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Welcome to Landmark Chambers'

'Bill of Rights Bill' webinar series – Session 1

The recording can be accessed here.

Your speakers today are…

Landmark Chambers

David Lock QC (Chair)

Topic:
Short overview of the Bill

Fiona Scolding QC

Topic:
"It's my way or the highway" - Deference to Parliament and Declarations of Incompatibility

Tim Buley QC

Topic:
Interpretation of Convention rights

Charles Bishop

Topic:
Permission stage

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Short overview of the Bill

David Lock QC

The background

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- For a satirical view on the background see:

See https://www.theguardian.com/culture/video/2016/apr/25/patrick-stewart-sketch-what-has-the-echr-ever-done-for-us-video

- Human Rights Watch have described this Bill as a

> “power grab by the executive” and that “far from being a Bill of Rights, it is a Bill of Wrongs”.

More moderately …

Professor Mark Elliott of Cambridge University has said:

"We can now see, then, that the Bill of Rights forms part of a much bigger picture. The Deputy Prime Minister, Dominic Raab, claims that the Bill of Rights is 'a rights enhancing instrument'. But it's nothing of the sort. It will in fact weaken human rights protection and, as a result, it will weaken the ability of individuals and courts to hold the Government to account by reference to human rights standards. The real aim of the Bill of Rights is not to enhance human rights protection in the UK: it is to shield from scrutiny on human rights grounds a Government whose authoritarian instincts are increasingly evident"

- See https://publiclawforeveryone.com/2022/06/23/1000-words-the-bill-of-rights/

The main proposed effects of the Bill

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- Not yet in law – only a “Bill” before parliament
- see https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf
- Repeals the Human Rights Act 1998 entirely
- UK remains as signatory to the ECHR – still a party to the convention
- It is still unlawful for a public body to act in contravention of convention rights (see cl12)

But seeks a “rebalance”

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- Introduces a “permission” requirement to raise HR issues (clause 15)
- Substantial shift in rights as between journalists and personal confidentiality (cls 21 and 22)
- Interim orders of the ECtHR will no longer have effect
  - Rule 39 of the Rules of Court
  - Only in exceptional cases
  - Arguable that binding nature of decisions of ECtHR under article 46 of ECHR only applies to a final judgment

Other provisions (1)

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- Limits on damages for breach of human rights under clause 18
- Narrowing of sufficient interest for JR under clause 16 to victims
- Limits to the power to avoid deportation of foreign criminals under clause 20
- Preserves jury trial under clause 9
  - Unclear if this was ever under threat save possibly for the duty to give reasons

Other provisions (2)

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- Removes interpretive provisions under s3 HRA
- Makes the UK Supreme Court and not ECtHR ultimate arbitrator of convention rights
  - Not clear how that is compatible with article 32 ECHR but a s19 certificate
- Makes changes to Declarations of Incompatibility
- Changes (and weakens) the law on positive obligations of public bodies (see clause 5

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Interpretation of Convention rights

Tim Buley QC

BILL OF RIGHTS (BILL)

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- The Bill is available here:

  Bill of Rights Bill - Parliamentary Bills - UK Parliament

- When enacted, it will not become the “Bill of Rights Act 2022”, but (see clause 41) simply the Bill of Rights 2022

(1) INTERPRETATION OF THE BILL OF RIGHTS (BILL)

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- The Bill is drafted in a way that is, by comparison with other domestic legislation including the HRA 1998 and other "constitutional" statutes (e.g. the EU Withdrawal Act 2018), unusual or even strange. Many clauses and sub-clauses can be described as "preamble", without any direct legal effect, or at best "declaratory". EG clause 1:

  (1) This Act reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998.

  (2) In particular, this Act clarifies and re-balances the relationship between courts in the United Kingdom, the European Court of Human Rights and Parliament by ensuring—

  (a) that it is the Supreme Court (and not the European Court of Human Rights) that determines the meaning and effect of Convention rights for the purposes of domestic law (see section 3(1));

  (b) 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);

  (c) that courts must give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament (see section 7).

