Articles 13 and 35(1), Subsidiarity, and the Effective Protection of European Convention Rights in National Law

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Abstract: *The 'effective remedy' requirement in Articles 13 and 35(1) of the European Convention on Human Rights prescribes minimum levels of protection for Convention rights at national level, subject to the constraint that incorporation of the Convention is not required. It is underpinned by subsidiarity as a rationale, and provides constraints on any signatory state which seeks to reduce the level of protection in its national law. In particular, Article 13 requires that judicial review before national courts is no less intense than the scrutiny the European Court of Human Rights would employ in the case concerned. In relation to the United Kingdom, Article 13 will require the continuation of proportionality review in any successor to the Human Rights Act 1998, and it remains unclear whether the current declaration of incompatibility procedure is sufficient.*

Repeal of the Human Rights Act 1998 ("HRA"), whether or not it is replaced by a 'British Bill of Rights', will involve significant constitutional questions.[1] The drafting of any replacement will also generate important questions from the standpoint of Articles 13 and 35(1) of the European Convention on Human Rights, going to the minimum requirements which continuing adherence to the Convention will entail.

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[1] See, for example, Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008), HL Paper 165-I/HC 150-I, chs. 3, 4, 5, 7; Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, *Volume 1* (2012), chs 2, 3, 6, 7, 8, 9.

These latter questions concern the continuing availability of effective national-level remedies to enforce the substance of Convention rights before national courts. It will be argued in this article that, although the European Court of Human Rights ("the Court") has stipulated that Article 13 does not require the incorporation of the Convention into national law, the idea of an 'effective remedy' within Articles 13 and 35(1) entails the existence of certain minimum standards, with Article 13 precluding the reduction below these minima of the protection granted to Convention rights in national law. These arguments, if correct, would suggest that Parliament's room for manoeuver in drafting any successor legislation to the HRA will in practice be constrained, assuming that the UK intends to remain a signatory to the Convention.

The arguments will be outlined in further detail in the next section. Two organizational points should first be mentioned. First, since the HRA did not bring Article 13 into domestic law, Strasbourg-level rather than national decisions form the basis for the arguments. More specifically, Strasbourg cases to which the UK was a party provide the logical basis for the analysis of Articles 13 and 35(1), although the broader framework of the Court's case law is also discussed given that the UK cases are an integral part of it. Secondly, the article is concerned only with the requirements of Articles 13 and 35(1). Prominent examples exist of national legal systems failing to protect Convention rights to the extent required by the Court's case law.[2] Such examples may be regrettable, but they give rise to issues beyond the scope of the

[2] Key practical examples are the reactions by national authorities to the ECtHR judgments in *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41 and *Anchugov and Gladkov v Russia* (App. Nos.11157/04 and 15162/05), judgment of 4 July 2013.

current article.

Overview of the arguments

According to Article 13, "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". Article 35(1) prescribes that the Court "may only deal with the matter after all domestic remedies have been exhausted". The Court often describes the two Articles as having a "close affinity".[3] In *Kudla v Poland*, it explained the connections between them in the following ways:

"The purpose of Article 35(1) … is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court …. The rule in Article 35(1) is based on the assumption, reflected in Article 13 …, that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights …. In that way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires* …, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court."[4]

[3] Examples include *Akdivar v Turkey* (1997) 23 E.H.R.R. 143, para 65; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 152; *Rachevi v Bulgaria* (App. No.47877/99), judgment of 23 September 2004, para 61; *McFarlane* v *Ireland* (2011) 52 E.H.R.R. 20, paras 107, 112; *Ananyev v Russia* (2012) 55 E.H.R.R. 18, para 93.

[4] (2002) 35 E.H.R.R. 11, para 152. See also, for example, *Selmouni v France* (2000) 29 E.H.R.R. 403, para 74; *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 132; *Rachevi v Bulgaria* (App. No. 47877/99), judgment of 23 September 2004, para 61; *Dogan v Turkey* (2005) 41 E.H.R.R. 15, para 102; *McFarlane* v *Ireland* (2011) 52 E.H.R.R. 20, para 107; *Ananyev v Russia* (2012) 55 E.H.R.R. 18, para

Writing extra-judicially, Judge Grabenwarter of the Austrian Constitutional Court characterised Article 35(1) as the "procedural counterpart to the substantive guarantee under Article 13",[5] and suggests that the two are "interdependent" when it comes to the idea of an 'effective remedy'.[6] As an underpinning rationale, both Articles "embody the principle of subsidiarity, according to which the Convention system is subsidiary to the primary responsibility of national constitutional systems for safeguarding fundamental rights".[7] In *Akdivar v Turkey*, the Court went so far as to suggest that Article 35(1) "dispensed" signatory states from "answering before an international body" for their acts, so long as effective remedies were available at national level.[8] Meanwhile, in *Burden v United Kingdom*, the Court stressed that its role was "intended to be subsidiary to the national systems safeguarding human rights … and it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries".[9] Nonetheless, as will become clear later, the idea of subsidiarity in play, including in the key Article 13 cases, is one whereby the protection required to guarantee the core content of

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93; P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerp/Oxford: Intersentia, 4th edn, 2006), pp. 998-9, 1009-1010, revised by Y. Arai.

5 C. Grabenwarter, *European Convention on Human Rights: Commentary* (Munchen/Oxford: C.H. Beck/Hart Publishing, 2014), p.328. See also C. Grabenwarter, 'The Right to Effective Remedy [*sic*] against Excessive Duration of Proceedings', in J. Brohmer (ed.), *The Protection of Human Rights at the Beginning of the 21st Century* (Baden-Baden: Nomos, 2012), pp. 123, 128-9.

6 *European Convention on Human Rights: Commentary*, n.5 above, p.328.

7 *European Convention on Human Rights: Commentary*, n.5 above, p.328. See further *Rachevi v. Bulgaria* (App. No.47877/99), judgment of 23 September 2004, para 61.

8 *Akdivar v Turkey* (1997) 23 E.H.R.R. 193, para 65. See also *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 51.

9 (2008) 47 E.H.R.R. 38, para 42, repeated in *A. v United Kingdom* (App. No.3455/05), judgment of 19 February 2009, para 154.

Convention rights is a matter for the Court to specify, while the choice of means used to discharge the obligation to protect remains initially (and in the vast majority of practical situations, wholly) at national level. It is on this basis that the statement in *Kudla* about Article 13 being an *additional* guarantee should be understood. Practical subsidiarity and a substantive definitional role for the Court are effectively inseparable, on this view.

Against this background, the arguments in subsequent sections can be divided as follows. The first set of 'thinner' arguments concern the basic requirements of Article 13 as articulated by the Court (also reflected in Article 35(1) cases). Minimum standards of 'effective' protection are prescribed for substantive Convention rights, to which signatory states are required to adhere whether or not the Convention has been formally incorporated into their national law. In relation *specifically* to the UK, these standards have been employed by the Court in cases concerning judicial review of executive action and in relation to the role of declarations of incompatibility under section 4 of the HRA, and indicate the minimum levels of 'effective' protection which must be offered. However, a second body of 'thicker' arguments concerning the subsidiarity rationale underpinning Articles 13 and 35(1) is also needed in order to fully understand the significance of the Court's interpretations of 'effective' levels of protection. When both sets of arguments are considered, it becomes clear that unilateral attempts to reduce the national-level protection provided to Convention rights below the Court-interpreted 'effectiveness' threshold are unlikely to pass muster. Provided the UK remains a signatory to the Convention, this constrains the opportunities available for adjusting the protections currently offered to Convention rights.

