



Law Society
of Scotland

Law Society of Scotland

Bill of Rights Bill Second Reading Briefing

September 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional and Human Rights, Immigration and Asylum and Mental Health and Disability Sub-committees welcome the opportunity to put forward the following comments for consideration at Second Reading of the Bill of Rights Bill.

General Comments

Introductory: Human Rights and Convention Rights in Scotland

The UK remaining at State Party of the European Convention on Human Rights (ECHR)

We were reassured that the consultation *Human Rights Act Reform: A Modern Bill of Rights* made it clear in paragraph 183 that: *Under these proposals, the UK would remain party to the Convention, with the rights in the Convention sitting at the heart of a Bill of Rights* and in paragraph 184 that: *The rights as set out in Schedule 1 to the Human Rights Act will remain* which policy is confirmed in clause 2 and schedule 1. This will go some way to respecting the rule of law and help to keep in view the UK's international obligations under the ECHR and the Trade and Cooperation Agreement between the UK and the EU articles 524 and 763.

We believe that the Government should go further than the statements in the consultation paper and those made on introduction of the Bill concerning the Government's "fundamental commitment" to the ECHR by amending the Bill expressly to commit in law to the UK's permanent adherence to the Council of Europe and the ECHR.

The potential impact of the repeal of the Human Rights Act 1998 and its replacement by the Bill is likely to cause confusion as to the respect which the UK accords human rights (and the meaning of those rights) and to create a lack of clarity and coherence in the application of the law. Provisions substantially lacking from the Bill such as equivalents to section 2 HRA (Interpretation of Convention rights), section 3 HRA (Interpretation of legislation) and section 19 (Statements of Compatibility) plus the inclusion of provisions limiting judicial discretion for example in clauses 3, 4, 5, 6 and 7(2) add to the confusion about the direction being taken in the Bill.

We did not however agree with the conclusion expressed in paragraph 184 that: *The key problems have*

arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels. Accordingly, we do not agree with the general premise upon which the Bill rests. Given that there appears to be no intention to withdraw from the Convention, a major cost of making it harder to secure a domestic remedy which appears to be an objective and effect of the Bill will be increased recourse to and possible success for some litigants at Strasbourg.

Convention Rights and the Scotland Act 1998

The Bill of Rights Bill is about the repeal and replacement of the Human Rights Act 1998 (HRA) but it is important to point out at the outset that questions as to whether an Act of the Scottish Parliament (“ASP”) or subordinate legislation or other executive acts by Scottish Ministers are incompatible with Convention rights, are usually not dealt with under the HRA (although they could be) but under the Scotland Act 1998 (SA). Under section 29(1) and (2) (d) of the SA, a provision in an ASP is “not law” if it is incompatible with any of the Convention rights.

Accordingly, any challenge to a provision in an ASP on the grounds that it is incompatible with a Convention right is a “devolution issue” and can be brought under the SA. This is so even although an ASP also is included in the definition of “subordinate legislation” in section 21 of the HRA and so could also be regarded as unlawful under section 6(1) of HRA. There is another potential issue in that ASPs are also defined as subordinate legislation under the Bill, but subordinate legislation may now be subject to a declaration of incompatibility rather than invalidation, which would introduce a conflict between the SA regime and that in the Bill.

Additional problems arise because of the different interpretive obligations under the SA and the Bill. An ASP may be saved under the SA because of the s.101 duty to interpret it narrowly, where possible, so as to bring it within competence. But there is no such duty under the Bill. Accordingly, a provision may be given a narrow interpretation and therefore be validly enacted under the SA yet given a different meaning and be subject to invalidation or a Declaration of Incompatibility under the Bill.

Similarly, under section 57(2) of the SA, a member of the Scottish Government has “no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.” Any challenge to such an act on that ground can be brought under the SA even although that act is also unlawful under section 6(1) of the HRA.

Compliance with the legislative consent convention

We note the terms of the Explanatory Notes in the Annex which identifies that legislative consent from the Scottish Parliament is “needed” for clauses 3, 4, 5, 6, 9, 10, 11, 12, 15, 17, 18, 19, 21, 22, 30, 31, 32, 33, 34, 35, 36, 37, 40 and schedule 5.

We take it that the Annex indicates that the UK Government will adhere to the legislative consent (or Sewel) convention when approaching such an important measure which touches on the rule of law, legislative and executive competence, the role of the Courts in Scotland and other issues of constitutional propriety by altering how Convention rights are to be interpreted. Repeal of the HRA and its replacement with the Bill of Rights Bill as a protected statute in itself engages the constitutional arm of the convention,

because the substantive policy space open to the Scottish Parliament will be different under this Bill compared to the HRA and the meaning of convention rights is changed for the purpose of sections 29 and 57 SA.

Specific comments on clauses

1. Introduction

Clause 1 sets out the main purposes of the Bill.

Clause 1 (1) provides that the Bill will reform the law relating to human rights by repealing and replacing the HRA (See schedule 5 paragraph 2.)

Clause 1(2) sets out what are the 3 main objectives of the Bill. It provides that the Bill clarifies and re-balances the relationship between the UK courts, ECtHR, and Parliament in 3 ways, by ensuring

- a) That it is the UK Supreme Court (and not the ECtHR) that determines the meaning and effect of Convention rights for the purposes of domestic law clause 3(1));
- b) That section 3 of HRA is repealed and not replaced so that the courts are no longer required to read and give effect to legislation (UK and Scottish), so far as is possible in a way which is compatible with Convention rights;
- c) That the courts must give the greatest possible weight to the principle that in a Parliamentary democracy, it is Parliament (and not the ECtHR) that properly makes decisions about the balance between different policy aims, different Convention rights, and the Convention rights of different people (see section 7).

