

BID's RESPONSE TO THE CONSULTATION

HUMAN RIGHTS ACT REFORM: A MODERN BILL OF RIGHTS

INTRODUCTION

1. This is the response of Bail for Immigration Detainees (“BID”) to the Ministry of Justice consultation *Human Rights Act Reform: A Modern Bill of Rights*. The Government’s view of the case for reform, its specific proposals, and its specific questions to consultees are set out in the document dated December 2021 (“the Consultation Paper”).
2. BID is an independent charity established in 1999 to promote access to justice for those detained under the Immigration Acts. Our work includes
 - a. Conducting field research and large-sample analyses of our own casework as the basis for our publications.
 - b. Giving evidence to and engaging with government agencies, Parliament, international human rights bodies and the judiciary concerning the position of immigration detainees in the UK. For example, in November 2018 BID gave oral evidence to the Joint Committee on Human Rights and the Home Affairs Committee in the course of their investigations into immigration detention. BID also recently provided evidence to the Independent Review of Administrative Law (23 October 2020) and to the Parliamentary Justice Committee’s review into the future of Legal Aid (19 November 2020).
 - c. Preparing and presenting bail applications in the First-tier Tribunals for the most vulnerable detainees, with the assistance of barristers acting *pro bono*, as well as producing written materials, running legal advice sessions and providing telephone support to assist detainees in representing themselves at bail hearings. During the period from 1 August 2020 to 31 July 2021, BID assisted 4,792 people and prepared 406 bail applications, of which 361 were heard; 309 individuals (86%) were granted bail.
 - d. Outreach to those detained in the prison estate under the Immigration Acts with a view to providing advice, assistance and potential representation in relation to bail.

During the period from 1 August 2020 to 31 July 2021, BID assisted 315 foreign national offenders (“FNOs”) detained under the Immigration Acts in prisons following their custodial sentence. 53 bail applications were prepared, of which 50 were heard and 47 were granted.

- e. Providing advice, assistance, and potential representation to individuals seeking to resist deportation on Article 8 ECHR grounds, through BID’s Article 8 Deportation Appeals Project. During the period 1 August 2020 to 31 July 2021 the project provided assistance to 107 people.

- f. Intervening in key domestic and international cases relevant to our work, including before the Supreme Court and the European Court of Human Rights (“ECtHR”). In particular BID has, with the Supreme Court’s permission, acted as an intervener in almost every appeal the Supreme Court has heard concerning the powers of detention and bail under the Immigration Acts, including *R (Lumba and Mighty) v SSHD* [2012] 1 AC 245 *R (Kambadzi) v SSHD* [2011] 1 WLR 1299; *R (O) v SSHD* [2016] 1 WLR 1717; *B (Algeria) v Secretary of State for the Home Department* [2018] AC 418; *R (DN (Rwanda)) v SSHD* [2020] AC 698; and *R (Majera) v SSHD* [2021] 3 WLR 1075. BID also intervened before the Supreme Court in *Kiarie and Byndloss v SSHD* [2017] 1 WLR 2380, a landmark case concerning Article 8 ECHR, the deportation of foreign national offenders and access to justice. In each of these cases the Supreme Court endorsed, at least in part, the positions for which BID contended. Beyond the Supreme Court:
 - i. BID has intervened in the ECtHR in cases concerning the Convention compatibility of individual detention and of the UK’s detention regime – *Abdi v United Kingdom* (2013) 57 EHRR 16, *JN v United Kingdom* (32789/12, 19 May 2016) and *Draga v United Kingdom* (33341/13, 25 April 2017).

 - ii. BID has intervened in the Court of Appeal in the immigration detention cases of *D v Home Office* [2006] 1 WLR 1003; *R (ex p K) v SSHD* [2009] UKHRR 973; *BA v Home Office* [2012] EWCA Civ 944; and *R (Francis) v SSHD* [2015] 1 WLR 567.

- iii. BID recently intervened in *R (SM) v SSHD* [2021] 1 W.L.R. 3815, establishing that the differential arrangements for publicly funded legal advice for immigration detainees held in prisons breached Article 14 read with Articles 2,3, 5 and 8 ECHR.
3. Through all this work, BID has acquired extensive experience of and expertise in the operation of the Human Rights Act 1998 (“the HRA”), particularly in the areas of administrative detention, removal/deportation, access to justice, and prisons. The responses below are directly informed by this experience and expertise. Accordingly, BID has provided full responses to the questions which are most relevant to its work (Part 1); it has also provided shorter responses to other, more general questions (Part 2). BID has not responded to questions which fall outside of its experience and expertise.
4. In summary, the proposals addressed in this response are incoherent, unnecessary, and would have the consequence of diminishing human rights protection in the UK. The proposed amendments will only increase litigation costs and deter genuine claims, while reducing the accountability of public bodies. BID notes that the proposals go far beyond those recommended by the Independent Human Rights Act Review (“IHRAR”). As the IHRAR Panel acknowledged, the case for widespread reform to the HRA has not been made out.

PART 1: FULL RESPONSES TO CONSULTATION QUESTIONS

5. In this first part of its consultation response, BID addresses those questions which directly affect its work or in which it otherwise has particular expertise.

Question 2

The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

6. BID does not agree that there is a need for reform on this point. The existing provisions in s2 HRA already strike an appropriate balance between maintaining the autonomy of national courts and taking into account the decisions of the ECtHR and those made in other jurisdictions. As BID observed in its response to the call for evidence by the IHRAR, the domestic courts have taken a balanced and sensible approach to the duty to “take into account” the jurisprudence of the ECtHR. In particular:
 - a. The lower courts have consistently recognised that, where domestic authority which is formally binding on them conflicts with Strasbourg authority, they must follow the former: see e.g. *Kay v Lambeth LBC* [2006] 2 AC 465, [43]. Accordingly, the domestic doctrine of precedent remains undisturbed by the operation of the HRA, and the Supreme Court remains the final arbiter of its interpretation and application in the UK.
 - b. The Supreme Court has been equally clear that it is not bound by Strasbourg authority: see e.g. *Manchester City Council v Pinnock* [2011] 2 AC 104, [48]. Rather, it proceeds on the basis that:
 - i. It should “follow any clear and constant jurisprudence of the [ECtHR]”: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [20] per Lord Bingham.
 - ii. It “will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber”: *R (Anderson) v SSHD* [2003] 1 AC 837, [18] per Lord Bingham.
 - iii. Ultimately, “the degree of constraint imposed or freedom allowed by the phrase ‘must take into account’ is context specific”: *R (Kaiyam) v SSJ* [2015]

AC 1344, [21] per Lords Mance and Hughes (and see the discussion in *R (Hallam) v SSJ* [2020] AC 2791).

7. BID has seen this approach applied in many cases within its areas of expertise, with appropriately measured results.
8. One example is the series of cases comprising *James v United Kingdom* (2012) 56 EHRR 399, *Kaiyam v SSJ*, *Kaiyam v United Kingdom* (2016) 62 EHRR SE13, and *Brown v Parole Board for Scotland* [2018] AC 1.
 - a. In *James* the ECtHR held that, where a prisoner is detained on the basis of the risk they would pose on release, Article 5(1) ECHR requires the State to afford them access to rehabilitative courses designed to reduce that risk.
 - b. In *Kaiyam*, the Supreme Court reminded itself that it was not bound by the jurisprudence of the ECtHR: [18]-[21]. On careful review of the authorities, it agreed with the ECtHR that the State (and hence, in that case, the Secretary of State for Justice) was required to afford access to opportunities for rehabilitation, but did not agree that this obligation arose from Article 5(1). Rather, the Court held that it was an “ancillary” obligation inherent in Article 5 as a whole: see [24]-[39]. One of the Court’s key concerns about Strasbourg’s approach was that it would mean prisoners who could not be offered appropriate opportunities for rehabilitation (for example due to funding constraints) would be automatically entitled to release – which would have been contrary to the domestic statutory scheme and potentially dangerous to the public: see [23], [30], [34]. This risk was avoided by the Court’s preferred approach, which was “more satisfactory in result”: [39]-[40]. On the facts, the Court found that in two of the four cases before it there had been breaches of the “ancillary” obligation which sounded in modest awards of damages: [50], [60], [69].
 - c. Three of the appellants then took their cases to Strasbourg. The ECtHR, while maintaining its view of the source of the obligation to provide opportunities for rehabilitation, found all three complaints to be “manifestly ill-founded” on the facts: *Kaiyam v UK*.
 - d. Several years later, the Supreme Court had occasion to reconsider the issue in the case of *Brown*. Following an extensive and detailed review of the judgments in *James* and *Kaiyam*, as well as subsequent Strasbourg jurisprudence (at [8]-[37]), the Court

considered it appropriate to align its approach with that of the ECtHR by locating the obligation to provide opportunities for rehabilitation in Article 5(1): [44]. Importantly, the Court did not consider itself constrained to follow Strasbourg despite the concerns that had underpinned the decision in *Kaiyam*. To the contrary: the Court considered not only that these concerns had been misplaced (as a breach of Article 5(1) did not entail an automatic right to release), but that the approach in *Kaiyam* had actually resulted in the imposition on the Secretary of State of a duty which was “different from, and more demanding than” that recognised by the ECtHR: [42]-[45].

