**IN THE COURT OF APPEAL (CIVIL DIVISION)** **Ref. C4/2019/0660**

**BETWEEN:**

**THE QUEEN on the application of the**
**JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS**

**Claimant**

**-and-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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**REPLACEMENT SKELETON ARGUMENT**
**OF THE NATIONAL COUNCIL FOR CIVIL LIBERTIES**

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## INTRODUCTION

1. The National Council for Civil Liberties ("Liberty") is grateful for the Court's permission to intervene in the present appeal.

2. Liberty's intervention is limited to: Ground 1, concerning whether the "Right to Rent" scheme ("the Scheme") under the Immigration Act ("IA") 2014 falls within the ambit of Article 8 of the European Convention on Human Rights ("ECHR") for the purposes of Article 14 ECHR; Ground 3, concerning whether the state is responsible for any such discriminatory effect notwithstanding the role of third-party landlords; and Ground 5, concerning whether the judge was right to grant a declaration of incompatibility under section 4 of the Human Rights Act ("HRA") 1998.

3. Liberty respectfully submits that the judge's decision was correct for the reasons given by him and for the additional reasons given by JCWI in their Respondent's Notice. Liberty agrees with the skeleton argument submitted by JCWI and does not repeat arguments set out there.

## GROUND 1: AMBIT

4. In considering ambit it is useful to begin by considering how the issue was framed before the judge and setting out a number of basic terms, as these are not used consistently across the authorities.

5. Article 8 ECHR is a qualified right, in which an ***interference*** with rights falling within the ***scope*** of Article 8(1) can be justified under Article 8(2), such that the interference does not become a ***violation*** of the Article. It is well-established that: "The application of Article 14 does not necessarily presuppose the *violation* of one of the substantive Convention rights. It is sufficient—

and also necessary—for the facts of the case to fall 'within the ***ambit***' of one or more of the Convention articles" (see e.g. *Bah v United Kingdom* (2012) 54 E.H.R.R. 21 at para 35, emphasis added). In relation to Article 8:

a. This means that an *interference* with rights falling within the *scope* of Article 8(1) that is justified for the purposes of Article 8(2), and so not a *violation* of Article 8, may nonetheless fall foul of Article 14 if it is discriminatory.

b. It is common ground that an *interference* with rights falling within the *scope* of Article 8(1) – i.e. something calling for justification under Article 8(2) – will fall within the *ambit* of Article 8 for the purposes of Article 14.

c. Further, it is common ground that, where the state takes positive action which demonstrates its respect for the matters set out in Article 8(1), this will fall within the *ambit* of Article 8 for the purposes of Article 14, even where a failure to take the positive action would not have constituted an *interference* with rights within the *scope* of Article 8(1) (***"positive modality cases"***).

d. What this does not say is whether, outside positive modality cases, the application of Article 14 necessarily presupposes an *interference* with rights within the *scope* of Article 8(1) or whether a lesser form of negative intervention would suffice (referred to by the judge as a ***"negative modality case"***); in other words, it does not say whether the *scope* of Article 8(1) and the *ambit* of Article 8 for the purposes of Article 14 are coterminous.

6. Although this is how the issue came to be framed before the judge - and it is therefore useful to understand the vocabulary adopted in that framing - it is not the way in which the issue has tended to be framed by Strasbourg. Accordingly, it is submitted below that, notwithstanding the lack of discussion in terms of "negative modality", the Strasbourg jurisprudence supports the judge's conclusion (that the *scope* of Article 8(1) and the *ambit* of Article 8 are not coterminous).

**(1) Cross-appeal: The judge was wrong to find no interference with Article 8(1)**

7. On the cross-appeal, Liberty supports the submissions of JCWI and does not propose to add to them here, save to the extent that its submissions on the appeal also support the cross-appeal.

**(2) Appeal: The judge was right to find the discrimination fell within the ambit of Article 8**

(a) No clear distinction between positive and negative modality cases in principle

8. The judge held that the facts fell within the ambit of Article 8 for the purposes of engaging Article 14 on the basis that they constituted what he described as a "negative modality" case. The SSHD characterises this as an unprecedented extension of Article 14 (SSHD skeleton para 43). She is wrong to do so.