Clause 1 (3) “affirms” that the judgments, decisions and interim measures (the jurisprudence) of the ECtHR “(a) are not part of domestic law and (b) do not affect the right of Parliament to legislate”.

Comment

These provisions make it clear that it is intended that the UK courts will no longer interpret Convention rights in the same way as the ECtHR. The provisions of clause 1(3)(a) even make it uncertain whether or to what extent UK courts will be able to take account of ECtHR jurisprudence. This will have the effect of preventing UK courts from protecting the rights of persons which they enjoyed under the HRA.

However, as the UK will remain a party to the ECHR, the UK will, as a matter of international law, be bound by that Convention which falls to be interpreted by the ECtHR. What will happen, therefore, is that persons, who are denied a remedy under UK law because of the restrictive interpretation of Convention rights or because provisions of domestic legislation are incompatible with Convention rights, will be able to seek redress before the ECtHR but that is a slower and more expensive process. It will increase the number of cases where the UK is found to be in breach of the Convention.

The Convention Rights

2. The Convention rights

Clause 2 of the bill provides for a definition of “Convention rights as: the rights and fundamental freedoms set out in—

- (a) Articles 2 to 12 and 14 of the Convention,
- (b) Articles 1 to 3 of the First Protocol, and
- (c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention.

This clause replicates the terms of the Human Rights Act 1998 section 1(1), (2) and (3).

The Convention rights are set out in Schedule 1 to the Bill in similar terms as in Schedule 1 to the HRA.

This includes the omission of Article 13, the right to an effective remedy. The Government should explain why they have decided to continue to exclude this right from the Convention rights under the Bill.

3. Interpretation of the Convention rights

Clause 3(1) provides that the Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection with Convention rights.

Clause 3(2) requires the courts, when determining any question in connection with a Convention right, to

“(a) have particular regard to the text of the Convention right and, in interpreting the text, may have regard to the preparatory work of the Convention....”

and clause 3(3) underlines the importance of the original text of the Convention by providing that a court

“(a) may not adopt an interpretation of the right which expands the protection conferred by the right unless the court has no reasonable doubt that the [ECtHR] would adopt that interpretation if the case were before it [and]

(b).... may adopt an interpretation of the right that diverges from Strasbourg jurisprudence.”

Comment

In view of clause 1(3)(a) which “affirms” that such jurisprudence “is not part of domestic law,” it is not even clear whether, or to what extent, a court may have regard to such jurisprudence when interpreting a Convention right.

As a reflection of existing law, clause 3(1) is not entirely correct because the High Court of Justiciary sitting as a court of appeal is the ultimate judicial authority on such questions in Scottish criminal proceedings except where there is

- (a) a “devolution issue” within the meaning of paragraph 1 of Schedule 6 the SA which in effect means a question whether the LA has acted incompatibly with any of the Convention rights; and

(b) a “compatibility issue” under sections 288ZA to 288B of the Criminal Procedure (Scotland) Act 1995
These are defined in section 288ZA of the 1995 Act as issues:

“(a) whether a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998 or

(b) whether an Act of the Scottish Parliament or any provision in an Act of the Scottish Parliament is incompatible with any of the Convention rights”

Section 288ZA is not amended by the Bill to refer to clause 12 which replaces section 6 of the HRA.

Clause 3(2) and (3). The interpretation of Convention rights under the Bill is significantly different from under the HRA.

Under the HRA, section 2 requires the courts, when determining any question in connection with a Convention right, to take account of Strasbourg jurisprudence. In other words, Convention rights fall to be interpreted in a similar way as the “ECtHR” would do so.

There is no equivalent of section 2 of the HRA in the Bill. Instead, clauses 3(2) and (3) make it clear that UK courts are intended to interpret those rights in a different way than the ECtHR.

Clause 3(2) requires the courts to have “particular regard” to the original text and the preparatory work rather than how judicial decisions of the ECtHR may have developed the text. This is emphasised by Clause 3(3) which prohibits a court, when interpreting a Convention right, from adopting an interpretation which “expands the protection conferred by that right” unless they are certain “beyond reasonable doubt” that the ECtHR would do the same. But it is not clear how the courts can determine that they are “expanding” the original protection or how they can be satisfied “beyond reasonable doubt.”

It is clear that what is intended is that the courts should not regard the Convention as a living document whose meaning can be developed from time to time but as a static document whose meaning was fixed at the time of its original drafting.

4. Freedom of speech

Clause 4(1) provides in an exception to the prohibition on expansive interpretation that

“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 that right.”

Comment

The bill should explain more clearly what giving Article 10 “great weight” means in the context of clause 4. Does this mean that Article 10 has priority over Article 8 rights? Should Article 8 not also be given “great weight”. These are Articles which, by their very nature, are of strong public interest.

Clause 4(2) seeks to define freedom of expression for the purposes of the section. The definition contains most of the components of the right as expressed in ECHR Article 10 but does not refer to the exercise of the right “without interference by public authority and regardless of frontiers” nor that Article 10 “shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises” and excludes the right to receive information.

This is understandable given the focus on the right as it relates to individuals. However, Article 10 is already protected by the mechanisms in section 12 HRA such as section 12 (3) and (4) and any party seeking to curtail the right to freedom of expression requires to show that they are likely to prevail in their action. The scope for interference with Article 10 is already limited to exceptional circumstances, where an individual’s Article 8 rights outweigh a publisher’s Article 10 rights.

