

## Freedom of expression and journalistic sources



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## Clause 4: Freedom of Speech

*“When determining a question which has arisen in connection with the right to freedom of speech, a court **must give great weight** to the importance of protecting the right.” (4(1))*

- Right to freedom of speech = Article 10 ECHR (4(2)) *“so far as it consists of **a right to impart** ideas, opinions or information by means of speech, writing or images (including in electronic form).”*
- A deliberately distinguished sub-category (excl. freedom to hold/receive)
- To secure increased weight given to importance of free speech by decision-makers

## Clause 4: Freedom of Speech

- Exemptions (4(3)):
  - Criminal proceedings / legislation creating criminal offences
  - Breach of confidence claims based on agreement/professional relationship
  - Immigration / citizenship cases
  - National security
  
- Picks up key ‘themes’ of Article 10(2) as limitations will continue to apply
  
- Breach of confidence exemption narrowed to exclude cases where no relationship giving rise to duty of confidence (e.g. *Mosley v NGN Ltd* [2008] EWHC 1777 QB)

## Clause 4: Freedom of Speech

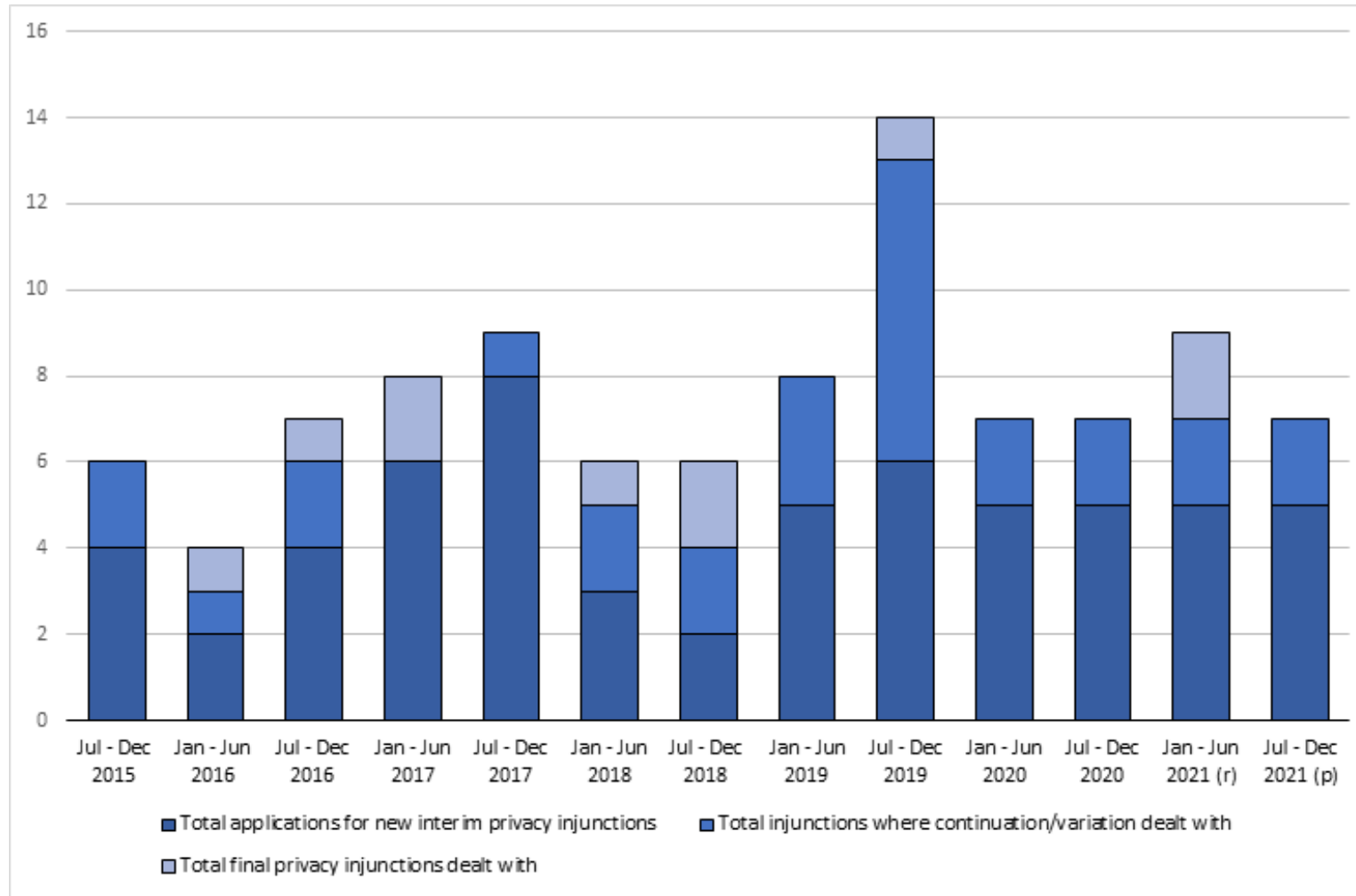
- Courts determining question arising in connection with Convention right must comply with clause 4 (3(2)(c))
- Compliance with clause 4 to allow more expansive interpretation of Convention rights by UK courts (3(4))

