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Permission stage

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Introduction

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- This session will cover the introduction of a new “permission stage” to human rights claims.

- To understand what this might mean in practice, we need to understand who can bring human rights claims currently. So we will look at the current law on “victim status” and what that means.

- Then we will go through the wording of the new permission stage and how that might fit alongside victim status, which will remain.

Victim status in human rights claims

- Public authorities are under a duty to act compatibly with Convention rights: section 6 Human Rights Act 1998 (HRA 1998).
- A person who claims that a public authority has acted unlawfully under s6 may bring proceedings under the HRA 1998 or rely on the Convention right in any legal proceedings, but **only if** she is, or would be, a **victim** of the unlawful act: s 7(1).
- If the proceedings are by way of judicial review, an individual only has standing if they are a victim: section 7(4).
- However, the victim test does not apply for the purposes of challenging the compatibility of legislation with Convention rights under ss 3 and 4 HRA: *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2019] 1 All ER 173 at §§17, 62 185.

Who is a victim?

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- A victim is defined by reference to Article 34 of the European Convention on Human Rights (ECHR): s7(7). The courts have made clear that the meaning of "victim" is given its "autonomous Convention meaning" within Article 34 ECHR: *Al Hassan-Daniel v HMRC* [2011] QB 866 at §23. This itself is consistent with Strasbourg case law which provides that Art 34 must be interpreted irrespective of domestic concepts such as "interest or capacity to act": see e.g. *Lizarraga v Spain* (2007) 45 E.H.R.R. 45 at §35.

ARTICLE 34

Individual applications

The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be **the victim of a violation** by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Who is a victim under Art. 34?

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- Those who are **directly or indirectly affected** by the act or omission in question: see e.g. *Lüdi v Switzerland* (1993) EHRR 173 at §34 (on directly affected) and *Vallianatos v Greece* (2014) 59 EHRR 12 at §47. Indirect victims are those to whom the violation **would cause harm or who would have a valid personal interest** in seeing it brought to an end.

- In the case of the existence of secret measures, where the applicant is a potential victim: see eg *Klass v Germany* (1979-80) 2 EHRR 214.

- Existence of a law (e.g. criminalisation of homosexual acts) may continuously and directly affect an individual if it forces them to change their behaviour, even if they have not yet been prosecuted: see e.g. *Dudgeon v UK* (1981) 3 EHRR 40 at §86

- Threat of future violation is also sufficient in removal cases: see e.g. *Soering v UK* (1989) 11 EHRR 439 at §109; *Othman v UK* (2012) 55 EHRR 1 (in context of Art 6).

Who is a victim under Art. 34?

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- An individual can be “directly affected” in relation to benefits that should exist but do not (contrary to Convention rights) if they have “done something which identifies [them] as having wished to make a claim”: *Hooper v SSWP* [2005 1 WLR 1681 at §56.

- The test may be summarised as whether claimant can establish they “‘run the risk of being directly affected by’ the measure of which complaint is made”: *Lancashire County Council v Taylor* [2005] 1 WLR 2668 at §39.

Clause 15 of the Bill of Rights Bill

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15 Permission required to bring proceedings

(1) No proceedings under **section 13(2)(a)** may be brought by a person in relation to an act (or proposed act) of a public authority **unless the person has obtained permission** from the court in which the proceedings are to be brought.

What proceedings are in scope?

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Cl13(2)(a) relates only to proceedings (including JRs) being brought by a person who claims that a public authority has acted or proposes to act in a way which is made unlawful by clause 12(1). Cl12(1) is the equivalent of s6(1) HRA, subject to some modifications.

Thus the permission stage does not apply to those relying on Convention rights in other proceedings – e.g. as a defence to a criminal prosecution.

And it does not apply to:

- JRs in Scotland or Northern Ireland: cl15(2)(a) (and see cl16);
- proceedings before the Investigatory Powers Tribunal: cl15(2)(b);
- proceedings relating to a deportation order in respect of a foreign criminal: cl15(2)(c).

How do you get permission?

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CI15(3):

The court may grant permission only if **it considers that**—

(a) the person is (or would be) a **victim** of the act (or proposed act), and

(b) the person **has suffered** (or **would suffer**) a **significant disadvantage** in relation to the act (or proposed act).

So:

1. Retention of the victim test.
2. Introduction of a test of “significant disadvantage”

1. Victim status under the Bill of Rights Bill

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- No change: the victim test essentially remains the same under the BRB: cl13(6) incorporates Art. 34 ECHR.

- But as will now be considered at an earlier stage, likely to be raised more frequently and requires addressing upfront. No longer burden on defendants to strike out claim on this basis.