If the courts in striking a balance of rights between Articles 8 and 10 are considering restricting publication being made, clause 4(1) would require greater weight to be placed on Article 10 rights. In other words, Article 10 automatically carries greater weight than Article 8.

We take the view that if there is a concern about the way the courts have been approaching the tension between Articles 8 and 10, and the resulting development of a privacy jurisprudence, the more appropriate response may be for Parliament to legislate on privacy law rather than seeking to put greater weight on Article 10 in the hope that the jurisprudence will develop in a particular way.

5. Positive obligations

The Explanatory Notes provide in paragraph 59 that clause 5 prohibits domestic courts from adopting new interpretations of Convention rights that would require a public authority (as defined by clause 34 of the Bill) to comply with a positive obligation and requires courts applying existing interpretations to consider the need to avoid certain identified consequences.

Comment

Positive obligations are pivotal to ensure that public authorities are held to account. Some rights consist almost entirely of positive obligations – eg Art 6 or Article 3 Protocol 1. What about the right to compensation under Article 1 Protocol 1? Clause 5 would significantly reduce access to justice for the victim of a human rights breach post-commencement, as such persons may not otherwise be aware of their rights.

6. Public protection

Comment

We are concerned at the suggestion in clause 6 that ‘public protection’ should be given greater emphasis in interpreting rights in relation to people serving a ‘custodial sentence’. Custodial sentence is to be defined in regulations made by the Secretary of State but should not include a mental health disposal by a criminal

court. Scotland's mental health law is predicated on the protection of the rights of people with mental health conditions, rather than primarily focusing on concerns about public safety.

Universality is one the fundamental tenets of human rights. It should not apply in a way that prevents access to justice for those with whom we disagree with or who have not been 'well-behaved.' Clause 6 appears to exclude the concept of rehabilitation. The Government should explain if it is fair and reasonable to deny access to rights where an imprisoned individual has made a genuine effort to be rehabilitated.

7. Decisions that are properly made by Parliament

Clause 7 applies when courts are determining the compatibility with the Convention rights of an Act of Parliament or an act of a public authority in discharging its statutory duties.

Comment

The clause limits judicial discretion by requiring the courts, when determining an incompatibility question in relation to an Act of Parliament, to regard Parliament as "having decided" that the Act strikes an "appropriate balance" between the competing factors in clause 7 (1) (b)(i) to (iii). It also requires courts to '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.' This impacts on the application of the principle of proportionality but as Professor Elliott observes it "*does not in terms preclude courts from making their own mind up about whether it was appropriate for Parliament to have reached such a view in the first place.*" [The UK's \(new\) Bill of Rights – Public Law for Everyone](#) .

8. Article 8 of the Convention: deportation

Comment

Section 117C of the Nationality, Immigration and Asylum Act 2002 constitutes (subject to the provisions on automatic deportation in section 32 of the UK Borders Act 2007) the current relationship between the deportation of foreign criminals and Article 8 ECHR. Section 117C provides certain exceptions to deportation, one of which relates to "a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh"

Section 117C differentiates between those offenders who have been sentenced to 1-4 years, and those who have been sentenced to more than 4 years imprisonment. Automatic deportation under the UK Borders Act 2007 is also subject to an exception where removal of the foreign criminal in pursuance of the deportation order would breach a person's rights under the Refugee Convention.

Clause 8 applies a 'one size fits all' approach to any offender sentenced to more than 12 months. It is not just to apply the same threshold to a person sentenced to 13 months and another sentenced to 20 years.

Furthermore, there is no reconciliation between clause 8 and the existing law therefore for example the reference to the deportation decision in section 117C being unduly harsh is different from the terms of

clause 8 which provides that “No deportation provision may be found to be incompatible with the right to 5 respect for private and family life unless the court considers that the provision requires a public authority to act in respect of P in a way that would result in manifest harm [our emphasis] to a qualifying member of P’s family.*.Harm is extreme “ only if— (a) it is exceptional and overwhelming, and 10 (b) it is incapable of being mitigated to any significant extent or is otherwise irreversible”. Will the Nationality, Immigration and Asylum and UK Borders Acts be separately amended?

Clause 8(5) is vague in its definition of ‘qualifying family member’. By referring to someone who is ‘otherwise dependent on p,’ it is unclear if this extends to spouses/civil partners etc. This should be clarified explicitly so as to avoid uncertainty. Additionally, if such persons are not included, this is a significant and disproportionate departure from the current test where the rights of partners are an important factor in such an assessment.

The Government should explain clearly how they consider the treatment of “foreign criminals” in clause 8 (along with clauses 15 (2)(c) and 20) and the limitation on judicial discretion in clause 8 (2) to be compliant with Convention rights including Article 6.

Professor Elliott highlights other problems with clause 8: “Clause 8 goes on to say that harm is only ‘extreme’ if it is ‘exceptional and overwhelming’ and cannot be mitigated to any significant extent or is ‘otherwise irreversible’. This does not accord with Strasbourg case law on Article 8 and will therefore result in UK courts being obliged to rule that legislative provisions concerning deportation are compatible with the ECHR when they are in fact incompatible. That, in turn, means that the UK will be in breach of its obligations under the Convention and will be vulnerable to adverse rulings by the Strasbourg Court. As above, proclaiming the UK Supreme Court as the ultimate judicial authority on such matters does not change the position in international law one iota”: The UK’s (new) Bill of Rights – Public Law for Everyone.

The Government should rethink the effect of clause 8 on the impact on domestic law and on the rule of law internationally.