*“Subsection (3)(a) does not prevent a court from adopting an interpretation of a Convention right where it does so as a result of complying with section 4 (freedom of speech)”.*

## Clause 4: Freedom of Speech

- Intention to lead to “*more restrictive application of rights than [ECtHR] would adopt where the great weight to be given to the importance of protecting freedom of speech permits greater interference with another qualified right than would otherwise be the case*”.
- Intention to limit ability to rely on competing rights but reassures that “*the great weight to be given to the importance of protecting freedom of speech will never operate to extinguish*” other Convention rights.
- Classic scenario = Article 8 v Article 10 publication injunction cases

# Number of privacy injunction proceedings (15-21)



## Clause 4: Freedom of Speech

- Particular focus in IA on increase in Strategic Lawsuits Against Public Participation (SLAPPs)

*“an abuse of legal process, where the primary objective is to harass, intimidate and financially and psychologically exhaust one’s opponent via improper means”.*

- Impacting areas of defamation law, DPA and privacy law (e.g. Catherine Belton/Putin’s People case; Tom Burgis/Kleptopia case - *ENRC v Burgis & Harper Collins* [2022] EWHC 487 (QB)).
- Aim to reduce availability of injunction as a ‘*weapon*’

## Clause 22: Limiting court's power to grant relief

- Imposes limit on granting of any relief (“*any remedy or order*”) which might affect exercise of Article 10 (i.e. all of it) (22(1))
- No relief to be granted in respondent’s absence unless the court is satisfied that (22(2)):
  - The applicant has taken all practicable steps to notify the respondent; or
  - That there are exceptional and compelling reasons why the respondent should not be notified.
- No relief restraining pre-trial publication unless court satisfied applicant likely to establish publication should not be allowed (22(3))



## Clause 22: Limiting court's power to grant relief

- Restatement of s.12 Human Rights Act 1998 except:
  - “**exceptional and compelling reasons**” to proceed *in absentia* where all practicable steps to notify not taken;
  - S.12(4) (particular regard in cases of journalistic, literary or artistic material) not included.
- Combined effect of clause 4 and 22 (with 21) is that protection of freedom of speech is “*enhanced*”.

## Clause 21: Disclosure of journalistic sources

- Court may not require disclosure unless satisfied that (21(1)):
  - Disclosure necessary in the interests of justice or national security or for the prevention of crime or disorder; and,
  - There are exceptional and compelling reasons why it is in the public interest for the disclosure to be made.
- Same test for contempt of court for refusal to disclose

## Clause 21: Disclosure of journalistic sources

- In determining whether exceptional and compelling reasons (21(2)):
  - “...*the court must give great weight to the public interest that exists in protecting journalistic sources, including the fact that their protection supports the Convention right set out in Article 10 of the Convention...*”
- Applies to any body exercising the judicial power of the state (21(3))
- Journalistic source = person who supplies information to another person intending it to be used for purposes of journalism / knowing that it is likely to be so used

## Clause 21: Disclosure of journalistic sources

- Intended as “*strengthened equivalent*” to s.10 Contempt of Court Act 1981
- Changes:
  - Expressly journalistic sources (plus new definition);
  - Not confined to publication for which person responsible;
  - Adds “*exceptional and compelling reasons in the public interest*” requirement;
  - Express requirement to give great weight to PI in protecting journalistic sources in line with Article 10;
  - Applies to any body exercising judicial power of the State.

# Thank you for listening

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