9. In *Petrovic*, which has come to stand as the archetypal positive modality case, the key passage of the Court's judgment states (paras 28-29):

> *28. The Court has said on many occasions that Article 14 comes into play whenever "the subject-matter of the disadvantage . . . constitutes one of the modalities of the exercise of a right guaranteed" [See the National Union of Belgian Police v Belgium (A/19): 1 E.H.R.R. 578, para. 45], or the measures complained of are "linked to the exercise of a right guaranteed" [See the Schmidt and Dahlström v Sweden (A/21): 1 E.H.R.R. 632, para 39].*
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> *29. By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14—taken together with Article 8—is applicable.*

10. The definitions of *ambit* drawn by the Court from authority are those set out in paragraph 28[1]. These imply no restriction to cases of positive intervention by the state; indeed the words "complained of" and "subject matter of the disadvantage" are applied more easily to negative intervention. Within this context, Austria's positive "demonstrat[ion of] respect for family life" by granting parental leave was clearly only a specific instance of a measure "linked to" (as opposed to *interfering* with) the exercise of rights guaranteed by Article 8.

11. Further, as set out in JCWI's skeleton argument (para 66), the judge's decision is consistent with Strasbourg's flexible approach to ambit more widely. This is illustrated by the line of authority relating to Article 14 ECHR in connection with Article 4.

12. By contrast with Article 8, the prohibitions in Article 4(1) and (2) ("No one shall be held in slavery or servitude" and "No one shall be required to perform forced or compulsory labour", respectively) are absolute: an *interference* with rights falling within the *scope* of those paragraphs cannot be justified and will constitute a *violation* of the Article. Article 4(3) does, however, set out a list of matters which are not included within the *scope* of "forced or compulsory labour" for the purposes

[1] Cited as the source of the relevant principle by, for example, Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 at para 10.

of Article 4(2), including "any service of a military character" (Art.4(3)(b)) and "any work or service which forms part of normal civic obligations" (Art.4(3)(d)).

13. In addition to the case of *Grandrath* discussed in JCWI's skeleton argument (para 41), the application of Article 14 in relation to Article 4 has been considered in a number of more recent cases, namely: *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163 (compulsory legal assistance work), *Schmidt v Germany* (1994) 18 E.H.R.R. 513 (compulsory fire service), *Graziani-Weiss v Austria* (2014) 58 E.H.R.R. 22 (compulsory appointment as legal guardian) and *Zarb Adami v Malta* (2007) 44 E.H.R.R. 3 (compulsory jury service). In each, the Court found that the obligation in question was part of "normal civic obligations" for the purposes of Article 4(3)(d) – and so there was no *violation* of Article 4(2) (necessarily, therefore, that the obligation did not constitute an *interference* with rights within the *scope* of that paragraph) – but that it nonetheless fell within the *ambit* of Article 4, such that Article 14 was applicable.

14. The most detailed discussion of the question of ambit is found in the concurring opinion of the President of the Court in *Zarb Adami,* Sir Nicholas Bratza (paras O-I1 to O-I9). Although the majority had, following the previous cases, based its decision on "normal" obligations being rendered "abnormal" by discrimination, Sir Nicholas set out his doubts about such reasoning, before explaining his reasons for nonetheless agreeing that Article 14 was applicable (at para O-I7, emphasis added):

> *O-I7. The central question which arises is what constitutes "the ambit" of one of the substantive Articles, in this case Art.4. It has been argued that "even the most tenuous links with another provision in the Convention will suffice" for Art.14 to be engaged. Even if this may be seen as going too far, it is indisputable that a wide interpretation has consistently been given by the Court to the term "within the ambit". Thus, according to the constant case law of the Court, the application of Art.14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the Article. This is best illustrated by the fact that Art.14 has been held to cover not only the enjoyment of the rights that states are obliged to safeguard under the Convention but also those rights and freedoms that a state has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention. This would indicate in my view that the "ambit" of an Article for this purpose must be given a significantly wider meaning than the "scope" of the particular rights defined in the Article itself. Thus, in the specific context of Art.4 of the Convention, the fact that work or service falling within the definition of "normal civic obligations" in para.3 are expressly excluded from the scope of the right guaranteed by para.2 of that Article, in no sense means that they are also excluded from the ambit of the Article as seen as a whole.*