9. Jury trial

Comment

Clause 9 declares that the ways in which a right to a fair trial under article 6 is secured includes trial by jury. This approach is different from that anticipated by the Government Consultation on a Human Rights Reform: A Modern Bill of Rights [Human Rights Act Reform: A Modern Bill of Rights - consultation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights) paragraph 202-203.

The Government should explain why they consider clause 9 to be necessary and why the Explanatory Notes include clause 9 in the list of clauses which need the consent of the Scottish Parliament. The Impact Assessment (paragraph 117) suggests that it is insurance against the ECtHR deciding at some point in the future that a jury trial does not fulfil the requirements of a fair trial under Article 6. It also states that Clause 9 is not a change to the law as it stands. If clause 9 does not change to the law, then no devolved consent would appear to be necessary.

Legislation

10. Declaration of incompatibility

Comment

We do not agree that the power to make declarations of incompatibility should extend to subordinate legislation.

Currently under section 4(2) HRA the court has a discretion to make a declaration of incompatibility if it is satisfied that a provision in an Act of Parliament is incompatible with a Convention right. Section 4(6) preserves parliamentary sovereignty by providing that a declaration of incompatibility does not affect the validity, operation, or enforcement of the law to which it refers.

The law is unaffected by the declaration. It is a matter for Parliament to change the law. Furthermore, the declaration is not binding on Ministers. An example which shows how section 4 operates and how the court and Parliament dealt with it in practice is the case of *Bellinger v Bellinger (2003) UKHL 21*. As a result of this decision Parliament enacted the Gender Recognition Act 2004 which provides legal recognition for those who have undergone gender reassignment.

In the light of the operation of section 4 since the HRA came into effect, it is unnecessary to protect secondary legislation from invalidation on the grounds of incompatibility with convention rights. See further, (Tomlinson, L. Graham and A. Sinclair, '*Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law making?*', *U.K. Const. L. Blog (22nd Feb. 2021)* (<https://ukconstitutionallaw.org/>)). Judicial Review of secondary legislation, as Tatiana Kazim, Mia Leslie and Lee Marsons point out in their Constitutional Law Association Blog comes from the common law, not the HRA: *The government's Human Rights Act consultation: divergence, context and evidence - The Constitution Society (consoc.org.uk)*. Kazim, Mia and Marsons identify that research shows that, of the 14 successful challenges to secondary legislation between 2014 and 2020, "the court quashed or otherwise disapplied the offending provisions in just four of them". Secondary legislation, even if subject to affirmative resolution, is a ministerial act which does not engage the protection of parliamentary sovereignty.

It is appropriate to distinguish primary and secondary legislation and between different types of subordinate legislation for example ASPs as noted in our introductory comment. It would not be appropriate to bring all secondary legislation within the purview of declarations of incompatibility, especially where there has been no meaningful parliamentary scrutiny. If secondary legislation is struck down because it is ultra vires or for some other reason Ministers can always bring a revised instrument back to Parliament. A declaration of incompatibility would mean that the instrument continued in effect even if it was recognized as having no legal basis, this would be contrary to the rule of law and result in a lack of clarity about what the law is.

We also note that this would apply to ASPs, creating inconsistency between the SA and the Bill but would not apply to subordinate legislation made by Scottish Ministers unless the Scotland Act were amended in a significant way.

Clause 10 is likely to have significant consequences on declarations of incompatibility. As Professor Mark Elliott sets out in his blog *Public Law for Everyone: The UK's (new) Bill of Rights: the possibility of declarations of incompatibility under the Bill sits within a significantly different legal framework from that which we find in the HRA. On the one hand... courts may be more likely to discover incompatibilities under the Bill, on account of reduced judicial powers to read UK legislation compatibly with Convention rights. On the other hand, other provisions in the Bill limit domestic courts' powers to read Convention rights generously, thereby potentially reducing the circumstances in which incompatibilities will be found and potentially declared: [The UK's \(new\) Bill of Rights – Public Law for Everyone](#).*

11. Right of Crown to intervene

Comment

Clause 11 is in substantially the same terms as section 5 HRA and requires that the Crown be given notice whenever a court is considering making a declaration of incompatibility. Clause 11 updates section 5 with a reference to Welsh Ministers and the substitution in clause 11(5) of “permission” to appeal for the word “leave” which occurs section 5(4). We agree with clause 11.

Section 5 of the HRA conferred the right on a Minister to be heard in a case where the court was considering a declaration of incompatibility. Section 5(2) (replicated and updated in clause 11(2)) ensured that UK and devolved Ministers had the opportunity to address the court on the legislation under review. In *R v A (Joinder of Appropriate Minister)* [2001] 1 WLR 789, the House of Lords ruled that where in criminal proceedings a matter arose which might lead to the House of Lords considering making a declaration of compatibility, it was appropriate to join the Crown in advance of the appeal hearing. Where the Crown was already represented by the Director of Public Prosecutions, the role of the prosecutor was different from that of a Government Minister in the discharge of executive responsibilities. The House granted the application for joinder made by the Home Secretary, who had promoted the legislation in question.

Public authorities

12. Acts of public authorities

Comment

Clause 12 on the face of it replicates section 6 HRA and places an obligation on public authorities not to act in a way which is incompatible with a Convention right.

