Derby and Derbyshire Activity for the HRA: submission to the Commission on a British Bill of Rights: 10 11 2011, minor revision 12 12 2011; responses@commissiononabillofrights.gsi.gov.uk

***The HRA: Where Now?* (6/11/2010 for the 60th ECHR Jubilee) and *The HRA Under Threat* (11/10/2011): http://www.amnesty-hra.org.uk**

Summary:

1. Rationale: public misperceptions of and press deceit about the HRA
2. Overview of our two HRA seminars
3. Summary of expert explanations of ECHR and HRA
4. Summary of expert-led, case-based group discussions: details Table, pp. 5 & 6
5. Analysis of group discussions: overall agreement with judgments made under the ECHR and HRA; all disagreements in the direction of increased clemency or provision; agreement particularly extends to criminal judgments; and particularly supportive of HRA Section 6.
6. Recommendations: (i) Need for Commission recommendations to be resilient to political and media interference; (ii) HRA to be the core of any Bill of Rights; (iii) Particular importance of maintaining the proactive effect of HRA Section 6, to reach people with low rights awareness.

1. Rationale and the burden on the Commission

The above two open seminars, one in central Derbyshire in 2010 and the other in the city in 2011, consisted of explanation of the ECHR and the HRA, followed by expert-led discussions of relevant cases. Commissioners know the grave concern across the human rights spectrum[i] regarding the alarming gulf between support for implicit human rights (the decency and fairness by which most people run their lives) compared with that for explicit human rights in the form of legislation, particularly for the HRA. In particular there is ignorance about the beneficiaries of human rights legislation, 42% on one recent survey agreeing that only the undeserving benefit.[ii]

It is also very widely agreed that this ignorance is compounded by large media elements that are very powerful in our democracy, particularly by the Eurosceptic tabloid and right of centre press, which campaign against the HRA by straight- forward, never corrected untruths about cases, and also by attributing all rulings they dislike to the HRA[iii]. Given that very senior politicians of both main parties have engaged in such deceit, and the recent acceleration of such newspaper stories, it is unlikely that public knowledge and understanding of the Act has improved much since the 2009 research.

We note calls, e.g. by Justice,[iv] for a full convention of citizens, interest groups and parliamentarians to increase validation of the recommended settlement. Given that the Coalition Government has opted for the narrower path of a Commission, we believe the above issues of public perception and media deception make your task of reaching a wise recommendation particularly difficult.

2. Our open seminars 2010 and 2011

In this spirit, our open seminars were offered to the public and to HR activists, as facilities for expression of opinion and for learning. They consisted of explanations about the Convention and the Act by lecturers in public law from local universities, which were followed by expert-led group discussions mainly based on ECHR and HRA cases (see p. 4 for speakers and expert group discussion presenters). The seminars were widely advertised by conventional and electronic means.

Approximately 80 people attended each seminar, with a small overlap between meetings. Attenders were of all ages, from churches, mosques and temples, and from other ethnic minority groups, including Derbyshire's only indigenous minority, the nationally acclaimed Derbyshire Gypsy Liaison Group; also from the Labour and LibDem Parties, and from LGB groups including Transcend. There were magistrates and practising lawyers, 10 sixth formers, and 15 Derby university students of law

The 2010 event in our county town of Matlock was opened by local M.P. and Conservative Chief Whip, Patrick McLoughlin, who himself drew attention to the problem of perceptions of the Act. Sanchita Hosali, acting Policy and Public Affairs Manager, British Institute of Human Rights, opened our recent 2011 meeting in Derby University's Multifaith Centre. This 2011 event was particularly interesting vis à vis our partnership with the University of Derby Law School, which is one of the first law departments in Britain to teach HR legislation to all its students, some of whom made valuable contributions to our seminar discussions.

3. Opening explanations of the ECHR and the HRA

At the 2010 ECHR Jubilee event, Sorcha McLeod (Sheffield University Law School) explained the ECHR's world historic significance vis à vis the extent of its protection and also its court facilities. She also explained its structure of Articles and their derogability. A strength is the inter-state flexibility of Articles 5 – 12 and 14, while possible problems include its limitation to civil and political rights, and the non-derogability of Articles 2 – 4 in times of national emergency. Then Tom Lewis (Nottingham Trent Law School) explained the HRA's attempt to span the historic divide between rights protection and parliamentary sovereignty, through the duty on Parliament for ECHR compatibility for new legislation; and through the elaborate incorporation of the Convention into domestic law via the requirement for judges to take Strasbourg caselaw into account, permission for them to read down legislation as though it were ECHR compatible (with the risk of misinterpreting Parliament's original intention), and the certification process for laws which cannot be so read down.

