***PUBLIC LAW PROJECT ANNUAL CONFERENCE***

***DEMOCRACY AND THE LAW***

***KEYNOTE SPEECH***

***THE INDEPENDENT HUMAN RIGHT ACT REVIEW***

***WHETHER THE HRA IS WORKING EFFECTIVELY?***

***Sir Peter Gross***

***October 2022***

***Introduction***

1. Thank you for the invitation; it is a pleasure to be here today and to give the keynote address at your Conference, entitled *“Judicial Review Trends and Forecasts”*. I have been asked to talk specifically on the Independent Human Rights Act Review (IHRAR), which I had the privilege and pleasure of Chairing, and to address the question of whether the *Human Rights Act 1998* (the HRA) is working effectively. IHRAR’s Report[[1]](#footnote-1) was published in Parliament on 14 December 2021, accompanied by a short Executive Summary[[2]](#footnote-2). Nothing I say should be taken as in any way amending either the Report or the Executive Summary; I stand by them fully.
2. Given that the Public Law Project (“PLP”) website describes its aims as “*Promoting access to justice, upholding the rule of law, ensuring fair systems*” and that the theme of this conference is “*Democracy and the Law”*, the topic is of obvious relevance. While, doubtless, there will be learned discussion of this theme later today, my simple view is that the two are mutually supportive, albeit tensions can arise – by no means necessarily unhealthy as part of society’s checks and balances.
3. Our legal framework necessarily forms part of the context for this year’s Conference theme – and the HRA is an important part of that framework.
4. Our legal framework shapes the society in which we live but it also forms part of a wider picture which serves to emphasise that importance of that framework. English[[3]](#footnote-3) law and London as a centre for dispute resolution are world leaders. That is of great importance in terms of both the value of our exports and the exporting of our values – soft power.
5. A very recent illuminating address by Lord Hodge[[4]](#footnote-4) focused on the law and the Rule of Law as underpinning economic prosperity. The figures cited by Lord Hodge are noteworthy:

“*A recent analysis by Legal UK highlighted that in 2018-2019, English law governed around £80 billion of gross written insurance premiums in the London market; £250 billion of global M&A deals; US$11.6 trillion of global metals trading; and €661.5 trillion of global derivatives transactions. English law is the governing law of choice for maritime contracts, a sector that contributes over £15 billion annually to the UK economy. English law secures 7% of the global legal services fee revenue of US$ 713 billion. The UK is the second largest legal services market in the world and the largest in Europe, where it accounts for a third of all Western European legal services fee revenue. The UK legal services sector generated a trade surplus of £5.9bn in 2019.*”

1. The stakes therefore are high when considering the working of an important part of our legal edifice and whether changes to it should be made.
2. I turn to IHRAR which was, in a nutshell, an independent, objective, evidence-based, review into the operation of the HRA – not the substance of the *European Convention on Human Rights* (“the Convention”). IHRAR’s overall conclusion was that the HRA had generally worked well, benefited many, and fulfilled three of its original objectives: (1) “bringing rights home”; (2) reducing the number of cases in which the UK lost before the ECtHR (the Strasbourg Court); (3) facilitating a UK contribution to the development of Strasbourg jurisprudence and the high regard in which UK Courts are (rightly) held by the Strasbourg Court. All that said, IHRAR concluded that there was clear room for a coherent package of practical reforms, readily capable of implementation, with benefits both domestically and in the UK relationship with Strasbourg. While it is of course a matter for Parliament, IHRAR urged HMG to implement its recommendations in full. That remains my position – and I await and look forward to a proper dialogue and engagement with Government as to the way ahead.
3. In my remarks to you today, my anchor is the IHRAR Report. I am not free-wheeling and, as has consistently been my position, I emphatically do not want the IHRAR Report and Recommendations lost in the crossfire surrounding Mr Raab’s *Bill of Rights*, now shelved. My focus remains firmly on the work of IHRAR and its Recommendations.
4. This Address divides conveniently into two parts:
5. IHRAR and its work;
6. The working of the HRA.
7. ***IHRAR and its work:***