The term “public authority” defined in clause 34 as including:

- (a) a court, and
- (b) any person certain of whose functions are functions of a public nature but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

Professor Elliott makes clear the superficial similarity between clause 12 and section 6 does not mean that their effect will be the same considering the context of wider changes in the Bill:

Two considerations arise. In the first place, as noted above, domestic courts have less scope to interpret Convention rights generously, thus potentially diminishing the overall scope of the duty on public authorities to act in accordance with those rights. In the second place, as under the HRA, the duty contained in the Bill yields when public authorities are required by primary legislation to act incompatibly with Convention rights and when they act to give effect to or enforce legislative provisions that are incompatible with Convention rights. Since, as explained below, domestic courts will have less scope under the Bill to interpret domestic legislation compatibly with Convention rights, there will be likely be more situations in which the clause 12 duty to act in accordance with the Convention rights is displaced by legislative provisions that are found to be incompatible with those rights: [The UK's \(new\) Bill of Rights – Public Law for Everyone](#) .

13. Proceedings

Comment

Clause 13, which replicates section 7 HRA establishes how a litigant can deploy Convention rights in legal proceedings. This includes bringing proceedings against a public authority by judicial review; and using Convention rights to assist with establishing a cause of action already recognised in domestic law or to establish a defence to proceedings.

14. Overseas military operations

Comment

Clause 14 excludes from clause 13 claims where extraterritoriality of the Bill involves military operations overseas. This means that a claim under the Bill cannot be brought for acts done or proposed to be done in the context of a military operation overseas.

The Government should explain on what basis such an ouster provision will be effective and why clause 14 is necessary especially the recent reforms made to the HRA by the insertion of limitation provisions in section 7A as recently as 30 June 2021 by the Overseas Operations (Service Personnel and Veterans) Act 2021 sections. 11(2), 14(2) and S.I. 2021/678, reg. 2. The approach of limitation of action is more likely to be held compliant with Convention rights rather than the complete exclusion found in clause 14.

Dominic Grieve QC's opinion <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/derogation-from-human-rights-briefing-paper/> remains relevant and identifies that "There has been a number of cases which established that the ECHR and the HRA will apply in certain circumstances outside of the territory of the UK". *Al-Skeini [2007] UKHL 26* where the House of Lords decided that the HRA could apply to the actions of British forces abroad where this occurred on a British Army base, but not more generally in Southern Iraq as the UK in practice did not exercise control there. When the case went to the ECtHR in *Al-Skeini v UK (2011) 53 EHRR 18*, it was

held that the UK Government had a duty to conduct an effective investigation into the deaths of all civilians killed by British soldiers, in Southern Iraq because the UK had assumed responsibility for the maintenance of security there and was therefore exercising “control and authority” over Iraqi civilians. In *Al-Jedda v Sec of State for Defence* [2007] UKHL 58, the House of Lords had held that the indefinite detention without charge of a dual British/Iraqi national in a Basra facility was lawful because the UK had been authorised to act by UN Security Council Resolution 1546 on which the UK was entitled to rely and which took precedence over any ECHR obligation. When the case went to the Grand Chamber (*Al-Jedda v UK* 2011 ECtHR), it held that the Security Council Resolution did not displace the Government’s obligations to protect the right to liberty under Article 5 of the ECHR and where no derogation under Article 15 had taken place, such a system of detention was a breach of Convention rights. Since then, the case law has developed further in a manner that emphasises that the Convention and the HRA can apply to UK actions abroad in varied forms. In *Smith v MOD* [2013] UKSC 41 the Supreme Court held that claims under Article 2 (the Right to Life) brought by relatives of some British soldiers killed in Iraq, on the grounds of inadequate equipment and training, should not be struck out and could proceed to trial, as Article 2 applied, and they were entitled to argue Article 2 rights had been breached. It also declined to rule that the principle of “combat immunity” from negligence claims was absolute in a number of cases that relied on claims of negligence alone. It allowed for the possibility of the courts considering claims on factual merits that took account of the legal principles involved. So far there has been no successful claim either under Article 2 or for negligence following these cases.

15. Permission required to bring proceedings

Comment

Clause 15 provides for a permission test for a human rights claim brought under section 13(2)(a), exempts certain proceedings, and establishes the right of appeal against a decision to refuse permission. Subsection (1) sets out that a litigant needs the court’s permission before a human rights claim against a public authority can go to a full hearing. The permission stage will only apply to judicial review proceedings in England and Wales. Subsection (2) exempts certain proceedings from the permission stage. Subsection (2)(a) provides that clause 15 does not apply to permission for proceedings brought in Scotland or Northern Ireland on a petition or application for judicial review for human rights claims.

A permission stage is currently in place in cases of judicial review in Scotland. The tests to meet are that the applicant has sufficient interest and real prospects of success (Court of Session Act 1988 section 27B (2)).

We agree with the Government’s decision to follow Article 35 ECHR which provides that an application to the European Court of Human Rights may be inadmissible if: (a) the application is incompatible with the provisions of the Convention... manifestly ill founded, or an abuse of the right of individual application; or (b) 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.

Richard Clayton QC notes in his UK Constitutional Law Association blog: *The Government's New Proposals for the Human Rights Act Part 2: An Assessment – UK Constitutional Law Association*, that there is already a “significant disadvantage test” in ECHR procedure. 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”).

The significant disadvantage test is fairly stringent but, if a permission stage is to apply, we take the view that there should be an “overriding public importance test” for cases which fail it.

16. Judicial review: sufficient interest

Comment

Clause 16 provisions relating to sufficient interest in respect of petitions for judicial review follow substantially the terms of section 7 (4) HRA and we have no further comment.

