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Welcome to Landmark Chambers' 'Human Rights Act – the new Bill of Rights' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Lord Carnwath (Chair)

Topic:
Summary of Government Proposals

Richard Drabble QC

Topic:
Proposed statutory guidance: the presumption in favour of the common law; refinement of section 3; and article 8

Alex Goodman

Topic:
Human Rights Act Reform: A Modern Bill of Rights
What difference will it make?

Your speakers today are…

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Hafsah Masood

Topic:
Proposals for a permission stage and judicial remedies

Leon Glenister

Topic:
The Policy Exchange proposals

Alex Shattock

Topic:
‘Strengthening Free Speech’

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Summary of Government Proposals

Lord Carnwath

- (i) The UK would remain party to the Convention, with the rights in the Convention sitting at the heart of a Bill of Rights. The rights as set out in Schedule 1 to the Human Rights Act will remain. “We regard the Convention as offering a common-sense list of rights. The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels.” These proposals will not, therefore, create any fundamental conflict with the Convention, nor necessitate our withdrawal. (paras 183-5)

- (ii) Section 2 would be amended to allow for the courts to have recourse to a wider range of jurisprudence – “a formulation that emphasises the primacy of domestic precedent, while setting out a broader range of case law – including, but not confined to, the Strasbourg case law – that UK courts may consider, if they so choose” (para 196).
- (iii) The Bill of Rights will make clear that the UK Supreme Court is “the ultimate judicial arbiter of our laws in the implementation of human rights”. This is because “the domestic courts are better placed than international courts to determine our laws, including relating to the training, calibre, experience, outlook and legitimacy of our senior judiciary.” (para 200)

- (iv) The qualified right to trial by jury will be recognised (para 202).
- (v) Greater emphasis will be placed on the right to freedom of expression. The new Bill will make clear that “the right to freedom of expression is of the utmost importance, and that courts should only grant relief impinging on it where there are exceptional reasons”. (paras 206, 213)
- (vi) There would be a permission stage for human rights claims, requiring proof of “significant disadvantage” subject to an exception in cases of “overriding importance”. (para 222-3) Litigants would be required to pursue other claims first (para 226).

- (vii) Ideas would be sought to “address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation” (para 231 question 11). No specific proposals are made.
- (viii)Section 3 would be repealed or replaced to avoid “judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament” (para 233).
- (ix) Guidance would be given on interpreting qualified rights to ensure that “great weight is given to Parliament’s view of what is necessary in a democratic society” (para 233ff)
- (x) Steps will be taken to clarify the extraterritorial application of the Convention (para 281)

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Human Rights Act Reform: A Modern Bill of Rights
What difference will it make?

Alex Goodman

Command Paper paragraph 184

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The rights as set out in Schedule 1 to the Human Rights Act will remain. We regard the Convention as offering a common-sense list of rights. The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels.

Command Paper paragraph 116

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… the Human Rights Act requires the courts to **alter the meaning** of primary legislation in order to make it compatible with the Convention rights, whenever it is possible to do so (section 3). It is one thing for the UK courts to declare legislation incompatible with human rights, but quite another for them to be **required to revise that legislation**, in material respects, in order to ensure compatibility without there being any direct or meaningful Parliamentary oversight (emphasis supplied)

Section 3 of the HRA 1998

- So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights
- This Section…
  - (b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
  - (c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility

How the Command Paper Understands the HRA

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Paragraph 154, n context of discussion about article 6 the paper states:

“We accept that government should be restrained by the protection of fundamental rights. The incremental expansion of rights into novel areas, however, creates a democratic tension with the prerogative of elected representatives to determine what may amount to finely balanced questions of public policy.”

At paragraph 177, the conclusion is this:

“The shift of law-making power away from Parliament towards the courts, in defining rights and weighing them against the broader public interest, has resulted in a democratic deficit.”

Section 117C of the NIA 2002

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(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

The Living Instrument Doctrine

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Hirst v The United Kingdom (No.2) [2004] 38 EHRR 40

- Article 3, protocol 1, the duty to hold free elections.
- When the UK signed the Convention it had a prohibition on voting rights for felons,
- *Hirst* brought in the UK in 2001 decided in Strasbourg in 2005. 2018 UK proposed to the Council of Europe that prisoners on licence would be permitted to vote. Case closed.
- No legislative amendment; guidance to prison governors and a leaflet advising prisoners of voting rights. The government's estimate is that amendment would permit up to 100 prisoners on licence to vote at any one time.
- Concerns the Convention and the Council of Europe: it has nothing to do with the Human Rights Act 1998. Parliament has not been forced to do anything it does not want by virtue of that domestic legislation.