'Thinner' arguments (1): the requirements of Article 13

The Court has specified that Article 13 requires "an individual [who] has an arguable claim to be the victim of a violation of the rights set forth in the Convention" to have "a remedy before a national authority" to test the substance of the relevant rights in whatever form they are secured in the national legal order and to grant appropriate relief.[10] It does not "go so far as to require any particular *form* of remedy, Contracting States being afforded a margin of discretion in conforming to their obligations".[11] Van Dijk and van Hoof's account suggests that in "flesh[ing] out the substance of the requirements under Article 13 the Court has consistently invoked the principle of effective protection, which serves as one of the 'constitutional' underlying principles of the Convention".[12] The Court has asserted that generally it is "necessary to

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[10] *Silver v United Kingdom* (1983) 5 E.H.R.R. 347, para 113(a). For further examples, see *Leander v Sweden*, (1987) 9 E.H.R.R. 433, para 77(a); *Boyle and Rice v United Kingdom* (1988) 10 E.H.R.R. 425, para 52; *Soering v United Kingdom* (1989) 11 E.H.R.R. 439, para [120]; *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248, para. 122; *Murray v United Kingdom* (1995) 19 E.H.R.R. 193, paras 101-103; *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413, para 145; *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 95; *D. v United Kingdom* (1997) 24 E.H.R.R. 423, para 69; *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, para. 135; *Conka v Belgium* (2002) 34 E.H.R.R. 54, para 75; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 157; *Paul and Audrey Edwards v United Kingdom* (2002) 35 E.H.R.R. 19, para 96; *Hatton v United Kingdom* (2003) 37 E.H.R.R. 28, para 140; *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 132; *Peck v United Kingdom* (2003) 36 E.H.R.R. 41, para 99; *Surmeli v Germany* (2007) 44 E.H.R.R. 22, para 98; *Ramirez Sanchez v France* (2007) 45 E.H.R.R. 49, para 157; *Baysayeva v Russia* (2009) 48 E.H.R.R. 33, para 155; *Glas Nadezhda Eood and Elenkov v Bulgaria* (2009) 48 E.H.R.R. 35, para 65; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, para 78; *Poghosyan and Baghdasaryan v Armenia* (2015) 61 E.H.R.R. 2, para 43. For general analysis of Article 13, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004), ch.8; P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), n.4 above, ch.32, revised by Y. Arai; R. Clayton and H. Tomlinson, *The Law of Human Rights, Volume 1* (Oxford: OUP, 2nd edn, 2009), pp. 1992-1998; C. Grabenwarter, *European Convention on Human Rights: Commentary*, n.5 above, pp. 327-339.

[11] *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248, para 122, emphasis added. See also *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413, para 145, *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 95; *D. v United Kingdom* (1997) 24 E.H.R.R. 423, para 69; *Kurt v Turkey* (1999) 27 E.H.R.R. 373, para 139; *Kaya v Turkey* (1999) 28 E.H.R.R. 1, para 106; *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, para 135; *Hasan and Chaush v Bulgaria* (2002) 34 E.H.R.R. 55, para 96; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 154;.*Paul and Audrey Edwards v United Kingdom* (2002) 35 E.H.R.R. 19, para 96; *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 132; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, paras 78, 85.

[12] P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), n.4 above, p.1006, revised by Y. Arai (for detailed analysis of Article 13's interaction with particular substantive rights, see pp. 1011-1023). See, for example, *Mamatkulov and Askarov v Turkey* (2005) 41 E.H.R.R. 25, paras 101, 121. In relation to

determine in each case whether the means available to litigants in domestic law are 'effective' in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred".[13] The national remedy "must be 'effective' in practice as well as law" and its exercise "must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state".[14] However, Article 13 does not inevitably demand the determination of matters by a judicial authority,[15] the effectiveness of the remedy "does not depend on the certainty of a favourable outcome" for the claimant,[16] and even if a single remedy does not satisfy the requirements of Article 13 by itself, the aggregate of remedies provided may do so.[17]

Art 6 and Art 13, see C. Grabenwarter, 'The Right to Effective Remedy [*sic*] against Excessive Duration of Proceedings', n.5 above; A. Mowbray, n. 10 above, pp. 210-11

[13] *Surmeli v Germany* (2007) 44 E.H.R.R. 22, para 98, drawing on *Kudla v Polamd* (2002) 35 E.H.R.R. 11, para 158.

[14] *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 95. For further examples, see *Kurt v Turkey* (1999) 27 E.H.R.R. 373, para 134; *Ilhan v Turkey* (2002) 34 E.H.R.R. 36, para 97; *Paul and Audrey Edwards v United Kingdom* (2002) 35 E.H.R.R. 19, para 96; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, para 80.

[15] For examples, see: *Silver v United Kingdom* (1983) 5 E.H.R.R. 347, para 113(b); *Leander v Sweden* (1987) 9 E.H.R.R. 433, para 77(b); *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413, para 152; *Conka v Belgium* (2002) 34 E.H.R.R. 54, para 75; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 157; *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 132; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, para 79. In relation to a national ombudsman, see *Ananyev v Russia* (2012) 55 E.H.R.R. 18, para 106.

[16] *Soering v United Kingdom* (1989) 11 E.H.R.R. 439, para. 122. For further examples, see *Swedish Engine Drivers' Union v Sweden* (1979-80) 1 E.H.R.R. 617, para 50; *Sunday Times v United Kingdom (No. 2)* (1991) 14 E.H.R.R. 229, para 61; *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248, para. 122; *Pine Valley v Ireland* (1992) 14 E.H.R.R. 319, para 66; *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, para. 135; *Conka v Belgium* (2002) 34 E.H.R.R. 54, para 75; *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 132; *Peck v United Kingdom* (2003) 36 E.H.R.R. 41, para 99; *Surmeli v Germany* (2007) 44 E.H.R.R. 22, para 98; *Ramirez Sanchez v France* (2007) 45 E.H.R.R. 49, para 159; *MSS v Belgium and Greece* (2011) 53 E.H.R.R. 2, para 394; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, para 79.

[17] Examples include *Silver v United Kingdom* (1983) 5 E.H.R.R. 347, para 113(c); *Leander v Sweden* (1987) 9 E.H.R.R. 433, para 77(c); *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413, para 145; *Conka v Belgium* (2002) 34 E.H.R.R. 54, para 75; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 157; *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 132; *Surmeli v Germany* (2007) 44 E.H.R.R. 22, para 98; *Ramirez Sanchez v France* (2007) 45 E.H.R.R. 49, para 159; *Glas Nadezhda Eood and Elenkov v Bulgaria* (2009) 48 E.H.R.R. 35, para 67; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, para 79.

Since the "scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint",[18] the nature of an effective remedy at national level reflects the substantive Convention right in play. The following examples are useful illustrations.[19] First, the Court has emphasised that "in the case of a breach of Articles 2 and 3 … which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should, in principle, be available as part of the range of redress",[20] as should "a thorough and effective investigation capable of leading to the identification and punishment of those responsible … including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible".[21] In this context, Article 13 also requires "a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible … it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention".[22] National mechanisms for examining