9. These cases illustrate how the obligation to take account of ECtHR jurisprudence is understood and applied in a way that is both analytically rigorous and sensitive to domestic context. Indeed, in these cases the Supreme Court ultimately considered that Strasbourg’s approach produced results preferable to its own earlier decision.
10. This view is reinforced by the fact that, in some of the areas central to BID’s work, the jurisprudence of the ECtHR has informed or tracked (rather than altering) the common-law position. This is particularly common in cases involving administrative detention. For example:
 - a. In *R (Lumba) v SSHD* (BID intervening), the Supreme Court considered the lawfulness of detention under a policy which had been kept secret from those it affected (as well as from the general public). Lord Dyson drew on the jurisprudence of the ECtHR in considering a number of key issues, including the limits on the lawful exercise of powers of administrative detention (see [30]); the character of executive policy as part of the “law” governing the exercise of broad statutory powers (see [32]-[34]); and the lawfulness of a policy containing a presumption in favour of detention (see [45]-[54]). On each issue, however, his Lordship’s conclusions were ultimately based on the requirements of the common law. As Lady Hale put it in her judgment, “[t]he common law is just as respectful of the liberty of the person, and just as distrustful of arbitrary and secret decision-making ... as is the Convention”: [206].
 - b. In *B (Algeria) v SLAC* (BID intervening), the Supreme Court considered whether a power to impose conditional bail where a person was “detained” related only to a person who was lawfully detained. The Court’s conclusion that this was what Parliament intended was wholly driven by the common-law principles of

interpretation which apply where fundamental rights are in issue. The Court did not consider that the Strasbourg jurisprudence on Article 5 added anything to its reasoning: see [56].

11. Again, these cases reflect a flexible and context-sensitive approach to s 2 HRA, to which (in BID's view) no amendment is required.

12. This remains BID's view.

Question 8

Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.

13. The introduction of a threshold test of "significant disadvantage" for human rights claims would undermine human rights protection in the UK, is unnecessary, and would be counter-productive to the aims identified in the Consultation Paper of "*reinforcing our freedoms under the rule of law*" and "*continuing to respect the UK's international obligations as a party to the Convention.*"

14. The implied premise of the proposal is that there is a sub-species of "non-significant" human rights that do not deserve legal protection or of "non-significant" breaches which require no sanction or remedy. This lacks legal foundation. The fundamental rights protected in the Convention reflect universal minimum standards. Any violation of those rights is treated as significant in the Convention. The question of breach is binary: either a breach of a fundamental right protected under the Convention has occurred or it has not. Shutting individuals with meritorious human rights claims out of the domestic courts on the basis that the breach complained of was insufficiently significant would reduce human rights protections; reduce Government accountability for human rights breaches; and moreover place the UK in breach of Article 13 ECHR (the right to an effective remedy) and, in many classes of case, also Article 6 ECHR (the right to a fair trial).

15. The proposal appears to be based on a misunderstanding or misapplication of the "significant disadvantage" admissibility criterion in Article 35(3)(b) ECHR. That provision was introduced in 2004 as a mechanism to "*relieve pressure*" on the Strasbourg court, by allowing it to focus on the most serious cases and leave less serious cases to the domestic

courts, in accordance with the principle of subsidiarity.¹ Although Article 35(3)(b) is itself the subject of controversy,² it is considered an appropriate control measure at the international level precisely because mechanisms exist for enforcing breaches with less dramatic consequences at the domestic level. To introduce a similar criterion in domestic courts would undermine that machinery: it would simply deny those who have suffered such breaches in the UK any redress whatsoever.³

16. Beyond the vague reference to “*restoring a sharper focus*”, it is unclear what mischief the proposed permission stage is intended to address. If the purpose is to discourage unmeritorious or spurious claims, then better procedural safeguards already exist to filter out such claims at an early stage and prevent repeat claims. These include the requirement that proceedings can only be brought by a “victim” under s7 HRA, the strike-out and summary judgment procedures under Parts 3 and 24 of the Civil Procedure Rules (‘CPR’), and the availability of civil restraint orders. In judicial review proceedings, the existing permission stage under CPR rule 54.4 includes consideration of arguability, standing and the “highly likely” materiality test.⁴ These procedural controls are already effective at weeding out unmeritorious and abusive claims, as is implicitly recognised in the Consultation Paper: in each of the spurious case examples described at [127]-[131], the case was struck out at a preliminary stage.

17. In any event, the imposition of a *severity* threshold is an ineffective and inappropriate way to address a perceived problem with *unmeritorious* claims: a claim might be highly meritorious but not involve significant disadvantage to the victim, or might involve extreme disadvantage but be wholly spurious. The case examples given at [127]-[131] of the consultation deserved (on the face of it) to fail on their merits, not because the rights that the claimants had sought to rely on or the consequences of the breaches they alleged were trivial or unimportant. BID is aware of many other cases involving restrictions on detainees which would certainly entail significant disadvantage: for example, restrictions

¹ *Explanatory Report to Protocol No 14 to the Convention*, Council of Europe Treaty Series – No. 194 (2004), paragraph 15.

² Vogiatzis, N. (2016), *Admissibility Criterion under Article 35(3)(b) ECHR: A ‘significant disadvantage to human rights protection?’* International and Comparative Law Quarterly, 65(1), 185-211.

³ See *A v United Kingdom* (2009) 49 EHRR 29 at [174]: ““It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity.”

⁴ s31(2A) of the Senior Courts Act 1981

that interfere with privileged correspondence, prohibit contact with family, restrict the right to worship, or deny nutritional or medical needs. Indeed, these reflect fundamental rights that are also recognised at common law.⁵ Each case is highly fact specific, which is why unmeritorious cases are better dealt with under the strike out procedure than through a severity threshold.

18. If, on the other hand, the Government’s aim is to reduce litigation costs, then the proposed solution is the wrong way to go about it for different reasons. Introducing an additional mandatory procedural hurdle can only serve to increase litigation costs. The proposals would require the Court in each case, in order to decide whether a victim of human rights abuse has suffered significant disadvantage, to embark on a pre-emptive assessment of the severity of the violation and the impact on the victim. This will inevitably require additional pleadings, witness evidence, hearings, appeals and satellite litigation at an early stage, delaying the Court from determining the issues in dispute. There are far better ways to reduce litigation costs. BID notes, for example, that the proposal fails to consider the impact of ongoing Ministry of Justice reforms to civil litigation, such as the HMCTS reform programme and the expansion of fixed recoverable costs.