17. Judicial remedies: general

Comment

Clause 17 adopts aspects of section 8 HRA such as that a court may grant such remedy as it considers just and appropriate where it finds an act (or proposed act) of a public authority is (or would be) unlawful by having breached a Convention right. Clause 17 does not deal with the award of damages (as section 8 HRA does) but confirms in clause 17(2)(b) that the courts “may award damages only if the court has power to award damages, or order the payment of compensation, in civil proceedings” reflecting section 8(2) HRA. Clause 18 deals more fully with the award of damages.

Subsection (3) provides that the relevant person (defined in clause 31(1) as the Lord Chancellor, Scottish Ministers, and relevant Northern Ireland Departments) may make regulations to ensure that a tribunal can provide an appropriate remedy, where a breach of a Convention right has occurred.

Subsection (3)(a) provides that the relevant person can add to the relief or remedies the court may grant, for the same reasons as above.

Subsection (3)(b) provides that the relevant person can add to the grounds on which the tribunal may grant a remedy, for the same reasons as above.

Subsection (4) provides that regulations made under subsection (3) can become effective immediately but must be approved by affirmative procedure in the UK Parliament, the Scottish Parliament, or the Northern Ireland Assembly.

18. Judicial remedies: damages

Comment

Under Clause 18(1) a court may award damages in a human rights claim to a person who has suffered loss or damage arising from a breach of rights and if the court would not be able to grant a remedy that is just and appropriate (reflecting clause (17)(1)) without making an award of damages.

Reflecting section 9(3)(a) HRA, clause 18(2) provides when the breach of rights relates to Article 5 (the right to liberty and security), a court may award damages in a human rights claim notwithstanding subsection (1). Clause 18(2) means that in an Article 5 case the conditions for an award of damages under Clause 18(1) do not apply.

Clause 18(4)-(7) removes the discretion of the court by imposing obligations on the court to consider certain conditions. These include:

- a. taking into account all the circumstances of the case including the conduct of the person, anything done by the public authority to avoid acting incompatibly, the seriousness of the unlawful act, any other remedy granted in relation to the unlawful act and the consequences of any other decision in respect of the unlawful act.
- b. taking into account, and giving great weight to, the importance of minimising the impact that any contemplated award of damages would have on the ability of the public authority, or of any other public authority, to perform its functions.
- c. having regard (in particular) to future awards of damages which may fall to be made in cases involving issues that are the same as, or similar to, those involved in the unlawful act.

We do not agree with such constraints on the court's discretion. Judges should be free to decide cases based on the evidence led to the court and the law which applies to the facts as substantiated. These considerations are unnecessary because damages are discretionary at the instance of the court. The general principle of damages is that the person who has suffered as a result of the unlawful act should be made whole. Damages are not a punishment for the unlawful conduct of the authority, nor a reward for virtue or meritorious conduct on the part of the claimant. Article 17 is included in the Convention rights to which the Bill refers and remedies are already discretionary. Fundamental rights apply to everyone, whether or not they are popular or seen as deserving. If there is any change, the right should be extended rather than limited.

19. Judicial acts

Comment

As the Explanatory Notes confirm in paragraph 173, Judges and others acting in a “judicial capacity are usually immune from damages awards being made against them in proceedings under the Bill of Rights”. Clause 19 which reflects closely section 9 HRA, sets out how a claim can be made, and when damages can be awarded. 174 Subsection (1) details how a claim can be made against judges or those acting in a judicial capacity under clause 13(2)(a): by appealing a judgment; applying (or, in Scotland, petitioning) for judicial review; or in another way that has been set out by procedural rules.

Subsection (3) sets out the exceptional circumstances in which compensation may be awarded in claims against judicial acts done in good faith. Awards of damages are provided for under subsection (3)(a) as required by Article 5(5), where a judicial act breaches Article 5 (right to liberty and security), subsection (3)(b) when the judicial act is incompatible with Article 6 (right to a fair trial) and subsection (3)(c) when a judge follows an unfair procedure, breaching an individual’s Article 8 rights (right to respect for private and family life).

We welcome the provision in subsection (3)(c) for damages for a breach of a person’s Article 8 rights which is in addition to the rights to damages set out in section 9(3) HRA.

Limits on powers of court etc

20. Limits on court’s power to allow appeals against deportation

Comment

The Government should set out fully why it believes the suggested limitation in clause 20 would be compatible with the UK’s obligations under the European Convention on Human Rights as interpreted by both the ECtHR and domestic courts.

In order to assess whether a decision to deport is compatible with the convention all of the circumstances of the case need to be assessed. The assessment should be limited to whether the deportation order would result in a breach of the right to a fair trial so fundamental as to amount to a nullification of that right.

The Nationality, Immigration and Asylum 2002 Act (as amended by the Immigration Act 2014) already includes extensive public interest considerations to be taken into account and states that where the length of imprisonment is 4 years or more then it will be in the public interest to deport unless there are very compelling circumstances. The domestic case law confirms that this assessment required a wide-ranging consideration of all the facts in order to be compatible with Art. 8 ECHR (see: *MS (s.117C(6))*: ‘very compelling circumstances’) *Philippines [2019] UKUT 122* (IAC (para 16) and *Akinyemi v SSHD [2017] EWCA Civ 236* (para 14).

21. Limit on court’s power to require disclosure of journalistic sources

Comment

Clause 21 makes specific provision for the protection of journalists' sources. The clause applies where a person supplies information to another whilst intending or knowing the information is likely to be used for journalism. The Explanatory Notes state in paragraph 190 that in some circumstances, "courts can order disclosure of a journalist's source. Clause 21(1) sets out that a court can order disclosure only if it is necessary in the interests of justice; or in the interests of national security or the prevention of crime or disorder. There must also be an exceptional and compelling reason why it is in the public interest to disclose the source."