15. Sir Nicholas's reference to positive modality cases as the "best illustration" of why the state's negative intervention in *Zarb Adami* fell within *ambit* of Article 4 (despite not being an *interference*

with rights falling within the *scope* of Article 4(2)) suggests that there is no clear distinction of principle to be drawn between positive and negative modality cases (even if the term "modality" has not been used – and, indeed, is not necessary – in relation to the latter) . This is also seen in the citation of *Petrovic* by the majority in *Zarb Adami* (para 42) and by the Court in *Graziani-Weiss* (para 54); and in turn the citation of *Schmidt* by the Court in *Petrovic* (para 22).

(b) No clear distinction between positive and negative modality cases in practice

16. As set out in JCWI's skeleton argument (paras 60-63), there is often no clear distinction in practice between positive and negative interventions of the state: what is a "pre-existing freedom" in a common law system – such that the modality of any state intervention could be characterised as negative – may be a right that is positively granted in a civil law system. This provides a factor militating against any clear distinction in principle between positive and negative modality cases.

17. Indeed, although the SSHD's skeleton characterises the Scheme as merely "regulating a pre-existing freedom (to rent property)" (para 41), the facts of the present case can just as easily be characterised in terms of positive modality.

18. First, not only can freedom to enter into a lease be viewed instead as comprising a set of positive rules at common law (including as to who may be a valid grantee), but the rights of certain groups to hold a lease (amongst other property) has been expressly granted or recognised by statute. These include both married women (s1 Law Reform (Married Woman and Tortfeasors) Act 1935) and, of particular relevance for present purposes, "aliens":

    a. At common law, by the 17th century, only aliens who were merchants could hold a lease, and then only as an incident to commerce and for the duration of their presence; in all other cases the lease would be forfeit to the king (*Co. Litt.* at [2b]; *Bl. Comm.* at [372]).[2]

    b. The Aliens Act 1844 provided that every person born abroad to a British mother was capable of holding an estate in land such as a tenancy (s2); otherwise, aliens who were subjects of friendly states could hold only personal property (s3), save that those who were residing in the United Kingdom could take a lease of up to 21 years for the purpose of "residence etc." (s4) (an early Victorian "right to rent").

[2] Prior to this, the position seems to have been more restrictive still: see *Bl. Com.* at [372], note 6 ("…from the conquest till upwards of two hundred years afterwards, it does not appear that strangers were permitted to reside in England even on account of commerce beyond a limited time, except by a special warrant…")

c. The Naturalization Act 1870, repealing the 1844 Act, expanded the capacity of aliens to hold property, providing that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject" (s2).

d. The Status of Aliens Act 1914[3], repealing the 1870 Act, reproduces the same provision in section 17, which remains in force.

19. Secondly, in any event, the Scheme does not prohibit the grant of *any* tenancy agreement to a person without the right (or permission) to rent. It only prohibits the grant of a "residential tenancy agreement", defined in section 20(2) as a tenancy (or licence: s20(3)) under which *inter alia* "one or more adults have the right to occupy the premises as their only or main residence" (s20(4)).

20. For more than 30 years, since the enactment of the Housing Act 1985, occupation of premises as a person's "only or main residence" (or words to the same effect) has been precisely the gateway through which a person may access various benefits conferred by the state through various legislative schemes, including the following:

a. Secure tenancy status under the Housing Act 1985 (requiring *inter alia* occupation as "only or principal home": s81), including various other rights set out in sections 82 to 188;

b. Assured tenancy status under the Housing Act 1988 ("only or principal home": s1), including a similar set of associated rights;

c. The protection of the regulatory regime applying to "houses in multiple occupation" ("HMOs") ("only or main residence": Housing Act 2004, s254);

d. The protection of the requirements set out in the Smoke and Carbon Monoxide Alarm (England) Regulations 2015 ("only or main residence": reg.2);

e. Eligibility for legal aid to defend possession proceedings or bring proceedings to remove or reduce a serious risk of harm to health or safety (Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1, paras 33 and 35);

f. Protection from disconnection of water supply for non-payment of charges ("only or principal home": Water Industry Act 1991, Sch 4A, para 1(1));