  (3) It is affirmed that judgments, decisions and interim measures of the European Court of Human Rights (a) are not part of domestic law and (b) do not affect the right of Parliament to legislate.

- See also clause 9, on jury trial

(1) INTERPRETATION OF THE BILL OF RIGHTS (BILL)

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- The courts will be faced with a difficulty in how to interpret these provisions, and to what extent they should inform its interpretation of other parts of the Bill of Rights. Some of these provisions appear to be aimed, not at lawyers and courts of law, but at the court of public opinion (or a section thereof) and certain preconceptions about how the HRA 1998 operated.

- You cannot understand the Bill without first understanding that it is a reaction to the Human Rights Act and / or to a particular perception (and / or misunderstanding) of the Human Rights Act

- It is possible nevertheless to read these provisions as a Parliamentary declaration of intent, that UK courts should not only be permitted (as they already are) but encouraged to depart from Strasbourg case law in interpreting the ECHR. On that basis the courts might read into

- More generally, there may be difficult questions as to how the Bill is interpreted, which will be important given the many ambiguities. For example, will the principle of legality, that Parliament must use clear language to take away fundamental rights *(R v SSHD, ex p Simms* [2000] 2 AC 115, be used to limit its power to take away fundamental rights?

(2) NO CONVENTION COMPLIANT INTERPRETATION OF DOMESTIC LEGISLATION

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- Section 3 of the HRA 1998 required courts to interpret legislation, “so far as it is possible to do so”, “in a way which is compatible with Convention rights”.
- Important principle in the HRA, key in many ways to its success.
- Section 3, with the rest of the HRA, will be repealed by the Bill, and (unlike other provisions0 of the HRA) will not be replicated. Clause 1(2)(b) points this out, albeit that is not necessary for the effectiveness of the repeal
- No corresponding principle. Seems bound to lead to more declarations of incompatibility
- Also a recipe for legal chaos, in that it is unclear whether this opens the door to reinterpretation of long-settled understanding of legislation that was given a section 3 interpretation under the HRA. Does the repeal of the HRA thus render uncertain the meaning of all legislation where section 3 was deployed?
- Clause 40 gives strong indication that this is intended, because it gives the Secretary of State power to *preserve* such interpretations by amending legislation (including primary legislation) so that it should be read as if it said what the court had said it meant

(3) INTERPRETATION OF CONVENTION RIGHTS: Position under the HRA

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- Section 2 of the HRA left the interpretation of Convention Rights (i.e. the ECHR rights which the HRA and now the Bill incorporated) to the courts, save that the court must "take account of" various things including judgments of the ECtHR.
- Section 2 did not specify that regard was to be had to the ***text*** of the Convention, but that may be said to be implicit. It would have been a bold and unpromising submission that the court should not have regard to the text of the Convention right that it was interpreting, especially when it was doing so by virtue of the inclusion of that very text into the HRA Schedule
- Early statement of approach, still generally followed, is from *Ullah* [2004] 2 AC 323:

  20. In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: … . This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. … It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.

- Two points in particular:
  - Aim is to follow the interpretation of ECHR as an international treaty, effective in international law
  - The "*Ullah principle",* that UK courts should not generally go further than or be more expansive that Strasbourg

(3) INTERPRETATION OF CONVENTION RIGHTS: The Bill of Rights, overview

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- A number of provisions address the way in which the courts must henceforth approach the interpretation of Convention Rights. At least:
  - Clause 3, “interpretation of the Convention Rights”
  - Clause 4, “Freedom of Speech”
  - Clause 5, “Positive obligations”

- In addition, the following arguably affect that interpretation, or at any affect the way in which the court will approach its task of *applying* Convention Rights:
  - Clause 6, Public Protection
  - Clause 7, “Decisions that are properly made by Parliament”
  - Clause 8, “Deportation”

- Some of these will be considered in other talks, so I will focus on clause 3

(3) INTERPRETATION OF CONVENTION RIGHTS: Interpretation under clause 3

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Clause 3 is the most general interpretative clause, to be contrasted with the later clauses (which address particular topics). It says:

(1) The Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection with the Convention rights.
(2) A court determining a question which has arisen in connection with a Convention right—
(a) must 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;
(b) may have regard to the development under the common law of any right that is similar to the Convention right;
(c) must comply with sections 4 to 8.