2. Significant disadvantage

CI15(8):

For the purposes of this section a person has suffered (or would suffer) a "significant disadvantage" in relation to an act (or proposed act) only if the person would be regarded as suffering significant disadvantage for the purposes of Article 35 of the Convention (admissibility criteria) if proceedings were brought in the European Court of Human Rights in respect of that act (or proposed act).

- Test in Article 35 was introduced by Protocol No. 14 effective from 1 June 2010. Protocol No. 14 was agreed by Contracting Parties on 13 May 2004 with the ambition to address the court's backlog, which was significant at that point (see JCHR report from Dec 2004). No clear analogy to present situation where no evidence of backlog of human rights claims in UK courts.
- Wording of Article 35 does not add to this concept: have to look at Strasbourg authorities.

What is significant disadvantage?

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- The criterion *"hinges on the idea 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 account of both the applicant's subjective perceptions and what is objectively at stake in a particular case"*: *Ladygin v Russia* (app. no. 35365/05) 30 Aug 2011 (inadmissibility decision).

- The applicant's subjective perception has to be justifiable on objective grounds: *Ladygin* (above).

- Violation may concern important questions of principle and thus ***may*** cause a significant disadvantage regardless of pecuniary interest: see e.g. *Korolev v Russia* (app. no. 25551/05) 1 July 2010 (Art 6 and A1P1 case)

Law on significant disadvantage

- Strasbourg court has adopted different approaches to different articles:
  - Article 2 (right to life): court rejected application as right to life one of most fundamental provisions: *Makuchyan and Minasyan v Azerbaijan and Hungary* (app. no. 17247/13) 26 May 2020 §§72-73
  - Article 3 (prohibition on torture and inhuman/degrading treatment/punishment): Court found it "difficult to envisage" a situation where this inadmissibility criterion would add anything in Art 3 cases *Y v Latvia* (app. no. 61183/08) 21 October 2014 §44
  - Article 5 (right to liberty and security): Court has "so far rejected application" in Art 5 cases *Zelčs v Latvia* (app. no. 65367/16) 20 Feb 2020 §44
  - Article 9 (freedom of thought, conscience and religion): application should take due account of importance of freedoms of thought, conscience and religion and be subject to careful scrutiny *Stavropoulos and Others v Greece* §§29-30 (app. no. 52484/18) 25 Jun 2020
  - Article 10 (freedom of expression): similar to Art. 9, such scrutiny should encompass elements such as the contribution made to a debate of general interest and whether the case involves the press or other news media: see e.g. *Margulev v Russia* (app. no. 15449/09) 8 Oct 2019 §§41-42
  - Article 11 (freedom of assembly and association): Court should take due account of the importance of these freedoms for a democratic society and carry out a careful scrutiny *Obote v Russia* §31

What is significant disadvantage?

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- In *Giusti v Italy* (app. no. 13175/03) at §§22-36, court could take into account nature of the right allegedly violated, the seriousness of the claimed violation and/or the potential consequences of the violation on the personal situation of the applicant. In evaluating these consequences, the Court will examine, in particular, what is at stake or the outcome of the national proceedings.

- Court can take into account the applicant's conduct, for example in being inactive in court proceedings during a certain period which demonstrated that the proceedings could not have been significant to her: *Shefer v Russia* (app. no. 45175/04) 13 March 2012

Exceptions

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Cl 15(4): “The court may **disregard** the requirement in subsection (3)(b) if it considers that it is appropriate to do so for reasons of **wholly exceptional public interest**.”

If the court grants permission in reliance on cl15(4), the court must certify that that condition is met: cl15(5).

- Will this mean the same as Art. 35(3)(b) which prevents an inadmissibility finding where *“respect for human rights ... requires an examination of the application on the merits”*? This has not necessarily been interpreted to refer to *“wholly exceptional public interest cases”.*
- Unclear: courts likely to consider there are reasons why Parliament chose language of cl15(4) rather than Art. 35(3)(b).
- Unclear what “wholly exceptional” means in this context. Presumably it must mean *more than* exceptional. Equally unclear what will be in the “public interest”.
- Likely category is where may resolve important point of law.

Appeal route

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Cl 15(6)

A person who is refused permission under this section—

(a) may appeal against that refusal to such court as may be specified in **rules**, but

(b) may not appeal to any other court against any decision made on an appeal under paragraph (a).

- Useful comparator is the jurisdiction to appeal a refusal of permission to bring judicial review, which allows an appeal to the Court of Appeal but no further onward appeal if that is refused.
- Power to make rules which may make "further provision about permission and appeals" under cl15: cl15(7). See also cl 31 for further provision on "rules". No further info on this in the delegated powers memorandum.

Purpose of the permission stage?