[3] Formerly known as the British Nationality and Status of Aliens Act 1914, prior to amendment by section 34 of the British Nationality Act 1948

g. Provision of assistance under the Water Industry (Charges) (Vulnerable Groups) (Consolidation) Regulations 2015 ("only or principal home": reg 2(6)(b));

h. Rights of disabled persons in relation to improvements to let dwelling houses ("only or main home": Equality Act 2010, s190);

i. Exemption from enforcement by seizure and sale of goods which are also premises under Schedule 12 of the Tribunals, Courts and Enforcement Act 2007 ("only or principal home": Taking Control of Goods Regulations 2013, reg. 5);

j. Eligibility for payment of compensation under various statutes ("only or main residence": Land Compensation Act 1973, ss20A, 29; Coal Mining Subsidence Act, Sch 4, para 1);

k. Exemption from "restrictions on disposal of house in National Parks, &c" ("only or principal home"; Housing Act 1985, ss37 and 157; Housing Act 1996, s13).

21. To the extent that the Scheme operates, in practice, to prevent occupation as a residence at all, it restricts access to a yet broader range benefits – dating back over a century to the Rent Restriction Acts (see e.g. *Brown v Brash* [1948] 2 K.B. 247, and indeed further (see the Aliens Act 1844 above) – including as to repairs and fitness for human habitation (Landlord and Tenant Act 1985, s16) and the right of a displaced residential occupier to force re-entry (Criminal Law Act 1977, s.6).

22. These benefits clearly constitute a demonstration of respect for people's ability to establish and maintain homes, private lives and family lives. Therefore, even if the definition of "modality" were restricted to its positive sense, clearly "the subject-matter of the disadvantage [caused by the Right to Rent Scheme] constitutes one of the modalities of the exercise of a right guaranteed."

(c) The intended and unintended extent of the effects of the Scheme cannot be separated

23. The Scheme is part of a series of measures directed at making it more difficult for people without the right to remain to establish a settled lifestyle (the "Hostile Environment" policy). By way of comparison, in *Aristimuño Mendizabal v France* (2010) 50 E.H.R.R. 50, the refusal to grant the applicant a long-term residence permit interfered with her rights under Article 8 on the basis that it left her in a precarious situation. The Court commented (at paras 71-72):

> *71. The applicant states in fact—and the Government has not contradicted her on this point—that the precariousness of her situation and the uncertainty as to her fate had a significant moral and financial impact on her (casual and unskilled jobs, social and financial difficulties, impossibility, as a result of not having a residence permit, of renting premises and carrying on the professional activity for which she had undertaken training).*

*72. The Court considers that, in the circumstances of the case, the failure to issue the applicant with a residence permit for such a long period of time, even though she had already been lawfully resident in France for over 14 years, constituted an undeniable interference with her private and family life.*

24. The more severe impact of the Hostile Environment is an *a fortiori case*. That being so, the Court should lean against finding that particular aspects of the policy are outside the ambit of Article 8. Each of the elements furthers the overall aim and cannot realistically be separated from it. In this regard, the SSHD's acceptance of the ECHR impacts in her own memorandum on the IA 2014 dated October 2013, in relation to those who do not have the right to rent are relevant.[4]

25. Where the same effects spill over to affect those who are not intended to be caught by the scheme (albeit generally to a lesser degree), it is unrealistic for the SSHD to suggest that such effects are no longer within the ambit of Article 8.

(d) Grounds of discrimination also weigh in favour of the facts being within the ambit Art 8

26. In *Glor v Switzerland* (2009) Application no. 13444/04, the applicant had been required to pay a tax after being assessed to be unfit to complete military service by reason of his disability. The Swiss Government submitted that "the purely financial disadvantage suffered, which in this case had been tailored to his financial means, had not adversely affected the applicant's private life" (para 49). However, the Court – without making any findings as to the effect of the financial disadvantage on the applicant's private life – held that the matter fell within the ambit of Article 8 for the purposes of Article 14, commenting (para 54):