Costs and Benefits

- Question 29 of the Consultation is “what do you consider to be the likely costs and benefits of the proposed Bill of Rights?”
- Are the benefits perceived or real?
- What are the costs of amendment? Is there a value in immutability of human rights instruments?
- Poll:

Bill of Rights
Or
Human Rights Act?

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Proposed statutory guidance: the presumption in favour of the common law; refinement of section 3; and article 8

Richard Drabble QC

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‘Strengthening Free Speech’

Alex Shattock

This talk

- Freedom of expression today
- The proposed changes
- Reasons for the proposed changes
- Lessons from the US

Quiz

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Quiz

Which of the following Convention rights does the HRA say that judges must have particular regard to?

- *The right to life*
- *Freedom of expression*
- *Prohibition of torture*
- *Right to a fair trial*
- *Freedom of thought, conscience and religion*
- *Freedom of assembly and association*
- *Right to play Wordle for free, without targeted ads or a New York Times subscription, forever*

Quiz

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- *Prohibition of torture*
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- *Freedom of thought, conscience and religion*
- *Freedom of assembly and association*
- *Right to play Wordle for free, without targeted ads or a New York Times subscription, forever* Not a convention right*

Freedom of Expression in the Convention

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ARTICLE 10 **Freedom of expression**

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of Expression in the HRA: section 12

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12 Freedom of expression.

(1)This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2)If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a)that the applicant has taken all practicable steps to notify the respondent; or

(b)that there are compelling reasons why the respondent should not be notified.

(3)No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4)The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a)the extent to which—

(i)the material has, or is about to, become available to the public; or

(ii)it is, or would be, in the public interest for the material to be published;

(b)any relevant privacy code.

The Consultation

“Some rights, such as the right to freedom of expression, will be strengthened”

- 205 “*The government believes that the public interest is overwhelmingly assisted by protection for freedom of expression and in a free and vibrant media*.”
- 206 … “*the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy*”
- 210… “ *The government is also clear that freedom of speech and academic freedom are fundamental principles, not least in the higher education sector*.”

The Consultation: specific proposals

213… “The government proposes that the Bill of Rights legislation should contain a stronger and more effective provision, making it clear that the right to freedom of expression is of the utmost importance, and that **courts should only grant relief impinging on it where there are exceptional reasons**.”

215… “The government would also like the Bill of Rights to provide more general guidance on how to balance the right to freedom of expression with competing rights (such as the right to privacy) or wider public interest considerations. The government does not believe such principles should be merely left to the courts to develop. Instead, it believes **there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds**, clearly spelt out by Parliament.”

Why does the government want to strengthen free speech?

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Why does the government want to strengthen free speech? Culture war debates

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Why does the government want to strengthen free speech? Culture war debates

- Particular concern for Universities and “no platforming”
- See 2017 comments of then-universities minister Jo Johnson:

“Universities should be places that open minds not close them, where ideas can be freely challenged. In universities in America and worryingly in the UK, we have seen examples of groups seeking to stifle those who do not agree with them.

“We must not allow this to happen. Young people should have the resilience and confidence to challenge controversial opinions and take part in open, frank and rigorous discussions. That is why the new regulator, the Office for Students, will go even further to ensure that ***universities promote freedom of speech within the law****”*