Question 9

Should the permission stage include an ‘overriding public importance’ second limb for exceptional cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

19. For the reasons set out under Question 8 above, BID opposes the imposition of a “significant disadvantage” threshold for human rights claims as inconsistent with the Government’s obligations under the ECHR and incoherent.
20. If, however, the Government does proceed with the proposals, then BID would support the inclusion of a safeguard clause to allow the courts to determine claims in the public interest. Otherwise there will be no mechanism for ensuring that the Government is held to account for widespread breaches of human rights. Take for example restrictions on freedom of movement imposed during the pandemic. Large numbers of asylum-seekers accommodated (but in principle not detained) by the Government in hotels were subjected

⁵ *R v SSHD, ex parte Daly* [2001] UKHL 26 (on privileged communications); *R v Deputy Governor of Parkhurst ex p Weldon* [1992] 1 AC 58 (on intolerable prison conditions).

to restrictions on the periods and purposes for which they could leave their hotels, ostensibly to enforce the COVID Regulations in force at the time. They were threatened with serious consequences if they did not comply.⁶ After litigation was brought by four asylum-seekers challenging the restrictions imposed upon them in different hotels, the Secretary of State for the Home Department (“the Secretary of State”) accepted that such restrictions lacked lawful foundation and contacted private contractors operating the hotels to ensure that the restrictions were lifted. In those cases, the claimants claim that they were in effect confined to cramped rooms in their hotels for 23 hours out of every 24 and that they were deprived of their liberty with severe consequences for their mental health. Suppose, however, that the unlawful restrictions in question instead had a much more minor impact and amounted to no more than an unjustified interference with the right to private life of the hotel residents. This would still represent a widespread human rights breach (and abuse of power) requiring urgent adjudication.

21. BID does not agree that the word “overriding” is required: if the Court considers that there is a compelling reason and/or it is in the public interest for a human rights claim to be heard, then it should proceed.

Question 10

How else could the government best ensure that the courts can focus on genuine human rights abuses?

22. This question is posed in the section of the Consultation Paper addressing “judicial remedies”: [224]-[227]. The asserted aim is to “*strengthen the courts’ discretion when granting remedies for human rights breaches*”: [9]. This is said to be desirable because human rights are being “*misused to provide a fall-back route to compensation on top of other private law remedies*”, but should only “*be relied upon when a genuine and serious breach has taken place*”: [225].
23. BID does not agree that reform of this kind is required, either for the reasons given or at all.
24. **First**, the courts already have a wide discretion when granting remedies for human rights breaches. Section 8 HRA provides that:

[Asylum seekers threatened with homelessness for not complying with ‘unlawful’ 23-hour curfew, court hears | The Independent](#)⁶

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

... (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

[...]

25. The discretion to grant such relief or remedy as the court considers just and appropriate, subject only to the limitation in subsections (2)-(3), does not require further broadening. In fact – and as set out further below – the Government’s proposals appear more likely to reduce judicial discretion than to widen it.
26. **Second**, there is no evidence – and, in BID’s experience, it is not the case – that human rights claims are providing claimants with an inappropriate or undesirable “*fall-back route to compensation on top of other private law remedies*” in circumstances where there has been no “*genuine and serious breach*” of the relevant rights.
27. The starting-point is that it is orthodox and appropriate for a claimant who has suffered any kind of potential wrong to identify more than one cause of action which arises on the facts of their case. It is also orthodox and appropriate for a claimant to pursue both, provided that they are properly arguable. So – to take a pure common law example – a claim arising out of severe injury intentionally caused by force used by a guard on a detainee in an Immigration Removal Centre may give rise to causes of action for assault and/or misfeasance in public office. A claimant may choose to pursue only one of these – for example, to save time and cost – but this is a matter for them.
28. If a claimant succeeds on more than one cause of action, a court will not order the payment of damages where this would result in “double recovery”. The assaulted detainee will not, under claims for assault and misfeasance, recover twice for the same personal injuries.
29. Claimants are not, then, required to stake everything on a single cause of action any more than defendants are required to rely on only one defence. In both instances there may be more than one route to the right answer.

30. Everything said at [22]-[24] above applies equally where one of the causes of action is a claim under the HRA. The injured detainee is not misusing the ECHR if, in view of the severity of the harm suffered, she additionally seeks vindication of her fundamental rights by seeking a declaration that she suffered inhuman or degrading treatment contrary to Article 3 ECHR.
31. The advancing of a meritorious HRA claim alongside common law claims is not a “*fall-back route to compensation*”: it is an alternative cause of action which is properly available and is properly advanced. Recognition that an individual has suffered a breach of their fundamental rights plays a vital vindicatory function for the individual and is moreover critical for the rule of law. In our pure common law example, a court’s recognition that the tort of misfeasance in public office was committed in addition to assault plays a vital function (and it could not seriously be suggested that it was a misuse of the law to bring *both* common law claims). So too there would be nothing redundant or improper in the same individual also seeking recognition that she had suffered inhuman or degrading treatment contrary to Article 3 ECHR. Further, there will be many cases where the claimant is properly entitled to succeed under the HRA even if a common-law or other statutory cause of action fails; and/or where the HRA claim affords some significantly different form of relief – for example, if the injured detainee’s Article 3 claim also concerned breach of the State’s positive obligation to conduct an effective investigation into the ill-treatment she suffered in order to redress the systemic issues that allowed it to occur.
32. Where HRA claims are brought alongside common law claims, as in any other case, the courts will use their experience and common sense to manage the claims in a way that makes sense. The same rule against double recovery applicable to the common law claims would, moreover, also apply to the HRA claims.
33. Finally – and, BID would hope, obviously – no reform to the HRA is required in order to ensure that damages are awarded only in cases involving a “*genuine and serious*” breach. Whether there has been a “*genuine*” breach of s 6 is for the courts to determine in adjudicating on the individual case; any established breach of a fundamental right is inherently “*serious*” (as discussed in relation to Question 8 above); and under s 8(3) damages are only available where this is required by way of just satisfaction.

34. The Government’s specific proposal for “strengthening” the rule in s 8(3) is to “require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered, to allow the courts to decide whether the private law claims already provide adequate redress”: [226]. The paper indicates that the Government “expects that this would reduce the numbers of human rights-based claims being made overall, while preserving people’s ability to bring rights claims where justice requires it”: [227]. While the Government does not expressly invite comment on this proposal, BID understands this to be implicit in Question 10 and makes the following observations.
35. **First**, and as noted above, this proposal does not appear to strengthen the courts’ discretion in granting remedies for human rights breaches, but rather to limit it. The proposal would do this either by rendering particular causes of action “generally [un]available” (so that the courts could not adjudicate on them at all), or by requiring non-HRA claims to be made or considered “in advance” of HRA claims (giving the courts no option but to determine them in a particular order). This is said to be “to allow the courts to decide whether the private law claims already provide adequate redress” – but, in any case involving a HRA claim and another cause of action, the courts are already required by s 8(3) to consider whether damages are required by way of just satisfaction and to take account of “any other relief or remedy granted” in doing so.
36. **Second**, Parliament could not “go further” than existing arrangements without breaching the UK’s international obligations. Article 13 ECHR requires that the UK provide any person whose Convention rights have been violated with “an effective remedy before a national authority.” Article 5(5) ECHR further requires that everyone who has been the victim of arrest or detention in contravention of that article “have an enforceable right to compensation.” Plainly, any further limitation on the availability of damages – and still more so any limitation on the availability of any HRA claim at all (see immediately below) – would mean that in some cases damages would not be awarded despite being required in order to afford the claimant just satisfaction. This would place the UK in clear breach of Article 13.
37. **Third**, insofar as the proposal contemplates restricting the availability of a claim under the HRA *per se* –so that a person whose case also gave rise to another cause of action would be precluded from issuing a human rights claim either at all, or until they had exhausted that option – this is deeply concerning. The rule of law requires that, where a person has a meritorious claim, they can pursue it before the relevant court (subject to applicable rules

around limitation periods and standing). As discussed above, courts have a range of gatekeeping powers which enable them to weed out vexatious or obviously unmeritorious cases, including strike-out powers (in civil claims) and permission requirements (in judicial review and on appeal to higher courts or tribunals). Rendering a meritorious human rights claim “*not generally available*” would infringe Article 13 ECHR and would undermine the rule of law. This aspect of the proposal is all the more concerning given that it is based on the hazy concept of the “availability” of an alternative cause of action. Would a claimant be precluded from bringing a very strong HRA claim simply because they could bring a weak claim under another legal rule? What if the HRA claim and the alternative claim were equally strong, but were based on slightly different facts? If the comparative strength of the claims mattered, what would the test be? In BID’s view, there is simply no good reason to introduce these serious risks, complexities and uncertainties – particularly where fundamental rights are at stake.