*54. The Court considers that a tax collected by the State which has its origin, as in the present case, in unfitness to serve in the army for health reasons – that is, a factor outside the person's control – clearly falls within the scope of Article 8 of the Convention, even if the consequences of the measure are above all pecuniary (for cases concerning the "family" aspect of Article 8, see, for example, mutatis mutandis, Marckx, cited above, § 31; Pla and Puncernau v. Andorra, no. 69498/01, § 55, ECHR 2004-VIII; Petrovic v. Austria, 27 March 1998, § 29, Reports 1998-II; and Merger and Cros v. France, no. 68864/01, § 46, 22 December 2004; in this last case the Court declared that "family life" did not include only social, moral or cultural relations, but also comprised interests of a material kind).*

[4] "The restriction on establishing a residence in the private rented sector as one's only or main residence prevents the individual living his own personal life as he chooses and potentially prevents him from living with members of his family and in that respect engages his right to respect for private and family life" (para 98); "The restriction will also impact on the right to respect for family life enjoyed by both the individual themselves, and also British citizens, EEA Nationals, and those with an unlimited right to reside in the United Kingdom who will be prevented from arranging accommodation for themselves and any adult family member who is disqualified from occupation. This engages Articles 8 and arguably Article 14" (para 99) **[SB182]**.

(Note, again, the Court's citation of *Petrovic* as authority for finding that a negative intervention by the state, namely the imposition of a tax, fell within the ambit of Article 8).

27. See also *Boyraz v Turkey* (2015) 60 E.H.R.R. 30, in which the Court held the applicant's dismissal from employment on grounds of sex fell within the ambit of Article 8, in part on the basis that "a person's sex is an inherent part of his or her identity" (para 44).

28. In the present case, the grounds of discrimination – race and nationality – are similarly generally "matters outside the person's control". It is not submitted that this is sufficient by itself to bring the matter within the ambit of Article 8. However, in light of the above dicta, it is a further factor weighing in favour of the judge's finding, as relied on by the judge at paragraph 68 of the judgment.

**GROUND 3: STATE LIABILITY FOR THIRD PARTIES**

29. The judge was right to find that the state was responsible for the discrimination that he found to exist for the reasons given by him (paras 98 to 106) and in the JCWI skeleton (paras 7 to 19).

30. The discrimination complained of is the predictable result of action by the state to restrict access to the rental market. The SSHD asserts (skeleton para 10) that there is no sufficient "nexus" between the acts of private landlords to the legislation to "render it incompatible." This term is not used in the Convention case law, and the SSHD does not explain what its content is said to be. State liability is said to be avoided because it is the result of action by private landlords, it has not been authorised by Parliament but rather has been prohibited and is a breach of the Equality Act 2010, and the Secretary of State has put in place safeguards. None of these matters exclude the responsibility of the state in principle but rather belong in this case to the argument on justification.

31. The duty under Article 1 of the ECHR[5] is to "secure to everyone within their jurisdiction the rights and freedoms defined in Article 1 of this Convention." Article 14 likewise requires that the rights and freedoms set forth "shall be secured without discrimination."

32. A core case of the state failing to secure Convention rights is when its own action, such as legislation, produces a breach of a substantive duty or unjustifiable discrimination within the meaning of Article 14. This includes where it authorises discrimination between private individuals

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[5] Which is not one of the Convention Rights listed in Schedule 1 to the HRA 1998 but, as with Article 13 (which is also not listed in Sch 1), is given effect through its provisions and it affects the scope of the scheduled Articles: see e.g. *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153 para 66.

within the ambit of Article 8 (see for example *Ghaidan* at para 5).[6] However, liability cannot be limited to what is authorised. That would give insufficient weight to the duty to "secure" and fails to ensure rights that are "practical and effective" since legislation operates in the real world and must take account of the characteristics of those to whom it is addressed. Here, the measure was explicitly intended to alter the behaviour of landlords in circumstances where they are bound to seek to run profitable businesses with the least risk to themselves.

33. In a case such as the present, where action is said to have caused indirect discrimination, the touchstone of liability is causation, and the test is that in *DH v Czech Republic* (2008) 47 E.H.R.R. 3: "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group" (para 175).