[18] *Kurt v Turkey* (1999) 27 E.H.R.R. 373, para 134. See also, for example, *Ilhan v Turkey* (2002) 34 E.H.R.R. 36, para 97; *Conka v Belgium* (2002) 34 E.H.R.R. 54, para 75; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 157; *Paul and Audrey Edwards v United Kingdom* (2002) 35 E.H.R.R. 19, para 96; *Krasuski v Poland* (2007) 44 E.H.R.R. 10, para 65; *Ramirez Sanchez v France* (2007) 45 E.H.R.R. 49, para 158; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, para 78.
[19] For examples relating to other substantive rights, see: *Kurt v Turkey* (1999) 27 E.H.R.R. 373, paras 135-137 (Article 5); *Hasan and Chaush v Bulgaria* (2002) 34 E.H.R.R. 55, para 98-104 (Article 9); *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 133 (Article 8); *Conka v Belgium* (2002) 34 E.H.R.R. 54, paras 79-85 (Article 4 of Protocol No 4).
[20] *Paul and Audrey Edwards v United Kingdom* (2002) 35 E.H.R.R. 19, para 97. See also, for example, *Kaya v Turkey* (1999) 28 E.H.R.R. 1, para 107; *Keenan v United Kingdom* (2001) 33 E.H.R.R. 38, para 129; *Z. v United Kingdom* (2002) 34 E.H.R.R. 3, para 109; *Ilhan v Turkey* (2002) 34 E.H.R.R. 36, para 97; *Baysayeva v Russia* (2009) 48 E.H.R.R. 33, para 155.
[21] *Baysayeva v Russia* (2009) 48 E.H.R.R. 33, para 155. See also, for example, *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 98; *Aydin v Turkey* (1998) 25 E.H.R.R. 251, para 103; *Velikova v Bulgaria* (App. No.41488/98), judgment of 18 May 2000, para 89; *Ergi v Turkey* (2001) 32 E.H.R.R. 18, para 98; *Ilhan v Turkey* (2002) 34 E.H.R.R. 36, paras 97, 98, 101, 103.
[22] *Mamatkulov and Askarov v Turkey* (2005) 41 E.H.R.R. 25, para 124. See also, for example, *Conka v Belgium* (2002) 34 E.H.R.R. 54, para 79; *Benediktov v Russia* (App. No.106/02), judgment of 10 May 2007, para 29; *Roman Karasev v Russia* (App. No.30251/03), judgment of 25 November 2010, para 79; *Ananyev v Russia* (2012) 55 E.H.R.R. 18, para 97; *M. v Bulgaria* (2014) 58 E.H.R.R. 20, para 129.

allegations of a serious risk of ill-treatment contrary to Article 3 in the event of deportation must therefore have automatic suspensive effect.[23]

Secondly, the emphasis is slightly different in the context of Article 6 complaints about the length of domestic court proceedings. Here, remedies can be effective and satisfy Article 13 if they prevent the alleged violation or its continuation (for example, by expediting a court decision), or – echoing the treatment of Articles 2 and 3 – provide adequate redress for a violation that has already occurred.[24] Thirdly, in *De Souza Ribeiro v France* the Court contrasted Article's 13 requirements in the contexts of Articles 3 and 8. Where a complaint concerned "allegations that the person's expulsion would expose him to a real risk of suffering treatment contrary to Article 3", the importance of the right and the irreversible nature of the harm that might occur required "that the complaint be subject to close scrutiny by a national authority …, independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 …, and reasonable promptness …. [E]ffectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect".[25] Where the complaint rested on Article 8, by contrast, it was "not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect".[26] The individual must have an effective possibility of challenging relevant orders and having issues examined with

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[23] *M. v Bulgaria* (2014) 58 E.H.R.R. 20, para 129. See also, for example, *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, para 137; *Saadi v Italy* (2009) 49 E.H.R.R. 30, para 138; *MSS v Belgium and Greece* (2011) 53 E.H.R.R. 2, para 293.

[24] *Krasuski v Poland* (2007) 44 E.H.R.R. 10, para 65; *Surmeli v Germany* (2007) 44 E.H.R.R. 22, paras 98-100 (expressing a preference for prevention). See also *Kudla v Poland* (2002) 35 E.H.R.R. 11, paras 157-160; *McFarlane v Ireland* (2011) 52 E.H.R.R. 20, paras 108, 114.

[25] (2014) 59 E.H.R.R. 10, para 82. The Court related the same requirements to Article 2.

[26] (2014) 59 E.H.R.R. 10, para 83.

"sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality".[27]

The Court has been keen to stress, however, that the protection offered by Article 13 is not absolute, despite the absence of express qualifications in its text.[28] As was noted in *Kudla*, "[t]he context in which an alleged violation … occurs may entail inherent limitations on the conceivable remedy".[29] In such circumstances (one example being cases involving national security constraints), an effective remedy was to be read as meaning "a remedy that is as effective as can be having regard to the restricted scope for recourse" in the context concerned.[30] In addition, Article 13 does not lay down "any given manner for ensuring" within the "internal law" of contracting states "the effective implementation of any of the provisions of the Convention"[31] and does not require the incorporation of the Convention into domestic law.[32] As such, it does not "guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention"[33] or, if this is any different, "a remedy against the state of domestic

[27] (2014) 59 E.H.R.R. 10, para 83. See also para 84.
[28] As noted in the Concurring Opinion of Judges Bindschedler-Robert, Golcuklu, Matscher and Spielmann in *James v United Kingdom* (1986) 8 E.H.R.R. 123.
[29] (2002) 35 E.H.R.R. 11, para 151. See, generally, P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), n.4 above, p.999, revised by Y. Arai.
[30] *Klass v Germany* (1979-80) 2 E.H.R.R. 214, para 69; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 151. See also *Leander v Sweden* (1987) 9 E.H.R.R. 433, para 78.
[31] *Swedish Engine Drivers' Union v Sweden* (1979-80) 1 E.H.R.R. 617, para 50, repeated in *Silver v United Kingdom* (1983) 5 E.H.R.R. 347, para 113(d). The distinction drawn in *Boyle and Rice v United Kingdom* (1988) 10 E.H.R.R. 425, para 87 between the "content" and "implementation" of national norms is useful in this regard.
[32] *James v United Kingdom* (1986) 8 E.H.R.R. 123, para 84. See also, for example, *Sunday Times v United Kingdom (No.2)* (1991) 14 E.H.R.R. 229, para 61; *Observer and Guardian v United Kingdom* (1992) 14 E.H.R.R. 153, para 76; *Peck v United Kingdom* (2003) 36 E.H.R.R. 41, para 99. Note also the drafters' interpretation-based explanation of *James* adopted in the Concurring Opinion of Judges Bindschedler-Robert, Golcuklu, Matscher and Spielmann in the case.
[33] *James v United Kingdom* (1986) 8 E.H.R.R. 123, para 85. This is repeated in, for example, *Lithgow v United Kingdom* (1986) 8 E.H.R.R. 329, para 206; *Leander v Sweden* (1987) 9 E.H.R.R. 433, para 77(d); *Sunday Times v United Kingdom (No.2)* (1991) 14 E.H.R.R. 229, para. 61; *Kudla v Poland* (2002) 35 E.H.R.R. 11, para 151; *Peck v United Kingdom* (2003) 36 E.H.R.R. 41, para 101; *Wainwright v United Kingdom* (2007) 44 E.H.R.R. 40, para 53, noting that an effective domestic

law".[34] Instead, states are "afforded a margin of appreciation in conforming with their obligations under this provision".[35] Since these constraints sit alongside Article 13's stipulation that "the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States",[36] there is therefore – as we shall see later – scope for argument about the ambit of the one and the limits of the other.

As a general matter, the Court is thus clear that, subject to occasional implied limitations and to the absence of requirements to allow challenges to national law or incorporate the Convention, a suitable remedy must be available at national level to deal with the substance of Convention-related complaints and to provide appropriate relief whatever the form in which Convention rights are secured. When it comes to the Court's decisions concerning the adequacy of judicial review of executive action *specifically* in the UK, the general message is that national courts must offer the same level of scrutiny as Strasbourg would offer, although the manner in which it is provided may vary. As such, cases which formally constitute examples of the *same* procedure, namely judicial review, at national level have been evaluated differently by the Court viewed through the lens of Article 13, depending upon the standard of scrutiny and/or remedy which was deployed at national level. The key cases – *Soering v United Kingdom*,[37] *Vilvarajah v United Kingdom*,[38] *Chahal v United Kingdom*,[39]

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remedy is nonetheless required. For a useful practical illustration, see *Greens and M.T. v United Kingdom* (2011) 53 E.H.R.R. 21, paras 90-92.

