



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: [Legislative Scrutiny: Bill of Rights Bill](#), HC 611

Wednesday 7 September 2022

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Members present: Joanna Cherry MP (Chair); Baroness Chisholm of Owlpen; Lord Dubs; Florence Eshalomi MP; Lord Henley; Baroness Ludford; Lord Singh of Wimbledon CBE.

Questions 9 – 15

Witnesses

[II](#): Lord Sumption, Former Judge, Supreme Court; Tom Hickman QC, Barrister at Blackstone Chambers, and Professor of Public Law at University College London; Kate O'Regan, Professor of Human Rights Law at The University of Oxford, and Director at The Bonavero Institute of Human Rights.

Examination of witness

Lord Sumption, Professor Tom Hickman QC and Professor Kate O'Regan.

Q9 Chair: Welcome back to the second evidence session of the Joint Committee on Human Rights this afternoon, where we are joined by a panel of three witnesses to take evidence on the Government's Bill of Rights Bill.

Our first witness is Lord Jonathan Sumption, who was a judge of the United Kingdom Supreme Court between 2012 and 2018. He was called to the Bar in 1975, and it will be remembered that in 2019 he delivered the Reith Lectures for Radio 4 in which he criticised the Strasbourg court's interpretation of the European Convention on Human Rights. Thank you for joining us this afternoon, Lord Sumption. We are very grateful to you for your time.

Our second witness is Tom Hickman QC, a barrister at Blackstone Chambers and professor of public law at University College London. Tom has conducted litigation for the UK Government, including the Treasury and the Ministry of Defence.

Last, but by no means least, we are delighted to welcome Professor Kate O'Regan, who is professor of human rights law at the University of Oxford and the director of the Bonavero Institute of Human Rights. She is a former judge of the Constitutional Court of South Africa, in which she served from 1994 until 2009. She has worked extensively to promote democracy, the rule of law, human rights and equality. She is very welcome this afternoon. Thank you so much to all three of you for joining us.

As I have explained previously, we are in a slightly curious situation today because we know that the Second Reading of the Bill of Rights Bill, which was due to take place in the House of Commons next Monday, has been delayed. We understand that the Bill may be shelved and a senior government source has said that it is not going to go ahead in its current form. None of those last points has been confirmed by the Government. None the less, this afternoon's evidence session is a useful exercise in the committee's duty to scrutinise legislation before Parliament.

I am going to start with a general question to all three witnesses. Do you think that the Human Rights Act should be repealed, and, if so, why? Perhaps I could start with you, Lord Sumption.

Lord Sumption: I am not surprised that the method adopted was to repeal and replace the Human Rights Act because of the radical nature of the draft legislation that is before you. A less radical scheme could have been achieved by amending the existing Act.

Chair: Thank you very much. Professor O'Regan, do you think the Human Rights Act should be repealed?

Kate O'Regan: My stance, speaking as a South African lawyer and a comparativist, is that the Human Rights Act strikes a remarkably deft balance between parliamentary sovereignty and the need to meet the United Kingdom's obligations under the European Convention of Human Rights, particularly through the technique of the declaration of incompatibility. I also think that this is demonstrated in the IHRAR report about which Sir Peter Gross has spoken a short while ago. It has been remarkably successful in practice. It may well be that small aspects of the Human Rights Act could benefit from some amendment, but the overall experience, looking at it as a comparative lawyer, has been that it has been very successful in practice.

Chair: Thank you. Mr Hickman.

Professor Tom Hickman: Thank you. I agree. I do not think the Human Rights Act should be repealed. I certainly do not hold the Human Rights Act in perhaps quite such high esteem and do not necessarily think it works quite as well, but there is certainly nothing fundamentally wrong with it and there is no depth of support for repealing it. That was the conclusion of the independent Human Rights Act review, which, although it did not look at repeal, noted that there was no depth of support for repealing it and nothing that cannot be achieved by simple amendments to the Human Rights Act.

Chair: I miscalled you there. I should, of course, have given you the dignity of your title as professor of public law. Can I stick with you, professor, and ask you this? Are there any clauses in the Bill of Rights Bill that you welcome as important or making any necessary changes to the domestic human rights framework?