*Genesis and ToR*

1. In December 2020, the then Lord Chancellor and Secretary of State for Justice, The Rt Hon Sir Robert Buckland KC, established IHRAR[[5]](#footnote-5) to review the operation of the HRA, by then in force for 20 years. Specifically, IHRAR was asked to consider two key themes: (1) First, *Theme I*, the relationship between UK courts and the *European Court of Human Rights* (“the Strasbourg Court”); (2) secondly, *Theme II*, the impact of the HRA on the relationship between the Judiciary, the Executive (Government) and the Legislature, i.e., the *“constitutional balance”.* [[6]](#footnote-6)
2. The WMS called on IHRAR to consider these questions independently and thoroughly. It also stated that IHRAR’s Report “*will be published as will the Government’s response*”. As I have said elsewhere, there never has been a “response” to the IHRAR Report; no such response was contained in the MoJ Consultation Paper or in the “Bill of Rights”; contrast the Government’s Response to the Report of the *Independent Review of Administrative Law (“IRAL”)*.
3. IHRAR had three features of paramount importance. First, it was an independent review. Secondly, its Panel was independent and formidable.[[7]](#footnote-7) Thirdly, its Terms of Reference (“ToR”) were expressed in neutral terms, not suggesting preconceived or predetermined answers. There were none.
4. As with any Review, the ToR are crucial. It is necessary to underline both what *was* and *was not* within IHRAR’s scope:
5. IHRAR was informed by the Government’s commitment to the UK remaining a party to the *European Convention on Human Rights* (“the Convention”); this commitment served as a fixed premise for IHRAR and told in favour of a broad consistency of approach between UK courts and the Strasbourg Court.
6. An examination of substantive Convention rights fell outside IHRAR’s scope. Its focus was on the operation of the HRA, the domestic statute. To be clear, on anything outside IHRAR’s scope, any views I could express would be personal only; I therefore concentrate on matters within IHRAR’s remit.
7. IHRAR was UK-wide and therefore concerned with England and Wales, Scotland and Northern Ireland. Throughout, the Panel was very much alive to devolution issues and determined to take proper account of all parts of the UK. In the event, none of IHRAR’s recommendations could sensibly be said to give rise to devolution concerns.

*Methodology*

1. As to methodology and as already underlined, IHRAR adopted throughout an objective, evidence-based approach, without preconceptions. It was emphatically not party political.
2. From the outset, openness and transparency were hallmarks of IHRAR. I made that clear in some 38 conversations with interested parties at the time of IHRAR’s launch. IHRAR’s *Call for Evidence* (“CfE”) encouraged responses from individuals and organisations, wherever they might be on the spectrum of opinion; upwards of 150 responses were received. Almost all were published on IHRAR’s website[[8]](#footnote-8), which is now a resource containing an exceptional store of knowledge and learning on the HRA.
3. As travel around the UK was precluded by Covid, IHRAR held 13 online *Roundtables*, by way of smaller meetings involving targeted engagement with interested parties; 1 online *Roundtable* with individuals who had personal experience of relying upon the HRA to give effect to their Convention rights; and 7 online *Roadshows*, in lieu of “town-hall” meetings, generously facilitated by Universities around the UK. We also held a number of online meetings with Judges of the ECtHR, the German Constitutional Court and the Irish Supreme Court.
4. It is of the first importance that IHRAR’s recommendations were informed by the breadth, depth and broad spectrum of this engagement, involving so many people across the UK and beyond, a factor worthy of consideration before departing from them. These were anything but the mere personal views of individual Panel members.
5. To ensure progress, the Panel exercised self-discipline: each Panel meeting would produce a decision on the topic under discussion; we kept to that and concluded our work in good time. The Panel ensured room to accommodate dissent, as appears from both the Report and the Executive Summary.
6. ***The working of the HRA***