By law journalist's sources are already protected. Section 10 of the Contempt of Court Act 1981 states: "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

The practical effect of Section 10 of the Contempt of Court Act 1981 is that even if a Pursuer/Claimant required a publisher to disclose the source, or obtained a court order to that effect, the publisher is not required to disclose the source. Whilst there is an exemption to that rule for "the interests of justice or national security or for the prevention of disorder or crime" the interests must be significant and stated cogently to allow for deviation from the statutory protection which is being provided. It is extremely uncommon for a source to be by court order. GDPR and the Data Protection Act 2018 must also be considered when seeking to publish personal data, recognising that journalistic and literary purposes benefit from special conditions for processing personal data, including publication. The Courts may benefit from further guidance about where the balance lies when weighing the public interest in publication of information against the privacy of individuals and the factors to take into account, to bring consistency in decision making, with individuals treated equally before the law.

Nevertheless, the bill seeks to amend by schedule 5 paragraph 1, section 10 of the Act by adding two new subsections. These provide that the existing section 10 does not apply where the source of information is a journalistic source and in such circumstances section 21 of the Bill applies which limits the court's power to require the disclosure of journalistic sources unless the disclosure is necessary— (i) in the interests of justice, or (ii) in the interests of national security or for the prevention of crime or disorder, and (b) that there are exceptional and compelling reasons why it is in the public interest for the disclosure to be made.

The addition of new subsection 21(1)(b) relating to the existence of exceptional and compelling reasons why it is in the public interest for the disclosure to be made ensures that the balance of rights is firmly against disclosure. The Government should explain its justification for this approach.

22. Limit on court's power to grant relief that affects freedom of expression

Comment

Clause 22 applies when a court is considering a court order to prevent publication of material which might affect a person exercising freedom of expression under Article 10. Clause 22(2) provides that if the person whose freedom of expression would be restricted, is neither present or represented in court, the court

cannot grant relief, unless the applicant has taken all practicable steps to notify the person, or if there are exceptional and compelling reasons why the person should not be notified. Clause 22(3) outlines that courts cannot restrain publication before trial (i.e., where courts are considering granting a court order such as an interim interdict or injunction) unless the court is satisfied that the pursuer/applicant is likely to establish that publication should not be allowed at full trial.

Clause 22 seeks to ensure that obtaining a court order to prevent publication by an ex parte hearing will only be successful if all practicable steps to notify the respondent; or there are exceptional and compelling reasons why the respondent should not be notified.

The proposition that the courts cannot grant an interim order unless satisfied that the pursuer/applicant is likely to establish that publication should not be allowed at full trial asks the courts to engage in speculation as to the outcome of a proof of the facts in the case. It is unacceptable to expect the courts to pre-judge the case in this way.

23. Freedom of thought, conscience and religion

Comment

Clause 23 provides that when a court is considering a court order which might affect a religious organisation's exercise of the Article 9 right to freedom of thought, conscience and religion, the court must pay 'particular regard' to the importance of protecting the right. Why does the table in the Explanatory Notes say that legislative consent is not required for this provision, when, eg, it is required for clause 4?

Article 9 (freedom of religion or belief) can in certain circumstances be balanced against the rights of society at large.

24. Interim measures of the European Court of Human Rights

Comment

This clause sets out that interim measures of the European Court of Human Rights (ECtHR) are not to be taken into account in determining rights and obligations under domestic law of a public authority or any other person.

The UK acceded to the ECHR which in Article 24 (Registry and rapporteurs) provides that the ECtHR shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court which were agreed under Article 25.

Under Rule 39 of the Rules of Court, the ECtHR may indicate interim measures to any State Party to the ECHR. Measures under Rule 39 are decided in connection with proceedings before the ECtHR, without prejudging subsequent decisions on the merits of the case. The ECtHR grants such requests only on an exceptional basis, when the applicants would otherwise face a real risk of irreversible harm.

Rule 39 interim measures came to prominence recently when on 14 June 2022, the ECtHR granted, an urgent interim measure in the case of *N.S.K. v. the United Kingdom* (application no. 28774/22, formerly *K.N. v. the United Kingdom*), an asylum-seeker facing imminent removal to Rwanda. The urgent interim measure concerned an Iraqi national who, having claimed asylum upon arrival in the UK on 17 May 2022 faced removal to Rwanda on 14 June 2022. The ECtHR indicated to the UK Government that the applicant should not be removed to Rwanda until three weeks after the delivery of the final decision in his judicial review proceedings. The case has been adjourned until mid-September.

Remedial action

25. Duty to notify Parliament of failure to comply with the Convention

Comment

Clause 25 introduces a duty on the Government to notify Parliament of any judgments of the ECtHR against the UK, as well as instances where the UK has unilaterally declared in proceedings before the ECtHR that it has failed to comply with a Convention right.

Article 44 ECHR (Final judgments) provides that the judgment of the Grand Chamber shall be final.

We believe that there might be value in clause 25 imposing a duty on the Secretary of State to notify Parliament of ECtHR decisions which are made in the UK's favour.

26. Power to take remedial action

Comment

The Explanatory Notes set out in paragraph 207 that this “clause gives Ministers, and Her Majesty in Council, the power to make remedial regulations. These are a type of secondary legislation which can be used to amend legislation, which has been found to be incompatible with the Convention rights, to remove the incompatibility. This process is intended to enable the incompatibility to be addressed more quickly than might be possible if only primary legislation could be used.”