Professor Tom Hickman: The one clause in the Bill that I think is definitely a positive contribution to the human rights framework overall would be Clause 25 were it enacted, which relates to the notification of Parliament of adverse rulings of the European Court of Human Rights. There is an assumption that Parliament has a watching vigil over what is going on in Strasbourg and in other international tribunals and so forth when it does not, in fact, have that. It would assist in making Parliament's role clear that Parliament can be vigilant and can ensure that its scrutiny functions are undertaken and fully informed of what has been going on.

Chair: Are there any clauses that you are particularly concerned about in the Bill of Rights?

Professor Tom Hickman: I suppose I would identify two clauses. The first is Clause 14, which relates to overseas military operations. During the independent Human Rights Act review, there was consideration of a suggestion that overseas military operations might be subject to a specialist tribunal if there were any concerns about the way those sorts of claims were dealt with by domestic courts.

The response of the Ministry of Defence was that it had full confidence in the British courts to deal with such claims. In those circumstances, taking away the jurisdiction of the courts entirely seems to me to be a serious mistake, and it would have the effect of meaning that the actions of the military were, in the first instance and the only instance, the subject of consideration in Strasbourg without the benefit of the domestic courts or, were there to be one, a domestic tribunal considering that. That seems to me to be a mistake.

The other clause that I would identify would be Clause 8 on deportations. That relates to foreign national criminals, which covers anybody who does not have British nationality even if they were born and raised in this country, and would have the effect that many people who were brought up British for all intents and purposes would be deported if they have committed criminal offences to countries to which they had no connection or perhaps had never even been.

It is a difficult area, because deportation of foreign national criminals would generally be very much in the public interest, but there are exceptional circumstances and exceptional situations that arise, and it seems to me that the courts are the best place for those exceptional circumstances to be considered and identified. To try to dictate to the courts in advance how those very difficult sorts of exceptional cases should be resolved is, again, a very serious mistake. That would be subject to challenge, no doubt, before the European Court of Human Rights.

Chair: Thank you. I will turn to Professor O'Regan and ask the same question. Are there any clauses in the Bill of Rights that you particularly welcome or any clauses you are particularly concerned about?

Kate O'Regan: I agree with Professor Hickman that Clause 25 is a very good clause that requires Parliament to be informed of adverse decisions in Strasbourg. I notice, however, that a subsection in Section 19 of the Human Rights Act, which requires a Minister introducing a Bill to a Second Reading to make a declaration as to the investigation of its compatibility with the convention, has not reappeared in the Bill of Rights Bill. In some ways, Clause 25 plays an important role, but you see a similar role having been removed by the proposed repeal of Section 19. That is the main clause that I would point to just like Professor Hickman. Would you like me to answer the question about clauses that concern me?

Chair: Yes.

Kate O'Regan: The one that I would like to pick out differently from Professor Hickman is Clause 40 of the Bill, which is an attempt at dealing with the proposed repeal of Section 3 and then the attempt to try to undo through executive legislation, effectively, the courts' interpretation of legislation apparently in terms of Section 3. There is a mixture of difficulties with this clause. One is that it puts it firmly into the hands of the executive powers of legislation, which is never a desirable position.

Even more worrying, as Sir Peter mentioned in his evidence, is that it is not clear in many cases where the courts have, in fact, invoked Section 3 in relation to their interpretation, so it also creates a fog of uncertainty as to the circumstances in which the Executive could exercise this power. So it is a doubly unsatisfactory clause. There are others, but that is one that really stands out for me as a worrying clause.

Chair: Thank you very much. Lord Sumption, I wonder if I could ask you the same question. Are there any clauses in the Bill of Rights Bill that you particularly welcome or any clauses that you have a particular concern about?

Lord Sumption: I find it difficult to answer that question by reference to specific clauses, because my concern about this draft legislation is altogether broader. First, I broadly welcome the objectives as stated in Clause 1, so I am not in principle an opponent of trying to do these things. However, it seems to me that the problem about the whole of the current draft legislation is that it is endeavouring to square a circle that cannot be squared. It is trying to retain membership of the European convention while doing a number of things that are plainly incompatible with it.