*General:*

1. Overall and as already recorded, IHRAR’s conclusion was that the HRA had worked well. As repeatedly emphasised to IHRAR, the working of the HRA was not to be viewed through the prism of a few high profile cases; what happens outside the Courtroom was of the first importance, especially with regard to the culture or mindset with which public authorities approached decision-making.
2. The Panel’s work further revealed that there is clear room for a coherent package of practical reforms, readily capable of implementation, with benefits both domestically and in the UK relationship with Strasbourg. Domestically, IHRAR’s proposed reforms seek to promote a settled acceptance of the HRA through a greater sense of public ownership of the rights in question. Majority support is needed, through recognition that rights are for all – consider for example, care homes in the pandemic. In formulating that package of reforms, IHRAR resisted the temptation to propose cosmetic changes, such as amending the reference to “Convention rights” in s.1 of the HRA to read “United Kingdom” (or “British”) rights.[[9]](#footnote-9)

*Major Recommendations*

1. Amongst IHRAR’s Recommendations, I would single out three:
* Amending s.2 HRA to give greater prominence to the common law, putting it centre-stage.
* Targeted proposals addressing concerns as to s.3 HRA, designed to generate light rather than heat.
* Recognition of an Extra-Territorial Jurisdiction problem resulting from the course taken by the Strasbourg jurisprudence but emphasising (in the national interest) the need for a multilateral, rather than unilateral, solution.
1. IHRAR made other Recommendations as well, going to Remedial Orders, Derogations and Suspended Quashing Orders. Additionally, and much urged on IHRAR, was the proposal that serious consideration be given by Government to developing an effective programme of civic and constitutional education, particularly focused on questions about human rights, the balance to be struck between such rights, and individual responsibilities.
2. Reflecting its concerns about the operation of the HRA, IHRAR proposed specific, targeted reforms – certainly not repeal of the Act.
3. Let me say a little more about the Recommendations I have singled out, together with the importance of the relationship between UK Courts and the Strasbourg Court.