- Clause 3(1) is yet another example of preamble or declaration, with no real legal effect (indeed, it largely repeats clause 1(2)(a), which was already in that category).
- Clause 3(2) *may* be more important. But:
  - As to 3(2)(a), it is surely implicit in any legal text that in interpreting it, one should have regard to its text. It is not generally thought necessary to spell that out. It is not clear what "particular" adds to this.
  - As to clause 3(2)(b), the courts have certainly seen themselves as free to have regard to the common law previously (see for example *Unison* [2020] AC 869).
  - Clause 3(2)(c) is a gateway to other provisions which will be covered in other talks

(3) INTERPRETATION OF CONVENTION RIGHTS: Interpretation under clause 3

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- Clause 3(3) and (4) say:

  (3) A court determining a question which has arisen in connection with a Convention right—
  (a) may not adopt an interpretation of the right that expands the protection conferred by the right unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it;
  (b) subject to paragraph (a), may adopt an interpretation of the right that diverges from Strasbourg jurisprudence.
  (4) Subsection (3)(a) does not prevent a court from adopting an interpretation of a Convention right where it does so as a result of complying with section 4 (freedom of speech).

- Clause 3(3)(a) is a (stronger?) version of the *Ullah* principle
- Clause 3(3)(b) makes clear that UK courts not bound by Strasbourg
- What are the boundaries of "interpreting" as opposed to "applying" the ECHR. EG:
  - Is "residence" a "status" for the purposes of Article 14 ECHR? That would appear to be a question of *interpretation* in the pure sense.
  - But what about a case where the ECHR has held that A3P1 (rights to free elections etc) gives prisoners the right to vote (*Hirst v UK* [2006] 42 EHRR 41). It is not clear that that case "interprets" the Convention in any radical way, because the controversy was not whether prisoners are in principle covered by A3P1. The controversy was whether a *complete* ban on prisoner voting was proportionate
- Clause 3(4) makes an exception for free speech / Article 10. But section 4 is about giving "weight" to protection of free speech, not about "interpretation"

(3) INTERPRETATION OF CONVENTION RIGHTS: What about status of Strasbourg case law?

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- Under section 2 of HRA, courts were required to have *regard* to Strasbourg case law, but not bound by it. Since ECHR was an international treaty, as explained by Lord Bingham in *Ullah* they would generally see themselves as having a duty to follow it

- The Bill does not expressly say that they are required to have regard to it, but it certainly does not prohibit it, and Lord Bingham's reasons for following it may be thought (subject to section 3(3) / the *Ullah* principle, to be equally relevant here.

- But one can go further. Section 3(3) makes *explicit* that regard must be had to ECHR case law in some circumstances, and implicit (at least) that it should do so in all cases:
  - Courts are required to ensure that they don't go beyond Strasbourg, at least other than in free speech cases, by section 3(3)
  - Courts are permitted to depart from Strasbourg in other cases, which necessarily implies a need to have regard to Strasbourg

- Brings one back to key question, whether courts will regard these provisions, and especially section 3(3)(b), as encouraging or requiring departure from Strasbourg, or merely replicating the pre-existing position where they are entitled to do so but will generally not.

