Qualified rights, proportionality and remedies

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1. I shall speak about the Government's proposals and consultation questions regarding:
    a. the interpretation and application of qualified rights, including the use of proportionality;
    b. remedies for interference with rights.
2. Purposes of the proposals. The proposals in the Consultation Paper relating to these matters have a number of purposes which run through the Paper. The two main ones, as they relate to my topics, are these.
    a. *Reducing burdens and costs borne by public authorities*. This is to be done by –
        i. making the law clearer and more predictable by limiting the expansion in the scope of rights, especially regarding positive obligations, and managing proportionality assessments to reduce the risk of courts second-guessing Parliament, ministers and other public authorities;
        ii. reducing the amount of litigation against public authorities and the costs incurred in such litigation; and
        iii. reducing amounts of money paid out in damages for violations of rights.
    b. *Reducing tensions between legislative competences and judicial decision-making* by –
        i. adjusting the way courts approach assess necessity in a democratic society; and

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ii. adjusting the way courts approach interpreting other legislation, especially primary legislation which confers delegated legislative power on ministers.

3. At the outset it may be noted that a consequence of moves to restrict the influence of the ECHR and Strasbourg jurisprudence on the UK's legal systems and to limit the capacity of people in the UK to rely on the Convention and Strasbourg jurisprudence before UK courts and tribunals will be to increase the number of applications to Strasbourg and make their success more likely. This will be so for three reasons.

   a. It will be harder for the Government to argue in Strasbourg that an application is inadmissible on the ground that the applicant has not exhausted effective remedies (ECHR Article 35.1) if the availability of domestic remedies specifically for violation of a Convention right is restricted.

   b. In relation to admissible applications, the UK's Government will find it more difficult to establish that proportionality assessments have been appropriately made if courts in the UK are discouraged or prevented from applying Strasbourg approaches to balancing rights and to assessing proportionality.

   c. Restricting UK courts' ability to give effective remedies for violations of Convention rights (assessed according to Strasbourg jurisprudence) would make it more likely that the ECtHR would decide that the UK failed to provide for an effective remedy for an alleged violation of a Convention right, thus violating ECHR Article 13, even if there had been no actual violation of a substantive right.

4. As the UK would still be bound in international law to comply with adverse judgments of the Strasbourg Court once they have become final (ECHR Article 46), the effect would be that the UK's domestic political freedom of action would be constrained by an international tribunal instead of a domestic tribunal.

A. Reducing uncertainty and burdens on public authorities

5. How could a Bill of Rights secure "less scope for ambiguity in interpreting claimants' rights, and less scope for judicial amendment of the statutory frameworks" (para. 140) in order to reduce confusion and risk aversion on the part of public authorities? The Government is concerned about the consequences of *Osman v. United Kingdom* (2000) 29 EHRR 245 (para. 144 ff of the Consultation Paper); extra-territoriality (box on pp. 43-44); proportionality assessments; positive obligations (covering voluntary as well as detained patients: para. 134); *DPP v. Ziegler* [2021] UKSC 23, [2021] 3 WLR 179 and its effect on police and

prosecutors (para 135 of the Consultation Paper); and the expanding right to respect for family life. Some of these are considered in the next section.

6. Clarifying matters which fall outside the competence of courts (para. 201). IHRAR referred to national security, diplomatic relations, resource allocation or where there is no social consensus as well as contentious moral or ethical issues, but did not recommend trying to exclude them from judicial competence. Hard to put these outside judicial competence; it might exclude much of child-care law, medical law, and immigration law. Either too general or too specific; over- or under-inclusive. (Interfering with removals and deportations in public interest is a recurring theme in the Paper: see e.g. at paras 292 ff and the options set out at paras 294 – 296.)

B. Limited and qualified rights, balancing and proportionality

7. Balance between qualified rights and proportionality: freedom of expression and respect for private life etc. The Government considers that free speech has been unduly limited, in favour of privacy, by the Strasbourg Court as interpreted by UK courts, and that s. 12 HRA has not been effective in redressing the balance. It is true that judges and Parliament in the UK have historically been suspicious of moves to protect privacy by contrast with protection of property and physical integrity. It is also true that one effect of Article 8 and the HRA has been to stimulate the development of a new tort of misuse of private information, in which the balance between Articles 8 and 10 is key. In *Pal v. United Kingdom* App. No. 44261/19, [2021] ECHR 990, the UK could not show convincingly that police, prosecutor or courts had considered the proper balance between Art. 10 and Art. 8 rights, leading to a violation of Art. 10.

8. But it is not clear that, where the balancing is correctly carried out, there is a problem. What is more, there is danger in trying to adjust the balance by making general rules about matters which are always highly fact-specific, e.g. *Bloomberg LP v. ZXC* [2022] UKSC 5. Consultation Paper cites *MC v. Slovakia* [2021] ECHR 821, but the important point there is that the national courts had failed to carry out the balancing exercise between Arts 10 and 8 and refused relief in respect of information publication of which was not in a public interest. From this point of view, analysis by Nicklin J. in *ZXC* (upheld by CA and SC) is exemplary, and protects UK against risk of losing in Strasbourg.