Sir Peter Gross is, therefore, absolutely right to say that this would introduce a gap between rights that can be enforced in the UK and rights that can be enforced in Strasbourg. That is not simply a lack of tidiness. It is very difficult to reconcile with international law, first, because the status of the Strasbourg court, whether one likes it or not, is that it is the authorised interpreter of the convention, with the result that the convention effectively means what the Strasbourg court says it means.

Secondly, under Articles 44 and 46 of the convention, there are provisions for enforcement that, among other things, require the British state to comply with judgments to which it is itself party.

There are a number of things that I will not go into at this stage unless you ask me to. There are five particular areas where the Bill, if it passed in this form, would open up a gap between Strasbourg and the UK that would not be comfortable and would not be consistent with having any real relationship with the convention at all.

Chair: Can you give us just a brief outline?

Lord Sumption: I can certainly identify them at some stage.

Chair: Could you identify those five areas for us, Lord Sumption, just in brief?

Lord Sumption: Absolutely. I will do that straightaway.

Chair: Thank you.

Lord Sumption: First, there are cases where the new statutory rules of interpretation produce a different result from the rules of interpretation applied by Strasbourg, which are altogether broader.

Secondly, it is a question of proportionality, which is the issue on which a very high proportion of human rights cases are decided. It has to be decided by Parliament and may be decided by Parliament differently from the way in which it would be decided by the Strasbourg court. Indeed, that is the whole object of Clause 7.

Thirdly, there is the area of positive obligations, about which very little has been said so far, but that is an enormously important area on which I am persuaded that the draftsman had no idea what he was actually taking on.

Broadly speaking, the obligations under a treaty like this are, first, that the state must not violate the convention itself; secondly, that it must protect people from violation by third parties; and, thirdly, that it must incorporate this in its law. The second and third are positive obligations, so Clause 5, by putting brakes on the recognition of positive obligations, is actually driving a coach and horses through a major part of the jurisprudence of Strasbourg.

Fourthly, there is the area of expanded rights, an area in which I have in the past criticised the approach of the Strasbourg court, but that does mean that we are likely to get expanded rights from Strasbourg that would not be recognised in the UK.

Fifthly, Clauses 27 and 28 are about reservations and derogations. Those clauses appear to give the Secretary of State a power that may be implicitly limited, but is certainly not limited by anything in the Act, to derogate from the convention in circumstances that would not be permitted by the relevant article of the convention itself, which confines the right of derogation to cases of war and other cases where the life of the nation is at risk.

Chair: Do you think this Bill of Rights legislation, if it was passed by Parliament, would result in greater respect for parliamentary sovereignty than the Human Rights Act, Lord Sumption?

Lord Sumption: It would to some extent, because in many ways the expanded rights that have emerged from Strasbourg are a form of legislation that is being handed to a body that does not stand within the constitutional framework of the United Kingdom. If I may go back to a point that you made to Sir Peter Gross, this is not about originalism.

There is a difference between the way that you interpret a text so as to make it relevant to the current day—in other words, you interpret the text as applicable in current situations—and creating analogous and supplementary rights, which is what in many cases the Strasbourg court has done. That undoubtedly is a process that undermines the sovereignty of the United Kingdom's own decision-making organs. It may undermine

it in ways that many people would approve of—I am not going into that issue at all—but it does so without question.

Chair: Professor O'Regan, from what you said to me earlier when you described the Human Rights Act as very deftly encompassing the United Kingdom's obligations under the ECHR while also paying respect to parliamentary sovereignty, you would possibly disagree with that. Is that your view?

Kate O'Regan: It is my view. The starting point for that view is that the Human Rights Act was originally enacted by Parliament, so it saw this as a way of ensuring that human rights were protected in the United Kingdom by British courts. Inevitably, Parliament cannot pay attention to every small human rights issue that arises, and giving that authority to courts does not take anything away from parliamentary sovereignty.