Why does the government want to strengthen free speech? Print media pressure

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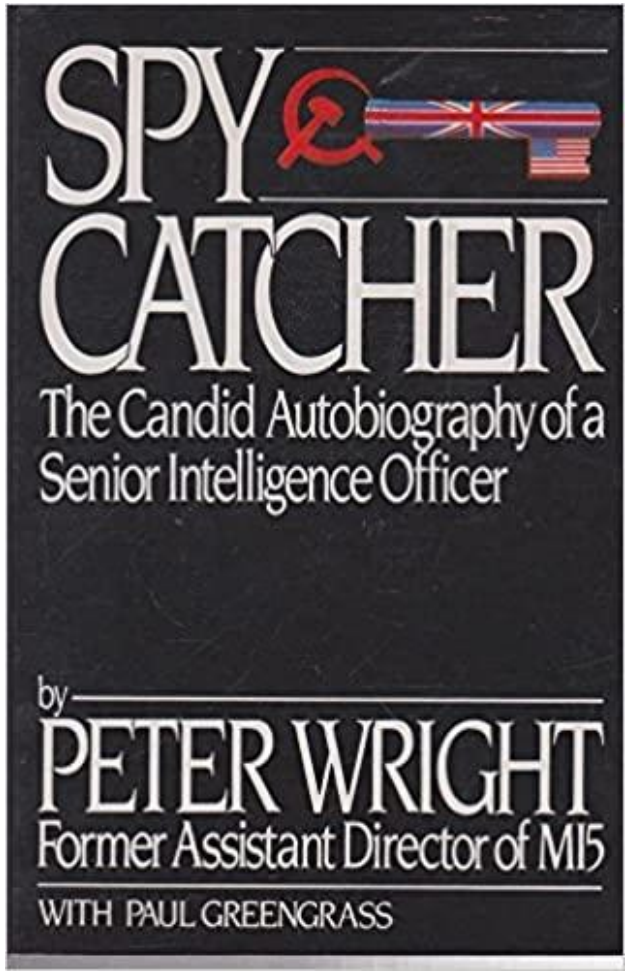

Scottish Daily Mail

FRIDAY, JULY 24, 2020 70p

FREE AMAZON FIRE 7 TABLET WHEN YOU JOIN MAIL+ SEE PAGE 57

Crabbit? Boris was positively bouncing

HENRY DEEDES SEE PAGES 8-9

Hate Crimes Bill condemned as 'totalitarian' and 'dangerous' ++ UN Human Rights expert warns of state censorship ++ Leading QC fears it will stifle debate

NEW SNP LAW'S 'CHILLING' THREAT TO FREE SPEECH

SCOTLAND will resemble a 'totalitarian state' where no one is exempt from censorship under the SNP's new hate crime laws, a UN legal expert has warned.

Analyst Lois McLatchie, who works with the UN Human Rights Council, said the proposals would have a 'chilling effect on society'.

By Rachel Watson
Deputy Scottish Political Editor

In a scathing review of the Hate Crime Bill now going through the Scottish parliament, she said that the erosion of freedom of speech would create a culture of silence more commonly seen in countries run by despots.

And she cited the row over author JK Rowling's views on transgender issues as an example of how 'cancel culture' would become enshrined in law as the state dictates what we say and which books we read.

Senior lawyer Thomas Ross, QC, also warned the wording of the Bill is so vague that ordinary people will find themselves dragged through the courts for unintentionally offending someone.

Justice Secretary Humza Yousaf has described the Bill as an 'important milestone' which shows the Government is determined to make Scotland a 'zero tolerance' society for such