34. This looks primarily to the effects caused by the measure and adopts a broad approach looking at "the manner in which the legislation was applied in practice" (*DH* at paras 185 and 209). As is clear from the facts of *DH*, those effects can be the result of the actions of third parties such as inappropriate tests at the request of teachers or paediatricians (paras 39-44, 198-201). The disproportionate placement of Roma children in special education was described as resulting from an "array of factors" that often reflected "racial biases in the society concerned" (paras 44, 200). Nothing in the reasoning in *DH* suggests that this negated state responsibility.

35. This is consistent with *Grzelak v Poland* (7710/02) 15 June 2010, concerning the inclusion on Polish school reports of a mark for "religion/ethics." This "created the risk of intolerance" (para 35) engaging the responsibility of the state even though the behaviour producing the adverse impact was that of third parties and was discouraged (para 75). The Court held (paras 95 and 99):

> *95. … The fact of having no mark for "religion/ethics" inevitably has a specific connotation and distinguishes the persons concerned from those who have a mark for the subject (see, Sinan Işık, cited above, § 51). This finding takes on particular significance in respect of a country like Poland where the great majority of the population owe allegiance to one particular religion.*
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> …
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> *99. Having regard to the foregoing, the Court finds that the absence of a mark for "religion/ethics" on the third applicant's school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation of the third applicant.*

[6] Where the legislation on its face permitted discrimination against same sex couples in relation to protected tenancies.

36. As a matter of principle, state liability cannot be excluded by the fact that the relevant discrimination is prohibited in national law, if indeed it is,[7] or because the disadvantage is produced through the medium of private third parties. This would not be a sufficient answer for a claim based on a positive duty because the obligation is to ensure effective civil and criminal remedies (see e.g. *Opuz v Turkey* (2010) 50 E.H.R.R. 28 152-3). The position cannot be more restrictive where the negative aspect of Article 14 is engaged. Moreover, it is well established that states cannot avoid liability for the acts of those for whom they are responsible by arguing that they were acting outside their authority.[8]

37. In addition to the clear causal link between the legislation and the discrimination the following matters support the attribution of responsibility to the state if more by way of "nexus" is required.

38. First, the complaint concerns race discrimination. "Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism" (*DH* para 176 and *Nachova v Bulgaria* [2006] 42 E.H.R.R. 43 cited by the judge at para 99).

39. Secondly, the arrangements here have much in common with the delegation of state functions even if they do not directly confer state functions on landlords.

40. In *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95, Baroness Hale summarised (at para 56) the bases on which the ECtHR has held states to be responsible for the acts of third parties, effectively as agents of the state, including where "the state may have delegated some other function which is clearly a function of the state to a private body".

41. As set out in the case of *Hirsi Jamaa v Italy* (2012) 55 E.H.R.R. 21 (in the opinion of Judge Pinto de Albuquerque, concurring with the majority of the Grand Chamber, at O-I33):

> *O-I33. Immigration and border control is a primary state function and all forms of this control result in the exercise of the state's jurisdiction. Thus, all forms of immigration and border control of a state party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court, regardless of which personnel are used to perform the operations and the place where they take place.*

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[7] Some discrimination by landlords could be indirect and so capable, in principle, of being justified.

[8] Article 7 Draft Articles on Responsibility of States: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the state even if it exceeds its authority or contravenes instructions". The Articles have been cited in several ECtHR cases – see for example *Al Nashiri v Romania* (33234/12). Liberty do not say that landlords are agents so as directly to engage this article but their position is close to it.

42. Thus "the full range of conceivable immigration and border policies … remain subject to the Convention standard. They all constitute forms of exercise of the state function of border control and a manifestation of state jurisdiction, wherever they take place and whoever carries them out" (including where they are carried out by third party international organisations on behalf of the state) (*ibid*, para O-I36).

43. The Scheme is plainly an immigration and border policy in this sense. Its aim was described in the impact assessment dated 25 September 2013: "to discourage those who stay illegally and encourage those who are resident in the UK illegally to leave by making it more difficult to establish a settled lifestyle through stable housing" **[SB125]**.