38. **Fourth**, insofar as the proposal contemplates regulating the way courts exercise their case management powers –so that they would be required to consider any alternative cause of action advanced by a claimant before any claim under the HRA – BID’s objection is a practical one. As explained above, courts already have considerable experience in dealing with claims which raise multiple causes of action; they also have wide powers of case management which enable them to do so in the way that makes most sense in all the circumstances. If the courts were forced to stay or “pause” an HRA claim at an earlier stage of the proceedings in all cases, and to come back to it only after any other cause of action had been considered and determined, time and resources may be saved in some cases; but in many others, there would be a colossal waste as parties and courts were forced to circle back following a hearing and judgment that had not dealt with all the issues in dispute. This would be particularly egregious where the factual background to both causes of action was the same. Depending on the circumstances, witnesses might need to be recalled, hearings reconvened, and fresh written arguments drafted – all at the kind of public expense the Consultation Paper ostensibly seeks to avoid. In BID’s view, courts ought to be left with the discretion to manage cases involving HRA claims like any case involving multiple causes of action.

Question 11

How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

39. The Consultation Paper suggests that that the Bill of Rights would seek to “*restrain the ability of the UK courts to use human rights law to impose ‘positive obligations’ onto our public authorities without proper democratic oversight*”: [9]. In essence, and as reflected in the framing of Question 11, the Paper contends that:
- a. The ECtHR has increasingly recognised positive obligations which Contracting States need to discharge in order to safeguard a range of Convention rights.
 - b. These obligations are not identified on the face of the Convention, and were not specifically envisaged by Contracting States when the Convention was signed.
 - c. As a result, these obligations amount to “judicial extensions of human rights” which are being introduced “without any meaningful democratic mandate or accountability” and need to be restrained.
40. BID does not agree with this analysis. It also notes that the IHRAR did not, in the context of its work on the margin of appreciation, identify any particular need for reform in the area of positive obligations.
41. The starting-point is that the ECHR identifies fundamental rights (in Articles 2-14) and, by Article 1, requires Contracting States to “*secure*” those rights “*to everyone within their jurisdiction*”. Particularly important to BID’s work are Article 3 (the absolute prohibition of torture and inhuman or degrading treatment or punishment), Article 5 (the right to liberty and security), and Article 8 (the right to respect for private and family life).
42. In order to secure these rights, a Contracting State will always be required both to refrain from doing certain things (“negative” obligations) and to do certain other things (“positive” obligations). As academic commentators have observed: “*Identifying the multiple duties that may be relevant to any one right sharpens an understanding of what is distinctive to and necessary to realise that right.*”⁷ This is true not only of Convention rights but also of longstanding common-law rights: for example, the right to trial by jury requires the State not only to

⁷ H. J. Steiner *et al.*, International Human Rights in Context. Law, Politics, Morals, 2007,186.

refrain from trial by judge alone but to set up a system for jury trials. Few if any rights could be meaningfully secured if corresponding positive obligations were simply ignored.

43. The precise parameters of the State’s obligations – whether negative or positive – can never be fully foreseen at the time a right is first recognised. When the executive ratifies a treaty on behalf of a State, and where Parliament legislates to domesticate the rights contained in that treaty, they are fully cognisant that not all of the resulting obligations will be “*immediately obvious from a superficial perusal of the text*” (see [52] of the Consultation Paper). This is particularly so in the case of international human rights instruments, which are often interpreted in an evolutive manner. In the case of the ECHR and HRA, and as Baroness Hale explained in *In re McCaughey* [2012] 1 AC 725 (at [90]):

“It has always been clear that the content of the Convention rights can evolve over time. When the [HRA] was passed, Parliament must be taken to have known of the jurisprudence which described the Convention as a ‘living instrument’ in Tyrer v United Kingdom (1978) 2 EHRR 1; which implied further rights into those expressed in Golder v United Kingdom (1975) 1 EHRR 524; which developed autonomous concepts in Engel v The Netherlands (No 1) (1976) 1 EHRR 647; which recognised positive obligations in Marckx v Belgium (1979) 2 EHRR 330; and which insisted that rights be made ‘practical and effective’ rather than ‘theoretical and illusory’ in Airey v Ireland (1979) 2 EHRR 305.”

44. The result is that both the executive (in ratifying the Convention) and Parliament (in passing the HRA) were perfectly aware that the parameters of the State’s positive obligations in respect of different Convention rights would need to be worked out, over time, on a case-by-case basis. Parliament entrusted this task to the courts. Thus, the exercise does not (as the Consultation Paper suggests) lack an appropriate “*democratic mandate*”. To the contrary: the courts are acting within established constitutional parameters by interpreting and applying the laws Parliament has chosen to enact.⁸
45. Furthermore, in the particular context of positive obligations both the ECtHR and the domestic courts have been extremely careful to respect the roles of the executive and the legislature as primary decision-makers. This respect is given effect:

- a. in describing the scope of positive obligations, with concepts of reasonableness and proportionality playing a central role; and

⁸ Nor is the resulting “incremental” expansion of the law (the term used in the Consultation paper at [133] and [229]) inimical to legal certainty. Indeed, incremental development is a core feature of the common law: for example, in *R (Jalloh) v SSHD* [2021] AC 262 the Supreme Court recognised for the first time that for the purposes of false imprisonment – a tort which protects the constitutional right to freedom from executive detention – being required to comply with a curfew can constitute “imprisonment”.

- b. in adjudicating on compliance with those obligations, with the courts repeatedly stressing the need for an appropriate degree of deference to the original decision-maker (this being the domestic equivalent of the “margin of appreciation” recognised by the ECtHR).
46. (BID notes in passing that the Consultation Paper is wrong to suggest that the developments described at [63]-[67] reflect a “*commitment to an increased margin of appreciation*”. They simply affirm Contracting States’ commitment to the margin already recognised in the jurisprudence of the ECtHR.⁹)
47. To take some examples from Strasbourg:
- a. In *Osman v UK* (2000) 29 EHRR 245, discussing the operational duty arising under Article 2 ECHR, the ECtHR held (at [116]) that “*bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, [the operational duty] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.*”
 - b. In *Al-Skeini v UK* (App. No. 55721/07, 7 July 2011) the ECtHR – discussing the associated investigative obligation – noted (at [168]) that this “*must be applied realistically, to take account of specific problems faced by investigators*” in “*a foreign and hostile region in the immediate aftermath of invasion and war.*”
 - c. In *Hatton and Others v. the United Kingdom (Grand Chamber)* (2003) 37 EHRR 28, the Grand Chamber – considering positive obligations arising under Article 8 – recalled (at [98]) that:

“Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights [...] or in terms of an interference by a public authority [...], the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.”
 - d. In *Ribcheva v Bulgaria* (App. No. 37801/16, 30 March 2021) the ECtHR emphasised that Contracting States enjoy a margin of appreciation in complying with their positive obligations under Article 2, including “*in appreciation of the choices they face in*

⁹ Thus, for example, the recital recently added to the Convention reads: “*Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,*”

terms of priorities and resources” (at [164]-[165]), and that “*it is not for the court to discuss with the benefit of hindsight the merits of alternative [approaches], or to substitute its views... for those of the competent authorities”* (at [170]; see also [179]).

48. The same approach has been taken by the domestic courts. For example:

- a. In *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225, discussing the operational duty under Article 2, the House of Lords warned expressly about the dangers of hindsight and noted that the key question was whether the police, “*making a reasonable and informed judgment on the facts and in the circumstances known to [them] at the time, [should] have appreciated*” the relevant risk: see [36]-[37]. The decision was confirmed by the ECtHR (*Van Colle v UK* (2013) 56 EHRR 23).
- b. In *Re E* [2009] 1 AC 536, Lord Carswell stressed the role of proportionality in assessing the scope of this obligation and the need to accord “*appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice*” (at [13]).

49. The result is that the courts most certainly will not – as the Consultation Paper suggests at [142] – seek, with the wisdom of hindsight, to second-guess exercises of professional judgment under pressure. Nor have they formulated or applied the positive obligations arising under the ECHR in a manner which is “*overly prescriptive*” (as suggested at [150]). To the contrary: positive obligations are formulated, and alleged breaches adjudicated, with careful and express regard to the separation of powers. As a result, public authorities which exercise “*common sense and professional judgment to determine operational priorities*” (see [142]) will be found to have acted unlawfully only where they have failed to take reasonable steps to protect the fundamental rights of those who depend on them to do so. Although the Consultation Paper also raises concerns about the cost to public authorities of unmeritorious claims, these concerns cannot properly be addressed by seeking to curtail the availability of meritorious ones.