Turn to Page 2

Why does the government want to strengthen free speech? Admiration for the US

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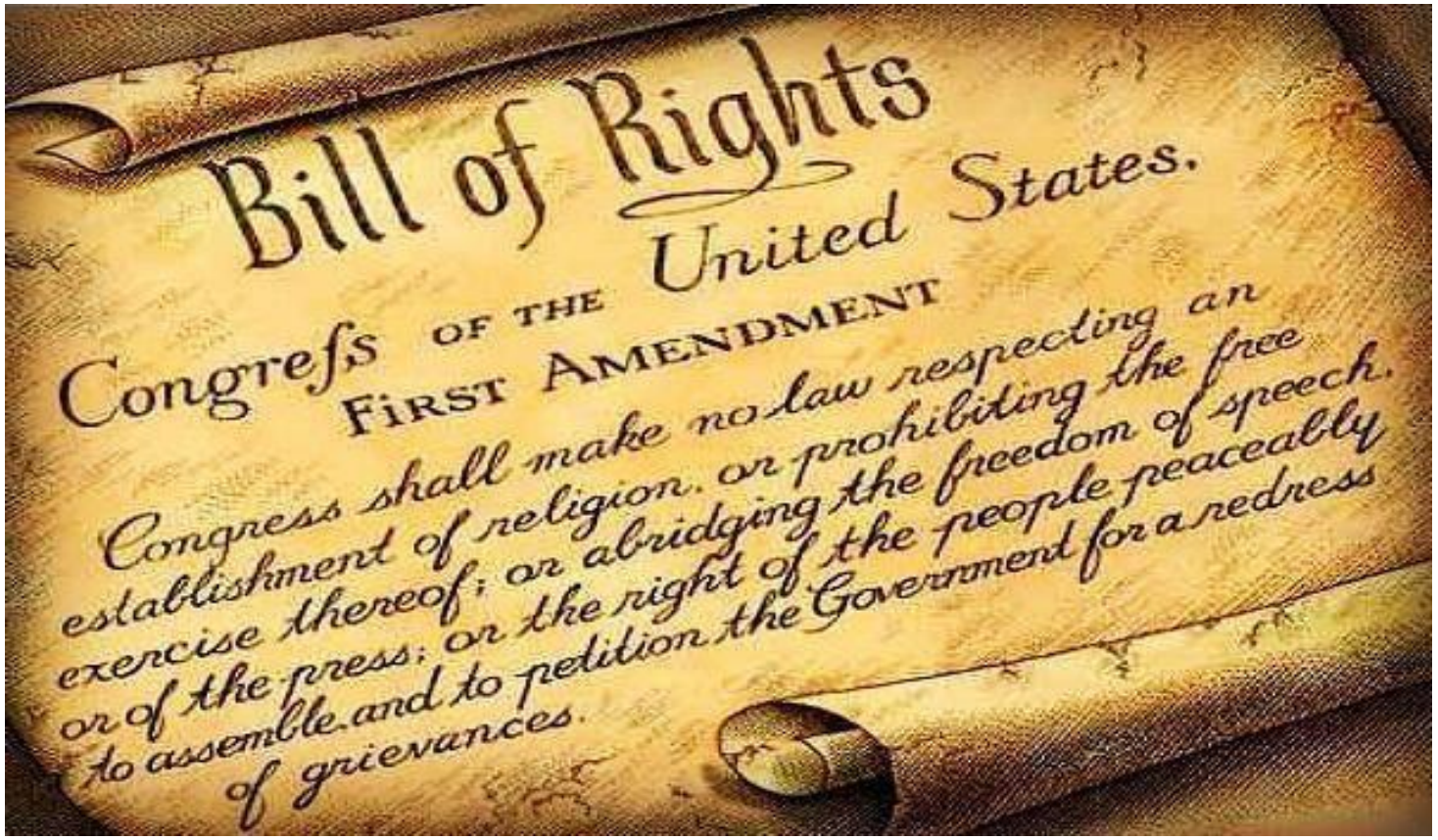

Lessons from the US: SC cases

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Citizens United v Federal Election Commission 558 U.S. 310 (2010):

- Free speech (First Amendment) prohibits the government from restricting political campaign spending
- Corporations= legal persons
- Spending money on political adverts= expression of beliefs
- Prohibiting corporations spending money on political ads= violation of freedom of expression

- Hugely negative impact on American democracy: big money in politics

Lessons from the US: SC cases

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44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996): ban on advertising alcohol prices was a breach of the First Amendment. Cf *British American Tobacco UK Ltd & Ors v The Secretary of State for Health* [2016] EWCA Civ 1182

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980): public utility companies can send political ads with billing statements

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992): Burning crosses in public is free speech ("*St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire*")

Snyder v. Phelps, 562 U.S. 443 (2011): Westboro Baptist Church allowed to picket funerals with placards displaying homophobic slurs

Conclusion

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- Preamble 1948 UDHR:

"It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"

- Free speech has developed in a worrying way in the US that seems at odds with the purpose of human rights as expressed in the UDHR
- Free speech is strong enough in the UK under the HRA and we should not seek to replicate the US approach

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The Policy Exchange proposals

Leon Glenister

Introduction

- The overarching concepts
- The Policy Exchange Judicial Power Project paper
- The themes from the paper:
  - The influence of the ECtHR
  - Who is the legislator?
  - Who balances rights / public interest?

The overarching concepts

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- Appeal and review
  - *General Medical Council v Michalak* [2017] UKSC 71 para 20.