*Section 2:*

1. I begin by disposing of a straw man. It has never been suggested, least of all by the Strasbourg Court, that ECtHR decisions bind UK Courts. They do not. “*Take into* account” in section 2 HRA patently does not mean “*bound* by”. IHRAR gave some thought to a declaratory amendment to s.2 to say just that but decided against it.
2. As ECtHR decisions do not form part of the hierarchy of UK Court decisions, the rationale of s.2 was to give guidance to UK Courts as to how they were to be considered. Much thought has since been directed towards the relationship between ECtHR case law and UK statute, common and case law. Inevitably, questions as to how closely UK Courts might choose to adhere to Strasbourg jurisprudence have given rise to anxious consideration and adaptation over time – typical of a common law system.
3. There are undoubted tensions in this context:
4. First, a Strasbourg straitjacket on the development of UK jurisprudence was never intended.
5. Secondly, “mind the gap”. A significant gap between rights protection before UK Courts and that available at the ECtHR would run counter to the UK commitment to remaining a party to the Convention and undermine the objective of “bringing rights home”.
6. Thirdly, there will, sometimes, be good reason for a difference of view between UK Courts and the ECtHR and is implicit in the important objective that UK Courts will make a distinctive British (UK) contribution to the development of Strasbourg case law. On occasions too, as the HRA makes clear[[10]](#footnote-10), our Courts will put the UK in breach of its international obligations, leaving the matter to be resolved at the political level.
7. Fourthly, as the UK Supreme Court has emphasised, our Courts are not to develop “free-standing” Convention rights, unsupported by Strasbourg case law [[11]](#footnote-11) The injunction against developing free-standing Convention rights does not apply to common law developments, in accordance with the traditional common law method, guided throughout by the principle of *judicial restraint[[12]](#footnote-12)* and subject, as such developments always are, to Parliamentary Sovereignty.
8. With these considerations in mind, IHRAR recommends[[13]](#footnote-13) amending s.2 HRA to clarify the priority of rights protection by making UK legislation, common law and other case law the first port of call before, if then proceeding to interpret a Convention right, ECtHR case law is taken into account. This recommendation is straightforward and simple to implement.[[14]](#footnote-14) It gives the common law[[15]](#footnote-15) greater prominence – putting it *centre-stage* – reflecting its centuries long protection of human rights. It codifies the approach taken by the Supreme Court in its decisions in *Osborn[[16]](#footnote-16)* and *Kennedy[[17]](#footnote-17)*.
9. IHRAR’s recommendation involves a natural approach – confidence in our own UK law as the starting point - an approach familiar to other Convention States, such as Ireland and Germany. Domestically, it serves to reinforce the foundation for the HRA’s settled acceptance. Likewise, it gives full and principled effect to the Convention principle of *subsidiarity* – i.e., that Convention States, not the ECtHR, have primary responsibility for human rights protection.
10. A word on certain of the other options, which the Panel did not recommend.
11. First, the Panel received no detailed submissions on repeal and replacement of the HRA by a British Bill of Rights[[18]](#footnote-18), which would in any event have been outside its ToR; to the contrary, there was overwhelming support for retaining the HRA.
12. Secondly, the question of repeal of s.2 was dealt with and rejected emphatically at paragraphs 145-150 of Ch. 2 of the IHRAR Report. It would remove the formal link between the HRA and the Convention; while the UK remains a party to the Convention, that option had nothing to commend it.
13. Thirdly, although meriting careful thought, the Panel did not recommend amending s.2 to introduce a requirement to consider case law from other jurisdictions.[[19]](#footnote-19)
14. Fourthly, while recognising the attractions of the option, a majority of the Panel were not persuaded to recommend statutory guidelines on the non-exhaustive circumstances to be taken into account when UK Courts were considering whether to depart from ECtHR case law.[[20]](#footnote-20)