50. BID is not well placed to comment on the Consultation Paper’s detailed discussion of the alleged impact of the need for “*Osman warnings*” on the use of police resources. It notes, however, that this discussion is somewhat selective in terms of the impact and beneficiaries of positive obligations: for example, the ECtHR has also recognised the applicability of the obligations under Articles 2 and 3 to police officers acting in the line of duty (*Ribcheva v Bulgaria*) and to victims of child sex abuse (*RB v Estonia* (App No 22597/16, 22 June

2021). Perhaps most relevant to BID's work is the example of *MA and BB v SSHD* [2019] EWHC 1523 (Admin), a case arising from footage secretly recorded by a detention officer at Brook House IRC in 2017. As the Judge recorded (at [3]):

"The covertly recorded material showed scenes later described by the Immigration Minister as 'appalling': a detainee with mental health issues being ridiculed and physically assaulted, an officer describing to a room of other staff his assault on a detainee, detainees being spoken of in depersonalised and derogatory terms using arguably racist language, a collective decision not to record use of force."

51. The judgment also recorded that, initially, the Secretary of State declined to order a comprehensive formal investigation into the serious issues this footage raised. Faced with a claim that this breached her investigative obligation under Art 3 ECHR, she (properly) decided to ask the Prisons and Probation Ombudsman to conduct a bespoke Special Investigation: [4]-[6]. The proceedings in *MA and BB* subsequently established that, in order to ensure that this obligation was discharged, it was vital that the Investigation have the power to compel the attendance of witnesses (see [54]-[64], [80]) and to hold public hearings (see [65]-[70], [81]).¹⁰ The investigation was subsequently converted into a statutory inquiry, with the Secretary of State stressing the importance of "*establish[ing] the facts of what took place... and ensur[ing] that lessons are learnt to prevent these shocking events happening again.*"¹¹ Proceedings brought in reliance on positive obligations were instrumental in leading to this result – one personally endorsed by the Secretary of State.
52. For all these reasons, BID does not agree that any reform to the HRA is required in order to limit the recognition of positive obligations required to secure Convention rights.

Question 23

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons. Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'. Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right. We would

¹⁰ See BID's summary at <https://www.biduk.org/articles/488-brook-house-investigation-powers-extended-by-high-court-judge>

¹¹ <https://www.ppos.gov.uk/news/ppos-brook-house-investigation-converted-into-statutory-inquiry/>

welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

53. BID makes four preliminary points in response to this question.
54. **First**, the principle of proportionality is applied by our courts independently of the HRA. The principle of proportionality was already well understood and, in certain contexts, applied well before the HRA entered into force. It now forms part of common law interpretative principles (see discussion in *R(Alconbury Developments Ltd) v SSETR* [2001] UKHL 23, [2003] F2 2 AC 295 at [51], [169]). For example, it has been accepted at the highest level that legislation impinging on fundamental rights protected at common law should be read subject to implied limitations of proportionality: see, in the context of access to justice, *R (UNISON) v Lord Chancellor* [2020] AC 869 (in particular [88]) and in the context of deprivation of nationality, *Pham v SSHD* [2015] 1 WLR 1591 (in particular [118]-[119]).
55. **Second**, the courts do not need further legislative guidance concerning the application of the proportionality principle because there has been ample, detailed, judicial guidance (see for example *Bank Mellat* [2013] UKSC 38, [2014] AC 700 ; or, in the context of immigration and deportation, *Huang v SSHD* [2007] UKHL 11, [2007] 2 A.C. 167 and *HA (Iraq) v SSHD* [2016] UKSC 60, [2016] 1 WLR 4799). In BID’s experience, the judicial guidance concerning Article 8 ECHR and deportation is very well understood including at the first tier of the tribunal judiciary.
56. **Third**, in the immigration context, there is already very detailed statutory guidance concerning the application of the proportionality principle (see s.117 of the Nationality Immigration and Asylum Act 2002). As the Court of Appeal observed in *CINigeria v SSHD* [2019] EWCA Civ 2027, | [2020] Imm. A.R. 503 [20] and [50]
- “if in applying section 117C(3) or (6) the conclusion is reached that the public interest ‘requires’ deportation, that conclusion is one to which the tribunal is bound by law to give effect...In such a case there is no room for any further assessment of proportionality under article 8(2) because these statutory provisions determine the way in which the assessment is to be carried out in accordance with UK law.”*
- “Part 5A of the 2002 Act is intended to provide a clear and straightforward set of rules for decision-makers to apply”.*
57. The detailed legislative provisions of Part 5A of the 2002 Act generated substantial litigation (as the Supreme Court observed with dismay in *KO (Nigeria) v SSHD* [2018]

UKSC 53 [2018] 1 W.L.R. 5273 [14]) but are now, following the judicial guidance that resulted from that litigation, also, in BID’s experience, very well understood at all levels of the judiciary hearing asylum and immigration cases. See also BID’s response to Question 24 below.

58. To the extent that legislation seeks to summarise the existing detailed judicial guidance, it is redundant (and, if aiming for brevity rather than simply cutting and pasting lengthy texts from judgments the legislative guidance, may well misstate the effect of that guidance or generate confusion). To the extent that it departs from the existing detailed judicial and statutory guidance, fresh legislative guidance is likely to obfuscate rather than clarify the law and lead to fresh, prolonged litigation.
59. **Fourth**, judicial guidance in the immigration context already makes clear that legislation pertinent to a proportionality exercise should be given great weight because it expresses the will of Parliament. See, for example, in the immigration and deportation context *HA (Iraq)* [14] and [15] and *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998, [54].
60. With those four preliminary points in mind, BID’s view is that legislative change to “*give more guidance to the courts on how to balance qualified and limited rights*” is unnecessary and likely to obfuscate rather than clarify the law and to generate years of litigation of precisely the sort this proposal is presumably intended to avoid.
61. Neither of the two draft clauses supplied at Appendix 2 is adequate or useful and both illustrate the foregoing point that attempts to summarise in short legislative form the law on proportionality are apt to obfuscate the law:
 - a. Option 1 makes little sense. See in particular para 2 of the draft clause referring to “*Parliament’s view that the legislation is necessary in a democratic society*”. It is not legislation that must be shown to be necessary in a democratic society.
 - b. As for Option 2, it is for the courts to ultimately decide where the public interest lies, while giving due deference to the assessment by the executive and Parliament of where that interest lies; and legislation does not establish facts. The proposed legislation cannot establish a “*fact that Parliament was acting in the public interest*”.

Question 24

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons. Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment; Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or Option 3: provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

62. Here too, BID makes four preliminary points.
63. **First**, this question appears to assume that (a) the Secretary of State is unable effectively to prevent abusive human rights claims from frustrating deportation; and/or that (b) even meritorious claims are contrary to the public interest and should be prevented from '*frustrating*' deportations. Both those premises are wrong. As to (a) there are already stringent, powerful safeguards against abusive claims in the immigration context, including the powers to certify claims as clearly unfounded (s.94 NIAA 2002); to remove a person while his or her appeal against deportation is still pending (s.94B NIAA 2002); and to certify a claim as one which should have been, or was already, made earlier (s.96 NIAA 2002). As to (b), deportation is indeed prevented where it would breach the ECHR; however it is not the Government's stated intention (and nor is it in the public interest) for Britain to breach fundamental rights or its international obligations.
64. **Second**, if the question is in fact intended to target the making of last-minute human rights claims, BID observes that many late challenges are necessitated by the very poor quality of Home Office decision-making at first instance (in the last quarter for which statistics are available 52% of human rights refusals were overturned on appeal¹²) and also on receipt of further representations (in BID's experience, those representations may be erroneously refused by the Home Office or simply overlooked for long periods). Late challenges may also be necessitated, in BID's experience, by impediments to obtaining any, or any competent, publicly funded legal advice (for more detail, see *Bail for Immigration Detainees*:

¹² [Tribunal Statistics Quarterly, July to September 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021)

*Legal advice in immigration detention: a 10-year review*¹³). A person with a meritorious claim accesses competent legal advice only when removal is imminent and brings a claim at a late stage which could, with competent legal advice, have been brought and succeeded considerably earlier.