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“It’s my way or the highway”

Deference to Parliament and Declarations of Incompatibility

Fiona Scolding QC

Deference to Parliament

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- Clauses 6, 7 and 8 of the Bill (now in its Second Reading) - Deference to Parliament as demonstrated in different ways.
- Clause 10 – Declarations of Incompatibility

Clause 7

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- **Decisions that are properly made by Parliament**
- This section applies where —
- (a) a court is determining an incompatibility question in relation to a provision of an Act, and
- (b) in order to determine that question, it is necessary to decide whether the effect of the provision (whether considered alone or with any other relevant provision or matter) on the way in which the Convention rights are secured strikes an appropriate balance—
- (i) as between different policy aims,
  (ii) as between different Convention rights, or
- (iii) as between the Convention rights of different persons; *20* or as between any combination of matters mentioned in sub-paragraphs (i) to (iii).
- The court must—
- (a) regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance as between the matters mentioned in *25* subsection (1)(b)(i) to (iii), and
- (b) 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.
- In this section “an incompatibility question”, in relation to a provision of an *30* Act, means a question whether—
- (a) the provision is incompatible with a Convention right, or
- (b) a public authority which acts (or proposes to act) in accordance with the provision does so in a way which is incompatible with a Convention right. *35*
- A reference in subsection (3)(b) to acting “in accordance with” a provision is to acting so as to comply with, or give effect to or enforce, the provision.

When will this apply ?

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What sort of provisions does it apply to?

- When determining “an incompatibility question in relation to provision of an Act” – so
- Only applies to a challenge to primary legislation (or secondary legislation as well???) .
- Applies to any argument that the provision is incompatible with a Convention right
- And applies to the acts of public authorities act (or propose to act) in a way incompatible with the provision of the Act

When will it apply (2)

- What is the court/tribunal examining?

"It is necessary to decide whether the effect of the provision – whether considered alone, or with any other relevant provision or matter - on the way in which Convention rights are secured strikes an appropriate balance

- As between different policy aims
- As between different Convention rights
- As between the Convention rights of different persons

Or any combination of those.

What does the Court Tribunal have to do?

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- Regard Parliament as having decided in passing the Act that it strikes an appropriate balance between the matters set out above – i.e. that it has considered and struck the balance between different policy aims, convention rights, or convention rights of different persons .
- “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”.

What mechanisms does the court already use?

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- Fundamental constitutional principle that Parliament is sovereign
- That many rights are qualified (Articles 8-11, Article 1 of the First Protocol and Article 2 of the First Protocol) and so the Court has to examine the concept of whether the measure impugned (a) meets a legitimate aim and (b) is necessary in a democratic society – i.e. “proportionate” and that involves examining the rights of others or other competing interests . Article 14 (discrimination) also is qualified in nature.
- The principle well enshrined in domestic (and ECHR) case law – (e.g. R(SC) v SSWP [2021] UKSC 26 that the court does not take over the function of the decision maker, and should not substitute its views on all matters of policy, judgement or discretion: that varies depending upon the rights in question but in cases concerning economic and social policy, there is a wide margin of discretion used.

Queries

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- Clause presumes that all the different convention rights have been considered and the various issues debated during the passage of the Bill through Parliament
- How far does it allow for unintended consequences if the impact of Acts on different groups not envisaged at the time that the Act was passed?

What impact will this clause make?

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- Is this clause superfluous?
- Does it have an unnecessarily chilling effect on the judiciary when examining issues of proportionality?
- Impact in particular upon :

- Social security and other claims related to state benefits/grants
- Housing cases
- Immigration cases
- Privacy claims (Article 8 vs 10)
- Discrimination cases brought under Article 14
- Article 1 of the First Protocol – so expropriation of land/property – compulsory purchase, planning issues?

Public protection – clause 6

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- In any case which involves (a) a question as to breach of Convention Rights and (b) the person was subject to custodial sentence when the alleged breach happened then :
- The Court must give the greatest possible weight to the importance of reducing the risk to the public
- This particular includes (Cl 6(3)) a decision whether to release someone from custody or : which part of prison someone should be placed within.
- Does not apply to claims brought under Article 2, 3, 4 and 7 (life, torture, slavery/forced labour and no punishment without law).