44. The mechanism for "making it more difficult" to establish such a lifestyle is through private landlords being required to deny tenancies to those without the right to rent or permission to rent and by taking enforcement action as appropriate. This is subject to the guidance and overall control of the Home Office (Impact Assessment dated 25 September 2013 at **[SB128]**):

> *The scheme will be administered by the Home Office. Landlords will be able to seek advice from the Home Office where they are unsure of a prospective tenant's status in the United Kingdom, or where document verification is required. Investigations and enforcement work will be undertaken by Home Office Immigration Enforcement Officers.*

45. Thirdly, where landlords do discriminate then their actions remain within the type of conduct contemplated by the Scheme even though they overshoot the classes of people caught by it. The Scheme operates by incentivising landlords to act in their own interests by refusing to grant tenancies or by evicting tenants in certain types of case. If they do so in relation to a wider group of cases then there is still a close connection between the authorised act and the discrimination (compare the position in domestic law in relation to vicarious liability: *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215 at para 28). This is a further reason why the example given by the SSHD about maternity rights is inapt (SSHD skeleton para 13). In that case the employer is trying to evade a provision designed to combat discrimination by committing a prohibited act at an earlier stage.

**GROUND 5: DECLARATION OF INCOMPATIBILITY**

46. Liberty maintains that the judge was right to make a declaration of incompatibility in the terms that he did, having found that the Scheme causes discrimination as alleged by JCWI.

47. The SSHD wrongly suggests that no declaration of incompatibility should have been made in this case, because "[i]n many cases the Scheme can be, and is, applied without discrimination" (see

paras 49-51 of her skeleton argument). The SSHD relies in this respect on the decisions of the Supreme Court in *R (Bibi) v SSHD* [2015] UKSC 68; [2015] 1 W.L.R. 5055 and *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 S.C. (U.K.S.C.) 29, but those decisions do not support the SSHD's position for the reasons set out by JCWI (see para 79 of its skeleton argument); recent decisions of the Supreme Court confirm that it was, contrary to the SSHD's position, open to the judge to make a declaration of incompatibility in the circumstances and that he was right to do so without reticence.

48. In *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2018] 3 W.L.R. 415, Lord Kerr (with whom three of the remaining four members of the Court agreed) considered the power under section 4 HRA 1998 at paragraphs 56 to 61, noting that the question of whether and to what extent a Court should be reticent in exercising this power depends entirely on the circumstances of the case. He noted that "[i]n Bellinger v Bellinger (Lord Chancellor intervening) [2003] 2 AC 467 it was said that where the court finds an incompatibility, it should 'formally record that the present state of statute law is incompatible with the Convention'" and concluded as follows:

> *There is no reason that this court should feel in any way reticent about the making of a declaration of incompatibility. To the contrary, I consider that we have been given the power under section 4 of HRA to do so and that, in the circumstances of this case, it would be wrong not to have recourse to that power.*

49. In the Parliamentary debates in relation to section 4 before the HRA was passed, the Lord Chancellor explained that it was his expectation that declarations of incompatibility would generally be made in cases in which legislation is found to be incompatible:

> *… I certainly would expect courts generally to make declarations of incompatibility when they find an Act to be incompatible with the convention. However, we do not wish to deny them a discretion not to do so because of the particular circumstances of any case.*[9]

50. In *McLaughlin's Application for Judicial Review* [2018] UKSC 48; [2018] 1 W.L.R. 4250, Baroness Hale (with whom the rest of the Court agreed) concluded as follows in relation to section 4 HRA 1998:

> *But the test is not that the legislation must operate incompatibly in all or even nearly all cases. It is enough that it will inevitably operate incompatibly in a legally significant number of cases: see Christian Institute v Lord Advocate 2016 SLT 805, para 88. A declaration of incompatibility does not change the law: it is then for the relevant legislature to decide whether or how it should be changed.*

[9] HL, col 546 (18 November 1997)

51. The legislation in issue in *Bellinger*, *Steinfeld*, and *McLaughlin* operated compatibly in most or many cases but declarations of incompatibility were made nonetheless: in *Bellinger* a statutory provision that a marriage was void if the parties to it were not respectively male and female was declared incompatible even though it infringed the Article 8 rights only of those who had undergone gender reassignment and wished to marry persons of their own genetic sex; in *Steinfeld* the relevant provisions restricted civil partnership status to same sex couples and were declared incompatible with Article 14 even though they only operated incompatibly in relation to different sex couples; and in *McLaughlin* the relevant provision as to widowed parent's allowance was similarly declared incompatible with Article 14 notwithstanding that it only operated incompatibly in relation to families in which the parents had not been married.

