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

Richard Clayton QC

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 background to the Government's proposed reforms

Chapter 1 of the Government's Proposals sets the scene for reforming the HRA- by describing the legacy of rights in the UK. It celebrates British exceptionalism, the UK's tradition of human rights and civil liberties stretching back to the Magna Carta (paras 13-20). It then discusses the evolution of the European Convention on Human Rights (paras 19-23) and how the campaign for a British Bill of Rights has developed (paras 24-31). The Proposals buttress its focus on British law by giving examples of domestic legislation and common law provisions relevant to Convention Articles which are set out in Appendix 1.

In 2006 the Leader of the Opposition, David Cameron MP, called for the HRA to be replaced with "*a modern British Bill of Rights to define the core values which give us our identity as a free nation*". Around the same time the Liberal Democrats fought for a Bill of Rights as part of their proposals for a written constitution. Gordon Brown's Government also supported a

Bill of Rights and published two green papers in 2007 (***The Governance of Britain*** CM 7170 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf) and in 2009 (***The relationship between rights and responsibilities*** Ministry of Justice Research Series 18/09 https://deliverypdf.ssrn.com/delivery.php?ID=850020098089104069002025122084029120028037009079051031109073106074027025000111012026118058007012054120046023085070092109068097007085094078038077067126006116017090062093020078029004006029015000095109030109077121028087069066123110100076087115005085025&EXT=pdf&INDEX=TRUE.

The 2010 Coalition agreement pledged to set up a Commission to investigate enacting a British Bill of Rights. This Commission consulted twice, in 2011 (in its discussion paper, ***do we need a UK Bill of Rights?*** https://www.justice.gov.uk/downloads/news/press-releases/cbr/cbr-discussion-paper.pdf and its 2012 report, **A UK Bill of Rights? The Choice Before Us** https://webarchive.nationalarchives.gov.uk/ukgwa/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf . The majority of the Commission's members concluded that there was a strong argument in favour of a UK Bill of Rights. The Conservative Party manifesto of 2015 committed to introducing a British Bill of Rights, and proposals for this Bill were developed in 2015 and 2016, prior to the referendum on the UK's membership of the European Union.

Chapter 2 of the Proposals looks in general terms at the international context : the United Nations (para 42), the Council of Europe (paras 43-45), the UK's relationship with the ECtHR (paras 46-67) and the UK's arrangements after Brexit (paras 68-70). It also examines the human rights framework in counties like Canada, New Zealand, South Africa, and the US (paras 71-82), how international obligations are incorporated into national law (paras 83-87) and how different countries interpret legislation contrary to human rights law (paras 88-93).

Chapter 3 makes the political case for reforming UK human rights law. The Government identifies the following flaws with the HRA:

- the growth of a "rights culture" that has displaced due focus on personal responsibility and the public interest;
- the creation of legal uncertainty, confusion, and risk aversion for those delivering public services on the frontline;
- putting public protection at risk by the exponential expansion of rights; and
- readjusting public policy priorities and public expenditure decisions by shifting them from Parliament to the courts, creating a democratic deficit.

The Government's contentions are tendentious, to say the least. The arguments advanced are highly contestable- and there are numerous powerful and convincing grounds for opposing the principles triggering the Proposals.

Nevertheless, the Proposals justifies its analysis at considerable length (paras 95- 176). It summarises its concerns (paras 176-181), asserting that its approach chimes with the more deferential approach in recent Strasbourg cases- without mentioning the underlying problem the ECtHR has struggled with since 1997, when it expanded the countries

subscribing to the Convention, causing the huge increase in cases brought to the Strasbourg court. For example, in 2020 the UK had 124 cases pending whereas Russia had 13,645, Turkey 11,750, and Ukraine 10,408: see ***Annual Report of the European Court of Human Rights 2020*** at 156.

Chapter 4 sets out the detail of the Government Proposals which it signposts as:

- 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 dialogue with Strasbourg, while guaranteeing Parliament and the devolved legislatures their proper roles.

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 the following themes.

