

Bill of Rights Bill: Protection of Rights

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Introduction

- I have been asked to address the impact of the BRB ‘on the protection of rights’;
- There will inevitably be overlap with issues that have been addressed in previous presentations, since the BRB impacts on the protection of rights in various ways, which cannot be hermetically sealed from issues that have been addressed earlier;
- It is, however, instructive to draw some such issues together to appreciate the diverse ways in which the BRB has an impact on the protection of rights, as compared to the status quo ante.

1 Protection of Rights: Interpretation

- The BRB impacts on the protection of rights as a result of clause 1(2)(a), which removes the interpretive obligation presently contained in the HRA section 3, such that:
- ‘courts are no longer required to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights (see paragraph 2 of Schedule 5, which repeals section 3 of the Human Rights Act 1998);’

1 Protection of Rights: Interpretation

- Points to note in this respect:
- 1st: There was much discussion in IHRAR as to whether there should be change to what is now section 3 HRA; there were differing views; I was in the camp that thought that section 3 as currently interpreted by the courts cohered with the intent underlying the HRA, and that it did not press interpretation too far;
- 2nd: In any event, the BRB has gone for the radical option: push section 3 off the edge of the legal cliff, no amendment, just repeal of the obligation;

1 Protection of Rights: Interpretation

- 3rd: The necessary outcome is that protection of rights is diminished, insofar as the courts are not *required* to read legislation so as to give effect to Convention rights, with the consequence that the *Ghaidan* case law disappears;
- 4th: This leaves two related questions:
 - Are the courts *allowed* to read legislation in the *Ghaidan* sense so as to give effect to Convention rights?
 - Assuming that the answer is no, on the ground that it would run counter to the intent of clause 1(2)(a), what principles of interpretation can and will the courts use? The obvious answer would be the fall back position that courts read legislation so as to comply with international obligations, including the ECHR. Which then prompts the further inquiry as to the relative strength of this interpretive obligation, the answer to which will affect the extent to which rights are protected.

2 Protection of Rights: Incompatibility

- There is a proximate and significant connection between Clause 1(2)(a) and Clause 7:
 - The former reduces the court's options when interpreting legislation to render it compatible with Convention rights;
 - The latter arguably removes much of the judicial function in the determination of whether legislation is compatible with Convention rights;

2 Protection of Rights: Incompatibility

- Clause 7 is lengthy and is entitled ‘Decisions that are properly made by Parliament’.
- Clause 7(2) states that the court ‘must regard’ Parliament as having decided when passing the legislation the appropriate balance between different Conventions rights, different policy aims and the Convention rights of different persons; and that the court must give the greatest possible weight to the principle that such matters should be decided by Parliament in a parliamentary democracy.

2 Protection of Rights: Incompatibility

➤ Comments:

- 1st: Clause 7 should be seen in the light of the fact that the courts already show considerable respect/deference/weight when reviewing legislation under the HRA;
- 2nd: The clear intent of the BRB is to limit further the judicial function in deciding whether legislation is compatible with Convention rights by instructing the court that it ‘must regard’ the balance struck as appropriate.
- 3rd: The assumption that when devising legislation Parliament has necessarily cast its mind to the appropriate balance does not withstand examination. There are many HRA cases where the rights-based issue was not necessarily thought of or apparent prior to the legislation coming into effect, with the consequence that Parliament had not necessarily addressed the appropriate balance.

3 Protection of Rights: Minimum and Maximum

➤ Clause 3(3): A court determining a question which has arisen in connection with a Convention right cannot give a more expansive interpretation unless the court has no reasonable doubt that the ECtHR would adopt that interpretation if the case were before it; but subject to this, a UK court can diverge from the Strasbourg interpretation.

3 Protection of Rights: Minimum and Maximum

➤ Two comments:

- 1st: It builds a prima facie one way ratchet into the BRB, -- difficult for a UK court to give a more expansive reading of the right, not difficult to interpret it more narrowly;
- 2nd: This clause sits ill at ease with the general approach of the BRB to the ECHR, which is to remove and reduce the impact of the Strasbourg Court. The rationale for the legislative equivocation in this respect is simply ‘political’, to prevent expansive interpretation of rights, : the BRB framers general preference is for rights to be narrowly construed and Clause 3(3) simply serves that purpose, even if there are good reasons for the right to be more expansively interpreted in the UK context.

4 Protection of Rights: Substantive Limit – Positive Obligations

- Clause 5(1): A court may not adopt a post-commencement interpretation of a Convention right that would require a public authority to comply with a positive obligation;
- Three Comments:
 - 1st: There will clearly be cases where it is contestable whether the interpretation would ‘require’ the public authority to comply with a positive obligation. The very line between the two can be contestable;
 - 2nd: Given that Clause 5(1) precludes positive obligations post-commencement, it clearly limits protection of rights, since the interpretation of the right might be more efficaciously protected in this manner;
 - 3rd: Positive obligation is defined broadly to mean an obligation to do any act, Clause 5(7).

4 Protection of Rights: Substantive Limit – Positive Obligations

- Clause 5(2): Requires a post-commencement court to consider whether to apply a pre-commencement interpretation of a Convention right that requires a positive obligation.
- In deciding whether it should do so, the court is required to give ‘great weight’ to the need to avoid a positive obligation that would have the consequences listed in Clause 5(2)(a)-(e).

4 Protection of Rights: Substantive Limit – Positive Obligations

- Two comments:
 - 1st: Clause 5(2) could have the effect that a lower court would depart from a precedent set by a higher court;
 - 2nd: The considerations that the court is instructed to give great weight to are open textured, contestable in application and some verge the reductionist –
 - Consider in this respect Clause 5(2)(a): the ability of the public body to perform its functions;
 - Consider in this respect Clause 5(2)(e): affect the operation of the primary legislation.

5 Protection of Rights: Substantive Limit – Prisoners subject to Custodial Sentence

- Clause 6: Imposes significant limits on the ability of those subject to custodial sentence to invoke Convention rights successfully.
- The court before which the breach of the Convention rights is invoked is instructed to give the ‘greatest possible weight’ to the importance of reducing the risk from persons in respect of whom such sentences have been imposed, Clause 6(2);
- Comment: There has been considerable discussion as to whether prisoners have certain rights, such as the right to vote. Clause 6 is nonetheless novel in so far as it applies to any Convention other than the 4 listed in Clause 6(7).

6 Protection of Rights: Substantive Limit – Deportation Cases

- Clause 8: limits severely the extent to which a person to be deported can rely on right to family life;
- Clause 20: limits severely the extent to which a person to be deported can rely right to fair trial to resist deportation.