At our 2011 event, Jamie Grace of Derby University Law School also dwelled on the tension between parliamentary sovereignty and the HRA. As in Lord Hoffman's '*Simms* principle'[v], judges use their 'read down' and declaration of incompatibility powers to challenge legislation, while Parliament 'must accept the political costs' if it creates laws that fly in the face of ECHR principles. It is natural for Governments to be opposed to bills of rights since they limit their powers, but Mr. Grace closed by quoting Lord Bingham that rights protections most of all exist for those in our society who are subject to 'public obloquy'[vi].

4. Expert-led case-based group discussions

At both events, we gave most time to these discussions, since they were planned to assist attenders' experiential learning of the ECHR structure; of the legal complications of an overarching act of Parliament, and of the Act's relationship with other rights-relevant and general legislation. It was also important that attenders have opportunity to discuss the HRA Section 6 duty for state organisations to work in compliance with ECHR rights, because the media, especially the right of centre press, largely ignore its good effects for ordinary British citizens. There were about 10 attenders per group.

For each group discussion, recorders noted cases, arguments, judgments, and discussants' views of judgments. This information informed our record of the group discussions, see Table, pp. 5 & 6. Cases discussed illustrated the interplay between the Convention / HRA and existing UK law. Also, some cases clearly showed that both the ECtHR and domestic courts under the Act can produce tough judgments. Examples were case B1 where the possibility of presidential mercy and case B2 where a very slight adjustment to the tariff allowed a small chink of hope to life prisoners; and case F2 where the Supreme Court brought local authorities' duty to have regard to their resources firmly into play.

In addition to cases listed in the Table, scenarios were discussed by one 2011 group where the Article 14 requirement for equal access to rights, together with other articles, was producing fairer treatment for ethnic minority citizens, by NHS, police, and other service providers, often without recourse to the courts. Also, these discussants forcefully raised the issue of BME people's under-awareness of rights.

5. Analysis of Table, pp. 5 & 6: attenders' satisfaction with court judgments under the Convention and HRA

(i) Our 150 attenders were at ease with almost all judgments from domestic courts that were made under the HRA, and two from Strasbourg, including judgments relating to vulnerable asylum seekers (Table: Section A); to convicts (Sections B, C, D & E); to social services prioritisation and provision (Section F); to electronics and privacy (Section G); to immigration (Section H); and to proportionality and democracy in civil case management (section J).

(ii) **Discussants disagreed with only three judgments** (cases D1, D2, and F2), and equivocated about one (case A2). All disagreements were in the direction of preferring greater clemency or more provision for the appellants. A2 and D2 were Immigration Tribunal judgments that had not yet gone to appeal. In case F2, the Supreme Court judgment in McDonald v Kensington, discussants felt too little attention was given to the fact that Miss McDonald was not incontinent. We discussed case D1, Jimmy Mubenga, in 2010, when it was high profile in the media, and are pleased to note that our discussants' feeling that the rights of children are paramount has now been enshrined in case law (ZH, Tanzania v Home Secretary, SC 2011/4) These discussants did, however, also raise the dilemma regarding the justice of unequal outcomes for crimes of similar severity

(iii) **We emphasise that attenders' satisfaction with court judgments under the HRA is not limited to rights for vulnerable people**, but includes satisfaction with judgments relating to the contentious issue of Convention rights for convicts. That is, there was no evidence that our discussants supported a conditionality approach to Human Rights. Indeed, as well as their satisfaction with judgements of Art. 8 violations for men convicted of smaller offences (Section D, cases 1 & 2), our attenders also agreed with Convention rights for murderers. These included three judgments of Art. 3 violations (sections B and C), one Arts. 5 & 8 violation (case D3), and the judgment in murder case E1 made under European legislation. D3, the Amy Houston case, is possibly the most distasteful of these murders, but only needed explanation of the BA's powers and omissions for attenders to understand the ruling that deportation would be an Article 8 violation. Would that the media were always as honest with our fellow citizens!

(iv) **Social services cases and ethnic minority issues**. We also emphasise that our discussants strongly welcomed the HRA's requirement for proactive protection of rights, seen in their strong support for council actions for abuse victims (cases F3 & 4), and in their opposition to councils' neglect and under-provision for the disabled (cases F1 & 2). The implication of the public ignorance about explicit human rights (above, ***Rationale***) is that many British people are ignorant of their own rights. We believe that this is also connected with media manipulation, with much copy about the Act as a charter for criminals, and very little on the advantages of the HRA to ordinary British people, particularly through the Section 6 duty on state authorities.