<u>I. Respecting our common law traditions and strengthening the role of the UK Supreme Court</u>

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 <u>*Ullah*</u> [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 <u>*Ullah*</u> principle has now become much diluted. By 2020 in <u>*Hallam*</u> [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 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 1 states:

> *(1) The meaning of a right or freedom in this Bill of Rights is not determined by the meaning of a right or freedom in any international treaty or repealed enactment.*
> *(2) In particular, it is not necessary to construe a right or freedom in this Bill of Rights as having the same meaning as a corresponding right or freedom in-*
> > *(a) the European Convention on Human Rights, or*
> > *(b) the Human Rights Act 1998.*
>
> *(3) The following provisions of this section apply where a court or tribunal is deciding a question in connection with a right or freedom in this Bill of Rights.*
> *(4) The court or tribunal must follow a previous judgment or other decision given in relation to this Bill of Rights by— (a) that court or tribunal, or (b) any other United Kingdom court or tribunal, if the judgment or other decision is a precedent in relation to the question being decided.*
> *(5) The court or tribunal may have regard to a judgment or other decision of a judicial authority made under-*
> > *(a) the law of a country or territory outside the United Kingdom, or*
> > *(b) international law, so far as the court or tribunal considers that it is relevant to the question being decided.*
>
> *(6) The court or tribunal is not required to follow or apply any judgment or other decision of the European Court of Human Rights.*
> *(7) Evidence of a judgment or other decision to which regard may be had under subsection (5) is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.*
> *(8) For the purposes of this section a judgment or other decision is a precedent in relation to the question being decided if, or to the extent that, the court or tribunal is required by any law to follow it in making the decision.*

Option 2 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.

Option 2 states:

> *(1) The Supreme Court is the judicial authority with ultimate responsibility for the interpretation of the rights and freedoms in this Bill of Rights.*
> *(2) The following provisions of this section apply where a court or tribunal is deciding a question in connection with a right or freedom in this Bill of Rights.*
> *(3) The court or tribunal must have particular regard to the text of the right or freedom, and in construing the text may have regard to the preparatory work of the European Convention on Human Rights.*
> *(4) The Court or tribunal must follow a previous judgment or other decision given in relation to this Act by-*
>
> > *(a) that court or tribunal, or*
> > *(b) any other United Kingdom court or tribunal, if the judgment or other decision is a precedent in relation to the question being decided.*
>
> *(5) Other matters to which the court or tribunal may have regard, so far as it considers them relevant to the question being decided, include-*
>
> > *(a) the development of any similar right or freedom under the common law in the United Kingdom;*
> > *(b) a judgment or other decision of a judicial authority under the law of a common law jurisdiction outside the United Kingdom in connection with a similar right or freedom;*
> > *(c) a judgment of the European Court of Human Rights.*
>
> *(6) The court or tribunal is not required by any enactment, rule of construction or other law to follow or apply any judgment or other decision of the European Court of Human Rights.*
> *(7) For the purposes of this section a judgment or other decision is a precedent in relation to the question being decided if, or to the extent that, the court or tribunal is required by any law to follow it in making the decision.*
> *(8) Evidence of-*
>
> > *(a) the preparatory work of the European Convention on Human Rights;*
> > *(b) a matter to which regard may be had under subsection (5)(b) or*
> > *(c); is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.*

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 achieve this, although the Proposals do not say this.

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 such as in 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 to cases 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 (*Marqulev 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.

III. Preventing the incremental expansion of rights without proper democratic oversight

The Government's Proposals next seek to prevent the incremental expansion of rights "*without proper democratic oversight*". These include limiting the duty on UK courts to reinterpret legislation enacted by Parliament, and clarifying restrictions on deportation, but also cover (para 232):

- respecting the will of Parliament when legislation is incompatible with the Convention rights;
- statements of compatibility;
- application to the devolved administrations;
- public authorities;
- extraterritorial jurisdiction;
- qualified and limited rights;
- deportations;
- illegal and irregular migration; and
- remedies.

Respecting the will of Parliament: s 3 of the HRA

The Proposals casts the debate about s 3 in terms of basic principle (para 233). It states that the balance struck between Parliament making legislation and how that legislation is interpreted by the courts sits at the heart of the UK constitution and argues that, in practice, the HRA has moved too far towards judicial amendment of legislation which contradicts, or is otherwise incompatible with, the express will of Parliament. The Government builds on its analysis (paras 116-123). It contends that s 3 compels the court to expand the scope of its interpretive duty beyond what is appropriate for an unelected body (para 235) and that a less expansive interpretive duty would provide greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues (para 236).