- Democratic dialogue
  - *R (UNISON) v Lord Chancellor* [2017] UKSC 51
  - Section 4 HRA

- Common law rights
  - *'Common Law Constitutional Rights'*, Elliott and Hughes (ed), 2021
  - *R v SSHD ex p Daly* [2001] UKHL 26

The real issue: where the balance lies

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- The varying intensity of review
  - *Re SC v SSWP* [2021] UKSC 26 para 158

- Deference
  - *A v SSHD* [2004] UKHL 56
  - *R (Lord Carlile) v SSHD* [2014] UKSC 60

Policy Exchange Judicial Power Project

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- The Judicial Power Project is run by the think tank Policy Exchange, which has argued that the inflation of judicial power unsettles the balance of the constitution.

- Its paper ‘How and Why to Amend the Human Rights Act 1998’, authored by Professor Richard Ekins (University of Oxford) and John Larkin QC (Former AG of Northern Ireland), with a foreword from Lord Sumption, is its submission to IRAL.

Legislative options

- Government's commitment to remain signatory to ECHR
- Do we need legislation at all?
- If so, should there be a new Bill of Rights?

Theme 1: Influence of the ECtHR

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- Section 2 HRA: Court must “take into account” ECtHR jurisprudence

- Concerns:
  - Government should be free to depart from ECtHR jurisprudence
  - The Convention as a “living instrument”

- PE suggestion to limit the situations where public body can be found to have acted in contravention of Convention rights

- Consultation suggestion to widen the sources of guidance for the Court

Theme 2: Who is the legislator?

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- Section 3 HRA: primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights “so far as it is possible to do so”.

- Concerns:
  - Judicial overreach, e.g. *Ghaidan v Godin-Mendoza* [2014] UKHL 30
  - Only works on pre-HRA statutes

- PE suggestion to limit to “so far as is consistent with the intention of the enacting Parliament or law maker”. Consultation suggestion to restrict any expansive approach.

Theme 2: Who is the legislator?

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- Section 4: declarations of incompatibility

- Consultation proposal pushes dialogue model:

  – Increase scope of declaration of incompatibility
  – Database of judgments where section 3 applied

Theme 3: who balances rights / public interest?

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- Is proportionality a legal or political test?

- Is the intensity of review or level of deference appropriate?
  - *R (Dolan) v SSHSC* [2020] EWCA Civ 1605
  - *R (Quila) v SSHD* [2011] UKSC 45
  - Due deference

- Proposal to give “great weight” to judgments of Parliament and decision makers

Conclusion

- A Bill of Rights at all?
- Where should the balance lie? Do you trust the judges?
- The scope of the issues

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Proposals for a permission stage and judicial remedies

Hafsah Masood

PERMISSION STAGE
The proposal

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- A permission stage for human rights claims
- Claimants to demonstrate they have suffered a “significant disadvantage” in order to bring a claim
- “Overriding public importance” limb for exceptional cases that fail to meet the “significant disadvantage” threshold but where there is a highly compelling reason for the case to be heard

PERMISSION STAGE
Stated justification

Command paper refers to:

- A proliferation of human rights claims '*not all of which merit court time and public resources*'
- Loss of trust in justice system when frivolous or spurious cases come before courts, even if ultimately unsuccessful
- Need to ensure that courts focus on genuine and credible claims/cases where a genuine harm or loss has been caused
- Need to ensure unmeritorious claims are filtered earlier

PERMISSION STAGE

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- Which proceedings? All proceedings? What about statutory appeals in the FTT (IAC)?

- What would it add to existing powers/control mechanisms for filtering out unmeritorious, frivolous claims? Not clear how much difference it would make in practice…

PERMISSION STAGE
Existing powers/control mechanisms

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- Permission stage already exists in judicial review.