65. **Third**, the cases cited at p.38 of the Consultation Paper are described selectively. These are not examples of Article 8 ECHR (or the legislative guidance in s.117 NIAA 2002) being misunderstood or misapplied:

- a. The case of *AD (Turkey)*¹⁴ is indeed an instance of an appeal allowed notwithstanding a prison sentence of four years or more imposed for a serious offence (grievous bodily harm in that case). Regrettably, the striking facts found by the specialist Tribunals leading to that appeal being allowed are omitted from the Consultation Paper.¹⁵
- b. The case of *OO (Turkey)*¹⁶ is another instance of an appeal allowed on Article 8 ECHR grounds notwithstanding a prison sentence totalling four years. Once again, the consultation paper cites the offences committed and length of sentence but omits the key facts that gave rise to the Tribunal's finding in the individual's favour.¹⁷

66. The foregoing cases are, moreover, the exception rather than the rule. Section 117C NIAA 2002 tightly restricts the circumstances in which appeals by foreign national offenders can succeed on Article 8 ECHR grounds. Take for example the following cases:

- a. *LE (St Vincent and the Grenadines) v SSHD* [2020] EWCA Civ 505, [2020] 4 WLR 56 concerned a former Royal Marine who had served for 14 years and had seen

¹³ https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1293/10_Years_of_Legal_Advice_Survey.pdf

¹⁴ <https://tribunalsdecisions.service.gov.uk/utiac/hu-01512-2019>

¹⁵ The Upper Tribunal, like the First tier Tribunal found of the appellant in that case that “*his actions in committing the index offence were very much out of character and he has expressed remorse; that he was a model prisoner and was on unconditional bail; that he has lived in the UK for over 30 years and is socially and culturally integrated in the UK; that he has no ties with Turkey and would have start anew if sent there; that he has a genuine and subsisting relationship with his wife*” of 31 years, a British Citizen with no ties to Turkey who suffered anxiety and depression and had undergone repeated surgeries for cancer, for whom relocation to Turkey would be unduly harsh. The Tribunals moreover found “*that the claimant's adult son, R, is unwell with Crohn's disease and is reliant on his father for assistance*” and accepted expert evidence showing that the appellant (a permanent resident since 1994) posed a low risk of reoffending and ran a company employing others.

¹⁶ <https://tribunalsdecisions.service.gov.uk/utiac/hu-16908-2018>

¹⁷ The appellant in *OO* had resided in the UK since childhood and had “*known only life in*” the UK; was socially and culturally integrated to the UK; six years elapsed between the offence and the hearing before the First tier Tribunal, during which time the appellant had made “*every effort*” and had been rehabilitated.

active service in Iraq and Afghanistan for which he had been commended. He suffered post-traumatic stress disorder as a consequence of his experiences in service, which in turn was accepted to be linked to the gambling problem giving rise to his offence. He had two sons in the UK with whom he wished to maintain or re-establish contact and from whom he would be separated by deportation. He had committed a single offence of defrauding an elderly woman of her savings, for which he had been sentenced to two years' imprisonment. Applying s.117C NIAA 2002, the Court of Appeal found that LE's deportation would not breach Article 8 ECHR:

"whatever one's own opinion as to the fairness or appropriateness of deporting a man who endured danger serving in this country's Armed Forces for fourteen years, the statutory regime is clear. Unless one or other of the Exceptions can be satisfied, the public interest in deporting foreign criminals will only be outweighed if the appellant can show "very compelling circumstances".Parliament has not created any statutory exception for foreign criminals who have served in the Armed Forces and the clear wording of the statute cannot be overridden by any general duty to ex-service personnel and their families..."

- b. *Imran (Section 117C(5); children, unduly harsh : Pakistan)* [2020] UKUT 83 (IAC) (11 February 2020) concerned a Pakistani national who had resided lawfully in the UK for ten years. He had three young children, all British Citizens (none of whom spoke Urdu) and two of them in full time education in the UK, with whom he was accepted to be particularly close. It was accepted that the children's mother would have difficulties in coping with her sons alone; that one of the children was already suffering emotional difficulties from his father's period of imprisonment and had stabilised upon his release; and that all three children would suffer serious disruption and emotional harm from their father's deportation. Mr. Imran had been convicted of a single offence of Assault Occasioning Bodily Harm for which he had been sentenced to 18 months' imprisonment; his risk of reoffending had been assessed as "*relatively low*". The specialist Tribunal found that his deportation would not breach Article 8 ECHR, having regard to the stringent criteria in s.117C NIAA 2002.

67. **Fourth**, the statistics cited in the box appearing after [150] the Consultation Paper are apt to mislead. The Paper cites data concerning the number of deportation appeals lodged and allowed on human rights grounds in support of the contention that "*expanding human rights restrictions on the government's ability to deport serious foreign offenders engages the government in costly litigation, and puts the public at additional risk by enabling dangerous criminals to frustrate the process*"

(our emphasis). In fact, there has been no expansion of human rights restrictions on the government's ability to deport serious foreign offenders in this period; rather, as already noted, s.117C NIAA 2002 has had the contrary effect. Because the dataset cited in the Consultation Paper is drawn from a period covering April 2008 to June 2021, the data obscures actual trends. As a Freedom of Information (FOI) response to BID from the Home Office dated 14 December 2021 shows, there are in fact now far fewer appeals lodged on human rights grounds (and still far fewer allowed) in the deportation context than the figures cited in the Consultation Paper might appear to suggest. In 2019, for example, 1548 deportation orders were served on non-EEA nationals, of whom 460 (29%) appealed; of those appeals, only 92 were allowed. In 2020, the figures were even more stark: of the 809 deportation orders served, only 124 (15%) had brought appeals¹⁸.

68. With those preliminary points in mind, BID turns to the options canvassed in the Consultation Paper:

(1) Option 1 would impose precisely the sort of legislative straitjacket that the Supreme Court has observed cannot be imposed compatibly with Article 8 ECHR. See *Ruppiah* [2018] UKSC 58, [2018] 1 W.L.R. 5536 [49] where the Supreme Court observed that legislation “cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself.” Option 1 would entail the UK breaching Article 8 ECHR for both procedural and substantive reasons. As to process, Option 1 would preclude decision-makers (in both the executive and judiciary) from engaging in the nuanced, fact-specific balancing of the public interest against the individual's family and private life that Article 8(2) ECHR requires. Deportation would, it seems, be mandatory (on a blanket or near blanket basis) once a sentence of a certain length had been imposed, where Article 8 ECHR rights are concerned. As to substance, Option 1 would compel decision-makers to dismiss Article 8 ECHR claims even in individual cases where the strength of the family or private life ties were so strong or the impact of expulsion on the deportee, or on innocent family members (including children) so acute, as to require another outcome. For all those reasons, Option 1 would ensure repeated and serious breaches of fundamental rights, inconsistently with the stated aims of the consultation. It would also lead to meritorious and long-running applications for relief from the ECtHR of precisely the type that the introduction of

¹⁸ Of those 124 appeals brought in 2020, 14 had been allowed at the time of the FOIA response (the figures on appeals allowed will not be conclusive- it is likely that certain of the 2020 deportation orders are still subject to appeal).

the HRA was intended to avoid. In certain instances, Rule 39 interim measures granted by the ECtHR would moreover prevent urgent removals. These outcomes would also, and again contrary to the objectives outlined in the Consultation Paper, diminish the role of the domestic courts.