*Sections 3 and 4:*

1. The rationale for s.3 is to avoid an undue gap between rights protection available from the UK Courts and from the ECtHR, which would undermine the objective of bringing rights home. The HRA architecture struck a careful balance between ss. 3 and 4, with declarations of incompatibility (s.4) providing a last resort, where interpretation in accordance with s.3 was not possible. [[21]](#footnote-21)
2. Clearly, s.3 HRA contains an unusual rule of interpretation, going beyond ordinary rules of interpretation and conferring a power and imposing a duty on UK Courts to read and give effect to primary and secondary legislation, so far as it is *possible* to do so, in a way which is compatible with the Convention rights. The s. 3 rule is not conditional on any ambiguity in the legislation interpreted. Though a Court giving effect to this rule is giving effect to the will of Parliament in enacting s.3 – a point too often overlooked – concern as to this rule is readily understandable, creating, as it does, the danger of Courts straying into territory more properly that of Parliament.
3. Importantly, however, neither s.3 nor s.4 adversely affect Parliamentary Sovereignty[[22]](#footnote-22). S.3, properly understood, confers an *interpretative power* – within the well-settled province of the Courts – not an amending power (the province of the legislature).
4. With regard to s.4, the Court has a discretion to grant a declaration of incompatibility, in keeping with the Court’s general discretion to grant declaratory relief. *If* the Court makes a declaration of incompatibility, Parliament is not *obliged* to act on it. That is not to say that a declaration of incompatibility is other than an important signal of the Court’s view. It is to be expected that it will be carefully considered by Parliament, but Parliament has the last word.
5. Making every allowance for the concerns as to s.3, consideration of the evidence powerfully suggested defusing such concerns through a focus on the facts as to the actual practice of the Courts in deciding cases. The reality is that the high-water mark of alarm as to the use of s.3 hinges on a case now over 20 years old.[[23]](#footnote-23) The next most-criticised decision dates back to 2004.[[24]](#footnote-24) Relatively settled, restraining, guidance as to the use of s.3 has stood for well over a decade.[[25]](#footnote-25) None of this suggests a pattern, still less an enduring pattern, of misuse of s.3. It follows that statutory amendment to narrow the section itself (*a fortiori,* to repeal it) itself risks uncertainty.
6. Two additional features of s.3 should be noted. First, in litigation involving Government, ordinarily at least Government invites the Court to use s.3 rather than to default to s.4. Secondly, perhaps strikingly, Government has not sought to reverse decisions founded on s.3 of which it disapproves.
7. Overall, in the view of the majority of the Panel, once the law had settled down post-HRA, the Courts have been guided by judicial restraint and institutional respect. This (majority) conclusion is reflected in the options which follow: notwithstanding the unusual rule of interpretation contained in s.3, there is no substantive case for its repeal or amendment *or* for altering the balance between ss. 3 and 4, leaving s.4 as a rare, last resort.
8. Against this background, IHRAR’s package of recommended options in connection with s.3 focuses on shedding light (rather than heat) on the facts as to the actual practice of the Courts[[26]](#footnote-26):
9. First, clarifying by way of amendment to s.3, the order of priority in which UK Courts apply the normal principles of interpretation and then the particular interpretative principle set out in s.3. This amendment is simple to implement and is analogous to the amendment proposed in respect of s.2. It is designed to assist clarity of analysis and contrast pre-conceptions with evidence and fact.
10. Secondly, increased transparency in the use of s.3 by the creation of a judgments database. By way of contrast, much more is known as to the use of s.4 than is presently known as to the use of s.3.
11. Thirdly, an enhanced role for Parliament in particular through the Joint Committee on Human Rights (“the JCHR”) in scrutinising the s.3 cases. Again, there is currently a contrast between the work done by the JCHR on s.4 and that done on s.3.
12. To reiterate, IHRAR’s package of recommended options should either allay concerns as to s.3 or point the way to targeted statutory intervention. By contrast, any amendment diluting (*a fortiori*, repealing) s.3 at this stage risks a period of uncertainty and creating an undue gap between UK Courts and Strasbourg.

*Dialogue with the Strasbourg Court*

1. For the majority of the Panel, the question concerning Judicial Dialogue, formal and informal, between UK Courts and the ECtHR yielded a straightforward answer: such Dialogue should continue to develop organically. The relationship between UK Courts and the Strasbourg Court is and is intended to be interactive and dynamic; dialogue is key to achieving this objective. IHRAR, I should say, is most grateful to the ECtHR for the time given and the constructive discussions which took place when conducting its work.[[27]](#footnote-27)
2. As set out in the Report, the ECtHR has welcomed the “mature equilibrium” reached with UK Courts. This neither means nor requires that UK Courts and the Strasbourg Court always agree. It does entail mutual respect bringing mutual benefit.
3. Overall, IHRAR was struck by the high regard in which the UK Courts and Judiciary are held by the ECtHR and the beneficial influence this has, both domestically and for the ECtHR. The use made by the ECtHR in the *Denmark* case[[28]](#footnote-28) (to which the UK was not a party), in which the ECtHR had regard to a judgment of a UK Court interpreting a Convention right, is but a striking example of this now mature relationship. Judicial dialogue will be a most important element in further developing that relationship and maintaining the equilibrium it has achieved. That dialogue between the UK Courts and the Strasbourg Court has borne fruit is beyond argument – perhaps the best known examples concerning the approach to hearsay evidence and whole life sentences.[[29]](#footnote-29)
4. IHRAR placed great store on strengthening and preserving that dialogue[[30]](#footnote-30). It is important that the respect enjoyed by the UK Courts and Judiciary in Strasbourg and the ECtHR’s gratifying receptiveness to UK judicial thinking[[31]](#footnote-31), should be widely and better appreciated domestically; such considerations are linked to questions of public awareness, already discussed; this relationship is a UK asset, under-valued domestically[[32]](#footnote-32). It should go without saying that a relationship of this nature is too valuable to be discarded simply because of dissatisfaction with an unfortunate individual rule 39 interim decision.