9. The Consultation Paper (para. 282 et seq. and Question 23) suggests two possible options for adjusting the process of balancing rights and making proportionality assessments more predictable.

    a. In assessing compatibly of legislation or decisions, "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". But that would not be determinative; great weight might also be attached to other considerations. It is also very hard for Parliament to foresee which rights/interests fall to be balanced in different circumstances. Is it intended to exclude the assessment of proportionality and the way the Strasbourg Court approaches it? If so, it is a recipe for losing a lot of cases in Strasbourg, especially if the legislation gives no hint of how Parliament assessed proportionality. It is also unclear how Parliament can express its view in a way that makes its reasons for making its assessment clear. What is more, it is unclear how it is relevant to individual decisions by ministers and administrators.

b. In assessing the compatibility of legislation or decisions, a court or tribunal "must give great weight to the fact that Parliament was acting in the public interest in passing the legislation". But it is not clear what effect that has. One may act in the public interest but do it in a way that is unnecessary or disproportionately interferes with rights. great weight should be given to the expressed view of Parliament when assessing public interest, to determine compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with rights.

10. We might not like restrictions on freedom to peddle damaging tittle-tattle, but if the UK is to remain part of Convention machinery we need to ensure so far as possible that our courts are conducting balancing assessments and applying proportionality assessments consistently.

11. Higher threshold for giving relief under HRA s. 12(4) – more than "likely" that claimant would be able to establish at trial that publication should not be allowed – possible, but trouble with information about people is that once it is out the damage is done, especially in the era of the internet. Apparently considering limiting interference with Article 10 to "limited and exceptional circumstances" (Question 6), but that would leave UK exposed horribly in Strasbourg even if it were a good thing to do. (Bear in mind that Art. 10 is the only Convention right which expressly refers to duties and responsibilities of the right-bearer.)

12. Protection for journalists' sources (Question 6) is protected by PACE; legislation has weakened it, not strengthened it, and protections owe a great deal to Strasbourg in face of UK legislative interference (*Goodwin*; *Harman*).

13. Responsibilities and the behaviour of claimants. Consultation paper: Bill of Rights "could require courts to give greater consideration to the behaviour of claimants and the wider public interest when interpreting and balancing qualified rights" (para. 131). It is hard to see how the behaviour of claimants could affect the *interpretation* of rights, although it might affect the way rights are balanced against each other in particular cases.

14. The overall purpose of this proposal is to "ensure that claimants' responsibilities, and the rights of others, form a part of the process of making a claim based on the violation of a human right" (ibid.) See paras. 302 ff and Question 27 – reduction of damages. But the cases discussed in the Paper at paras 126-129 to justify this mostly failed. The real objection seems to be to costs being incurred to contest suits brought by prisoners, as well as a suggestion that allowing such suits to be brought damages public confidence in the HRA: paras 129-130. (See also the box on p. 40 of Consultation Paper, where it is not clear whether £7m refers to cost of providing methadone or what the principled objection to providing methadone is where that is medically indicated.) There is a general sense that we do not want prisoners and irregular immigrants or foreign national offenders to assert rights in the same way as other people. But why should they not be able to assert rights? Responsibilities as conditions for having rights? Or some sort of "clean hands" doctrine? But if so, how far does it go? Is it to be related only to the circumstances in which the alleged violation of a right occurred, or does it extend to general behaviour, previous criminal record, tiresome behaviour on social media, etc.?

15. Clarifying matters which fall outside the competence of courts (para. 201). IHRAR referred to national security, diplomatic relations, resource allocation or where there is no social consensus as well as contentious moral or ethical issues. It is hard to put these out of judicial competence; one might end up causing difficulty for much of child-care law, medical law, and immigration law. There is a danger that any list of proscribed fields will be over- or under-inclusive, or both.

C. Remedies

16. Who can sue and whom? "Public authority": should current definition be retained (Question 20)? List as in FOIA? Consultation paper says that current version has "benefit of flexibility, which has allowed the application of the Act to evolve in line with changes in how public functions are delivered" (para 268). But has it really done that? *YL v. Birmingham City Council* [2007] UKH: 27, [2008] 1 AC 95, HL, not very helpful unless "public function" is one that could not, by its nature, be exercised or delivered by a private body. And what about continuing responsibilities of public authority after contracting out (para. 267)? Non-delegable responsibility?

17. Exception from liability where acting in way required by primary legislation (s. 6(2) HRA): note paras. 270-276 and Question 21 about changing what is now HRA s. 6(2) to protect public authorities either (Option 1) when they are "clearly giving effect to primary legislation" "in the way Parliament clearly intended" or (Option 2) as under current version of s. 6(2) but tweaking its effect so that, as under proposed change to s. 3, public authorities would not be liable if implementing unambiguous legislation.

18. Claimants: permission stage: para. 219; claimants to show that they have suffered a "significant disadvantage" as in Strasbourg or *Bundesverfassungsgericht* (Federal Constitutional Court) of Germany. This already seems, however, to be the position with the "victim" test under HRA s. 7(7)). Is there a way of limiting the enforcement of rights to "serious cases" (para. 224 ff)? How would one decide on seriousness? It might, of course, be possible and desirable to make people litigate other causes of action before raising their fundamental rights (para. 226) although having to raise them in successive pieces of litigation might lengthen cases and increase costs overall.

19. Taking account of wider public interest: The Government wants:

- courts to consider impact of award of remedy on the public authority's ability to discharge its mandate (299);
- courts to consider extent to which public authority has discharged its obligations towards claimant and, perhaps, public authority's obligations in general and available resources as well as wider public interest considerations (300);
- courts to have discretion not to award damages against public authorities when authority was trying to give effect to express provisions or clear purpose of legislation, to limit potentially negative impact of individual claims on services benefiting community as a whole (301).

20. Making available suspended and prospective-only remedies in all cases where Convention rights are used to challenge subordinate legislation (para. 252 and Question 16). Would this have a significant effect? How would it work with declarations about subordinate legislation?