[34] *Christine Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18, para 113. Note also the broad prohibition in *Hatton v United Kingdom* (2003) 37 E.H.R.R. 28, para 138, to Article 13 challenges to "general policy".

[35] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, para. 135. See also, for example, *Peck v United Kingdom* (2003) 36 E.H.R.R. 41, para 99.

[36] *James v United Kingdom* (1986) 8 E.H.R.R. 123, para 84.

[37] (1989) 11 E.H.R.R. 439.

[38] (1992) 14 E.H.R.R. 248.

[39] (1997) 23 E.H.R.R. 413.

Smith and Grady v United Kingdom[40] and *Hatton v United Kingdom*[41] – all concern judicial review at a time when Convention rights were not a part of domestic law, so would be of particular relevance if the current level of HRA-based protection was reduced. The general approach to Article 13, detailed earlier, was applied in each case.[42] The central Article 13 issue was whether domestic judicial review in cases involving Convention rights – conducted, in situations involving discretionary decisions, under the *Wednesbury* heading before the HRA came into force[43] – was sufficiently robust. The Court's answers, which varied as between the cases, are instructive.

The substantive Convention claims in each of *Soering*, *Vilvarajah* and *Chahal* centred on Article 3 (prohibiting torture and inhuman or degrading treatment or punishment). *Soering* involved the successful argument that a decision to surrender the claimant to the U.S. authorities to face trial for murder would breach Article 3 due to the danger that the he would experience the so-called 'death row phenomenon'.[44] The *Vilvirajah* claimants, who were Tamils, argued unsuccessfully that there were reasonable grounds to fear that their deportation to Sri Lanka (their home country) would lead to breaches of their Article 3 rights,[45] whereas the claimant in *Chahal*, a well-known Sikh activist, succeeded in his argument that deportation to India would

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[40] (2000) 29 E.H.R.R. 493.
[41] (2003) 37 E.H.R.R. 28.
[42] For other illustrations, see *Silver v United Kingdom* (1983) 5 E.H.R.R. 347; *Paul and Audrey Edwards v United Kingdom* (2002) 35 E.H.R.R. 19, esp paras 96-101 on the 'aggregate of remedies' available at the time. See generally R. Clayton and H. Tomlinson, n.10 above, pp. 1998-9 (21.187 to 21.192).
[43] The original '*Wednesbury*.test' was set out by Lord Greene M.R. in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 K.B. 223, 229. During the 1990s, it came under the influence of an approach known as 'anxious scrutiny': for analysis, see M. Fordham, 'What is "Anxious Scrutiny"' [1996] J.R. 81; M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart, 1997); P. Craig, *Administrative Law* (London: Sweet & Maxwell, 7th edn, 2012), pp. 576-581 (19-012 to 19-016).
[44] (1989) 11 E.H.R.R. 439, paras. 80-111.
[45] (1992) 14 E.H.R.R. 248, paras 109-116.

violate Article 3 due to the real risk of his being subjected to torture or other ill-treatment by the police or security forces.[46] Domestic judicial review was found to have provided an effective remedy in *Soering* (in which it was claimed that no reasonable Home Secretary could have regarded assurances from the USA about the claimant's treatment as enough to provide a reasonable basis for surrendering him[47]) and *Vilvarajah*, but not in *Chahal*.

In *Soering*, having noted that the Convention was not at the time "considered to be part of United Kingdom law", the Court declared itself "satisfied that the English courts can review the 'reasonableness' of an extradition decision in the light of the *kind of factors* [which the claimant] relied on before the Convention institutions in the context of Article 3".[48] In saying this, the Court invoked the UK government's argument that a national court would have had "jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take".[49] Although the judicial review claim had failed on the facts at national level because it had been brought prematurely, there was "nothing to have stopped" the claimant "bringing an application … at the appropriate moment and arguing '*Wednesbury* unreasonableness' *on the basis of much the same material* that he adduced before the Convention institutions in relation to the 'death row phenomenon'. Such a claim would have been given the 'most anxious scrutiny' in view of the

[46] (1997) 23 E.H.R.R. 413, paras 100-107.
[47] As explained in *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248, para. 123.
[48] (1989) 11 E.H.R.R. 439, para. 121, emphasis added. See also *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248, para. 123.
[49] (1989) 11 E.H.R.R. 439, para. 121. See also *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248, para. 123.

fundamental nature of the human right at stake".[50] The Court reiterated and used these points when dismissing the Article 13 argument in *Vilvarajah*,[51] while also noting that national courts "have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk",[52] and that the highest courts in the land could hear judicial review proceedings in asylum cases.[53]

The two italicised phrases from *Soering* are of great importance. For, by identifying that it was crucial from the standpoint of Article 13 for the form of scrutiny available at national level to focus on the same 'kind of factors' and involve 'much the same material' as would be in play at Strasbourg level, the Court's focus was clearly on the *substance/content* of the scrutiny available from national courts, not the *heading* under which it was conducted. The references to 'the most anxious scrutiny' in *Soering* and *Vilvarajah* need to be read in the light of this, given that the Court later found in *Smith and Grady* that 'anxious scrutiny' review was insufficient in the circumstances of *that* case. The language, or even category, of review used by national courts takes second place to the actual substance/content as it occurred in practice, something which must itself be considered in light of the nature of the right and situation in issue.

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[50] (1989) 11 E.H.R.R. 439, para 122, emphasis added. It is interesting, given the Court's subsequent decision in *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, to note the concern expressed in Judge Walsh's and Judge Russo's dissenting judgment, para 1, as to the high threshold a claimant had to meet in judicial review.

[51] (1992) 14 E.H.R.R. 248, paras 122-125. See also *D. v United Kingdom* (1997) 24 E.H.R.R. 423, paras 65-73.

[52] (1992) 14 E.H.R.R. 248, para. 125.

[53] (1992) 14 E.H.R.R. 248, para. 126.

This later point, mentioned earlier, is illustrated by *Chahal*. At national level, the Home Secretary's decision to deport the claimant had not been open to appeal due to the national security elements in the case. Instead, the matter had been considered further by an advisory panel, some members of which were senior current or retired judges. Legal representation was not permitted before the panel, information could be withheld from it, and its advice to the Home Secretary was confidential and could be disregarded.[54] The claimant's attempts to challenge the final deportation decision on *Wednesbury* grounds had been unsuccessful.[55] As noted earlier, the Article 13 challenge succeeded before the Court. While Article 13 required only a remedy that was 'as effective as can be' when national security considerations were central (for example, where direct examination by a court was envisaged[56]) the complaint in *Chahal* was in fact that a person's deportation would expose them to a real risk of treatment contrary to Article 3, rendering national security concerns "immaterial".[57] Given "the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3", an effective remedy thus required "independent scrutiny" of the claim that there were substantial grounds for fearing a real risk of ill-treatment,[58] without regard to what the claimant may have done to warrant expulsion or any perceived threat to national security. The right in play (Article 3) and the situation (deportation where there was a real risk of ill-treatment) were thus key. Neither the advisory panel nor the courts had been able to review the deportation decision with reference *solely* to the risk of ill-treatment and

[54] (1997) 23 E.H.R.R. 413, paras 29, 60.
[55] (1997) 23 E.H.R.R. 413, paras 40-43.
[56] (1997) 23 E.H.R.R. 413, para 150. See, e.g., *Klass v Germany* (1979-80) 2 E.H.R.R. 214, para 69; *Leander v Sweden* (1987) 9 E.H.R.R. 433, paras 78, 84; *Al-Nashif v Bulgaria* (2003) 36 E.H.R.R. 37, paras 136-138; *M. v Bulgaria* (2014) 58 E.H.R.R. 20, paras 124-133. For general analysis of the national security cases, see A. Mowbray, n.10 above, pp. 208-210.
[57] (1997) 23 E.H.R.R. 413, para 150; see also para 149.
[58] (1997) 23 E.H.R.R. 413, para 151.

without reference to national security considerations. Instead, in the judicial review proceedings the courts had assessed whether the Home Secretary had balanced the risk to the claimant against the danger to national security. In combination with the procedural defects of the advisory panel, these shortcomings meant that Article 13 had not been satisfied[59]: underlining the weight placed by the Court upon the substance/content of the national-level review actually conducted.