Further, this non-awareness of rights may be particularly strong for members of ethnic minority groups. This would be consistent with very large sample research [vii] showing BME people's support for rights of free speech, to vote, and for free health care to be lower than that of white people, but higher for the right to a job and to be treated fairly. However, we also note that there seems to be no large sample research of BME people's actual awareness of their rights, as opposed to their support for rights, a serious omission when this concerns 8% of our population with a more than proportionate degree of disability and other problems.

6. Recommendations

(i) Our open seminars happened because of concern that this country may be lurching towards a long-term Human Rights settlement that will be influenced by an electorate that is disastrously ill-informed about the universality of benefit brought by the HRA, a situation caused or at least exacerbated by deceptive prejudice operated by large and powerful media sections. We respectfully but strongly urge the Commission to recommend a settlement that is resilient against such blatant media manipulation, and against the political manipulation that the media to some extent also cause.

Recommendations (ii) & (iii) – over

(ii) We also urge a settlement that is strongly inclusive of members of our society who are, in Lord Bingham's phrase, most exposed to 'public obloquy'. We strongly believe that this is best achieved through a Bill of Rights that maintains the current incorporation of the ECHR into domestic courts, through the various mechanisms provided by the HRA.

(iii) Finally, we believe that the settlement must take into account that large proportions of the population, particularly some minority groups, do not know their rights. Only the proactive form of rights protection that is provided by HRA Section 6 can redress this lack of awareness. .

We therefore oppose repeal of the HRA under any circumstances. We also oppose discontinuation of HRA Section 6. On the contrary, we urge that the Act be the core of any UK Bill of Rights.

Key supporters of this submission:
Amnesty International (Derby and Derbyshire local groups)
Age UK (Derby and Derbyshire)
British Institute of Human Rights (national body)
Paragon Law Nottingham
University of Derby (Law School and Multifaith Centre)
Derby and Derbyshire Race Equality Commission

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Jamie Grace, Lecturer, Derby University Law School
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References:

i Donald, A., et al. (2008). Human Rights in Britain since the Human Rights Act 1998: a critical review. Equalities and Human Rights Commission Research Report 28.

ii Kaur-Ballagan, K. et al. (2009). Public perceptions of human rights. Ipsos-Mori for Equalities and Human Rights Commission. Research Report 16.

iii e.g. Lord Neuberger, Judicial Studies Board: Lecture, 2011.

iv Justice (2007): A British Bill of Rights: Informing the debate. London: Justice

v R. v. Secretary of State for Home department, Ex p. Simms (2000) 2 AC115

vi Lord Bingham: Speech to Liberty's 76th anniversary conference, 6.06.2009

vii Vizard, P. (2010). What do the public think about economic and social rights: research to inform the debate about a Br Bill of Rights. LSE CASE 61

Table:

Cases with Presenter:	Judgment and discussants' views of it
A: Arts 2,3 & 8: Vulnerable asylum seekers	
1. HJ (Iran) and HT (Cameroon) v. Secretary of State for Home Affairs, UKSC 31, 2010. ECHR Arts. 2, 3, & 8 issues; also Geneva Convention on Refugees (particular social group).	Judgment: deportation would contravene the Geneva Convention. Discussants supported this.
2. AA/05374/2011: Afghani illiterate, life threatened by Taliban; arrived via Greece and France. Challenged at ECtHR based on deportation to Greece, and arising from treatment of asylum seekers in Greece. UKBA eventually accepted that the asylum claim should be considered substantively in the UK. ECHR Arts. 2 & 3 argued; also Refugee Convention (imputed political opinion).	Judgment: Lower Tribunal refused the asylum and human rights appeal: permission to appeal to Upper Tier. Discussants sympathised with UKBA / Home Secretary's task, but also noted the culture of suspicion of asylum seekers within the UKBA.
B: Art 3: Life cases	
1. Kafkaris v Cyprus – ECtHR 21906/2004: Art. 3 case that life without hope of reprieve is torture.	Judgment: not torture because the Cypriot president can order release, so hope remains. Discussants agreed
2. Rex v Bieber – Appeal Court: EWCA (Crim.)1601/2008. Killing of police officer, technically executable offence pre HRA. Art. 3 case as above.	Judgment: Art. 3 violation. Appeal Court substituted 57years for the lifelong sentence. Discussants agreed.
C: Art. 3: foreign national prisoner	
1. CD v Home Secretary: IA/21761/2007. Former head of Jamaican gang; convicted of a UK murder.	Judgment: deportation would be an Art. 3 (risk of torture) violation, since he would be recognised in Jamaica. Discussants agreed, but wondered about the accuracy of the evidence from Jamaica.
D: Arts 5 & 8: other foreign national prisoners	
1. Jimmy Mubenga v Home Secretary: *The Guardian* 15 10 2010 + private information. Angolan asylum seeker with indefinite leave to remain; 12 years in UK; married with 5 children; positive employment record. Convicted of ABH. 2 year sentence. Discussed 2010 Derbyshire seminar.	Judgment (2010): no violation Arts 5 & 8: Discussants disagreed with the court, on grounds of the children's needs for their father's presence, a principle recently enshrined in case law by the UKSC, 2011/4 (ZH) judgment. Discussants also raised the dilemma of sentence disparities between lone people and those with families convicted of crimes of similar severity.
2. MT v Home Secretary – DA/00364/2009. Jamaican national in UK since 1974 but not nationalised; 9 months imprisonment for common assault; history of mental health problems; all family in UK. Sec. State used her discretion to deport a prisoner with shorter than 12 months sentence.	Judgment: no violation Arts 5 & 8. Discussants disagreed because judgment was discretionary; there were mental health issues; and appellant had no family in Jamaica. To be appealed to ECtHR.
3. Aso Mohammed Ibrahim; Court of Appeal, 8.4.2011. Failed asylum seeker, killed 12 year old Amy Houston in a road traffic accident 2003; prosecuted only for minor offences; 4 months sentence. Married UK citizen; children. Deportation attempt only in 2010.	Immigration tribunal refused deportation on Art. 8 grounds. Discussants saw that UKBA and police acted minimally, allowing opportunity to establish Art. 8 rights.
E: Foreign national convict: European legislation	