52. Having found that the Scheme causes discrimination as alleged, the judge was right to make a declaration of incompatibility without hesitation, just as the Supreme Court did most recently in *Steinfeld* and *McLaughlin*; indeed it would be surprising if a scheme found to be causing systemic discrimination contrary to Article 14 were not declared incompatible (particularly when there is no apparent reason for declining to do so, such as an imminent change in the law to remove the discrimination – see *Steinfeld* at para 58).

53. The SSHD is also wrong to suggest that the declaration made by the judge was too broad. Nothing in section 4 HRA 1998 prevents a declaration being made in respect of an entire scheme such as the one in issue in this case. It will often be the case that a declaration can be made in relation to a narrower range of statutory provisions, but a broad declaration is appropriate in this case given that the objectionable features of the Scheme are all interlinked and are inherently products of the disincentives and penalties created by it. Unlike section 3 HRA 1998, which must be applied very specifically to legislative provisions, section 4 should be used to make broad declarations of incompatibility in cases in which the incompatibility does not obviously arise solely from a single legislative provision or a narrow range of them. In such cases it is not for the Court to embark on a complex analysis of how an altered version of the scheme might operate compatibly; that is a task for the Government and Parliament to consider following the Court's declaration under section 4. This is illustrated by the case of *International Transport Roth GmbH and others v SSHD* [2002] EWCA Civ 158; [2003] Q.B. 728, which also concerned a challenge to an elaborate legislative scheme imposing penalties on persons other than migrants in the pursuit of immigration control (the scheme was set out in Part II of the Immigration and Asylum Act 1999 and is summarised at paras 4-6 of the judgment). The Court of Appeal upheld (by majority) the High Court's declaration that the scheme was incompatible with the ECHR (paras 54, 189 and 193).

54. In reaching his decision, Simon Brown LJ rejected the SSHD's contention that the Court should use section 3 HRA 1998 to render the scheme compatible, and in doing so emphasised how the scheme *as a whole* was incompatible with the ECHR and that it was appropriate for the Court to declare the scheme incompatible and give Parliament the opportunity to remedy it rather than to re-create the scheme itself:

> *…it appears to me quite impossible to recreate this scheme by any interpretative process as one compatible with Convention rights. As I have more than once endeavoured to explain, the troubling features of the scheme are all inter-linked: to achieve fairness would require a radically different approach. Mr Barling, of course, invokes section 3 only as his final fall-back position. But in asking us to apply it he is, in my judgment, necessarily inviting us to turn the scheme inside out, something we cannot do. As the authorities clearly dictate, the court's task is to distinguish between legislation and interpretation, and confine itself to the latter. We cannot create a wholly different scheme (perhaps of the sort envisaged by Sullivan J below) so as to provide an acceptable alternative means of immigration control. That must be for Parliament itself. As Lord Lester of Herne Hill pointed out, were we ourselves to create a fresh scheme purportedly under section 3, then indeed we should be failing to show the judicial deference owed to Parliament as legislators.* (para 66)

55. Following this decision, Parliament extensively amended the scheme through section 125 of and schedule 8 to the Nationality, Immigration and Asylum Act 2002.

56. Similarly, having found in this case that the Scheme causes discrimination as alleged, and in the absence of any suggestion by the SSHD as to how a more targeted declaration of incompatibility could be made in such circumstances, the judge was right to declare the Scheme incompatible in the terms that he did. There is no obvious way in which a more targeted declaration could be made in order to address the discrimination found by the judge to be caused by the Scheme, but the task of identifying which of its provisions require amendment in order to stop the discrimination is in any event one for the Government and Parliament rather than the Court. The declaration made by the judge does not affect the ongoing validity of the Scheme (s4(6) HRA 1998), and if the Government and Parliament do decide to amend it in light of the declaration they can retain as much or as little of it as they wish.

**Martin Westgate QC**
**James Kirk**
**Daniel Clarke**

Doughty Street Chambers
7 October 2019
(Replacement 6 January 2020)