Clayton Comments

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THE GOVERNMENT'S NEW PROPOSALS FOR THE HUMAN RIGHTS ACT
PART 2: AN ASSESSMENT

The Government explains its Proposals in its ***Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998*** CP 588 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf, which represent a radical departure from the HRA. The specific Proposals are developed in the context of broader themes:

- respecting our common law traditions and strengthening the role of the UK Supreme Court;
- restoring a sharper focus on protecting fundamental rights;
- preventing the incremental expansion of rights without proper democratic oversight;
- emphasising the role of responsibilities within the human rights framework; and
- facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role.

The Government's Proposals are designed to recast the HRA profoundly. They seek to create a framework for human rights which focuses principally on British law rather than ECtHR judgments and propose that the UK courts should give greater weight to the views of Parliament. The most important proposed changes concern:

- amending s 2 of the HRA;
- creating new protections for freedom of expression which will impact on claims for misuse of private information;
- enacting a new permission test for human rights cases;
- reformulating positive obligations (although the Government has not identified any precise changes it proposes); and
- reframing qualified rights, particularly in relation to deportation and illegal immigration cases.

The Government's rationale for its Proposals

The Government confirms that the UK will remain party to the Convention (para 183) and that the rights stipulated in Sch 1 of the HRA will also remain (para 184). Its reasoning is described in para 186:

> *These proposals will strengthen our common law traditions, reduce reliance on the Strasbourg case law and reinforce the supremacy of the UK Supreme Court in the*

> *interpretation of rights. They will restore sharper focus on fundamental rights, including by ensuring unmeritorious cases are filtered earlier, and giving the UK courts greater clarity regarding the interpretation of qualified rights and imposition by implication of 'positive obligations.' They will prevent the incremental expansion of rights without proper democratic oversight, including by limiting the duty on UK courts to 'read down' legislation enacted by Parliament, and by clarifying restrictions on deportation. They will emphasise the role of responsibilities in interpreting qualified rights and awarding compensation. They will make clear and reinforce Parliamentary sovereignty in the exercise of the legislative function, whilst remaining in dialogue with Strasbourg and devolved administrations.*

The specific Proposals are grouped around a number of themes. This post considers (i) respecting our common law traditions and strengthening the role of the UK Supreme Court, and (ii) giving a sharper focus to fundamental rights. A final post will then consider: (iii) preventing the incremental expansion of rights without proper democratic oversight, (iv) the role of responsibilities within the human rights framework, and (v) dialogue with Strasbourg.

I. Respecting our common law traditions and strengthening the role of the UK Supreme Court

Reforming s 2 of the HRA

The first topic tackled is s 2, which requires a court or tribunal to take into account any Strasbourg so far as it is relevant to the proceedings. In recent years this issue has been dominated by Lord Bingham's principle in *Ullah* [2004] 2 AC 323, that the domestic courts were required to take account of ECtHR case law and should follow its clear and constant jurisprudence- save in exceptional circumstances.

But the *Ullah* principle has now become much diluted. By 2020 in *Hallam* [2020] AC 279 the Supreme Court took a very narrower view, emphasising that degree of constraint imposed or freedom allowed by the phrase "must take into account" in s 2 is context specific.

The proposed draft clauses replacing s 2

Nevertheless, the Government's shift away from the Strasbourg jurisprudence led it to propose two different options set out in Appendix 2.

Option 1 (Appendix 2, p.96) makes clear that the courts are not required to follow or apply any judgment or decision of the ECtHR and that the meaning of a right in the Bill of Rights is not necessarily the same as the meaning of a corresponding right in the Convention. That will be a matter for the UK courts and tribunals to determine. It requires the courts to follow any binding precedent of our domestic courts or tribunals under the Bill of Rights when

deciding a human rights question under the Bill. It also provides that the courts may have regard to relevant judgments from other countries and international courts outside the UK.

Option 2 (Appendix 2, p.97) is designed to reinforce the role of the UK Supreme Court as having ultimate responsibility for interpreting rights under the Bill of Rights. The courts, when deciding a human rights question must have particular regard to the text of the right and, in construing that text, may have regard to the *travaux préparatoires* of the Convention. As with Option 1, the courts must follow any binding precedent of domestic courts or tribunals under the Bill of Rights. They may also have regard to the development of any similar right under the common law in the UK, a judgment or decision from any common law jurisdiction or a judgment of the European Court of Human Rights. Again, it is made clear that the courts are not required to follow or apply any judgment of the European Court of Human Rights.

Both proposed model clauses create practical difficulties. First, the options proposed expressly entitle domestic courts to reverse the HRA and ECtHR precedents which will create uncertainty and encourage litigation, even in settled areas of human rights law. Secondly, they broaden the sources for domestic courts to examine when deciding human rights cases by considering authorities of other countries or of international courts. This amendment may well have beneficial consequences for developing human rights jurisprudence, but will, again, generate uncertainty and inspire litigation. Thirdly, these options give a steer for litigants to rely on the preparatory work when drafting the Convention- which is out of step with the fundamental principle that the Convention is a living instrument. Fourthly and crucially, the options entitle the courts to decline to follow any ECtHR judgment which will mean that the British courts failing to keep pace with developing Strasbourg jurisprudence- so that the UK ends up with a Convention minus position, which will encourage litigants to re-argue their cases before the ECtHR and transfer power away from the UK courts.