Looking at the Bill, although I agree with Lord Sumption that there are elements of the Bill, arguably Clause 7, that might enhance the role of Parliament, I am not sure that it strikes an appropriate balance between judicial power and Parliament, because that is the provision that deals with proportionality and seeks to say that courts should be deferential or presume that any balance that is struck in legislation has been struck by Parliament correctly between the interests of the right and whatever public interest there may be in limiting a right. That enhances Parliament's power, but it also diminishes the court's authority. "Micromanaging the courts" is how Professor Elliott referred to it.

I have also mentioned earlier my concern that the non-replication of Section 19 of the Human Rights Act, the duty upon the Minister introducing legislation to satisfy herself or himself that the legislation is indeed compatible with the convention, weakens Parliament's scrutiny of legislation, or may weaken it, in the process of making it, and that seems to me to be an unfortunate aspect of the proposed Bill.

Q10 **Baroness Ludford:** I will put the question out there and perhaps whoever would like to answer it can, rather than going round to you all in turn. The Government say that the way the courts have applied the Human Rights Act has led to uncertainty in the law. Do you think the Bill of Rights Bill will or would have reduced uncertainty? Does anybody in particular want to pick that up? Professor Hickman is smiling, which either means he wants to or does not want to.

Professor Tom Hickman: I think probably "grinning" would be the accurate description. It is fairly obvious that the Bill of Rights will increase uncertainty in the area of giving effect to human rights. Its provisions are in some respects obscure, in some respects unorthodox, and in many respects destabilising. There are provisions, for example, directing the courts to have regard to the text and the travaux of convention rights, the purpose of which and how they would operate is somewhat obscure. The way that the courts are directed to give particular weight to Parliament's decisions—in other cases, it is great weight or the greatest possible weight—is unorthodox, to put it mildly.

Overall, the approach is highly destabilising because, using the phrase we have used before today, by seeking to micromanage the approach of the courts across the whole plateau of human rights, it means that there will inevitably have to be a lot of re-litigation of issues that have previously been resolved because all the questions about how rights should be interpreted will need to be looked at again. It will create a great deal of uncertainty, a great deal of litigation, and it would be highly destabilising. The idea that it is going to improve the clarity and stability of the law is clearly wrong.

Baroness Ludford: Lord Sumption, can I tempt you to come in?

Lord Sumption: Broadly, I take the same view as Professor Hickman. All new legislation creates potential uncertainty, particularly when it takes an existing area covered by jurisprudence and endeavours to start again. That is an inevitable source of uncertainty. It is increased in this case by the fact that this is, if I may say so, a singularly badly drafted Bill, and it uses expressions such as "weight", "great weight", "the greatest possible weight" and "with no reasonable doubt", which, frankly, do not belong to the language of legal analysis at all and which the courts will find it very difficult to grapple with. To that extent, it will undoubtedly increase uncertainty.

Baroness Ludford: Thank you very much. Professor O'Regan, do you want to come in on this one?

Kate O'Regan: I agree with both Lord Sumption and Professor Hickman in this regard.

Baroness Ludford: Great. Thank you very much.

Q11 **Lord Singh of Wimbledon:** I am a Cross-Bench Member of the House of Lords. My question is on the UK's international obligations, directed particularly to Lord Sumption. You have previously stated that a situation in which the domestic law in the UK was persistently at odds with its international obligations would be extremely uncomfortable. Do you think the Bill of Rights could lead to that position, and, if so, why?

Lord Sumption: I think it undoubtedly would lead to that position. I identified in an answer to the Chair's question to me at the outset five areas where it seems to me very likely that the UK would end up by diverging from the way that the convention is applied by Strasbourg. The way that the convention is applied by Strasbourg is binding on the UK in two respects. First, the Strasbourg court is the authorised interpreter under the treaty that we have signed up to, and, secondly, in Article 44 we have a convention obligation to comply with judgments in cases to which we are party.

What will happen is that people will petition Strasbourg if they do not like the outcome in the UK and the Government will end up paying damages because of the gap that has opened up and the fact that many people who would have had rights under Strasbourg's law as applied in the UK

will no longer have those rights or no longer have them to the same extent.

Lord Singh of Wimbledon: If I could just follow on, Lord Sumption, could you tell us which clauses could lead to UK domestic law being permanently at odds with its international obligations, and how could that situation be avoided?