In *Smith and Grady*, a policy of automatically discharging all military service personnel who were lesbian or gay was ruled incompatible with the Article 8 right to respect for private and family life.[60] The Court also found that the Court of Appeal's *Wednesbury*-driven treatment of the case fell below the standard demanded by Article 13. This latter conclusion was especially significant given the detail in which Sir Thomas Bingham M.R. had sought to explain the approach of national law in *Wednesbury* cases involving human rights at a time when the Convention could not be directly invoked before national courts. Sir Thomas had accepted the claimants' formulation that: "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it can be satisfied that the decision is reasonable."[61] Where a decision interfered heavily with a

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[59] (1997) 23 E.H.R.R. 413, paras 153-155.
[60] (2000) 29 E.H.R.R. 493.
[61] *R. v Secretary of State for Defence, Ex p. Smith and Grady* [1996] Q.B. 517, 554; the formulation built on principles previously articulated in *R. v Secretary of State for the Home Department, Ex p. Bugdaycay* [1987] A.C. 514 and *R. v Secretary of State for the Home Department, Ex p. Brind* [1991] 1 A.C. 696.

fundamental right, the decision-maker was required to produce a strong justification to convince the court that it fell within the range of reasonable responses. As Sir Thomas went on to make clear, however, "[t]he greater the policy content of a decision, and the more remote the subject matter … from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational ... Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations".[62]

The Court noted that, notwithstanding the language used in the Court of Appeal, the fact that the Convention did not form part of domestic law meant that questions concerning whether the policy violated the claimants' Article 8 rights and had responded to a pressing social need or been proportionate to a legitimate Convention-approved aim "were not questions to which answers could properly be offered" by national courts.[63] The "threshold of irrationality" which the claimants were required to surmount "was a high one", with judges in both the High Court and Court of Appeal commenting favourably on their submissions yet still concluding that the policy fell within the range of responses open to a reasonable decision-maker.[64] In reality, the threshold "was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention."[65]

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[62] [1996] Q.B. 517, 556.
[63] (2000) 29 E.H.R.R. 493, para 136.
[64] (2000) 29 E.H.R.R. 493, para 137.
[65] (2000) 29 E.H.R.R. 493, para. 138.

As in earlier cases, these statements show that the Court was concerned to measure the effectiveness of review at national level by reference to the substance/content of the scrutiny *actually* applied: a point strongly underlined by the judgment's refusal to place weight on the *language* about the 'human rights context' used in the Court of Appeal. Furthermore, as the reference to 'the Court's analysis' implies, it seems clear that it was necessary for the national courts – even though the Convention was not (at the time) a part of national law – to provide *as much scrutiny* as would have been available at Strasbourg level. This latter point was reinforced by the Court's explanation of the different outcomes in *Smith and Grady* as opposed to *Soering* and *Vilvarajah*. In the latter cases, "the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and expulsion matters *coincided with the Court's own approach*" under Article 3,[66] meaning that there had been no breach of Article 13. In *Smith and Grady*, by contrast, national courts had failed to scrutinise the policy closely enough.[67]

The distinction between *Smith and Grady* and *Soering* and *Vilvarajah* was expanded upon in *Hatton*.[68] The Court (in Grand Chamber format) stated that "The scope of the domestic review in *Vilvarajah*, which concerned immigration, was relatively broad because of the importance domestic law attached to the matter of

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[66] (2000) 29 E.H.R.R. 493, para. 138. See also *Peck v United Kingdom* (2003) 36 E.H.R.R. 41, paras 100, 105-107.
[67] Clearly this distinction would not make sense to supporters of Judge Walsh's and Judge Russo's dissenting judgment in *Vilvarajah v United Kingdom* (1992) 14 E.H.R.R. 248. For further questions about the ECtHR's analysis in *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, see *R. v Secretary of State for the Home Department, ex p. Turgut* [2000] H.R.L.R. 337, [2000] 1 All E.R. 719, Simon Brown L.J.; M. Beloff and R. Beloff, 'Judicial Review – Is It Sufficient for Arts 6 and 13 of the European Convention on Human Rights?' [2001] J.R. 154, 157-160.
[68] (2003) 37 E.H.R.R. 28. The Court repeated its explanation of *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493 and *Hatton v United Kingdom* (2003) 37 E.H.R.R. 28 in *Glas Nadezhda Eood and Elenkov v Bulgaria* (2009) 48 E.H.R.R. 35, para 69.

physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13. In contrast, in *Smith and Grady* …, the Court concluded that judicial review was not an effective remedy on the ground that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 in the domestic courts".[69] The national proceedings in *Hatton* were found to have fallen on the wrong side of the line for Article 13 purposes. The claimants' substantive argument concerned the compatibility with Article 8 of a government-approved scheme to increase the number of night-time aircraft flights over their homes, which were close to Heathrow Airport. Although this argument was unsuccessful, the claimants' Article 13 argument succeeded on the basis that while pre-HRA judicial review proceedings had the capacity to establish that the government scheme was unlawful due to an unduly wide gap between government policy and practice,[70] it was "clear … that the scope of review by the domestic courts was limited to the classic English public-law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not at the time … allow consideration of whether the claimed increase in night flights under the .. Scheme represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow Airport".[71] In other words, as in *Smith and Grady*, an approach had been employed which fell short of that which the Court would itself have used.

Overall, it is clear from the Court's treatment of the UK cases that whether a national judicial review standard is styled as *Wednesbury*, proportionality or anything

[69] (2003) 37 E.H.R.R. 28, para. 140.
[70] As had been established in *R. v Secretary of State for Transport, Ex p. Richmond LBC (No.2)* [1995] Environmental L.R. 390.
[71] (2003) 37 E.H.R.R. 28, para. 141.

else is unimportant from the perspective of Article 13: what counts is the intensity of scrutiny deployed in practice. While scrutiny in *Soering* and *Vilvarajah* amounted to an effective remedy, that in *Smith and Grady* and *Hatton* did not, a key indicator being how closely the review conducted coincided with the approach the Court would itself adopt. All these cases originated in the period before the HRA came into force, but from their central role in the Court's case law it is clear that they represent the standards which continue to be deployed, and to which domestic law must adhere in cases involving Convention rights. In consequence, were the HRA to be repealed but the UK to remain a signatory to the Convention, the intensity of judicial scrutiny could not be diluted below that held to be 'effective' in Article 13 terms in these cases: national courts would continue to need to consider whether a pressing social need existed to restrict 'qualified' Convention rights, and to conduct proportionality review of any restriction imposed.[72] As Richard Clayton and Hugh Tomlinson have noted, and restriction of rights presently available under the HRA "would simply mean that the United Kingdom would be in breach of its international law obligations under the Convention and unsuccessful claimants would be able to bring successful applications in Strasbourg which would, in turn, place the United kingdom under an international law obligation to make appropriate changes to render domestic law consistent with the Convention".[73]

'Thinner' arguments (2): the requirements of Article 35(1)

The Court's application of Article 35(1) in relation to the declaration of incompatibility under section 4 of the HRA has turned on its general approach to an

[72] At national level, differences between the *Wednesbury* approach and the Court's use of proportionality were explored in *R. v Secretary of State for the Home Department, Ex p. Daly* [2001] UKHL 26, paras 26-28 (Lord Steyn).
[73] R. Clayton and H. Tomlinson, n. 10 above, p.12 (IN.34).