However, the Proposals note that the Independent Review did not support repealing s 3- having addressed this question in considerable detail in Chapter 5 of its Report. In fact, the Review concluded (para 118) that there "*was a broad and strongly argued view from the evidence that there was no basis on which to amend section 3 or 4 of the HRA. There was a strongly held view that the evidence supported the conclusion that UK Courts had not abused the use of section 3 and that section 4 had been used sparingly as Parliament had intended*". The Review considered a few submissions for no change (para 119), several reforms of s 3 and 4 (paras 120) and various other reforms (para 121).

The Review emphatically rejected the repeal of s 3 (paras 123-129). First, repeal is premised on a misconception, that the HRA has removed from Parliament its primary role in rights protection. The Review decided that the HRA has patently not done this and was careful to retain Parliamentary Sovereignty (para 124). Secondly, it rebuffed the idea that s 3 could properly be characterised as a Henry VIII clause- providing the Government with a power to amend primary legislation through secondary legislation (para 125). Thirdly, the weight of evidence before the Review supported the view that UK Courts have not misused s 3 to

misconceive Parliament's intention in enacting legislation (para 126). Fourthly, repeal would significantly weaken the overall scheme of the HRA by removing one of the key means by which Convention rights are to be given their full effect in UK domestic law (para 127). Finally, such a repeal would raise real concern as to adversely affecting devolution and the Northern Ireland Peace Agreement (para 129).

The Government's Proposals say that it is minded to agree with the Review (para 237). Nevertheless, it believes that the Court's expansion of its interpretative duty warrants consulting on options for reform. The Proposals welcome comments on:

- *Option 1*- repealing s 3 altogether. This would mean that the common law presumption that Parliament does not intend to act in breach of international law, including treaty obligations, would apply. Where legislation was ambiguous, and a meaning that could reasonably be attributed to it was compatible with the Convention and other meanings were not, the compatible meaning would be preferred (para 239).
- *Option 2*- repealing s 3 and replacing it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. Appendix 2 sets out two possible drafts for illustrative purposes.

The first draft clause states:

> *(1) Where the words used in a provision of legislation can be given more than one interpretation which-*
>
> > *(a) is an ordinary reading of the words used, and*
> >
> > *(b) consistent with the overall purpose of the legislation, the interpretation to be preferred is one that is compatible with the rights and freedoms in this Bill of Rights.*
>
> *(2) In this section 'legislation' means- (a) primary legislation, and (b) subordinate legislation (within the meaning of the Interpretation Act 1978)*

The second draft clause states:

> *(1) Legislation must be interpreted in a way that is compatible with the rights and freedoms in this Bill of Rights, but only if that interpretation is both-*
>
> > *(a) an ordinary reading of the words used in the legislation, and*
> >
> > *(b) consistent with the overall purpose of the legislation.*
>
> *(2) In this section 'legislation' means- (a) primary legislation, and (b) subordinate legislation (within the meaning of the Interpretation Act 1978).*

When legislation is incompatible with the Convention rights: ss 4 and 10 of the HRA

The Proposals consider amending one aspect of the declaration of incompatibility procedure (para 249). Under the HRA declarations of incompatibility can only be made in relation to secondary legislation (like Regulations and Orders) where the Act of Parliament under which the legislation is made requires the incompatibility. Section 4 does not otherwise apply in relation to secondary legislation. So, under the law as it stands, the courts can, amongst other things, declare secondary legislation invalid or disapply the provision in question: see eg *R(C) v Secretary of State for Justice* [2009] QB 657; *R(T) v Chief Constable of Greater Manchester Police* [2015] 1 AC 49; *R(R) v Secretary of State for Work and Pensions* [2019] 1

WLR 6430. The Government wishes to explore whether there is a case for providing that declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation (para 250).

However, the justification for amending the impact of s 4 on secondary legislation is difficult to understand. If the Government accepts that s 3 should not be repealed, then there is no principled reason to pursue this Proposal.

