ANNEXE TO MISHCON DE REYA'S RESPONSE TO THE
IHRAR'S CALL FOR EVIDENCE

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ANNEXE A: MOJ Dataset

This annexe sets out the data analysis approach for the statistics relating to the grant of declarations of incompatibility pursuant to section 4 of the Human Rights Act 1998 (the "**HRA**").

The MOJ Dataset has been constructed from data made publicly available by the Ministry of Justice in its December 2020 report to the Joint Committee on Human Rights on the Government's response to human rights judgments for the period 2019 to 2020 ("**the MOJ Report**").[1] Annexe A to that report comprehensively lists all 43 judgments (including judgments given in the courts of the devolved nations) in which a declaration of incompatibility had been granted pursuant to section 4 of the HRA.[2]

1. CONSTRUCTION OF THE DECLARATIONS OF INCOMPATIBILITY DATASET

1.1 Stage 1: Data Capture and Adaptation

The first stage in our analysis of granted declarations of incompatibility was to capture the data presented in Annexe A to the MOJ report in a form that could be analysed. To achieve this, the data in Annexe A to the MOJ report was manually adapted into tabular form. The following information was captured for each judgment listed:

a. Case name (e.g. *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions);*[3]

b. Date of the judgment (e.g. *13 December 2000*);

c. Court (e.g. *Administrative Court*);

d. Neutral Citation (where provided, e.g. *[2001] EWCA Civ 415*);

e. Whether, as at 20 December 2020, the judgment had been overturned on appeal (1 for True, 0 for False);

f. Whether, as at 20 December 2020, in the case of a declaration that had been overturned on appeal, there is scope for further appeal (1 for True, 0 for False);

g. Whether, as at 20 December 2020, the case related to provisions that had already been amended by primary legislation at the time the declaration was granted (1 for True, 0 for False);

h. Whether, as at 20 December 2020, the declared incompatibility had been addressed by Remedial Order (1 for True, 0 for False);

i. Whether, as at 20 December 2020, the declared incompatibility had been addressed by primary or secondary legislation (other than by Remedial Order) (1 for True, 0 for False);

j. Whether, as at 20 December 2020, the Government had proposed to address the declared incompatibility by Remedial Order (1 for True, 0 for False); and

k. Whether, as at 20 December 2020, the manner by which the declared incompatibility is to be address was under consideration (1 for True, 0 for False).

1.2 Stage 2: Data Augmentation

Having captured the data in tabular form (see Stage 1, above), the next stage was to normalise the data and capture additional data about the case listed.

1.2.1 Removal of cases that did not originate in England and Wales

Judgments in cases that did not originate in England and Wales were removed. There were four such judgments, leaving a total of 39 judgments in which a declaration of incompatibility had been granted in cases that originated in England and Wales.

1.2.2 Extract the year of judgment

The year of judgment was extracted from the date of judgment to a separate "Year of Judgment" column. For example, if the date of judgment was 13 December 2000, the value of the Year of Judgment column was set to 2000.

1.2.3 Disambiguation of judgments in the Administrative Court

For cases with an Administrative Court neutral citation (e.g. *[2006] EWHC 1000 (Admin)*), the judgment was manually retrieved on BAILII to determine whether the court was constituted as the Divisional Court. Judgments given by the Divisional Court were designated by the abbreviation DC in the Court column and judgments given by a single judge in the Administrative Court were designated by Admin in the Court column.

There were three decisions of the Administrative Court and one decision of the Divisional Court for which neutral citations were not assigned and were unavailable on BAILII. Our retrieval strategy for these cases was as follows:

a. The Divisional Court's decision in *R (Alconbury Developments) v Secretary of State for the Environment* was fully reported in the All England Law Reports,[4] available on LexisLibrary

b. The Administrative Court's decisions in *Blood and Tarbuck v Secretary of State for Health* and *R (Gabaj) v First Secretary of State* are unreported. However, a synopsis of both of these cases are provided in Appendix 3 of the Joint Committee's Twenty-Third report.[5]

c. The Administrative Court's decision in *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department* (claim number CO/1793/2017) is unreported. However, a synopsis of the judgment is provided in the Explanatory Note to the British Nationality Act 1981 (Remedial Order) 2019.[6]

[1] Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020, Ministry of Justice [December 2020]

[2] Ibid, Annexe A: Declarations of Incompatibility

[3] R (on the application of *Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929