- (2) Option 2 is redundant. Such a legislative scheme already exists under s.117 NIAA 2002 for Article 8 ECHR and decision-makers are required to comply with it: see [56] above. The other right which in BID's experience is likely to be invoked against deportation is Article 3 ECHR, an absolute, unqualified protection from torture and inhuman or degrading treatment or punishment. Option 2 has no application to Article 3 ECHR at all. As for Article 6 ECHR, in BID's experience 'foreign' claims (that is, a claim that the right to a fair trial would be breached after expulsion) are rarely successful.
- (3) Option 3 would restrict the ability of the immigration judiciary, in the context of appeals concerning fundamental rights, to form their own conclusions, having heard oral evidence and submissions (neither of which are available to executive decision-makers). The proposal is particularly concerning given the acute defects in executive decision-making already described at [64]above; and given that the proposal appears to extend to all challenges to deportation, including those brought on the bases of risks of torture or inhuman or degrading treatment or punishment (Article 3 ECHR). Option 3 would give rise to human rights breaches and to meritorious applications to the ECtHR, including for urgent suspensive relief. Option 3 is also highly unlikely to have the effect of streamlining deportations. On the contrary, if Option 3 is intended to preclude the immigration judiciary from considering the up to date facts and evidence, Option 3 would substantially increase the number of fresh claims made at the point of removal and judicial review claims (far more costly to the public purse than appeals before the tribunals) where those fresh claims were not accepted by the Home Office.

Question 25

Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

69. This question appears to start from similar erroneous premises to those already identified at Question 24 above, namely that (a) the Home Office is currently unable effectively to prevent abusive human rights claims from thwarting immigration control efforts; and/or that (b) it is in the public interest and somehow lawful for the UK to circumvent “*impediments arising from the Convention and the Human Rights Act*” in the form of proper and meritorious objections to removal, deportation, or other forms of immigration control.
70. Both those premises are wrong. As to the first, there are already stringent, powerful statutory safeguards against abusive claims in the immigration context: see [63] above.
71. As to the second, the stated intention of the proposed amendments is to continue to “*respect our international obligations*” and it is in the public interest for the UK to do so. It would therefore be entirely improper, as well as unlawful as a matter of international law, for the Government to seek to “*address*” (in the sense of curtailing or removing) - or to take action which would have the effect of curtailing or removing – “*impediments*” which are in reality proper legal constraints on Government action which exist in order to ensure respect for fundamental rights and compliance with the UK’s international obligations.
72. In this context, it is important to note that:
- a. The extreme actions now publicly contemplated by the Secretary of State against those crossing the Channel by irregular means, namely marine pushbacks, are inconsistent with multiple international obligations owed by the UK.
 - i. Marine pushbacks (and the peremptory expulsion that pushbacks entail, of asylum seekers without individualised consideration of their claims) are inconsistent with the prohibition on collective expulsion in Article 4 Protocol 4 ECHR and with the absolute prohibition, inherent in Article 3 ECHR, on exposing individuals (by refoulement or by drowning) to a real risk of torture or inhuman or degrading treatment or punishment.
 - ii. Such actions would moreover be inconsistent with maritime law (including the duty to provide assistance to those in distress at sea under maritime

law, see Art 98(1) of the UN Convention of the Law of the Sea); and with the protection from refoulement enshrined in Article 31 of the Refugee Convention and in customary international law.

- b. Any blanket attempt to remove or diminish human rights-related “*impediments*” to immigration control actions is liable to affect meritorious as well as unfounded claims and for that reason also is inconsistent with “*respecting our international obligations*”. If, for example (as the Court of Appeal found was occurring in *FB (Afghanistan)* [2021] 2 WLR 839) the Home Office removes irregular migrants from the UK without giving them adequate time or notice to seek legal advice or challenge the decision, that is not only a breach of the right to access to justice protected by the common law and of procedural safeguards inherent in ECHR protections but also entails the potential removal of individuals to a real risk of death or torture, in breach of the absolute protections in Articles 2 and 3 ECHR.

73. Finally, the UK has at its disposal powerful means to tackle irregular migration while complying with its international obligations. BID notes that the UK’s current asylum regime renders inevitable irregular migration by those with meritorious asylum claims (through the combination of a lack of any visa by which an individual can travel lawfully to the UK to make an asylum claim; visa requirements imposed on countries particularly likely to generate asylum claimants; and carrier sanctions preventing any travel by regular routes without the requisite visa). As Simon Brown LJ (as he then was) stated in *R (Adimi) v Uxbridge Magistrates Court & Anor* [2001] QB 66, “[T]he combined effect of visa requirements and carriers’ liability has made it well-nigh impossible for refugees to travel to countries of refuge without false travel documents.”

Question 27

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons. Option 1: Provide that damages may be reduced or removed on account of the applicant’s conduct specifically confined to the circumstances of the claim; or Option 2: Provide that damages may be reduced in part or in full on account of the applicant’s wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

74. This is one of a number of ill-defined proposals in the Consultation Paper which would potentially diminish vital protections for fundamental rights as well as opening an impracticable or unworkable gap between the Bill of Rights and the ECHR.

75. Before addressing Question 27 in detail, it is important to understand that the notion that remedies for breaches of fundamental rights should only be available for the “responsible” is anathema to the common law as well as to the ECHR and to human rights instruments generally. Fundamental rights are universal, not the privilege of the virtuous, deserving or “responsible”: as Article 2 of the Universal Declaration of Human Rights puts it, “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...”.
76. Thus, meritorious claims to vindicate fundamental rights, including those rights protected by the common law long before the HRA, may be brought by, and substantial damages awarded to, for example, suspected or convicted terrorists; serving prisoners; and criminal suspects whether guilty or not. While those are very far from the main or only contexts in which fundamental rights are relied upon, individuals are particularly vulnerable to the power of the State in the fields of counter-terrorism, the treatment of prisoners and safeguards for criminal suspects. Many of the fundamental rights most jealously guarded at the common law have been tested, and protections affirmed, in those contexts. Examples include:
- a. The right of unimpeded access to the courts. See for example *Raymond v Honey* [1983] 1 AC 1, concerning the interception of privileged communications between a prisoner and his lawyer.
 - b. The right to liberty. See for example *R (Lumba and Mighty)* [2012] 1 AC 245, a case in which BID intervened, establishing, among other points, the right under the common law to have decisions concerning one’s liberty determined according to published policy (and not, as had occurred in that case, under a secret policy). The appellants in that case were foreign national offenders who had been convicted of serious offences. See also *B (Algeria)* [2018] UKSC 5, [2018] A.C. 418, another case concerning common law protections for liberty, in the context of bail, in which BID intervened. The appellant was a suspected international terrorist and had moreover been found guilty of contempt of court for his refusal to disclose his true identity; despite this. In neither case did the appellants’ past conduct affect the character of the public law obligations applicable in the State’s dealings with them.
77. The dicta of Justice Frankfurter in *United States v Rabinowitz* (1950) 339 US 56, p 69 – “*It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people*” – and of Lord Steyn from *R (Roberts) v Parole Board* [2005] UKHL

45, [2005] 2 AC 738 [84] – “[e]ven the most wicked of men are entitled to justice at the hands of the state” – are apposite here.

78. As to the specific options canvassed in this part of the consultation, BID makes five observations.
79. **First**, any inconsistency between the ECHR and the circumstances in which ECHR claims can be brought or remedies obtained in the domestic courts will almost inevitably result in breaches of Article 13 (the right to an effective remedy) and, in the context of deprivation of liberty, Article 5(5) (the entitlement to compensation for arbitrary deprivation of liberty).
80. **Second**, such inconsistency will also generate more successful claims against the UK before the ECtHR, generating precisely the sorts of delays and diminution of the role of the domestic courts that the drafters of the Consultation Paper apparently seek to avoid.
81. **Third**, as to liability, if the drafters of the Consultation Paper have in mind a defence similar to *ex turpi causa* (whereby a claim might be barred because it arises out of the claimant’s own criminality or bad conduct) there is no such defence under the ECHR, as the Court of Appeal confirmed in *Al Hassan-Daniel & Anor v HM Revenue and Customs & Anor* [2010] EWCA Civ 1443, [2011] QB 866.
82. **Fourth**, where qualified rights (such as Article 8 ECHR) are at stake, the ECHR already, albeit in a more nuanced manner, factors in the conduct of the individual in determining whether a measure is in the public interest.
83. **Fifth**, as to damages, the approach under the ECHR generally reflects the principle described at [75] above (rights are not the privilege only of the virtuous). Thus the ECtHR will award damages by way of just satisfaction where the applicant is suspected or has been convicted of the most serious offences (see eg *Husayn Abu Zubaydah v Poland* App No 7511/13, 24 July 2014, where a substantial award of damages was made to a suspected senior Al Qaeda operative who had been subjected to special rendition, arbitrary detention and torture). The ECtHR may also award damages even where the applicant was to an extent the author of his own misfortune (see eg *Mikolenko v Estonia* App No 10664/05, 8 October 2009, where an individual’s refusal to cooperate with the travel documentation process had prolonged the administrative detention which was the subject of his complaint but the respondent state had continued to hold him long after it should have been clear that expulsion was impossible). However, where the individual’s bad conduct is closely connected to the breach, the ECtHR may refuse to award damages by way of just

satisfaction: see e.g. the refusal of the ECtHR to award pecuniary damages in *McCann, Farrell and Savage v United Kingdom* (1996) 21 EHRR 97 [219] for breach of Article 2 ECHR to the estates of three IRA members unlawfully killed while seeking to plant a bomb in Gibraltar. The nuanced approach of the ECtHR considers a range of factors, including the degree of culpability of both the individual and the respondent State and the proximity of the individual's conduct to the breach. This was summarised by the Grand Chamber in *Al-Jedda v United Kingdom* (2011) 53 EHRR 789 [114]:

“The court recalls that it is not its role under article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.”