1. Learco Chindamo. EWHC 21 10 2007. EU citizen convicted as a child of murder of a head teacher.	Court refused deportation because of European Economic Area regulations (not because of ECHR Art. 8).
F: Art. 8 : Social Services cases	
1. Bernard v. Enfield Borough Council. EWHC 2002, 2292 Admin	Judgment: Article 8 violation; no violation Art. 3 Discussants strongly supported Art. 8 violation.
2. McDonald v. Kensington and Chelsea RLBC [2011] UKSC 33 and the issue of reducing funding for social care needs by local authorities with duties under the National Assistance Act 1948.	Judgment: no violation of Article 8. Discussants disagreed with this judgment on grounds that Miss McDonald is not incontinent.
3. TM - a woman subject to domestic violence including sexual abuse	Considered by district council to be a violation of her Art. 14 together with Art. 8 rights. Discussants unanimously supported the HRA development of a positive right to protection from violence.
4. AB - a young person with learning difficulties subject to bullying.	Considered by district council to be a violation of his Article 8 rights. Discussants strongly agreed that such embedding of HR law in local authority work should continue to be developed. They also felt that there was scope for more testing of such council activities in the courts.
G: Art. 8: electronics and privacy cases	
1. R. v. Barkshire & Others, EWCA Crim. B3 (20 July 2011)	Judgment: Breach of natural justice consistent with Art. 6 violation. Discussants strongly supported this.
2. Police access to personal communications: Regulation of Investigatory Powers Act 2000.	This Act regulates one aspect of the margin of appreciation of Art. 8's right to privacy. Discussants agreed that in some circumstances, e.g. severe public disorder, such police access to personal communications is justified.
H: Art. 8: Immigration cases	
1. IA/14578/2008: Art. 8. Camilo Soria Avila; in a stable partnership.	Tribunal judgement: deportation would violate Art. 8 rights. Judge alluded to family cat. Discussants agreed with judgment and felt Home Secretary wrong that cat was ground for the successful Art. 8 appeal.
2. DA/00109/2010: LA, a Nigerian in UK since age 11 but no right to remain; mental health risk; long-standing partner; detained pending deportation.	Judgment: Violation Arts. 5 & 8 Discussants agreed LA should be released because of his mental health, long-standing relationship in the UK, and that the UK is his long-standing home.
J: Art. 10 Free speech	
1. Steel and Morris v United Kingdom, ECtHR 68416/01. Issues of access to justice that pre-HRA were only sorted by the ECtHR	ECtHR judgment: Arts. 6 and 10 Violations. Discussants felt that the pre-HRA collusion between Parliament and the judiciary explained why it was left to Strasbourg to point out the severe lack of proportionality in the two parties' access to justice.
2. The use of super-injunctions for commercial purposes: the Trafigura situation	*The Guardian* claimed Article 10 violations, exceptions to which the Convention only allows for democratic purposes; also mentions in Parliament cannot be injuncted. Discussants agreed.