- Courts have power to strike out claims which have no reasonable prospects or are abusive.
  - This *includes 'pointless and wasteful litigation*' where it can demonstrated that the benefit attainable by the claimant in the action is of such limited value that '*the game is not worth the candle*' and the costs of the litigation will be out of all proportion to the benefit to be achieved: *Jameel v Dow Jones and Co* [2005] EWCA Civ 75; [2005] Q.B. 946)
  - Defendant must normally make an application, and applicant bears burden of justifying strike out
  - Command paper – '*wrong that burden is on public bodies to apply to strike out frivolous or spurious claims. A permission stage would shift responsibility to the claimant to demonstrate that a human rights claim does, in practice raise a claim which merits the court's attention and resources*' (para 221)

PERMISSION STAGE
"substantial disadvantage": Article 35 of ECHR

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Article 35(3)(b):

*'The Court **shall declare inadmissible any individual application** submitted under Article 34 **if it considers that**:*

…

*(b) the **applicant has not suffered a significant disadvantage**, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.'*

Introduced by Protocol No 14, in 2010. Stated aim was to enable a more rapid disposal of unmeritorious cases (against a background of an ever-increasing caseload).

PERMISSION STAGE
"substantial disadvantage": Article 35 of ECHR

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'Inspired by the general principle de minimis non curat praetor, this [criterion] … rests on the premise that ***a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity*** *to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case.* ***The severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case****. In other words,* ***the absence of any "significant disadvantage" can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant.*** *However, the applicant's subjective perception cannot alone suffice to conclude that he or she has suffered a significant disadvantage. The subjective perception must be justified on objective grounds…****A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest*** *…'*

(*Stravropolous v Greece,* App No 52484/18, para 28)

PERMISSION STAGE
"substantial disadvantage": Article 35 of ECHR

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Factors considered by ECtHR in determining whether "significant disadvantage"

- Nature of violated right;
- Gravity of alleged violation; and/or
- Possible consequences of alleged violation on the personal situation of the applicant.

(*Giusti v Italy,* App No 13175/03)

PERMISSION STAGE
"substantial disadvantage": Article 35 of ECHR

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- Has not been applied to cases concerning:
  - Article 2 (*Makuchyan & Minasyan v Azerbaijan*, App No 17247/13, para 72)
  - Article 3 (*Y v Latvia*, App No 61183/08, para 44)
  - Article 5 (Zelcs v Latvia, App No 65367/16, para 44)

- Application of criterion should take due account of importance of the relevant freedom, and be subject to careful scrutiny, in cases concerning:
  - Article 9 (*Stravropolous v Greece,* App No 52484/18, para 29)
  - Article 10 (*Margulev v Russia*, App No 15449/09, para 41)
  - Article 11 (*Obote v Russia*, App No 58954/09, para 31)

JUDICIAL REMEDIES
s.8 HRA 1998

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

….

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

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

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

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

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.'

JUDICIAL REMEDIES
The proposals

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- Strengthening the rule in s.8(3) so as to require claimants to pursue other claims they may have before pursuing a human rights claim.

- Setting out factors for the courts to consider in deciding whether to award damages in a claim against a public authority and how much. The proposed factors are:
  (i) the impact on the provision of public services;
  (ii) the extent to which the public authority had discharged its obligations towards the applicant;
  (iii) the extent of the breach;
  (iv) the fact that the public authority was trying to give effect to express provisions or the clear purpose of legislation.

- No proposal to remove or soften s.8(4)?

JUDICIAL REMEDIES

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- Number of the proposed factors e.g. (ii) and (iii) are already considered by courts.
- Proposed factor (i) (impact on provision of public services) - a departure?
  - *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, para 56 – '*in considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as whole*' who '*have an interest in the continued funding of a public service'.*
  - Has not taken off. McGregor on Damages, 50-115 – '*Lower courts have invoked this factor [i.e. protection of public funds] on occasion, but with decreasing frequency.'*
  - Has been controversial. See e.g. *Mott v Environment Agency* [2019] EWHC 1892 (Admin), para 27: '*fundamentally objectionable as a matter of principle. It amounts to a suggestion that the court should make some arbitrary reduction in the compensation awarded to a citizen for financial loss caused by the unlawful exercise of state power by reason of the assumed laudable purposes that the state sought to pursue*.' *Shilbergs v Russia*, App No 20075/03, para 78: *'the court finds it anomalous for domestic courts to decrease the amount of compensation to be paid to the applicant for a wrong committed by the State by referring to the latter's lack of funds…*'
  - How would assessment be made? Evidence required? Courts have been willing to assume a degree of impact in this context (see *Anufrijeva*, para 75) and in others (risk of diversion of resources and defensive practice, when restricting duty of care imposed on public authorities in negligence).

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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