Impact

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- The consultation response ,and explanatory notes make it clear that this is in response to and as part of reforms to the parole board.
- It is designed “to strengthen the government’s hand in contesting human rights claims from prisoners opposing their placement in a separation centre and the government’s ability to defend human rights claims brought regarding the deportation of foreign national offenders”. (paragraph 33 of the explanatory notes)

Deportation (seminar 3 preview)

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- Clause 8: in any deportation decision concerning a “foreign criminal” , where there is an allegation that removal to another country would breach Article 8 , no breach of Article 8 can be found unless:
- Manifest harm that is so extreme (cl 8(3) defines as “exceptional and overwhelming” and “is incapable of being mitigated to any significant extent or is otherwise irreversible”) that it would override the otherwise paramount public interest in removing the person from the UK
- Only applies to P’s family . Has to be “compelling circumstances” if it applies to anyone other than a “qualifying child” and has to outweigh the “strong public interest” in removal.
- “Qualifying child” means under 18, someone always has “genuine and subsisting parental relationship” and has lived in UK for at least 7 years.

Declarations of incompatibility (Cl 10)

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- The text of the Bill is identical to that of the HRA 1998, save in one respect
- It permits subordinate legislation – i.e. regulations to be the subject of declarations of incompatibility
- Declarations of incompatibility do not change the law: simply indicating to Parliament that the legislation is deficient .
- But alongside the repeal of s3, alters the previous position that subordinate legislation must be read in ways which are compatible with Convention rights (R(W) v SSHD [2020] EWHC 1299 and RR v SSWP [2019] UKSC 52 at [29-30])- unless they are mandated by primary legislation. This meant in principle that provisions of delegated legislation which resulted in a breach of the Convention should be disregarded. That is no longer.

Impact on changes under Clause 10

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- Along with repeal of s3, means that subordinate legislation will either have to be
- Struck down
- Declared incompatible

If it is in breach of the HRA, rather than being able to continue with the legislation just disregarding the bits which are not compatible – or reading them in a way which is compatible, if strained.

- In areas of law where lots of secondary legislation (arguably now everything but in particular education, family justice, health and social care, social security , agriculture and the environment) this could be highly material.

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Permission stage

Charles Bishop

Introduction

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- This session will cover the introduction of a new “permission stage” to human rights claims.

- To understand what this might mean in practice, we need to understand who can bring human rights claims currently. So we will look at the current law on “victim status” and what that means.

- Then we will go through the wording of the new permission stage and how that might fit alongside victim status, which will remain.

Victim status in human rights claims

- Public authorities are under a duty to act compatibly with Convention rights: section 6 Human Rights Act 1998 (HRA 1998).
- A person who claims that a public authority has acted unlawfully under s6 may bring proceedings under the HRA 1998 or rely on the Convention right in any legal proceedings, but **only if** she is, or would be, a **victim** of the unlawful act: s 7(1).
- If the proceedings are by way of judicial review, an individual only has standing if they are a victim: section 7(4).
- However, the victim test does not apply for the purposes of challenging the compatibility of legislation with Convention rights under ss 3 and 4 HRA: *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2019] 1 All ER 173 at §§17, 62 185.

Who is a victim?

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- A victim is defined by reference to Article 34 of the European Convention on Human Rights (ECHR): s7(7). The courts have made clear that the meaning of "victim" is given its "autonomous Convention meaning" within Article 34 ECHR: *Al Hassan-Daniel v HMRC* [2011] QB 866 at §23. This itself is consistent with Strasbourg case law which provides that Art 34 must be interpreted irrespective of domestic concepts such as "interest or capacity to act": see e.g. *Lizarraga v Spain* (2007) 45 E.H.R.R. 45 at §35.

ARTICLE 34

Individual applications

The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be **the victim of a violation** by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Who is a victim under Art. 34?

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- Those who are **directly or indirectly affected** by the act or omission in question: see e.g. *Lüdi v Switzerland* (1993) EHRR 173 at §34 (on directly affected) and *Vallianatos v Greece* (2014) 59 EHRR 12 at §47. Indirect victims are those to whom the violation **would cause harm or who would have a valid personal interest** in seeing it brought to an end.

- In the case of the existence of secret measures, where the applicant is a potential victim: see eg *Klass v Germany* (1979-80) 2 EHRR 214.