The power to make quashing orders

If enacted, Clause 1 of the Judicial Review and Courts Bill will allow courts to make quashing orders in judicial review proceedings by to suspending the effects of the order for a limited period of time, or removing or limiting any retrospective effect of the quashing. The clause sets out a presumption that these powers will be exercised if it appears to the court that including such provision would, as a matter of substance, offer adequate redress. Clause 1(8) specifies a number of factors to which the court is required to have due regard (such as the nature and circumstances of the relevant defect; any detriment to good administration that would result from exercising or failing to exercise the power; the interests or expectations of persons who would benefit from the quashing of the impugned act; the interests or expectations of persons who have relied on the impugned act; so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act; or any other matter that appears to the court to be relevant).

Clause 1 will affect the available remedies where secondary legislation is held to be incompatible with the Convention rights in judicial review proceedings. The Independent Review recommended that these powers should be made available in all proceedings where secondary legislation is challenged under the HRA.

The Government welcomes views on the Review's recommendation (para 252). The approach to be taken may well depend upon whether the Bill of Rights is to be treated as ordinary legislation or whether it is still be accorded some constitutional status like the HRA- see as eg in *Brown v Stott* [2003] 1 AC 681 at 703 where Lord Bingham described the HRA as being an "*important constitutional instrument*".

Remedial orders

Where a domestic court has made a declaration of incompatibility or there is an adverse ECtHR judgment, the incompatibility can be remedied by subsequent primary legislation or by a remedial order under s 10 of the HRA. Eleven remedial orders have been made under the HRA since 2000- three under the urgent procedure for making and commencing an order before a draft is approved by Parliament.

The Government believes there should be a strong presumption in favour of using more commonly used parliamentary procedures when legislating to address legislative incompatibilities with Convention rights and wants to retain remedial orders under the urgent procedure only, to addressing urgent (and compelling) cases where leaving the law unamended, even for a short period, could be damaging (paras 253-258).

This recommendation could well delay rectifying Convention incompatibilities. This has damaging constitutional implications for s 3 cases, but may have more significant consequences for ECtHR judgments. The UK's 14 year delay in resolving Prisoners' Vote case (*Hirst No 2*) undermined the whole Strasbourg system. For instance, in 2017 Russia breached its obligation under Article 46(1) of the Convention by failing to abide by Strasbourg decisions- when its Constitutional Court ruled that it would be "unconstitutional" to pay Euros 1.1b to Yukos's shareholders, as required by the ECtHR in *OAO Neftyanaya Kompaniya Yukos v Russia*, Judgment 31 July 2014).

Statement of compatibility: s 19 of the HRA

Section 19 requires the minister introducing a Bill into Parliament to express a view on the compatibility of the legislation with the Convention rights, by making and publishing one of two statements before Second Reading of the Bill in each House. The minister must state either in his or her view that the Bill is compatible with the Convention rights (s 19(1)(a)), or that, although he or she is unable to make that statement, the government, nevertheless, wishes Parliament to proceed with the Bill (s 19(1)(b)).

The Government takes the view that a parliamentary debate under s 19 strikes the right constitutional balance between Government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies. The Proposals (paras 259-261), therefore want to consult on whether the s 19 sets out the appropriate test, and, if not, how might it be improved.

Application to Wales, Scotland, and Northern Ireland

The Government will consult on whether the Bill of Rights strikes the correct balance between guaranteeing rights protection to all people across the United Kingdom, and allowing for difference in the application and implementation of the rights framework according to the needs and preferences of the nations of the UK (paras 263-264).

Public authorities- s 6 of the HRA

The Government believes that the range of bodies and functions to which the HRA apply is broadly right, and intends to maintain this approach. Nonetheless, it wishes to consider whether there is alternative drafting which might achieve broadly the same application of obligations under the Bill of Rights, but in a way which offers more certainty or clarity (paras 266-269).

Section 6(1) of the HRA makes it unlawful for a public authority to act incompatibly with rights, and the Bill of Rights will continue this approach. The Government also attaches importance to public authorities not being subject to litigation where they are acting to give effect to the direction and will of Parliament. This is recognised in section 6(2) of the Human Rights Act, which provides that an act will not be unlawful if the public authority did not, as a result of primary legislation, have any discretion compatibly with the Convention rights. The Government argues that this means s 6(1) could still require courts to compel the public authority to act in a way that is contrary to the clear will of Parliament.