Lord Sumption: The principal clauses in question are, obviously, Clause 3, interpretation of convention rights; Clause 5, positive obligations, which are an important part of Strasbourg jurisprudence but would be limited if this Bill were passed in its current form; and Clause 7, decisions that are properly made by Parliament that will potentially lead to cases where a court would have decided matters differently from Parliament.

However, I should say that that is more likely to arise as between Strasbourg and Parliament than as between the UK courts and Parliament because there have been some very important developments in human rights law just in the past 18 months, including two major decisions of the Supreme Court, both of which said that in principle the courts should take their cue from Parliament in deciding where the public interest lies and where the balance between the public interest and private rights lies.

The major case is the Child Poverty Action Group case decided last July. By judicial decision, we have already arrived some way towards the objective that is desired by the draftsman of this Bill. The other clauses, as I indicated earlier, are Clauses 27 and 28 on derogations and reservations and Clause 3 on expanded rights.

Lord Singh of Wimbledon: Thank you very much. That is very helpful.

Q12 **Lord Dubs:** This is specifically to Lord Sumption. Clause 7 of the Bill would effectively require the courts to accept that the balancing of policy aims and convention rights is always properly carried out by Parliament. This clause was described by Lord Pannick, an eminent lawyer and expert on human rights, as we know, as proceeding on a basis of complete ignorance of the way in which the judicial process operates. Would you agree with that assessment?

Lord Sumption: I entirely disagree with it. I do not know when Lord Pannick made that statement, but it seems to me that the developments in the jurisprudence of the Supreme Court, which I referred to in answer to Lord Singh of Wimbledon, indicate that this is a place that we are already arriving at under existing case law. I therefore find it very difficult to accept a statement quite as extreme as Lord Pannick's.

Lord Dubs: Seven special UN rapporteurs have also expressed concerns that other clauses in the Bill, including Clause 4, which would require courts to give great weight to freedom of speech, and Clause 7, which would place limitations on how judges must interpret convention rights, would unduly restrict the role of the courts. Do you agree with that?

Lord Sumption: The short answer is no, I do not, but it very much depends on what your starting point is. International human rights law, including in particular the views expressed by the relevant committees of the United Nations, have always put a premium on judicial lawmaking by comparison with legislative lawmaking. That particular statement is therefore one that is very characteristic of international human rights law. It is not a matter for me as a witness to say which should prevail as between judicial and legislative lawmaking. My view on the matter is that, in a democracy, fundamental issues of principle ought to be decided by the legislature and interpreted by the courts; they should not be decided by the courts themselves.

Lord Dubs: Thank you.

- Q13 **Lord Henley:** Clause 5 of the Bill would reduce the ability of the courts to enforce positive obligations on the state to protect human rights. The Government state that this clause is intended to guide courts to consider the wider implications of their decision. I direct this to all the panel. Do you consider Clause 5 to be necessary? Could it lead to incompatible interpretations of convention rights and divergence with Strasbourg? Professor Hickman, would you like to start?

Professor Tom Hickman: I agree with what has already been said about this clause in terms of it being very problematic and unorthodox in seeking to restrict the courts from developing the law, but the critical issue raised by your question is whether this is necessary. It seems to me that the positive obligation jurisprudence of the Strasbourg court developed very quickly in the early part of the 20th century and led to a major expansion of the jurisprudence. Whether that is right or wrong, it is a fundamental and central part of the Strasbourg system, and it has now bedded down.

Within that jurisdiction, and indeed from a very early case called *Osman v the United Kingdom*, the Strasbourg court has made clear that the positive obligations imposed on UK public authorities in that case, but in all public authorities in all states, should not impose unreasonable or disproportionate obligations on public authorities. It seems to me that the balance is there within the jurisprudence, and I do not see, quite apart from its other deficiencies, that Clause 5 is necessary.

Kate O'Regan: One needs to start by realising that most human rights systems recognise that human rights not only impose negative obligations, obligations not to interfere with rights, but at times require positive obligations. The classic example is the right to vote. There needs to be a positive obligation to provide an election and electoral systems in place for it to work. It is true that positive obligations can be met by legislation, and nearly always have to be met by legislation, but Clause 5 seems to suggest that in thinking about rights we can somehow excise from our minds the nature of positive obligations.