- Existence of a law (e.g. criminalisation of homosexual acts) may continuously and directly affect an individual if it forces them to change their behaviour, even if they have not yet been prosecuted: see e.g. *Dudgeon v UK* (1981) 3 EHRR 40 at §86

- Threat of future violation is also sufficient in removal cases: see e.g. *Soering v UK* (1989) 11 EHRR 439 at §109; *Othman v UK* (2012) 55 EHRR 1 (in context of Art 6).

Who is a victim under Art. 34?

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- An individual can be “directly affected” in relation to benefits that should exist but do not (contrary to Convention rights) if they have “done something which identifies [them] as having wished to make a claim”: *Hooper v SSWP* [2005 1 WLR 1681 at §56.

- The test may be summarised as whether claimant can establish they “‘run the risk of being directly affected by’ the measure of which complaint is made”: *Lancashire County Council v Taylor* [2005] 1 WLR 2668 at §39.

Clause 15 of the Bill of Rights Bill

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15 Permission required to bring proceedings

(1) No proceedings under **section 13(2)(a)** may be brought by a person in relation to an act (or proposed act) of a public authority **unless the person has obtained permission** from the court in which the proceedings are to be brought.

What proceedings are in scope?

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Cl13(2)(a) relates only to proceedings (including JRs) being brought by a person who claims that a public authority has acted or proposes to act in a way which is made unlawful by clause 12(1). Cl12(1) is the equivalent of s6(1) HRA, subject to some modifications.

Thus the permission stage does not apply to those relying on Convention rights in other proceedings – e.g. as a defence to a criminal prosecution.

And it does not apply to:

- JRs in Scotland or Northern Ireland: cl15(2)(a) (and see cl16);
- proceedings before the Investigatory Powers Tribunal: cl15(2)(b);
- proceedings relating to a deportation order in respect of a foreign criminal: cl15(2)(c).

How do you get permission?

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CI15(3):

The court may grant permission only if **it considers that**—

(a) the person is (or would be) a **victim** of the act (or proposed act), and

(b) the person **has suffered** (or **would suffer**) a **significant disadvantage** in relation to the act (or proposed act).

So:

1. Retention of the victim test.
2. Introduction of a test of “significant disadvantage”

1. Victim status under the Bill of Rights Bill

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- No change: the victim test essentially remains the same under the BRB: cl13(6) incorporates Art. 34 ECHR.

- But as will now be considered at an earlier stage, likely to be raised more frequently and requires addressing upfront. No longer burden on defendants to strike out claim on this basis.

2. Significant disadvantage

CI15(8):

For the purposes of this section a person has suffered (or would suffer) a "significant disadvantage" in relation to an act (or proposed act) only if the person would be regarded as suffering significant disadvantage for the purposes of Article 35 of the Convention (admissibility criteria) if proceedings were brought in the European Court of Human Rights in respect of that act (or proposed act).

- Test in Article 35 was introduced by Protocol No. 14 effective from 1 June 2010. Protocol No. 14 was agreed by Contracting Parties on 13 May 2004 with the ambition to address the court's backlog, which was significant at that point (see JCHR report from Dec 2004). No clear analogy to present situation where no evidence of backlog of human rights claims in UK courts.
- Wording of Article 35 does not add to this concept: have to look at Strasbourg authorities.

What is significant disadvantage?

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- The criterion *"hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed, taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case"*: *Ladygin v Russia* (app. no. 35365/05) 30 Aug 2011 (inadmissibility decision).

- The applicant's subjective perception has to be justifiable on objective grounds: *Ladygin* (above).

