorism Act 2000 sched.7, para.6A(3).

It is always possible that, in another case with another set of facts, the court thinks that section 3 of the HRA could be used instead. But there is no harm in making a section 4 declaration in the earlier case. After making a section 4 declaration, section 3 could be used in a later case in the unlikely event that that declaration has been ignored, or in the more likely event that it has been overturned on appeal. Although we have seen that a court may choose not to make a further declaration of incompatibility on an issue where a declaration has already been made,<sup>165</sup> it would be an entirely different matter for a court to use section 3 on a provision which has already been declared incompatible under section 4. Although that state of affairs seems contradictory, it is entirely possible to envisage a scenario where it could occur (albeit that such a scenario might occur rarely). For example, returning once again to *Ghaidan*, where section 3 was applied. Section 3 could not have been applied in Hypothetical Godin-Mendoza's case because there would be nothing to give effect to—there was no breach of Hypothetical Godin-Mendoza's Convention rights. But a declaration of incompatibility could have been made because the relevant provisions were clearly incompatible with Articles 8 and 14 in that they discriminated against long-term homosexual couples. In the event that that declaration was overturned or ignored, and a case identical to the actual facts of *Ghaidan* occurred, the court could then use section 3, as it did, even if a section 4 declaration had already been made in the earlier hypothetical case. There is nothing contradictory about saying that a piece of legislation is incompatible, because it could not be read compatibly in one case, but then reverting to section 3 when a case comes along where a compatible reading can be made. Part of the possibility of interpretation under section 3 depends as much on the instant case as it does on the piece of legislation. In both *Ghaidan* and *Hypothetical Ghaidan* the legislation, of course, is the same, but the facts of the case are vital to section 3 interpretations—not so for section 4 declarations.

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<sup>165</sup> *R. (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] A.C. 271.

Adjudication is commonly thought to serve two purposes: dispute resolution and exposition.<sup>166</sup> Dispute resolution, traditionally seen as the main purpose of adjudication, is, as the name suggests, designed to resolve a dispute between two parties and to provide a remedy. It is, however, “ill suited” to constitutional adjudication.<sup>167</sup> It certainly does not describe fully what the courts do when using section 4 of the HRA, given that no remedy is given to the instant applicant. Exposition, on the other hand, is most often seen as an ancillary function of adjudication. It is designed to expound the law and to provide guidance for future scenarios, not just the instant case. For declarations of incompatibility, however, the roles are reversed—their main purpose is in fact exposition and dispute resolution is incidental. There therefore seems to be no reason to limit declarations to the instant dispute between the parties.

Despite advancing an argument in favour of expository justice being the main, rather than ancillary, function of the courts, Spann warned that there were two dangers to be guarded against. First, care must be taken that the courts do not usurp the legislature; and second, the courts must be well-informed and must exercise their function prudently.<sup>168</sup> The argument advanced in this paper heeds both of those warnings. Declarations of incompatibility, by their very nature, do not threaten the legislature. Indeed, in line with Spann’s thesis, they merely allow the courts to provide “useful information to the executive and the legislature”.<sup>169</sup> The second warning reminds us that declarations cannot be made unless the incompatibility is clearly apparent without the court having to stretch its imagination too far. It is “easier, and safer, to expound a principle in a particular factual

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<sup>166</sup> See further G.A. Spann, “Expository Justice” (1983) 131 U. Pa. L. Rev. 585 and Miles, “Standing under the HRA” at 136.

<sup>167</sup> Sathanapally, *Beyond Disagreement*, at p.29.

<sup>168</sup> Spann, “Expository Justice” at 632.

<sup>169</sup> Spann, “Expository Justice” at 586.

context than in the abstract”.<sup>170</sup> But in certain cases, such as *Beghal*, “particular factual contexts” beyond the instant case are not abstract at all, but almost certain to arise.

## CONCLUSIONS

The UK courts have shown reluctance and confusion towards their novel power under section 4 of the HRA. They could employ a more consistent approach by, where possible, reviewing legislation on its face when considering whether to make a declaration of incompatibility. They should feel more comfortable to take such action because unlike the US courts, our courts do not exercise a strike down power and declarations of incompatibility, however persuasive they may be, do not affect the ongoing validity of an Act. The duties imposed under the Human Rights Act render the higher UK courts as quasi-constitutional courts, therefore it is not appropriate to compare their approach with that of the ECtHR, nor is it desirable to adhere slavishly to the traditional domestic judicial approach. Finally, and most compellingly, the courts are under a duty to act in the manner endorsed here under the terms of the HRA itself. Nothing on the face of the HRA necessitates the existence of a victim before section 4 can be used—indeed Parliament itself explicitly rejected such a requirement. As is obvious from the face of the Act, the use of section 4 provides no remedy for the applicant anyway. By concentrating too much on the facts of the instant case, the courts have conflated the rationale of section 4 with the rationale of sections 3 and 6–8.