The Government says that its proposed changes to s 3 will help to give public authorities confidence about how their duties will be interpreted by the courts (paras 270-273). But the Proposals suggest two further ways in which this problem might be tackled:

- *Option 1*- wherever public authorities are clearly giving effect to primary legislation, then they cannot be deemed to be acting unlawfully (para 274).
- *Option 2*- retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3 (paras 274-275).

However, the proposed changes to s 6(2) can only be justified if s 3 is amended. Importantly, however, the Government has stated that it is minded to agree with the Independent Review that s 3 should not be amended (para 237). It is, therefore, unclear whether it will pursue the proposed amendments to s 6(2).

Extraterritorial jurisdiction

Article 1 of the Convention provides that contracting states shall secure to "*everyone within their jurisdiction*" the rights and freedoms set out in the Convention. The HRA is, therefore, silent on its impact on activities abroad, leaving this to be determined by the courts. The Proposals describe how HRA and ECtHR case law has created uncertainty for the armed forces, because of the complex legal arguments involved (pages 44 to 45 of the Proposals).

The Government accept that the extraterritorial application of the Convention means there is no unilateral domestic legislative solution to this issue- so that drafting the Bill of Rights which applies just to a restricted territorial basis will not resolve the issue at the international level. The Government argues that this issue needs to be addressed in Strasbourg, itself (paras 277-281). But Article 1 is unlikely to be amended by the Council of Europe promulgating a new Protocol.

Qualified and limited rights

The Proposals launch a full frontal attack on the way in which the HRA addresses qualified rights or restrictions on rights under Articles 5 and 6 (paras 282-291). It fundamentally questions the Court's approach to proportionality:

> *We consider that the application of the principle of proportionality by the courts has created considerable uncertainty and impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest. We want decisions regarding human rights to be taken in a fair and balanced way, which consider the needs of the individual who has claimed that their rights have been infringed but also ensures due consideration of the rights of others and the diverse interests of society as a whole*

The Government wishes to give more guidance on how to balance qualified and limited rights and suggests two options:

- *Option 1*- clarify that when the courts are deciding whether an interference with a qualified right is "necessary" in a "democratic society," legislation enacted by Parliament should be given great weight, in determining what is deemed to be "necessary."
- *Option 2*- require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the

compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

Two draft clauses are contained in Appendix 2. Option 1 states:

(1) This section applies in any case where a court or tribunal is required to consider what is necessary in a democratic society for the purpose of determining whether-

(a) a provision of legislation, or

(b) a decision of a public authority made in accordance with a provision of legislation, is compatible with one or more of the rights and freedoms in this Bill of Rights.

(2) The court must give great weight to Parliament's view of what is necessary in a democratic society (and the fact that Parliament has enacted the legislation is for these purposes determinative of Parliament's view that the legislation is necessary in a democratic society).

(3) In this section 'legislation' means-

(a) primary legislation, and

(b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

Option 2 states:

(1) This section applies in any case where a court or tribunal is required to consider the public interest in deciding whether-

(a) a provision of legislation, or

(b) a decision of a public authority made in accordance with a provision of legislation, is compatible with one or more of the rights and freedoms in this Bill of Rights.

(2) The court or tribunal must give great weight to the fact that Parliament was acting in the public interest in passing the legislation.

(3) In this section 'legislation' means-

(a) primary legislation, and

(b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

Both draft clauses could potentially change the outcome a court will reach in particular cases significantly. But a statutory obligation to give great weight to Parliament is unlikely to breach Convention principles.

Deportations in the public interest

The Government believes that public confidence in the HRA has been eroded when foreign criminals threaten to evade deportation, because their human rights are given greater weight than the public's safety and security. The Government will not deport an individual on Article 3 grounds. However, it intends to ensure that deportations of foreign nationals in the wider public interest are not systematically frustrated by new and expanding human rights claims, including under Articles 5, 6 and 8 of the Convention (para 292). Several Proposals are suggested:

- one option would ensure that the Bill of Rights addresses the limits on HRA grounds to prevent deportation – either through an overarching provision specifically addressing deportation, or on an article-by-article basis. For example, it could be clarified that certain rights, such as the right to family life, cannot prevent the deportation of a certain category of individuals, for example, offenders sentenced to a term of imprisonment, or persons involved in terrorist related activity (para 294).
- An alternative would be to ensure the courts respect Parliament's approved criteria that balance the strong public interest in deportation strongly against Convention rights. For example, if Parliament has passed primary legislation, or approved immigration rules that properly balance these matters, then deportation should be prevented only in accordance with that statutory scheme (para 295).
- A further alternative is to prescribe that deportation decisions can only be overturned if the Home Secretary has obviously failed to take account of human rights considerations when deciding that deportation is in the public interest. The courts would not be permitted simply to substitute their own views for those of the Home Secretary (para 296).