*Extra-Territorial Jurisdiction (ETJ)*

1. The ETJ of the HRA is linked to that of the Convention.[[33]](#footnote-33) ETJ was one of the most significant topics considered by IHRAR because of its potential impact on important UK interests –additionally, because the extra-territorial and temporal scope of the HRA are sensitive areas for the relationship between the Judiciary and Government[[34]](#footnote-34). In a nutshell, there is a problem to which the Strasbourg case law has given rise. In IHRAR’s view, the Convention was never intended to have a worldwide remit; further, the Convention sits uneasily with International Humanitarian Law (“IHL”) in times of active combat operations, where IHL is the *lex specialis*. That problem needs addressing. There is a clear case for change. The far more difficult question is how best to achieve such change.
2. A unilateral solution – amending the HRA to restrict or remove its ETJ, tempting though it might be – would result in an own goal, potentially carrying very serious consequences for UK interests. The UK would remain a party to the Convention, so that our Armed Forces, Agencies and Police would be exposed to claims in Strasbourg, without the prior consideration of UK Courts and the assistance of (for example) closed material procedures. Moreover, in practical terms, UK Armed Forces, for instance, would still be operating on protocols geared to Convention compliance.
3. Accordingly, the solution needs to be multilateral, at a Convention level. IHRAR’s recommendations centre on inter-Governmental dialogue at Convention level.[[35]](#footnote-35) Technically, there would be much to be said for an amending Protocol to the Convention[[36]](#footnote-36) and it may be noted that there have been strong dissenting voices in Strasbourg as to the course taken by its jurisprudence in this area.[[37]](#footnote-37)

