

“It’s my way or the highway”

Deference to Parliament and Declarations of Incompatibility



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Deference to Parliament

- Clauses 6, 7 and 8 of the Bill (now in its Second Reading) - Deference to Parliament as demonstrated in different ways.
- Clause 10 – Declarations of Incompatibility

Clause 7

- **Decisions that are properly made by Parliament**
 - This section applies where —
 - (a) a court is determining an incompatibility question in relation to a provision of an Act, and
 - (b) in order to determine that question, it is necessary to decide whether the effect of the provision (whether considered alone or with any other relevant provision or matter) on the way in which the Convention rights are secured strikes an appropriate balance—
 - (i) as between different policy aims,
 - (ii) as between different Convention rights, or
 - (iii) as between the Convention rights of different persons; 20 or as between any combination of matters mentioned in sub-paragraphs (i) to (iii).
 - The court must—
 - (a) regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance as between the matters mentioned in 25 subsection (1)(b)(i) to (iii), and
 - (b) give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament.
 - In this section “an incompatibility question”, in relation to a provision of an 30 Act, means a question whether—
 - (a) the provision is incompatible with a Convention right, or
 - (b) a public authority which acts (or proposes to act) in accordance with the provision does so in a way which is incompatible with a Convention right. 35
 - A reference in subsection (3)(b) to acting “in accordance with” a provision is to acting so as to comply with, or give effect to or enforce, the provision.

When will this apply ?

What sort of provisions does it apply to?

- When determining “an incompatibility question in relation to provision of an Act” – so
- Only applies to a challenge to primary legislation (or secondary legislation as well???) .
- Applies to any argument that the provision is incompatible with a Convention right
- And applies to the acts of public authorities act (or propose to act) in a way incompatible with the provision of the Act

When will it apply (2)

- What is the court/tribunal examining?

“It is necessary to decide whether the effect of the provision – whether considered alone, or with any other relevant provision or matter - on the way in which Convention rights are secured strikes an appropriate balance

- As between different policy aims
- As between different Convention rights
- As between the Convention rights of different persons

Or any combination of those.

What does the Court Tribunal have to do?

- Regard Parliament as having decided in passing the Act that it strikes an appropriate balance between the matters set out above – i.e. that it has considered and struck the balance between different policy aims, convention rights, or convention rights of different persons .
- “Give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament”.

What mechanisms does the court already use?

- Fundamental constitutional principle that Parliament is sovereign
- That many rights are qualified (Articles 8-11, Article 1 of the First Protocol and Article 2 of the First Protocol) and so the Court has to examine the concept of whether the measure impugned (a) meets a legitimate aim and (b) is necessary in a democratic society – i.e. “proportionate” and that involves examining the rights of others or other competing interests . Article 14 (discrimination) also is qualified in nature.
- The principle well enshrined in domestic (and ECHR) case law – (e.g. R(SC) v SSWP [2021] UKSC 26 that the court does not take over the function of the decision maker, and should not substitute its views on all matters of policy, judgement or discretion: that varies depending upon the rights in question but in cases concerning economic and social policy, there is a wide margin of discretion used.

Queries

- Clause presumes that all the different convention rights have been considered and the various issues debated during the passage of the Bill through Parliament
- How far does it allow for unintended consequences if the impact of Acts on different groups not envisaged at the time that the Act was passed?

What impact will this clause make?

- Is this clause superfluous?
- Does it have an unnecessarily chilling effect on the judiciary when examining issues of proportionality?
- Impact in particular upon :
 - Social security and other claims related to state benefits/grants
 - Housing cases
 - Immigration cases
 - Privacy claims (Article 8 vs 10)
 - Discrimination cases brought under Article 14
 - Article 1 of the First Protocol – so expropriation of land/property – compulsory purchase, planning issues?

Public protection – clause 6

- In any case which involves (a) a question as to breach of Convention Rights and (b) the person was subject to custodial sentence when the alleged breach happened then :
 - The Court must give the greatest possible weight to the importance of reducing the risk to the public
 - This particular includes (Cl 6(3)) a decision whether to release someone from custody or : which part of prison someone should be placed within.
 - Does not apply to claims brought under Article 2, 3, 4 and 7 (life, torture, slavery/forced labour and no punishment without law).

- The consultation response ,and explanatory notes make it clear that this is in response to and as part of reforms to the parole board.
- It is designed “to strengthen the government’s hand in contesting human rights claims from prisoners opposing their placement in a separation centre and the government’s ability to defend human rights claims brought regarding the deportation of foreign national offenders”. (paragraph 33 of the explanatory notes)

Deportation (seminar 3 preview)

- Clause 8: in any deportation decision concerning a “foreign criminal” , where there is an allegation that removal to another country would breach Article 8 , no breach of Article 8 can be found unless:
- Manifest harm that is so extreme (cl 8(3) defines as “exceptional and overwhelming” and “is incapable of being mitigated to any significant extent or is otherwise irreversible”) that it would override the otherwise paramount public interest in removing the person from the UK
- Only applies to P’s family . Has to be “compelling circumstances” if it applies to anyone other than a “qualifying child” and has to outweigh the “strong public interest” in removal.
- “Qualifying child” means under 18, someone always has “genuine and subsisting parental relationship” and has lived in UK for at least 7 years.

Declarations of incompatibility (Cl 10)

- The text of the Bill is identical to that of the HRA 1998, save in one respect
- It permits subordinate legislation – i.e. regulations to be the subject of declarations of incompatibility
- Declarations of incompatibility do not change the law: simply indicating to Parliament that the legislation is deficient .
- But alongside the repeal of s3, alters the previous position that subordinate legislation must be read in ways which are compatible with Convention rights (R(W) v SSHD [2020] EWHC 1299 and RR v SSWP [2019] UKSC 52 at [29-30])- unless they are mandated by primary legislation. This meant in principle that provisions of delegated legislation which resulted in a breach of the Convention should be disregarded. That is no longer.

Impact on changes under Clause 10

- Along with repeal of s3, means that subordinate legislation will either have to be
 - Struck down
 - Declared incompatible

If it is in breach of the HRA, rather than being able to continue with the legislation just disregarding the bits which are not compatible – or reading them in a way which is compatible, if strained.

- In areas of law where lots of secondary legislation (arguably now everything but in particular education, family justice, health and social care, social security, agriculture and the environment) this could be highly material.

Thank you for listening

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