'effective remedy' when considering whether national remedies have been exhausted. The Court stressed in *Akdivar v Turkey* that: "normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness."[74] In practice, the respondent state must show that the remedies were "capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success".[75] Complaints intended subsequently to be brought before the Court should first "have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, … any procedural means that might prevent a breach of the Convention should have been used".[76] Since it operates as part of the Convention machinery for protecting human rights, Article 35(1) must be applied "with some degree of flexibility and without excessive formalism …. [T]he rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case …. This means amongst other things that [the Court] must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and

[74] *Akdivar v Turkey* (1997) 23 E.H.R.R. 143, para 66 (on the facts the ECtHR was dealing with Article 35's predecessor, the similarly-worded Article 26). See also, for example, *Johnston v Ireland* (1987) 9 E.H.R.R. 203, para. 45; *Vernillo v France* (1991) 13 E.H.R.R. 880, para. 27; *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 52; *Walker v United Kingdom* (2004) 39 E.H.R.R. S.E.4; *Pearson v United Kingdom* (application 8374/03), 27th April 2004; *Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54; *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, para 142; *Baysayeva v Russia* (2009) 48 E.H.R.R. 33, para 104; *Kennedy v United Kingdom* (2011) 52 E.H.R.R. 4, para 109; *McFarlane v Ireland* (2011) 52 E.H.R.R. 20, para 107; *Greens and M.T. v United Kingdom* (2011) 53 E.H.R.R. 21, para 66; *Ananyev v Russia* (2012) 55 E.H.R.R. 18, para 94.
[75] *Ananyev v Russia* (2012) 55 E.H.R.R. 18, para 94.
[76] *Akdivar v Turkey* (1997) 23 E.H.R.R. 143, para 66 (note also paras 67 and 68). See also, for example, *Walker v United Kingdom* (2004) 39 E.H.R.R. S.E.4; *Pearson v United Kingdom* (App. No.8374/03), decision of 27 April 2004; *Baysayeva v Russia* (2009) 48 E.H.R.R. 33, para 104; *Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54; *Greens and M.T. v United Kingdom* (2011) 53 E.H.R.R. 21, para 66.

political context in which they operate as well as the personal circumstances of the applicants".[77] The Court would examine on this basis whether, in all the circumstances, the claimant did everything that could reasonably be expected to exhaust domestic remedies.

The Court has yet to form a final view about the 'effectiveness' of section 4 as a remedy in terms of the criteria just set out. Relevant cases – generally admissibility decisions – have been concerned with whether domestic remedies have been exhausted, with 'effectiveness' being assessed on a similar basis to that used in relation to Article 13. In four cases, typified by *Hobbs v United Kingdom*, the Court at Chamber level held the declaration of incompatibility to be insufficient due to its "limitations":

"In particular, a declaration is not binding on the parties to the proceedings in which it is made. Furthermore, by virtue of section 10(2) of the [HRA], a declaration of incompatibility provides the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention. The minister concerned can only exercise that power if he considers that there are 'compelling reasons' for doing so".[78]

However, the Grand Chamber adopted a more nuanced position in *Burden v United Kingdom*.[79] The claimants were sisters who jointly owned a home and had

[77] *Akdivar v Turkey* (1997) 23 E.H.R.R. 143, para 69. See also, for example, *Van Oosterwijck v Belgium* (1980) 3 E.H.R.R. 557, para. 35; *Cardot v France* (1991) 13 E.H.R.R. 853, para. 34; *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 53; *Baysayeva v Russia* (2009) 48 E.H.R.R. 33, para 105;.*Ananyev v Russia* (2012) 55 E.H.R.R. 18, para 95.
[78] *Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54. A similar formulation was used in *Dodds v United Kingdom* (App. No.59314/00), decision of 8 April 2003; *Walker v United Kingdom* (2004) 39 E.H.R.R. S.E.4; *Pearson v United Kingdom* (App. No.8374/03), decision of 27 April 2004.
[79] (2008) 47 E.H.R.R. 38.

bequeathed their stakes in it to one another. They argued that as the survivor would face significant liability under the Inheritance Tax Act 1984 when the other died – liability which would not have arisen had they been entitled to register as civil partners under the Civil Partnership Act 2004 – domestic legislation was incompatible with Article 1 of Protocol No. 1 (concerning the peaceful enjoyment of possessions) in conjunction with Article 14 (prohibiting discrimination in the enjoyment of Convention rights). The Grand Chamber rejected the substantive claim,[80] but in doing so had to determine whether the sisters had exhausted all their domestic remedies, given that they had not sought a section 4 declaration before a domestic court. In determining whether the declaration was an effective remedy,[81] the Grand Chamber began by noting that "the Human Rights Act places no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility and that, primarily for this reason, the Court has held on a number of previous occasions that such a declaration cannot be regarded as an effective remedy".[82] Furthermore, where the applicant claimed to have suffered loss or damage as a result of the breach of their Convention rights (as in the four earlier cases), a declaration "has been held not to provide an effective remedy because it is not binding on the parties to the proceedings in which it is made and cannot form the basis of an award of monetary compensation."[83] However, these cases could be distinguished on the basis that the *Burden* applicants had not yet suffered pecuniary loss.

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[80] (2008) 47 E.H.R.R. 38, paras 62-66.
[81] See, generally, *Akdivar v Turkey* (1997) 23 E.H.R.R. 143, paras 65-67; *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, paras. 51-52; *B. and L. v United Kingdom* (App. No.36536/02), judgment of 29 June 2004; *Burden v United Kingdom* (2008) 47 E.H.R.R. 38, para 36.
[82] (2008) 47 E.H.R.R. 38, para 40. The cases cited are *Dodds v United Kingdom* (App. No.59314/00), decision of 8 April 2003; *Walker v United Kingdom* (2004) 39 E.H.R.R. S.E.4; *Pearson v United Kingdom* (App. No.8374/03), decision of 27 April 2004; *B. and L. v United Kingdom* (App. No.36536/02), judgment of 29 June 2004; *Upton v United Kingdom* (2008) 47 E.H.R.R. S.E.24; *Hobbs v United Kingdom* (2007) 44 E.H.R.R. 54.
[83] (2008) 47 E.H.R.R. 38, para. 40.

The Grand Chamber then indicated a slight shift from the earlier Chamber decisions. On the one hand, it "note[d] with satisfaction" progress with "legislative reform in response to the making of a declaration of incompatibility", given that "in all the cases where declarations of incompatibility have to date become final, steps have been taken to amend the offending legislative provision".[84] On the other hand, "given that there have to date been a relatively small number of such declarations that have become final", it "agree[d] … that it would be premature to hold that the procedure … provides an effective remedy to individuals complaining about domestic legislation."[85] The Grand Chamber felt that "it cannot be excluded that at some time in the future the practice of giving effect to the nationals courts' declarations of incompatibility by amendment of the legislation [declared incompatible] is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation",[86] and in those circumstances, except where an effective remedy "necessitated the award of damages in respect of past loss or damage caused by the alleged violation of the Convention", applicants would be required first to exhaust the declaration procedure before making an application to the Court.[87] Since that level of certainty had not yet been reached, however, the Grand Chamber rejected the argument that the applicants had not exhausted their domestic remedies.[88]

Two significant points emerge from this reasoning. First, a distinction has been established between cases where compensation is sought for pre-existing monetary loss – in which situation the declaration of incompatibility is not 'effective' for Article 35(1) purposes – and other cases, in which a different conclusion may be

[84] (2008) 47 E.H.R.R. 38, para. 41; see also the data in para. 24.
[85] (2008) 47 E.H.R.R. 38, para. 41.
[86] (2008) 47 E.H.R.R. 38, para. 43. It is unclear whether this meant legally or politically binding.
[87] (2008) 47 E.H.R.R. 38, para. 43.
[88] (2008) 47 E.H.R.R. 38, para. 44.