This power broadly replicates the power under the section HRA 10, with one exception in subsection (6). Subsection 6(b) ensures that the Bill cannot be amended by remedial regulations.

We have no further comments to make.

Derogations and reservations

27. Derogations

Comment

The Explanatory Notes set out in paragraph 216 that derogations “allow States to suspend temporarily some of their obligations under the Convention in times of war or other public emergency threatening the

life of the nation (Article 15 of the Convention). This clause sets out the process for giving UK derogations effect in domestic law, which is described as designating the derogation.” The Explanatory notes also state that clause 27 takes a similar approach to the HRA (sections 14 and 16) “in respect of derogations, but the drafting has been updated to make clarify how the process works”.

We have no comments to make.

28. Reservations

Comment

The Explanatory Notes set out in paragraph 223 and 224 that under “Article 57 of the Convention, any State may, upon signing of the Convention, make a reservation in respect of a provision of the Convention, where any domestic law is not in conformity with the provision of the Convention. Reservations may not be general but must relate to specific provisions of, or protocols to, the Convention. The UK has one partial reservation to the right to education in the First Protocol to the Convention. These clauses set out relevant provisions in respect of reservations...Clause 28(1) sets out the one existing reservation of the UK, namely to Article 2 of the First Protocol to the Convention. This is a designated reservation, meaning it has effect in UK law.”

We have no comments to make.

29. Designated derogations and reservations to be set out in Schedule 3

Comment

The Explanatory Notes set out in paragraph 229 that clause 29 relates to the content of Schedule 3, which contains current reservations and derogations of the UK and contains a duty on the Secretary of State to update Schedule 3 to reflect any designated derogations and reservations or their lapsing or changing.

We have no comments to make.

Judges of the European Court of Human Rights

30. Appointment to European Court of Human Rights

Comment

We have no comments to make other than this clause reflects section 18 HRA.

Rules and Regulations

31. Rules

Comment

Clause 31 (which bears some similarity with section 7(9) HRA) provides for powers to make rules of court or rules made by Ministers (including Scottish Ministers) in relation to a court or tribunal under the Bill. The Explanatory Notes state that this is in order to ensure legislative flexibility and relevant rules to operate these provisions are kept up to date. There are also general rules of court, separate to statutory instruments, which are relevant in several other areas of the Bill.

32. Regulations

Comment

The regulations made under clause 32 should be subject to pre-legislative consultation with relevant interests.

33. Regulations subject to made affirmative procedure

Comment

The bill includes provision to enable Ministers, to make regulations which become effective immediately before being approved by Parliament. Such regulations cease to have effect unless they are approved by Parliament within 40 days. Ministers should be required to make a statement of their reasons for making the regulations. We suggest it should be made clear that the statement of reasons should also explain why it is necessary to make the regulations urgently before they were approved by Parliament.

Interpretation

34. Meaning of “public authority”

Comment

The definition of a public authority has been a persistent problem under the HRA, and s.6(3)(b) has been applied very narrowly. For example, in the case of *Callin, Heather and Ward v Leonard Cheshire [2002] EWCA Civ 366*, the Court of Appeal held that state-funded patients in a privately-operated care home could not sue the private care home under the HRA, because the provision of care was not a ‘public function’ under s6(3)(b) HRA.

The Bill misses the opportunity to clarify the definition.

Clause 34 replicates section 6 (3) HRA and will attract the same criticisms.

35. Meaning of “Strasbourg jurisprudence”

Comment

Clause 35 adopts the terms of section 2(1)(a)-(d) HRA in identifying the categories of decision by the ECtHR and relevant Convention bodies. We have no further comment.

36. Interpretation

Comment

We have no comments to make

Final provisions

37. Consequential and minor amendments

38. Application and extent

39. Commencement

40. Power to make transitional or saving provision

Comment

Clause 40 empowers the Secretary of State to make transitional or saving provision but it contains a peculiar provision. It provides that the Secretary of State may:

'amend or modify any primary or subordinate legislation so as to preserve or restore (to any extent) the effect of a relevant judgment of a court.'

A 'relevant judgment' is defined as a judgment that (a) decides that a provision of primary or subordinate legislation is to be interpreted or applied in a particular way and (b) it 'appears' to the Secretary of State that that the interpretation or application of the legislation was made in reliance on section 3 HRA.

This implies that, despite section 16 of the Interpretation Act 1978 (the repeal of an enactment does not affect its previous operation "unless the contrary intention appears"), the repeal of section 3 of HRA will affect how it has been used to interpret legislation previously unless or until that interpretation has been "preserved or restored" by regulations under clause 40.

It is not clear what this provision means or what is its effect. Does it evince "the contrary intention" which ousts section 16 of the Interpretation Act? If so, how are the provisions identified where they have been interpreted by relying on section 3 of the HRA?

Quite apart from that uncertainty, the power which is given to the Secretary of State to preserve or restore the effect of a relevant judgment is very extensive.

It is suggested that this provision should be deleted, or its intention clarified.

41. Short title

We have no comments to make.

Schedule 1 —

The Articles

Part 1 -- The Convention

We note that as in the HRA Article 13 – Right to an Effective Remedy is omitted from the Convention Rights. The Government should explain why this omission is necessary.

Part 2 -- The First Protocol

Part 3 -- Article 1 of the Thirteenth Protocol

We have no comments on Schedule 1 Parts 2 and 3.

Schedule 2 — Remedial regulations

Schedule 3 — Designated reservation

Schedule 4 — Judicial pensions

Schedule 5 — Consequential and minor amendments

We have no comment to make on Schedules 2 3 4 or 5.



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