[4] Ibid

[5] Joint Committee's Twenty-Third Report published on 24 July 2006, Appendix 3

[6] The British Nationality Act 1981 (Remedial) Order 2019, Explanatory Note

The full list of court abbreviations used in the dataset is set out below:

a. Administrative Court: Admin
b. Divisional Court: DC
c. Court of Appeal (Civil Division): CA (Civ)
d. Family Division: Fam D
e. House of Lords: HL(E) (note: the *E* is parentheses indicates that the case originated in England and Wales)
f. Queen's Bench Division (not Administrative Court): QBD
g. United Kingdom Supreme Court: SC(*E*) (note: the E in parentheses indicates that the case originated in England and Wales)

1.2.4 Identification of primary legislation subject to declarations of incompatibility

Each of the 39 judgments granting declarations of incompatibility were manually reviewed to identify the primary legislation in respect of which the declaration had been granted. Where the judgment was available on BAILII, the official transcript of the judgment on that platform was used. There were four judgments that were not available on BAILII and information about these cases, including the primary legislation concerned, was retrieved according to the strategies outlined in section 1.2.3 above. The short title of the concerned legislation was added to a new column in the dataset.

Note: our data does not account for instances in which the incompatibility of primary legislation was linked to subordinate legislation made before and after 2000.

1.2.5 Extraction of the year of Royal Assent from the legislation concerned

The year of Royal Assent was extracted from the legislation short title to the "Year of Enactment" column. For example, where the relevant legislation was the Crime (Sentences) Act 1997, 1997 was extracted.

Having extracted the year of the relevant legislation, we then identified whether the legislation had been enacted in or after 2000 (the year in which the HRA entered into force).

1.2.6 Determination of whether a Government Minister was a party to the case

The final step in the Data Augmentation stage was the determination of whether a Government Minister was a party to the case. This stage was conducted manually by reviewing the parties listed, along with their representation, in the head of the judgment. A case was determined to include a Government Minister as a party if one of the following conditions were satisfied:

a. Either the applicant or respondent was explicitly identified by the prefix "Secretary of State" in the case name. This condition was satisfied, for example, by *R (Uttley) v Secretary of State for the Home Department*[7] *and Miranda v Secretary of State for the Home Department*[8] or

b. The Treasury Solicitor was instructed by either party. This condition was satisfied, for example, by In Re *MB*.[9]

1.3 Stage 3: The Constructed MOJ Dataset

The composition of the fully constructed MOJ Dataset is shown below, using the House of Lord's decision in *A and others v Secretary of State for the Home Department*[10] as an example:

Case Name: A v Secretary of State for the Home Department
NCit: [2004] UKHL 56
Court: HL(E)
DoJ: 16/12/2004
DoI in respect of: Anti-terrorism, Crime and Security Act 2001
DoI reversed? 0
Central Government Party: 1
Scope for further appeal: 0
Relates to provisions already amended by primary legislation when DoI granted: 0
Addressed by Remedial Order: 0
Addressed by primary or secondary legislation (other than Remedial Order): 1
Government proposed to address by Remedial Order: 0
Under consideration: 0
Year of judgment: 2004
Year of enactment: 2001
Year of enactment on or after 2000: 1

2. METHODOLOGY BEHIND THE CREATION OF VISUAL GRAPHICS RELATING TO DECLARATIONS OF INCOMPATIBILITY USED THROUGHOUT THE REPORT

The visual graphics on declarations of incompatibility used throughout the report have been generated from the MOJ Dataset, the construction of which is outlined in Section 1 above.

2.1 Section 4 declarations concerning primary legislation

The following charts show the number of occasions a declaration of incompatibility was granted with respect to specific primary legislation. The primary legislation subject to a section 4 declaration was recorded in the "DoI in respect of" column in the dataset. The dataset was grouped on that column and the quantity for each primary enactment was a plotted as a bar on the chart.

CHART C

[7] *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38

[8] *Miranda v Secretary of State for the Home Department* [2016] EWCA Civ 6

[9] Re *MB* [2006] EWHC 1000 (Admin)