Whether or not the Bill of Rights breaches ECtHR principles will depend on the way the legislation is drafted. But provided the domestic courts is entitled to consider all of the facts and circumstances in a particular case, the ECtHR is unlikely to overturn that decision.

Illegal and irregular migration

The Government also argues that elements of its Proposals for deportation apply equally to removing failed asylum seekers, and those who overstay their right to remain (paras 297-298). The second and third options could be applied to asylum removals; and the first could capture these cases insofar as the sentence length threshold is met. Other proposals in this consultation could also facilitate asylum removals, notably those that constrain the expansion of rights outside democratic control.

Remedies and the wider public interest

The Government believes that the compensation system can be used to make sure that the wider public interest is properly protected alongside individuals' rights (paras 299-301). It recommends that think the Bill of Rights could set out several factors in considering when damages are awarded and how much including:

- the impact on the provision of public services;
- the extent to which the statutory obligation had been discharged;
- the extent of the breach; and
- where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

IV. Emphasising the role of responsibilities within the human rights framework

The Government aims to build an element of responsibility explicitly into the Bill of Rights by permitting UK courts to consider the claimant's conduct in deciding whether to award a remedy by empowering it to consider relevant past conduct, such as whether the claimant has respected the rights of others (para 307-308). The consultation is asked to consider:

- *Option 1*- that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or
- *Option 2*- that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

Under Article 46 of the Convention, States Parties are required to implement final judgments of the Strasbourg Court in cases brought against them. The implementation of judgments is overseen by the Committee of Ministers of the Council of Europe. The Government strongly believes that democratic responsibility for legislation, and the power to legislate, lies ultimately with Parliament and that this should be reflected in our arrangements for responding to Strasbourg judgments (paras 309-312).

The Government believes there should be a formal way for Parliament to play a stronger role in responding to Strasbourg cases when the Court makes a final adverse ruling against the UK by ensuring there could be a formal requirement for government to lay notice of such judgments before Parliament, for the purposes of enabling general Parliamentary consideration and allowing ministers to table a motion allowing for a specific debate, which may culminate in a vote where it is deemed appropriate. The Government intends that legislation affirms Parliamentary sovereignty in the exercise of the legislative function, in the context of adverse Strasbourg rulings (paras 313-315).

Appendix 2 contains a draft clause which states:

> *(1) The Bill of Rights affirms that the judgments and decisions of the European Court of Human Rights-*
>
> > *(a) are not part of the law of any part of the United Kingdom, and*
> > *(b) cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty.*
>
> *(2) If the European Court of Human Rights finds, in its final judgment in a case to which the United Kingdom is a party, that the United Kingdom has failed to comply* Proposals to create a modern Bill of Rights are described in its ***Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998*** CP 588 *(3) In order to facilitate debate in the House of Commons or House of Lords on an adverse judgment, a Minister of the Crown may exercise any power that he or she as a member of that House to table a motion in that House.*
> *(4) In this section "notification period" means the period of [30] days beginning with the day on which the adverse judgment-*
>
> > *(a) is given (if it is final when it is given), or*
> > *(b) becomes final in accordance with the provisions of Article 44, paragraph 2 of the Convention (in any other case); and for the purposes of calculating that period, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days.*

The Government is, therefore, proposing to change the procedure for giving effect to adverse ECtHR judgments. However, these changes will not affect the obligation under Article 46(1) of the Convention to abide by any ECtHR judgments.

Conclusion

The Proposals described in its ***Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998*** are designed to enact legislation which will work very differently from the HRA. The extent of those differences and the potential for conflict with the ECtHR will only become clear once the Government publishes its draft legislation.

Richard Clayton QC is the joint author of ***the Law of Human Rights*** (*Oxford University Press). He practices from Exchequer Chambers, London and Kings Chambers, Birmingham and is a Visiting Professor at University College, London.*