possible. However, the Court appears to be waiting to see how things will develop with the declaration procedure at national level before reaching a final judgment about its effectiveness in cases not involving monetary loss.[89] Secondly, given the 'close affinity' between Articles 13 and 35(1), the Grand Chamber's reasoning concerning 'effectiveness' under the latter heading surely has implications for assessments in any Article 13 cases involving section 4. A logical implication of the Court's characterisation of section 4 as a provision whose ultimate effectiveness remains to be tested must be that any future replacement of the declaration by a weaker form of protection for Convention rights in national law is unlikely to find affirmation as an 'effective remedy' under Article 35(1) or Article 13. In relation to this last point, it is useful to note that the scrutiny of national legislation (including section 4) for Article 35(1) purposes does not in itself contravene the prohibition in the Article 13 case law on a requirement that national law 'as such' be open to challenge. For, when assessing national legislative provisions for Article 35(1) purposes, the Court is determining whether the case in hand *needs* to be considered at Strasbourg level. Article 13 – notwithstanding the shared definition of an 'effective remedy' – is the mechanism for the Court's *own* determination of Convention-compatibility, and as such is subject to its own constraints. Were an argument to arise *within* an Article 13 case concerning the 'effectiveness' of section 4 (or any replacement), the appropriate balance between the constraints and Strasbourg-level assessment of the content of rights protections in national law would be directly in issue. Any such assessment would need to be explained in terms of the underpinning rationale of subsidiarity, which will be considered further in the next section.

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[89] In *Kennedy v United Kingdom* (2011) 52 E.H.R.R. 4, para 109 and *Greens and M.T. v United Kingdom* (2011) 53 E.H.R.R. 21, para 68, the Chamber reiterated that the practice of giving effect to declarations of incompatibility by amending offending legislation was "not yet sufficiently certain" to justify a finding that a declaration was 'effective'.

From the standpoint of Article 35(1), we can therefore see that at Chamber level that there has been persistent doubt about the adequacy of section 4 as an 'effective remedy', although *Burden* indicates that the Grand Chamber is prepared to allow for an assessment to take place over the longer term. In the meantime, since it is not currently certain whether section 4 counts as 'effective' under Article 35(1), it seems questionable whether anything less could be.

'Thicker' arguments: the subsidiarity rationale

The previous two sections have provided a snapshot of relevant Article 13 and Article 35(1) case law, and have used this to suggest that the Court is unlikely to find that a dilution in the level of protection provided to Convention rights in national-level judicial review and through the declaration of incompatibility is acceptable. This conclusion can be reinforced by further considering the two Articles' underpinning rationale, subsidiarity: a concept which also helps to explain the apparent tension between the ambit of 'effectiveness' scrutiny and the prohibition on challenging national law.

In *Kudla*, the Court explained the association of Articles 13 and 35(1) with subsidiarity as follows:

"By virtue of Article 1 (which provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human

rights. This subsidiary character is articulated in Articles 13 and 35(1)".[90]

Significantly, the Court used the subsidiarity rationale, as well as practical arguments, to explain in *Kudla* that Article 13 should be held to impose an *additional* set of obligations to those already in existence at national level through Article 6. Practically, effective national-level protection required Article 13 not to be "absorbed by the general obligation" imposed by Article 6 to protect against undue delays in legal proceedings.[91] To the contrary: "the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6(1), rather than being absorbed".[92] The efficacy of Article 13 required that implied restrictions be kept to a minimum.[93]

Turning to subsidiarity, *Kudla* was subsequently characterised in *Scordino v Italy (No.1)* as having "stressed the importance of the rules relating to the subsidiarity principle so that individuals are not systematically forced to refer to the Court in Strasbourg complaints that could otherwise, and in the Court's opinion more appropriately, have been addressed in the first place within the national legal system".[94] *Kudla* thus seems like a powerful example of the role of the Court in shaping the notion of subsidiarity and its limits. On the one hand, the judgment emphasises the importance of decision-making at national level and has the effect, if properly applied, of expanding the range of cases determined at that level. On the

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[90] (2002) 35 E.H.R.R. 11, para 152. See also, for example, *Surmeli v Germany* (2007) 44 E.H.R.R. 22, para 97; *De Souza Ribeiro v France* (2014) 59 E.H.R.R. 10, para 77; *McFarlane v Ireland* (2011) 52 E.H.R.R. 20, para 112. *Greens and M.T. v United Kingdom* (2011) 53 E.H.R.R. 21, para 50.

[91] (2002) 35 E.H.R.R. 11, para 152. See further *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, paras 140 and 141.

[92] (2002) 35 E.H.R.R. 11, para 152. See further *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, paras 140 and 141.

[93] (2002) 35 E.H.R.R. 11, para 152.

[94] (2007) 45 E.H.R.R. 7, para 188.

other hand, the very fact of the judgment underlines the ECtHR's central role in defining the obligation to protect Convention rights imposed on signatory states. This practical aspect is emphasised by Alastair Mowbray, who categorises *Kudla* as "a fascinating example of a positive obligation being developed, in part, because of the practical needs of the Strasbourg Court. Although this re-interpretation of Article 13 can be justified in terms of the principle of subsidiarity, namely that the primary responsibility for safeguarding Convention rights rests with the member states, it was also motivated by the case-load crisis facing the Court".[95] Whether *Kudla* turned more on subsidiarity as a concept or on a practical concern to increase the speediness of decision-making at Strasbourg level, the decision clearly demonstrates how subsidiarity entails the Court laying down important minima for *national-level* legal protections. As the Court put things in *Conka v Belgium*: "Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements … In that connection, the importance of Article 13 for preserving the subsidiary nature of the Convention system must be stressed".[96]

It is a matter for debate how far subsidiarity requires the Court to make detailed prescriptions concerning the content of an 'effective remedy' in national law, when there is simultaneously no requirement to incorporate the Convention. *Scordino (No.1)* and *McFarlane v Ireland* offer some general guidance in the wake of *Kudla*. First, and crucially, "[t]he principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies, otherwise the rights guaranteed by Article 6 would be devoid of any substance" (a concern which also

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[95] A.Mowbray, n.10 above, p.211. This interpretation seems also to be supported by C. Grabenwarter's reference to reference to "its own overburdening with cases": 'The Right to Effective Remedy [*sic*] against Excessive Duration of Proceedings', n.5 above, p.130. See also *Ananyev v Russia* (2012) 55 E.H.R.R. 18, para 211.

[96] (2002) 34 E.H.R.R. 54, para 84.

applied to other Convention right).[97] Since Articles 13 and 35(1) give "direct expression to the subsidiary character of the Court's work … less than full application of the guarantees of Article 13 would undermine the operation of the subsidiary character of the Court in the Convention system" and weaken its effective functioning.[98] Secondly, the Court is "required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court's case-law"[99] concerning the definition of an 'effective remedy'. Thirdly, and pulling in the opposite direction, it remained "primarily for the national authorities, notably the courts, to interpret and apply domestic law and to decide on issues of constitutionality".[100] Where a national legislature or court had introduced a domestic remedy, the Court could tailor its response accordingly. In particular, "a wider margin of appreciation" would be left to a state "to allow it to organise the remedy in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned. It will, in particular, be easier for the domestic courts to refer to the amounts awarded at domestic level for other types of damage … and rely on their innermost conviction, even if that results in awards of amounts that are lower than those fixed by the Court in similar cases".[101] Interestingly, the Court noted that its supervisory role "should be easier in respect of States that have effectively incorporated the Convention into their legal system and consider the rules to be directly applicable, since the highest courts of these States

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[97] *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, para. 192. See also *McFarlane v Ireland* (2011) 52 E.H.R.R. 20, para 112.

[98] (2011) 52 E.H.R.R. 20, para 112. See also, for example, *Kudła v Poland* (2002) 35 E.H.R.R. 11, paras 152 and155; *Ivanov v Ukraine* (App. No.40450/04), judgment of 15 October 2009, para 63.