There are two questions. The first is what human rights require of Government and the second is who should enforce that and who is

primarily responsible for that. It seems to me that Clause 5 runs those two things together. That inevitably will great create a gap between Strasbourg and the United Kingdom law. It needs to be thought about very much more carefully. It is very appropriate for Parliament to think about what we need to do to give effect to it and make sure that human rights are respected.

Primarily, I believe that Parliament should take those steps, but you cannot say that human rights do not have a positive obligation attached to them. It is widely accepted, certainly in human rights law rather than among moral philosophers, that that is the case in the current era.

Lord Sumption: As I said earlier, I think the draftsman probably did not realise the enormous implications that Clause 5 could have, particularly, as Professor O'Regan has pointed out, in the area of implementation, which is almost by definition a positive obligation. I suspect that what the draftsman was really trying to target was the kind of positive obligation that might, for example, create a minimum level of social benefits or otherwise have significant implications for public expenditure.

There has always been a concern, particularly in the early years of this century, as Professor Hickman pointed out, that the Strasbourg court was moving in the direction of creating rights to minimum standards of living, minimum levels of state support and so on, which would be very difficult to reconcile with the basic function of Parliament, which was to determine the direction of public expenditure. If that was the object of the exercise, at the very minimum, Clause 5 should have had a tight definition of proper positive obligations. As it is, it is wholly undefined. As it stands, it is simply far too wide to be justified as consistent with the basic architecture of the convention.

Lord Henley: Professor Hickman, the Bill provides that public authorities will not be acting unlawfully whenever they are acting in accordance with primary legislation. In the light of the repeal of Section 3 of the Human Rights Act, what implications would that have for claimants trying to bring cases against public authorities?

Professor Tom Hickman: The question is directed at the issue that, if Section 3 no longer exists, the powers of public authorities will not be able to be read down, and therefore they will have more ability to rely on the defence that they are acting in accordance with statute. That would mean that the remedy available to an individual in those circumstances would be a declaration of incompatibility rather than achieving a ruling that the authority has acted incompatibly.

My view is that the cases in which Section 3 has been used in that way—that is, to read down legislation in a way that exposes a public authority to liability and takes away its defence—are very few and far between. That is not really the way that Section 3 has been widely used. In fact, I do not think Section 3 has been used all that aggressively, certainly not in recent years by the courts at all.

It tends to be used as something of a tiebreak provision where you have competing arguments about interpreting a provision. The court can say, "Given that Section 3 arises in this context, that's the tiebreak and we determine the question of interpretation in accordance with the human rights of the individual". I do not think that there would be a major impact on this particular issue on the Section 6 defence of statutory authority, as it is currently.

Lord Henley: Thank you.

Q14 **Baroness Ludford:** Clause 15 would introduce a new commission stage, meaning that a claimant would only be able to bring a human rights claim if they have suffered a "significant disadvantage". Do you think this change is necessary, and, if you do, why?

I will carry on to my supplementary to save time. What issues, if any, does this proposal raise for individuals seeking to enforce their rights and for the UK's compliance with its obligations under the convention? Does the European Court of Human Rights not already apply a similar test? Perhaps I could go first to Lord Sumption.

Lord Sumption: I found this clause mystifying. Initially, I thought that it was designed to exclude NGOs and bodies representing claimants who do not themselves suffer any disadvantage, but that does not appear to be the case, because the Bill adopts the definitions in Articles 34 and 35 of the convention itself and therefore by implication of the decisions on those articles in Strasbourg, and they explicitly include among victims representative organisations such as NGOs that are working in the interests of victims. I am not sure what Clause 15 changes.

As far as the UK courts are concerned, applications to enforce rights are generally brought by judicial review. They already require a leave stage to be gone through, and trivial cases are normally excluded at that stage. What is left in Clause 15 is a certain amount of rhetoric—that is a lot of adjectives that are designed to make courts feel more conscious than they otherwise would be of the potential problems. I do not actually think that is necessary. This is a piece of micromanagement that amounts to emphatic rhetoric rather than substantive legislation.