It has been argued elsewhere that the courts restrict section 4 use because of “the enduring influence of the principle of parliamentary sovereignty”.<sup>171</sup> But it is curious that the courts have used section 3 more liberally,<sup>172</sup> whilst holding back on section 4 when section 3

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<sup>170</sup> Spann, “Expository Justice” at 648.

<sup>171</sup> K.D. Ewing and J.-C. Tham, “The Continuing Futility of the Human Rights Act” [2008] P.L. 668 at 681.

<sup>172</sup> See the discussions above of *Ghaidan v Godin-Mendoza* [2004] UKHL 30 and *R. v A. (No.2)* [2001] UKHL 25.

is the greater (and more insidious) threat to sovereignty.<sup>173</sup> By straining to avoid making declarations of incompatibility, the courts have actually shown undue deference to the *executive* at the expense of parliamentary intent.<sup>174</sup> Yet governmental plans to restrict section 3, rather than section 4, suggest that the courts may have misjudged the situation—the “dialogue” the HRA was intended to provide is not especially healthy. It may also be that section 3 has been more warmly embraced by the courts because it is seen by them as simply an extension of their existing powers of interpretation—it is not “radically new”.<sup>175</sup> Section 4, on the other hand, is a much more alien power to come to terms with. Even making criticisms of legislation beyond the instant facts of the case, as the court did in *Beghal*, has been described as “unusual”.<sup>176</sup> But the courts, as our “guardians and interpreters of fundamental rights”,<sup>177</sup> should not shy away from looking beyond the facts where appropriate. Although the common law may traditionally be seen as embodying a dispute resolution model of adjudication because of its case-by-case approach, an expository function governing “future relations between persons not represented before the court” lies at the very heart of a system of law founded on precedent and reasoned judgments.<sup>178</sup> In that sense, expository justice is nothing new for our courts. Nor is expressing a view on problems with the law and potential ways to remedy them, yet deferring to Parliament by applying the current (“bad”) law.<sup>179</sup> Similarly, the giving of advice as to how to remedy incompatibilities is central to section 4 and is not constitutionally problematic as long as such advice is not automatically followed unreflectingly by Government. Scepticism of any form of advice-giving relies on an “unduly

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<sup>173</sup> See e.g. Lord Lester, “Developing Constitutional Principles of Public Law” [2001] P.L. 684 at 691: “It is interesting to consider which involves the greater inroad upon parliamentary sovereignty, a power to strike down inconsistent legislation, or a duty to adopt a strained (though not an absurd or fanciful) reading.”

<sup>174</sup> G. Marshall, “The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?” [2003] P.L. 236 at 243.

<sup>175</sup> Kavanagh, *Constitutional Review*, at p.115.

<sup>176</sup> Terrorism Acts Report 2015, at para.6.38.

<sup>177</sup> Spann, “Expository Justice” at 593.

<sup>178</sup> Miles, “Standing under the HRA” at 160. See also N.K. Katyal, “Judges as Advicegivers” (1998) 50 *Stanford Law Review* 1709 at 1801.

<sup>179</sup> See e.g. *R. v Howe* [1987] 2 A.C. 417, where the Court could not “pretend” that it regarded the outcome as “satisfactory”, “logical” or “just” (at 438 per Lord Brandon).

rigid” notion of the separation of powers, rather than allowing “[t]he three branches of government ... to work in harmony”.<sup>180</sup>

The courts should not routinely be pondering hypotheticals, but when incompatibilities leap out from the text of the statute, as they did in *Beghal*, it would be logical, desirable and constitutionally appropriate for the court to use section 4. The courts should make the most of vital opportunities to flag up incompatible legislation in the hope that such measures will be purged from the statute book. They should not demand that another person should suffer when an incompatibility has been brought to light. Instead, they should seize the opportunity to direct Government and Parliament to snuff that incompatibility out.

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<sup>180</sup> Katyal, “Judges as Advicegivers” at 1821 and 1824.

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