***Concluding Remarks***

1. Pulling the threads together, on Theme I, IHRAR recommended a coherent package, signifying self-confidence in our British/UK law while consistent with the principle of subsidiarity, and entailing incremental, targeted reform to the HRA. On Theme II, the evidence likewise supported the case for a measured, incremental approach, premised on judicial restraint – the philosophy now prevailing in the Supreme Court – and Judicial leadership. Furthermore, reforms of this nature would not imperil the certainty achieved over time as the HRA had settled down. Introducing uncertainty under the flag of reform did not strike IHRAR as a virtue. Put another way, one needs to be very certain of one’s ground before knowingly introducing uncertainty.
2. In his address already referred to, Lord Hodge highlighted the importance of certainty to the attractiveness of English law and dispute resolution in London. Strikingly, in their evidence to IHRAR, the City Law Firms of the Law Society[[38]](#footnote-38) emphasised the contribution to certainty made by the HRA and its links to the Convention in the same vein.
3. It would be unwise to undermine either or both the value of UK legal exports and the UK’s leadership role in law and dispute resolution by changes to the HRA, unless soundly based. IHRAR’s in-depth exploration of the evidence suggested scope for careful, incremental change.  The case for going further has not been made good.
4. Thank you and good luck with your programme today.
1. “The IHRAR Report”, CP 586 [↑](#footnote-ref-1)
2. “The ES”, CP 587 [↑](#footnote-ref-2)
3. I use “English law” as a shorthand for the law of England and Wales. [↑](#footnote-ref-3)
4. Deputy President of the UK Supreme Court; The Guildhall Lecture, delivered on 4 October 2022, *The Rule of Law, the Courts and the British Economy* [↑](#footnote-ref-4)
5. The *Written Ministerial Statement* (“WMS”) issued by the Lord Chancellor is at Annexe II to the IHRAR Report and IHRAR’s ToR are at Annexe III. [↑](#footnote-ref-5)
6. Sir John Laws, *The Constitutional Balance* (Hart, 2021). [↑](#footnote-ref-6)
7. See the WMS (and EMS, at [5]). [↑](#footnote-ref-7)
8. Save for a very few, as explained in the body of the Report. [↑](#footnote-ref-8)
9. See, the IHRAR Report, ch. 2, at [13] and following. [↑](#footnote-ref-9)
10. See further, s.4 below. [↑](#footnote-ref-10)
11. What might be termed the developed *Ullah* doctrine: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26;[2004] 2 AC 323; *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [[2021] 3 WLR 494 [↑](#footnote-ref-11)
12. Recently and authoritatively underlined by Lord Reed in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857. [↑](#footnote-ref-12)
13. ES, at [20] [↑](#footnote-ref-13)
14. An indicative draft amendment is at [199] of Ch. 2 of the Report. [↑](#footnote-ref-14)
15. And UK statute law and Scots case law. [↑](#footnote-ref-15)
16. *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115. [↑](#footnote-ref-16)
17. *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455. [↑](#footnote-ref-17)
18. Report, ch.2, at [19]. [↑](#footnote-ref-18)
19. Report, ch. 2, at [173] – [176]. [↑](#footnote-ref-19)
20. I.e., clarifying and codifying the exceptions to *Ullah*, which have developed in the case law: Report, ch. 2, at [177] – [184] [↑](#footnote-ref-20)
21. S.19 should not be overlooked; the starting point for post-HRA legislation is that there will have been a s.19 compatibility statement, unless, knowingly, Government has invited Parliament to proceed in circumstances where such a statement cannot be made. [↑](#footnote-ref-21)
22. ES, at [51]. [↑](#footnote-ref-22)
23. *R v A (Complainant’s Sexual History)* [2001] UKHL 25; [2002] 1 AC 45. [↑](#footnote-ref-23)
24. *Ghaidin v Godin-Mendoza*[2004] UKHL 30; [2004] 2 AC 557; the pragmatic advantages of these two decisions, whatever the difficulties of principle to which they give rise, should not be overlooked. [↑](#footnote-ref-24)
25. In addition to *Ghaidan*, see *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264. [↑](#footnote-ref-25)
26. ES, at [44] and following. [↑](#footnote-ref-26)
27. See too President Spano’s observations, subsequent to publication of IHRAR’s Report, in Joshua Rozenberg’s blog, 26 January 2022, *Human Rights Act ain’t broke*. [↑](#footnote-ref-27)
28. *S, V and A v Denmark* – 35553/12 (Grand Chamber) [2018] ECHR 856; see, Report, ch. 4, at [36] [↑](#footnote-ref-28)
29. See, *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373 (hearsay evidence); *R v McLoughlin* (also known as *Attorney General’s Reference* (No.69 of 2013)) [2014] EWCA Crim 188; [2014] 1 WLR 3964; *Hutchinson v The United Kingdom –* 57592/08 – *Chamber Judgment* [2017] ECHR 65; 43 BHRC 667. (whole life sentences) [↑](#footnote-ref-29)
30. Report, ch.4, at [89]. [↑](#footnote-ref-30)
31. See too, *Ndidi v The United Kingdom* 4215/14 [2017] ECHR 781. [↑](#footnote-ref-31)
32. ES, at [35] [↑](#footnote-ref-32)
33. *Al Skeini* [2007] UKHL 26; [2008] 1 AC 153 [↑](#footnote-ref-33)
34. See, ES, at [76], citing Lord Reed’s Submission to IHRAR, at [12]. [↑](#footnote-ref-34)
35. Report, ch. 8, at [124] – [127]. [↑](#footnote-ref-35)
36. Cf. the Brighton Declaration [↑](#footnote-ref-36)
37. *Hanan* 4871/16; [2021] ECHR 131 [↑](#footnote-ref-37)
38. IHRAR Report, ch. 2, para. 110 [↑](#footnote-ref-38)