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- Explanatory Notes describes the purpose as to *"ensure trivial cases do not undermine public confidence in human rights more broadly"* (para 16).
- Para 15 claims the absence of a procedure at the start of HRA proceedings to ensure claims are *"sufficiently serious to merit the expenditure of court time and resources...has also resulted in a situation whereby public authorities have incurred significant costs, including legal costs, in defending themselves against trivial claims under the HRA which have later been found not to be sufficiently serious and have wasted court time and public resources."*
- Para 17 suggests the introduction of the permission stage *"will ensure that courts focus on serious human rights-based claims and place responsibility on the claimant to demonstrate that they have suffered a significant disadvantage before a human rights claim can be proceeded to trial."*
- Proposed reforms did not enjoy public support. Chapter 2 of "Human Rights Act Reform: A Modern Bill of Rights Consultation Response": "*we asked if a condition that a claimant has suffered a 'significant disadvantage' in order to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way to ensure courts focus on genuine human rights matters. Of the 2,867 respondents who directly responded to this question, 2,568* ***(90%) responded no****, and 299 (10%) responded yes*."
- The original proposal simply introduced a "significant disadvantage" threshold. However, in the response the government said it had decided to "expressly" link the new requirement to the jurisprudence under the Strasbourg court's admissibility criterion.

Practical implications

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1.Retention of importance of Strasbourg authorities in respect of interpreting "significant disadvantage" and "victim": indeed, lawyers will now need to engage more than ever with Strasbourg case law on "significant disadvantage". Inconsistency with new approach of interpreting Convention rights.

2.Survey of govt consultation and response suggests "significant disadvantage" may in fact be a low threshold, intended to prevent "frivolous or spurious" claims. The "Human Rights Act Reform: A Modern Bill Of Rights consultation" supports this idea: "*We believe it is wrong that the burden is on public bodies to apply to courts to strike out frivolous or spurious human rights 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). The Impact Assessment also indicates overall volume of cases may only be "*reduced slightly*" (para 169). This is supported by approach Strasbourg takes to reduce importance in respect of many of the core rights.

Practical implications

3. Biggest impact likely to be in relation to rights subject to some sort of proportionality analysis. Article 6 and A1P1 in particular prime targets for this test.
4. Open question will be extent to which court's varying approach to different articles carries through to domestic case law – would it be lawful for courts to apply significant disadvantage test to Art 3 claims?
5. Explanatory Notes suggests intention of a burden of proof in *evidence* on claimants: see e.g. para 134 ("*in the absence of a claimant being able to evidence a significant disadvantage*"). Thus it is not enough for them to demonstrate that, *if the facts they allege are true*, they would have suffered significant disadvantage. This is probably consistent with statutory language to ensure the court *considers* you have suffered significant disadvantage.

Practical implications

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6. Impact assessment identifies "*it is intended to be mainly a paper-based procedure for the courts*" (para 165). Question mark over whether, if there is a refusal on the papers, it could be reconsidered at an oral hearing – how does that fit with provision on appeal right?

7. In a judicial review, do you just need to demonstrate at the permission stage that it is arguable you have suffered significant disadvantage?

Practical implications

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8. There is still no requirement to demonstrate victimhood to obtain a declaration of incompatibility, and thus the old case law in relation to that will remain. However, given there is no duty comparable to s3 HRA 1998 to interpret legislation compatibly with Convention rights (which never required victimhood to assert), there may be a renewed importance to victim status in other cases. Unclear where this leaves this.

9. Impact assessment identifies that "*The implementation of a permission stage will generate some costs for the wider justice system, including when dealing with appeals*" (p2), but equally identifies it may lead to "*savings for some public authorities through reduced litigation costs*" (p3). But ultimately it notes that the "*exact cost will depend on how the permission stage is implemented*" through the rules (para 165).

Compatibility with Convention?

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- The Human Rights Memorandum records:

"The threshold set by clauses 15 -16 is modelled on the ECtHR's own admissibility criteria, which provide the route by which arguable breaches of the ECHR rights by States may be assessed by the ECtHR. Previously, the requirement to declare inadmissible any application in which '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' was subject to a caveat preventing the ECtHR from ruling inadmissible a case in which the applicant had not suffered a significant disadvantage where there had been no consideration by a domestic tribunal. Protocol 14 to the ECHR removed the caveat, such that now there is no requirement, in order for an application involving insignificant harm to be declared inadmissible, that a domestic tribunal should first have opined. This was stated to be in order 'to give greater effect to the maxim de minimis non curat praetor'. An alleged breach causing no significant disadvantage (unless respect for human rights requires examination of the application on the merits) does not, under the Convention, require an effective remedy; and the provision is thus considered to be compatible."

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Thank you for listening

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