Kate O'Regan: I defer to both Lord Sumption and Professor Hickman on this as being people who practise in the United Kingdom. There is sometimes a sense that people bringing human rights cases that might be of great symbolic importance to them have not suffered great material disadvantage. We have had a series of cases about wedding cakes around the world, for example, that have reached not only the United Kingdom Supreme Court but the United States Supreme Court. That sort of interpretation here might well be unfortunate, because these symbolic questions often are very important to people and they want them to be satisfied.

It is not clear to me exactly how this provision will work in practice, and I associate myself with Lord Sumption's remarks that there is already quite

a monitoring process on ensuring that trivial matters do not bother the courts in the United Kingdom. Why this would be necessary is not clear.

Professor Tom Hickman: Can I make three very brief points? First, it seems to me that it is not at all clear what issue this clause is directed to. What is the problem that is plaguing the courts that this is intended to remedy? The consultation paper was not clear on the issue. It referred, I think, to unmeritorious cases brought by prisoners. If they are unmeritorious, they will be subject to early dismissal whether by refusal of permission or summary judgment in the court. It seems to me, first, that there is no evidence of any issue, and therefore it is very difficult to assess the merits of the provision as such.

Secondly, what is a significant disadvantage? This is going to generate, were it enacted, a huge amount of litigation. I did a case earlier this year for the organisers of a vigil on Clapham Common, and we succeeded in that judicial review. We succeeded in demonstrating that the police had acted in breach of the rights of the organisers in preventing them from organising the vigil. Had they suffered a significant disadvantage? How do you measure that in those sorts of circumstances? There would be no concrete or financial harm to them. It seems to me that it will give rise to unnecessary satellite litigation.

My third point is that it will result in all sorts of unforeseen problems that probably are not intended. One situation that occurs to me is in the context that I work quite a lot in, which is surveillance. Surveillance is a particular issue for human rights, because people do not know that they are subject to surveillance. You cannot expect people to bring challenges to surveillance laws and decisions about surveillance, interception of communications and so forth, because they do not know that they have been subject to it.

All the cases are brought by public interest groups on their behalf. Could they be said to suffer significant disadvantage? Is that what this clause is really aimed at? I do not think it is what the clause is aimed at, so I think that, overall, the clause has no evidential foundation and will just be a recipe for problems.

- Q15 **Florence Eshalomi:** We have touched on this briefly, but I just want to focus on Clause 20, which limits the court's power on immigration appeals against deportation. It would apply when the Secretary of State has made a deportation order in respect of a foreign national offender. Do you think that this would effectively require the courts to treat the Minister's acceptance of the assurances as determinative of the appeal? Do you consider that this approach is appropriate?

Professor Tom Hickman: Thank you. This is one of the provisions the impact of which is very difficult to know. It looks quite alarming. On the other hand, if all it is saying is that the courts cannot reject the reliability of an assurance entered into with another country unless they consider that it is unreasonable, it may be that the clause is not really doing very much more than the existing law already says. Where there is a

diplomatic assurance, in many cases, but not in all cases, the courts feel that they cannot go behind the judgments that have been made about the reliability of it unless it is demonstrated that the position taken by the British Government has been unreasonable.

It seems to me that it is one of these provisions that will be unsettling. It could have very detrimental impacts, but it is very difficult to judge. It seems to me that it is unnecessary and another recipe for problems.

Lord Sumption: I broadly agree with what Professor Hickman has said. At the moment, the position is that the courts treat with a great deal of deference any decision that the Secretary of State makes that affects relations with foreign Governments. Therefore, if the Secretary of State certified that a particular country was, for example, safe, the courts would require a good deal of persuasion that it was not. Effectively, I really do not think that this clause makes a great deal of difference to what happens at the moment anyway.

Chair: Thank you. We will have to leave it there for reasons of time constraints. I would like to apologise to our panellists as I have cut that slightly short. I thank all three of you for joining us this afternoon and for giving us, if I may say so, some very original and thought-provoking insights into aspects of the Bill of Rights.