84. In short, the Convention requires a nuanced and flexible approach to damages, with the courts determining by reference to a range of factors whether and if so to what extent equity and justice require an award of damages in just satisfaction on the facts of a particular case. The nuance and flexibility required are, in BID's view, inimical to attempts to set down general legislative guidance. There have by now been careful and detailed elucidations by the domestic courts of the approach to be taken to damages under the HRA (see in particular *D v Commissioner of Police of the Metropolis* [2015] 1 WLR 1833). Attempts to reproduce those in legislation are redundant; attempts to reduce those to short form are likely to misstate and obfuscate the law.
85. For all those reasons, BID considers both Options 1 and 2 to be poorly conceived and, in so far as the aim of the consultation is to simplify the law and bring rights home, overwhelmingly counter-productive. BID notes with regret that these proposals do not appear to have been put to the IHRAR and have apparently been drafted without the expert input of that committee.
86. Finally, to the extent that these proposals aim to increase public ownership and understanding of human rights and to shape behaviour, those are important matters for a programme of public, civic education rather than legislation. BID agrees with the recommendation of the IHRAR at [54] of its report for “*an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities.*”

PART 2: BRIEF RESPONSES TO CONSULTATION QUESTIONS

87. In this part of its response, BID furnishes briefer answers to general questions which are not of central relevance to its day-to-day work but in respect of which it nevertheless has relevant experience and expertise.

Question 1

We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

88. The domestic courts can and do already draw on a wide range of sources of law when determining human rights issues.

89. For an illuminating example, see the “Belmarsh” case, *A and Others v Secretary of State for the Home Department* [2005] 2 AC 68. The House of Lords concluded in that case that s.23 of the Anti-Terrorism, Crime and Security Act 2001 (permitting the indefinite detention without trial of suspected international terrorists) was incompatible with Articles 5 and 14 ECHR. Their judgment drew upon domestic jurisprudence concerning liberty, *habeas corpus*, discrimination and proportionality; the jurisprudence of the International Court of Justice; the jurisprudence of other common law jurisdictions (the US and Canada in particular); the opinions of the Joint Committee on Human Rights; the opinions of international bodies entrusted with oversight of human rights; UN Security Council resolutions; a wide array of international human rights instruments; as well as the jurisprudence of the ECtHR.

90. There is no need for reform in this area.

Question 12

We would welcome your views on the options for section 3. Option 1: Repeal section 3 and do not replace it. Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

85. BID makes only the following brief remarks on this proposal.

86. The case for reform of s 3, as set out in the Consultation Paper, is predicated on the idea that as currently drafted and interpreted it “require[s] [UK courts] to alter or interpret legislation contrary to Parliament’s clearly expressed democratic will”: [9] (see also [233]).
87. This characterisation is, in BID’s view, reductive. While the Paper does recognise that s 3 creates a duty to which the courts (like other public authorities) are required to give effect, it fails to acknowledge that this is therefore precisely what Parliament intended in enacting it. They are therefore giving effect to the “clearly expressed democratic will” of Parliament in enacting the HRA – even where this involves departing from the subjective intention of the promoters of the statute being interpreted, or the objective intention that would, absent s 3, have been attributed to the Parliament which enacted that original statute.¹⁹ As Lord Hoffman explained in *R (Wilkinson) v Commissioners of Inland Revenue* [2005] 1 WLR 1718 (at [17], emphasis added):

“The important change in the process of interpretation which was made by section 3 was to deem the Convention to form a significant part of the background against which all statutes, whether passed before or after the 1998 Act came into force, had to be interpreted. Just as the “principle of legality” meant that statutes were construed against the background of human rights subsisting at common law (see R v Home Secretary, Ex p Simms [2000] 2 AC 115), so now, section 3 requires them to be construed against the background of Convention rights. There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights. This of course goes far beyond the old-fashioned notion of using background to “resolve ambiguities” in a text which had notionally been read without raising one’s eyes to look beyond it. The Convention, like the rest of the admissible background, forms part of the primary materials for the process of interpretation. But, with the addition of the Convention as background, the question is still one of interpretation, i.e. the ascertainment of what, taking into account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute.”

88. It is therefore misleading to suggest that, in faithfully interpreting and applying s 3 as enacted by Parliament, courts are doing anything other than giving effect to its democratic will. If Parliament’s will has changed, and it wishes to amend s 3 (in any of the ways proposed) because it considers that human rights should be given less importance in the process of statutory interpretation, it is of course fully entitled to do so – but the nature of this choice should be confronted rather than obscured.

¹⁹ Parliamentary intent is in this sense a legal construct: see e.g. *R v Secretary of State for Transport, ex p Spath Holme* [2001] 2 AC 349.

Question 22

Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

89. BID does not seek to comment on the applicability of the HRA in situations of armed conflict – a question which falls outside its experience and expertise. It does, however, wish to emphasise the importance of not allowing concerns about this specific issue (which form the sole focus of the case for reform as set out in the Consultation Paper – see [10], p 43ff, [278]-[281]) to obscure the importance of extraterritorial application in other, more limited and less controversial, circumstances.
90. BID is particularly concerned, in light of its work, by the Government’s reported plans to establish an offshore processing regime for asylum-seekers arriving in the UK. The ECtHR has recognised that “*Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory*”: *Issa v Turkey* (2005) 41 EHRR 27, [71]. Outside the context of armed conflict (on which BID does not comment), the force in this proposition is self-evident. It is vital to ensure that, if the UK chooses to detain vulnerable asylum-seekers outside its territory, there can be no question of its seeking to evade responsibility for securing, as required by Article 1, the rights of those who remain under its authority and control.

Question 29 (Impacts) and CONCLUSION

91. In answer to **Question 29** BID reiterates that, for all the reasons already given, the proposals addressed:
- are unnecessary;
 - would significantly diminish the protection of human rights in the UK;
 - would undermine the rule of law;
 - would increase rather than reduce cost and legal complexity;
 - would result in more cases being brought before the ECtHR (partially reversing the process of “*bringing rights home*”) owing to a gulf between the approach mandated by the Bill of Rights and that required under the Convention; and
 - would reduce rather than expand the powers and discretion of the domestic courts when addressing human rights.

92. Many of the proposals BID has addressed here are moreover incoherent, are premised on apparent misunderstandings of the current legal position, and/or go far beyond the recommendations of the expert IHRAR panel.
93. Finally, BID notes with concern the unusually partisan tone and content of the Consultation Paper:
- a. The full Consultation Paper appears, both by the framing of the questions and by the selective citation of cases and data (see [65] and [67]above), more aimed at eliciting desired responses than at drawing from a range of range of well-informed sources.
 - b. The problem of framing is even more stark in the short version of the consultation document (“Bringing the Human Rights Act up to date”). The misleading and in some instances emotive assertions in that document (for example that “*sometimes the Human Rights Act protects the rights of a few people without looking at how this affects others*” or that “*the UK courts should be more able to make decisions without having to decide the same as the European Court*”) must cast serious doubt on the value of the responses it elicits.

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