[10] *A and others v Secretary of State for the Home Department* [2004] UKHL 56

2.2 Subsequent reversals of grants of declarations of incompatibility

The following chart shows the proportion of granted declarations that were subsequently reversed on appeal. The reversal status of each judgment in the dataset was recorded in the "DoI reversed?" Column, which was set to TRUE if the declaration had subsequently been reversed on appeal and FALSE if the declaration had not been subsequently reversed.
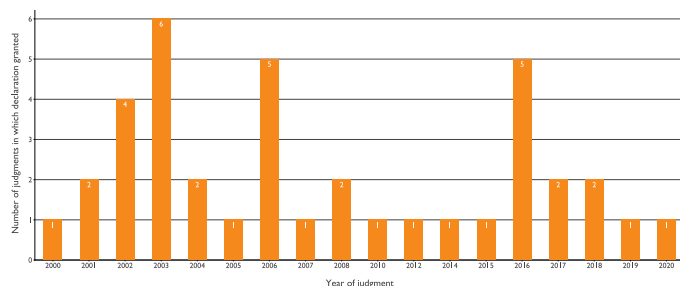
CHART D
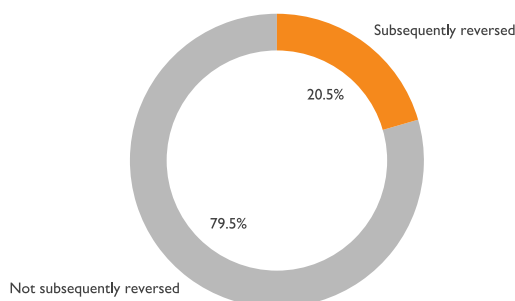
2.3 Declarations over time

The following chart presents the distribution of declarations granted over time from 2000 to 2020. The dataset has been grouped by the "Year of Judgment" column and the count of items for each group (i.e. each year) has been plotted as a bar.

CHART E

2.4 Grants of declarations of incompatibility in respect of primary legislation enacted before and after the year 2000

The following pie chart presents the proportion of declarations of incompatibility granted in respect of primary legislation enacted before and after the year 2000.

The dataset has been grouped by the "Year of Enactment on or after 2000" column, which is set to TRUE when the enactment year of the primary legislation concerned is equal to or greater than 2000.

CHART F

Grants of Declarations of Incompatibility in respect of primary legislation enacted before and after 2000
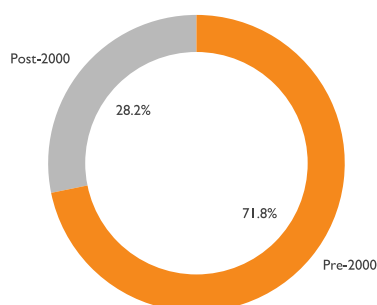

2.5 Responses to declaration of incompatibility

The following plot summarises the various responses from Government and Parliament to declarations of incompatibility, including where the grant of a declaration was subsequently reversed on appeal. We registered the state (i.e. TRUE or FALSE) of each declaration in the MOJ Dataset according to a matrix of the following seven conditions:

2.5.1 Whether the declaration had been subsequently reversed on appeal (DoI reversed?);

2.5.2 Whether there was scope for further appeal from a decision granting a declaration (Scope for further appeal);

2.5.3 Whether the relevant legislation had already been amended by primary legislation when the declaration was granted (Relates to provisions already amended by primary legislation when granted);

2.5.4 Whether the declaration had been addressed by primary or secondary legislations (other than by a Remedial Order) (Addressed by primary or secondary legislation (other than Remedial Order));

2.5.5 Whether the declaration had been addressed by a Remedial Order (Addressed by Remedial Order);

2.5.6 Whether the Government proposed to address the declaration by Remedial Order (Government proposed to address by Remedial Order); and

2.5.7 Whether the manner in which the declaration was to be addressed was under consideration as at December 2020 (Under consideration (as at December 2020)).

A new column was created in the MOJ Dataset, State of Declaration, which recorded the state of the declaration for each case (e.g. Reversed on appeal, addressed by Remedial Order, etc.) and the data was grouped on that column, where the proportion of each state was plotted as a segment on the chart.

CHART G
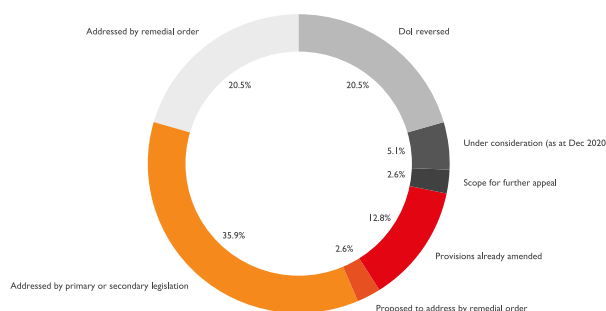
ANNEXE B: THE MASTER DATASET

The purpose of Master Dataset is to (a) enable us to quantify the number of cases originating in England and Wales that make reference to the HRA; and (b) quantify the number of cases that make reference to the power to grant a declaration of incompatibility under section 4 of the HRA.

The Master Dataset was constructed from data ("**the Original dataset**") provided by vLex Justis, a legal research provider that maintains a comprehensive collection of judgments handed down and delivered extempore in the senior courts of England and Wales and the Supreme Court of the United Kingdom.