[99] *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, para. 191. See also *McFarlane v Ireland* (2011) 52 E.H.R.R. 20, para 114.

[100] (2011) 52 E.H.R.R. 20, para 113.

[101] *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, para 189.

will normally assume responsibility for enforcing the principles determined by the Court".[102]

Andrew Drzemczewski has shown that divergent views emerged at an early stage of Article 13's existence about whether it required the incorporation of the Convention into the domestic law of signatory states.[103] In particular, *Ireland v United Kingdom* suggested that "By substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1 …, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section 1 would be directly secured to anyone within the jurisdiction of the Contracting States … That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law."[104] While this Article 1-based interpretation might once have been read as leaving the door to a change of position concerning incorporation, however, it is now some forty years old and later case law has consistently indicated that there is no obligation to incorporate.

Nonetheless, by reference to more recent cases such as *Soering*, *Vilvarajah*, *Chahal*, *Smith and Grady* and *Hatton*, it might be argued that the further the Court uses Article 13 to specify standards governing the content of the protection to be given in national law, the more it appears to intrude into the margin of appreciation or discretion otherwise available to signatory states. This point is captured in the disquiet expressed by Judge Bernhardt (supported by Judges Pettiti and Gersing) in his Concurring Opinion in *Abdulaziz, Cabales and Balkandali v United Kingdom*, to the

[102] *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, para 191.
[103] *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford: Clarendon Press, 1983), pp. 40-56.
[104] (1979-80) 2 E.H.R.R. 25, para 239.

effect that the Court's conclusion that there had been a breach of Article 13, when the Convention had not at the time been brought into national law, meant that Article 13 was: "always and automatically violated if the following conditions are met: (1) the Convention does not form part of the internal law of a given State; and (2) the internal law of the State violates – according to the findings of our Court – other rights guaranteed by the Convention …. The result of this reasoning is that the interpretation of the substantive provisions by this Court is decisive also for the violation or non-violation of Article 13 ... Whenever this Court finds a violation of one of the Articles 2 to 5 … or 8 to 12 … as a result of the existence and application of a national legal norm in a State where the Convention does not form part of internal law, Article 13 … also is automatically violated."[105]

The implication of this view is that Article 13 was being accorded an automatic role in cases involving a breach of other rights, by default expanding the reach of the Court's assessment under this heading. An analogous criticism is found in Judge Sir Brian Kerr's dissenting judgment in *Hatton*, in which he suggested that the majority's categorisation of domestic judicial review as falling below the required Article 13 standard had the effect of requiring a remedy against 'the state of domestic law' or national legislation 'as such', contrary to the Court's consistently-expressed view to the contrary.[106] From this perspective, an argument could also be made against the emphasis in *Smith and Grady* and other cases in which the need for national law to coincide with the Court's own approach was emphasised. Put simply, the national autonomy protected by giving signatory states a choice about whether or not to incorporate – an action with important implications for national-level

[105] (1985) 7 E.H.R.R. 471, Concurring Opinion, Para 2.
[106] (2003) 37 E.H.R.R. 28, Dissenting Opinion of Judge Sir Brian Kerr.

protections – might be said to be reduced to a formality by excessive Strasbourg-level specification of the details of the protection required, even when conducted in the name of subsidiarity.[107]

Obviously these are minority positions. They are important for present purposes because they demonstrate, alongside the early history of Article 13 and the *Kudla* decision, that arguments about the definition and ambit of the 'effective remedy' requirement have direct implications for the respective roles of the Court and the national legal systems in the protection of Convention rights. As *minority* positions, they also help highlight something important about the prevailing approach to subsidiarity in the Court's case law: namely that it justifies the setting of detailed minimum requirements for protecting the content of Convention rights at national level, even while it *also* means that incorporation of the Convention is not mandatory. While there is clearly tension between the two elements, the fact that a full understanding of subsidiarity must *involve* both is, in turn, important in relation to the range of Convention-compatible options for a signatory state: for a signatory's attempt to dilute the level of protection offered in its national law would need to involve, as part of its challenge to the prevailing 'effective remedy' case law, an attempt to reconfigure the very nature of subsidiarity as a rationale. Given the extent to which subsidiarity reasoning, involving its *two* elements, is embedded in the case law, this would be an onerous task – particularly for one signatory acting alone.

Conclusion

[107] For general analysis, see J. Polakiewicz, 'The Status of the Convention in National law', ch 2 in R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States 1950-2000* (Oxford: OUP, 2001), pp. 32-36.

Arguments from the previous section seemingly suggest that a Convention signatory state cannot reduce the protections offered by its national law to Convention rights merely by invoking an abstract or overarching margin of appreciation or zone of 'discretionary authority'.[108] For subsidiarity, as the basis for *such* discretionary authority as the Court currently permits, *also* contains detailed prescriptions – captured in the sequence of UK-related judicial review cases discussed in detail (namely, *Soering*, *Vilvarajah*, *Chahal*, *Smith and Grady* and *Hatton*) – concerning the protection which national law must offer in order to provide 'effective' remedies. The very nature of subsidiarity, as articulated by the Court, operates to prevent slippage below this level. The requirements of Articles 13 and 35(1), as interpreted by the Court, thus specify important constraints when it comes to possible replacements for the HRA, at least if the UK wishes to continue as a Convention signatory.

It may at present be going too far to suggest, as do Richard Clayton and Hugh Tomlinson, that "now that all State Parties have incorporated the Convention it is arguable that such an obligation [to incorporate it into national law] does arise",[109] and that "It is possible that the repeal of the HRA would now, in itself, be a violation of the Convention".[110] This argument has its foundation in the point that at the time the idea that there is no obligation to incorporate emerged, only a minority of Convention states had incorporated its provisions, and that as a 'living instrument' the Convention should now be interpreted in light of the position which currently

[108] An idea sometimes associated with the former Prime Minister David Cameron, who as Leader of the Opposition suggested in a speech to the Centre for Policy Studies (delivered on 26 June 2006) entitled 'Balancing freedom and security – a modern British Bill of Rights' that: "The existence of a clear and codified British Bill of Rights will tend to lead the European Court of Human Rights to apply the 'margin of appreciation'".
[109] R. Clayton and H. Tomlinson, n.10 above, p.1993 (21.174).
[110] R. Clayton and H. Tomlinson, n.10 above, p.12 (IN.36).

prevails.[111] These are interesting and important points. However, just as an attempt to dilute the level of protection offered to Convention rights at national level would run up against the Court's conception of subsidiarity and, to be successful, require reconsideration of that notion, an argument that the non-incorporation element of subsidiarity could itself be dispensed with would involve a similarly large re-think. When the current case law is aligned with its consistently-expressed underpinning rationale, it becomes clear that bringing about such a re-think (at least, through judicial decision-making alone) would be a difficult exercise.[112]

In summary, subsidiarity as it underpins Articles 13 and 35(1) involves a balance between the role of the European Court of Human Rights and practical protection at national level (a boundary which may not always be easy to draw). The requirements articulated by the Court concern the content or substance of Convention rights, while signatory states have a measure of discretion in relation to the application of protection at national level. Within this framework, the notion that there is no obligation to incorporate has been repeated so often that it currently seems embedded in Article 13. In relation to the UK, the future form of rights protection in domestic law is bound to be significantly affected by subsidiarity (assuming continuing Convention affiliation). 'Effective protection' for Article 13 purposes will require the same degree of protection for Convention rights in judicial review as would be offered by the Court, including proportionality review. Meanwhile, anything less than declaration of incompatibility is unlikely to find favour under Article 35(1).

[111] R. Clayton and H. Tomlinson, n.10 above, pp.12-13 (IN.36 and IN.37).

[112] These comments are made without expressing a view concerning the style of interpretation to be adopted by the Court.