- Violation may concern important questions of principle and thus ***may*** cause a significant disadvantage regardless of pecuniary interest: see e.g. *Korolev v Russia* (app. no. 25551/05) 1 July 2010 (Art 6 and A1P1 case)

Law on significant disadvantage

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- Strasbourg court has adopted different approaches to different articles:
  - Article 2 (right to life): court rejected application as right to life one of most fundamental provisions: *Makuchyan and Minasyan v Azerbaijan and Hungary* (app. no. 17247/13) 26 May 2020 §§72-73
  - Article 3 (prohibition on torture and inhuman/degrading treatment/punishment): Court found it "difficult to envisage" a situation where this inadmissibility criterion would add anything in Art 3 cases *Y v Latvia* (app. no. 61183/08) 21 October 2014 §44
  - Article 5 (right to liberty and security): Court has "so far rejected application" in Art 5 cases *Zelčs v Latvia* (app. no. 65367/16) 20 Feb 2020 §44
  - Article 9 (freedom of thought, conscience and religion): application should take due account of importance of freedoms of thought, conscience and religion and be subject to careful scrutiny *Stavropoulos and Others v Greece* §§29-30 (app. no. 52484/18) 25 Jun 2020
  - Article 10 (freedom of expression): similar to Art. 9, such scrutiny should encompass elements such as the contribution made to a debate of general interest and whether the case involves the press or other news media: see e.g. *Margulev v Russia* (app. no. 15449/09) 8 Oct 2019 §§41-42
  - Article 11 (freedom of assembly and association): Court should take due account of the importance of these freedoms for a democratic society and carry out a careful scrutiny *Obote v Russia* §31

What is significant disadvantage?

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- In *Giusti v Italy* (app. no. 13175/03) at §§22-36, court could take into account nature of the right allegedly violated, the seriousness of the claimed violation and/or the potential consequences of the violation on the personal situation of the applicant. In evaluating these consequences, the Court will examine, in particular, what is at stake or the outcome of the national proceedings.

- Court can take into account the applicant's conduct, for example in being inactive in court proceedings during a certain period which demonstrated that the proceedings could not have been significant to her: *Shefer v Russia* (app. no. 45175/04) 13 March 2012

Exceptions

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Cl 15(4): “The court may **disregard** the requirement in subsection (3)(b) if it considers that it is appropriate to do so for reasons of **wholly exceptional public interest**.”

If the court grants permission in reliance on cl15(4), the court must certify that that condition is met: cl15(5).

- Will this mean the same as Art. 35(3)(b) which prevents an inadmissibility finding where *“respect for human rights ... requires an examination of the application on the merits”*? This has not necessarily been interpreted to refer to *“wholly exceptional public interest cases”.*
- Unclear: courts likely to consider there are reasons why Parliament chose language of cl15(4) rather than Art. 35(3)(b).
- Unclear what “wholly exceptional” means in this context. Presumably it must mean *more than* exceptional. Equally unclear what will be in the “public interest”.
- Likely category is where may resolve important point of law.

Appeal route

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Cl 15(6)

A person who is refused permission under this section—

(a) may appeal against that refusal to such court as may be specified in **rules**, but

(b) may not appeal to any other court against any decision made on an appeal under paragraph (a).

- Useful comparator is the jurisdiction to appeal a refusal of permission to bring judicial review, which allows an appeal to the Court of Appeal but no further onward appeal if that is refused.
- Power to make rules which may make "further provision about permission and appeals" under cl15: cl15(7). See also cl 31 for further provision on "rules". No further info on this in the delegated powers memorandum.

Purpose of the permission stage?

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- Explanatory Notes describes the purpose as to *"ensure trivial cases do not undermine public confidence in human rights more broadly"* (para 16).
- Para 15 claims the absence of a procedure at the start of HRA proceedings to ensure claims are *"sufficiently serious to merit the expenditure of court time and resources...has also resulted in a situation whereby public authorities have incurred significant costs, including legal costs, in defending themselves against trivial claims under the HRA which have later been found not to be sufficiently serious and have wasted court time and public resources."*
- Para 17 suggests the introduction of the permission stage *"will ensure that courts focus on serious human rights-based claims and place responsibility on the claimant to demonstrate that they have suffered a significant disadvantage before a human rights claim can be proceeded to trial."*
- Proposed reforms did not enjoy public support. Chapter 2 of "Human Rights Act Reform: A Modern Bill of Rights Consultation Response": "*we asked if a condition that a claimant has suffered a 'significant disadvantage' in order to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way to ensure courts focus on genuine human rights matters. Of the 2,867 respondents who directly responded to this question, 2,568* ***(90%) responded no****, and 299 (10%) responded yes*."
- The original proposal simply introduced a "significant disadvantage" threshold. However, in the response the government said it had decided to "expressly" link the new requirement to the jurisprudence under the Strasbourg court's admissibility criterion.