1. THE ORIGINAL DATASET

The Original Dataset supplied by vLex Justis comprised 5,962 judgment XML files and associated metadata for cases in their United Kingdom judgment collection that contained one or both of the following phrases: *"Human Rights Act 1998"*; and *"HRA 1998"*.

The Original Dataset consisted of judgments dating from 1998 to 2021.

1.1 Preliminary filters
We performed two preliminary filtering operations on the Original Dataset to derive the Master Dataset. First, we removed all cases where the year of judgment was earlier than 2000 (the year the HRA entered into force). This reduced the number of cases from 5,962 to 5,862. Secondly, we removed three additional cases that originated in Northern Ireland and Scotland, resulting in a total of **5,859** cases in the Master Dataset.

2. ESTIMATING THE NUMBER OF CASES MENTIONING SECTION 4 OF THE HRA

We used the Master Dataset to quantify the number of judgments that mentioned section 4 of the HRA and/or declarations of incompatibility by applying a search for the following Content Phrases to the full-text of the judgments in the Master Dataset:

"Declaration of Incompatibility"; "declaration of incompatibility"; "Declaration of Incompatibility"; "section 4 of the Human Rights Act"; "section 4 of the HRA"; "section 4 HRA"; "s 4 HRA"; "s 4 Human Rights Act"; "s4 Human Rights Act"; "s4 HRA"; "s. 4 HRA"; "s.4 HRA"; "s 4 of the HRA"; "s. 4 of the HRA"; "section 4(1) of the Human Rights Act"; "s 4(1) of the Human Rights Act"; "section 4(1) HRA"; "s 4(1) HRA"; "s 4 of the 1998 Act"; "section 4 of the 1998 Act".

In total, 538 judgments met one or more of these Content Phrase conditions and, therefore, we estimated the number of judgments that mention section 4 of the HRA to be **538**.

2.1 Calculating the proportion of cases mentioning declarations of incompatibility out of the total number of judgments in the Master Dataset
We quantified the proportion of cases mentioning declarations of incompatibility according to the following calculation:

Total Judgments Mentioning Section 4 ÷ Total Judgments in the Master Dataset
538 ÷ 5,859 = 0.09 (9% of judgments)

2.2 Calculating the proportion of cases in which a declaration was granted and not subsequently reversed out of the total number of cases mentioning declarations of incompatibility
We quantified the proportion of cases in which a declaration of incompatibility was granted and not subsequently reversed out of the total number of cases mentioning declarations of incompatibility according to the following calculation:

(Total Judgments in which declaration granted - Total Judgments subsequently reversed) ÷ Total Judgments Mentioning Section 4

(39 - 8) ÷ 538 = 0.05 (5% of judgments mentioning declarations of incompatibility)

2.3 Calculating the proportion of cases in which a declaration was granted and not subsequently reversed out of the total number of judgments in the Master Dataset

We quantified the proportion of cases in which a declaration of incompatibility was granted and not subsequently reversed out of the total number of judgments in the Master Dataset according the following calculation:

(Total Judgments in which declaration granted - Total Judgments subsequently reversed) ÷ Total Judgments in the Master Dataset

(39 − 8) ÷ 5,859 = 0.005 (0.5% of judgments in the Master Dataset)

The HUDOC dataset contains high-level data about the judgments given by the European Court of Human Rights ("ECtHR") with respect to all European Convention of Human Rights member states, including the UK, from 1995 to 2020.

1.   CONSTRUCTION OF THE HUDOC DATASET

The HUDOC dataset was constructed by manually querying the ECtHR's official online judgment repository, HUDOC (https://hudoc.echr.coe.int/) , in the following way:

1.1   The HUDOC search console was constrained against English language judgments only to avoid counting the same judgment multiple times where it is available in a range of languages. This returned 23,552 judgments given by the ECtHR in respect of all Convention member states.

1.2   To remain within HUDOC's limit of 500 rows of data per export, we manually filtered the list of judgments returned following the steps outlined at 1.1 in HUDOC by limiting the search query using HUDOC's date of judgment filter to a window of time that returned 500 or fewer judgments. For example, the following URL query returns all judgments given in English between 1 January 1995 and 1 January 1998:

https://hudoc.echr.coe.int/eng#

```
{
%22languageisocode%22:[%22ENG%22],
%22documentcollectionid2%22:[%22JUDGMENTS%22],
%22kpdate%22:[%221995-01-01T00:00:00.0Z%22,%221998-01-
    01T00:00:00.0Z%22]
}
```

1.3   The procedure outlined at 1.2 was repeated moving forward in time (adjusting the time window to remain within the HUDOC's 500 row export limit) until all judgments given in English were captured from 1 January 1995 to 31 December 2020. The results for each export were then concatenated into a single CSV file with the following composition:

— Document Title (e.g. Case of Christine Goodwin v. United Kingdom)
— Application Number (e.g. 28957/95)
— Originating Body (e.g. Court (Grand Chamber))
— Date (e.g. 11/07/2002)
— Conclusion (e.g. Violation of Art. 8; No violation of Art. 12)

1.4   The year of judgment was extracted from the "Date" column to a new "Judgment Year" column.

1.5   The respondent country was extracted from the "Document Title" column to a new "Respondent Country" column by splitting the Document Title (e.g. Case of Christine Goodwin v. United Kingdom) on the v. separator.

1.6   To determine whether the judgment found at least one violation of a Convention Article, we searched the contents of the "Conclusion" column (e.g. Violation of Art. 8; Violation of Art. 12) for at least one instances of "Violation of". Where this condition was satisfied, the value of a new "Violation" column was set to TRUE. Where the condition was not satisfied, the value of the "Violation" column was set to FALSE.

1.7   To determine whether the judgment found at least one non-violation of a Convention Article, we searched the contents of the "Conclusion" column for at least one instance of "No violation". Where this condition was satisfied, the value of a new "No Violation" column was set to TRUE. Where the condition was not satisfied, the value of the "No Violation" column was set to FALSE.

2.   2. METHODOLOGY BEHIND CREATION OF VISUAL GRAPHICS RELATING TO ALL MEMBER STATE VIOLATIONS/NON-VIOLATIONS USED THROUGHOUT THE REPORT

The visual graphics on violations and non-violations by all member states used throughout the report were generated from the HUDOC Dataset, the construction of which is outlined in Section 1 above.

2.1   ECtHR determinations of Violations and Non-violations by the UK from 1995 to 2020

The following chart shows the distribution of ECtHR judgments that found that at least one Convention Article had been violated or not violated by the United Kingdom between 1995 and 2020.

The HUDOC dataset was first filtered on the "Respondent Country" column to exclude judgments where the United Kingdom was not the respondent country. The UK-only data was then filtered into the two separate tables: the first table contained all judgments in which the UK had been held to have violated a Convention Article ("the Violations table"); the second contained all judgments in which the UK had been held to have not violated a Convention Article ("the Non-Violations table"). It is important to note that there are cases in which the United Kingdom was held not to have violated one Convention Article (for example, Article 8), but were held to have violated another Convention Article (for example, Article 6). In this scenario, a violation and a non-violation is counted. The Violations and Non-Violations tables were then grouped by Judgment Year and the quantity of Violations/Non-Violations for each Judgment Year were plotted on the chart below. The orange line shows the quantity of UK violations and the grey line show the quantity of UK non-violations.

CHART A
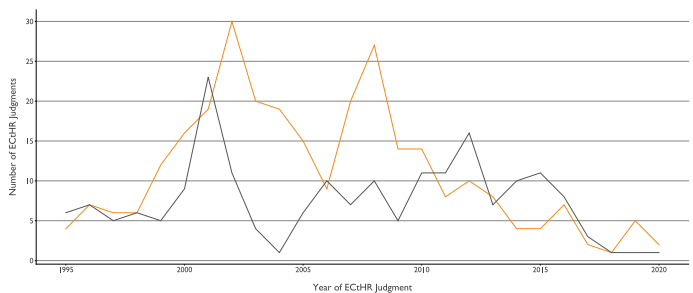
2.2 ECtHR determinations of violations by all member states from 1995 to 2020

The orange line on the following chart shows the distribution of ECtHR judgments over time that determined that at least one Convention Article had been violated across all Convention member states, including the United Kingdom, between 1995 and 2020. The quantity of judgments in which the ECtHR determined that at least one Convention right had been violated by the UK-only is shown by the grey line.

The HUDOC dataset was filtered to exclude all cases in which the ECtHR had not determined that at least one Convention Article had been violated by removing all rows from the dataset where the "Violation" column was equal to FALSE. This produced a new table that only contained cases in which the Respondent Country (including the UK) was held to have violated at least one Convention Article ("the Violations table").

The annual aggregate of cases in which there had been at least one determination of a violation against all member states (including the UK), shown by the orange line, was generated by grouping the Violations table by the "Judgment Year" column and plotting the count for each year.

The grey line shows the annual aggregate of cases in which there had been at least violation by the UK-only. This line was generated by excluding all cases from the Violations table where the "Respondent Country" column was not the United Kingdom. The remaining UK-only violations data was then grouped by the "Judgment Year" column and plotting the count for each year.

CHART B