The position of the Supreme Court

The Bill of Rights seeks to restore the role of the Supreme Court in interpreting UK human rights law (paras 198-200). Option 2 of the s 2 draft clauses may be intended to achieve this, although the Proposals do not say so.

Jury trials

The Government believes that there is scope to recognise trial by jury in the Bill of Rights, given its significant historical place in our legal traditions, and the role it plays in securing the fairness of certain trials (para 203).

Freedom of expression

The Government stresses how freedom of expression is assisted by a free and vibrant media (paras 204-205). The Proposals criticise the willingness of the ECtHR to give priority to

personal privacy (para 206) and emphasise the importance of academic freedom (para 210) and national security (para 211).

The Government takes the view s 12(4) of the HRA has "*no real impact*" (para 213) even despite requiring the Court to have "*particular regard to the importance of freedom of expression*" and to the specific issues identified in s 12(4)(a)(b). It, therefore, 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.

The Proposals are bound to impact on privacy claims, although the extent of its implications on the tort of misuse of private information will depend on the precise form of the new legislation. The Government also argues for a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament (para 215). Once again, it is not possible to assess the effect of the proposal until specific legislation is drafted.

Furthermore, the Proposals accept that journalists have an important role in providing scrutiny and holding those in positions of power to account and intends to make specific provision for journalists' sources in the Bill of Rights, to make sure that they are properly protected (para 217).

II. Restoring a sharper focus on protecting fundamental rights

This section of the Proposals fleshes out the Government's intention to restore a sharper focus on fundamental rights, including weeding out unmeritorious cases and giving the UK courts greater clarity regarding the interpretation of qualified rights and imposition by implication of 'positive obligations' (para 208).

A permission stage for human rights claims

The Proposals argue that introducing a permission stage would ensure that courts focus on genuine and credible human rights claims and would shift responsibility to the claimant to demonstrate that a human rights claim does, in practice, raise a claim meriting the court's attention (paras 220-221). It recommends that:

- the permission stage should require claimants to demonstrate that they have suffered a "significant disadvantage" before a human rights claim can be heard in court similar to the ECtHR and the German Federal Constitutional Court (para 222); and
- A second "overriding public importance" limb should be available in exceptional circumstances where claims fail to meet a "significant disadvantage" threshold but for some other reason merit consideration by the courts (para 223).

The proposals appear to mirror the amendments to Article 35 of the Convention after being amended by Protocol 14 of the Convention on 1 June 2010.

However, the ECtHR has interpreted these amendments to Article 35 restrictively. The "significant disadvantage" test has not been applied to cases concerning Article 2 (*Makuchyan and Minasyan v Azerbaijan and Hungary*, 26 May 2020 §§ 72-73), Article 3 (*Y v Latvia*, 21 October 2014 § 44) or Article 5 (*Zelčs v Latvia*, 20 February 2020 § 44). The "significant disadvantage" criterion should take due account of the importance of the freedoms and be subject to careful scrutiny in relation to cases concerning Article 9 (*Stavropoulos v Greece*, 25 June 2020 §§ 29-30), Article 10 (*Margulev v Russia*, 8 October 2019 §§ 41-42; *Sylka v Poland*, 6 April 2021 § 28; *Panioglu v Romania*, 8 December 2020 §§ 72-76) and Article 11 (*Obote v Russia*, 19 November 2019 § 31; *Yordanovi v Bulgaria*, 3 September 2020 §§ 49-52).

Judicial Remedies: section 8 of the HRA

The Proposals require applicants to pursue any other claims they may have first- so rights claims will not generally be available where other claims can be made, so that the courts can then decide whether the private law claims already provide adequate redress (paras 224-226). The Government expects this change to reduce the numbers of human rights-based claims being made overall, while preserving people's ability to bring rights claims where justice requires it (para 227). Whether this proposal will significantly reduce human rights cases is open to question-but it may not require amending the time limits prescribed by s 7(5) of the HRA ie one year which allows such longer period as the court considers equitable having regard to all the circumstances.

Positive obligations

The Government takes the view that positive obligations have created significant problems (paras 133-150 and 167-170) creating uncertainty about the scope of the Government's (and other public authorities') legal duties and fettering the way they can make operational decisions, determine policy in the public interest, and allocate finite taxpayer's resources. The Government, therefore, says it is interested in looking at ways to restrict the circumstances in which these obligations are imposed by what can amount to judicial legislation (paras 230-231).

The proposals are, however, silent about how this Proposal can be carried into effect. Nonetheless, the Government's stance, once again, demonstrates that it is adopting a Strasbourg minus approach- with the inevitable conflict which will result from the Bill of Rights failing to meet Convention obligations.

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