Practical implications

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1.Retention of importance of Strasbourg authorities in respect of interpreting "significant disadvantage" and "victim": indeed, lawyers will now need to engage more than ever with Strasbourg case law on "significant disadvantage". Inconsistency with new approach of interpreting Convention rights.

2.Survey of govt consultation and response suggests "significant disadvantage" may in fact be a low threshold, intended to prevent "frivolous or spurious" claims. The "Human Rights Act Reform: A Modern Bill Of Rights consultation" supports this idea: "*We believe it is wrong that the burden is on public bodies to apply to courts to strike out frivolous or spurious human rights claims. A permission stage would shift responsibility to the claimant to demonstrate that a human rights claim does, in practice, raise a claim which merits the court's attention and resources"* (para 221). The Impact Assessment also indicates overall volume of cases may only be "*reduced slightly*" (para 169). This is supported by approach Strasbourg takes to reduce importance in respect of many of the core rights.

Practical implications

3. Biggest impact likely to be in relation to rights subject to some sort of proportionality analysis. Article 6 and A1P1 in particular prime targets for this test.
4. Open question will be extent to which court's varying approach to different articles carries through to domestic case law – would it be lawful for courts to apply significant disadvantage test to Art 3 claims?
5. Explanatory Notes suggests intention of a burden of proof in *evidence* on claimants: see e.g. para 134 ("*in the absence of a claimant being able to evidence a significant disadvantage*"). Thus it is not enough for them to demonstrate that, *if the facts they allege are true*, they would have suffered significant disadvantage. This is probably consistent with statutory language to ensure the court *considers* you have suffered significant disadvantage.

Practical implications

Landmark Chambers

6. Impact assessment identifies "*it is intended to be mainly a paper-based procedure for the courts*" (para 165). Question mark over whether, if there is a refusal on the papers, it could be reconsidered at an oral hearing – how does that fit with provision on appeal right?

7. In a judicial review, do you just need to demonstrate at the permission stage that it is arguable you have suffered significant disadvantage?

Practical implications

Landmark Chambers

8. There is still no requirement to demonstrate victimhood to obtain a declaration of incompatibility, and thus the old case law in relation to that will remain. However, given there is no duty comparable to s3 HRA 1998 to interpret legislation compatibly with Convention rights (which never required victimhood to assert), there may be a renewed importance to victim status in other cases. Unclear where this leaves this.

9. Impact assessment identifies that "*The implementation of a permission stage will generate some costs for the wider justice system, including when dealing with appeals*" (p2), but equally identifies it may lead to "*savings for some public authorities through reduced litigation costs*" (p3). But ultimately it notes that the "*exact cost will depend on how the permission stage is implemented*" through the rules (para 165).

Compatibility with Convention?

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- The Human Rights Memorandum records:

"The threshold set by clauses 15 -16 is modelled on the ECtHR's own admissibility criteria, which provide the route by which arguable breaches of the ECHR rights by States may be assessed by the ECtHR. Previously, the requirement to declare inadmissible any application in which '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' was subject to a caveat preventing the ECtHR from ruling inadmissible a case in which the applicant had not suffered a significant disadvantage where there had been no consideration by a domestic tribunal. Protocol 14 to the ECHR removed the caveat, such that now there is no requirement, in order for an application involving insignificant harm to be declared inadmissible, that a domestic tribunal should first have opined. This was stated to be in order 'to give greater effect to the maxim de minimis non curat praetor'. An alleged breach causing no significant disadvantage (unless respect for human rights requires examination of the application on the merits) does not, under the Convention, require an effective remedy; and the provision is thus considered to be compatible."

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Thank you for listening

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