Written evidence from Adam Tomkins (HRR0003)

Introduction

On 26 January 2022 I gave oral evidence to the JCHR on the Government's proposals to reform the Human Rights Act. On that occasion I undertook to follow-up in writing on one matter, namely the *Ziegler* case, which was considered during that evidence session. This is that follow-up written evidence.

One further matter, considered in the Government's consultation proposals, but not raised in oral questions with the Committee on 26 January, is the law of freedom of expression. In case it is of assistance to the Committee, I also offer in this written evidence some thoughts on that matter.

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HRA ss.3-4 and the balance of power between parliamentary government and the courts

There is no doubt that the HRA has altered the balance of power between the courts, on the one hand, and parliamentary government, on the other. Discretionary decision-making which would formerly have been regarded as non-justiciable now falls within the scope of judicial review. The weight which courts would formerly have accorded to decisions reached by ministers, officials, decision-makers in public administration, and even by Parliament itself, has been diminished as courts regard themselves as emboldened to make such decisions for themselves. Judicial reach into areas of political judgement is greater in the early twenty-first century than at any point since before the Civil War in the middle of the seventeenth century.

The HRA is not the only cause of these shifts, but it is principal among them. The common law would have developed in this direction even without the HRA, and EU law has been influential in this regard as well as human rights law (not least as regards the law of remedies). In some cases, the HRA may even have acted as a brake on these developments—it would be a mistake to see the HRA only ever as an accelerator. Of course, in the generality the HRA has certainly contributed to an increase in judicial power (at the expense of parliamentary government) but the HRA acts also as a framework for ensuring that the balance is not shifted too far in favour of the courts. For example, s.4 makes it perfectly clear that a declaration of incompatibility "does not affect the validity, continuing operation or enforcement" of the provision(s) in respect of which it has been made. Likewise, s.19 and other provisions of the Act show that the protection of human rights in the United Kingdom constitution is not a matter exclusively—or even mainly—for the courts. Ministers (or other parliamentarians) proposing legislation also have a key role, as does Parliament itself. It has been a notable and, to my mind, wholly welcome feature of the courts' case law under the HRA that they will take formal notice of and give appropriate weight to Parliament's assessment of where the balance should fall between individual liberty and collective security (or other public interests), especially when the evidence is that Parliament (and ministers)

have thought about these matters carefully. The unanimous decision of the House of Lords in the *Animal Defenders International* case ([2008] UKHL 15) is a good example of this.

Whilst there has been a clear shift in the balance of power the courts have, on the whole, exercised their increased constitutional powers responsibly. By and large, the shift in the balance of power has not been especially problematic. There are notable exceptions, such as where courts have given too much emphasis to the Article 8 right to respect for family life and insufficient weight to the compelling public interest in deporting people whose presence in the UK is not conducive to the public good (because they have committed a criminal offence, for example). Parliament legislated on this matter in the Immigration Act 2014, authoritatively setting out how the proportionality balance is to be understood as regards deportation cases.

Despite exceptions such as this, however, the overall picture is positive and, moreover, it is improving.

For example, earlier Supreme Court case law suggesting that the Article 14 right to freedom from discrimination can be used to attack aspects of our social security law as legislated for by Parliament was checked last year in the critical decision of *SC, CB and others* ([2021] UKSC 26). In that case, a unanimous seven-strong panel of the Supreme Court ruled that parliamentary decisions about welfare reform should be respected by the courts unless they are "manifestly without reasonable foundation". The Supreme Court took the opportunity in the same case to repeat the dictum that "the democratic process is liable to be subverted if, on a question of moral or political judgment, opponents of [legislation] achieve through the courts what they could not achieve in Parliament".

Likewise, the Supreme Court set out with clarity in the *Begum* case ([2021] UKSC 7) how judicial review of sensitive ministerial decisions taken in the name of national security need to be accorded weight and respect even when they engage an individual's Convention rights. Cases such as these two—both decided by unanimous panels of Supreme Court justices in 2021—underscore that, even though the constitutional balance between the courts and parliamentary government has undoubtedly shifted under the HRA, the courts have taken care to ensure that no new era of judicial supremacy has emerged. The powers of the courts and of parliamentary government are still held in balance—as they always have been—it is just that the balance has shifted.

It is critical, though, that however and wherever the balance is set, Parliament has the last word. The HRA protects and does not undermine the sovereignty of Parliament. The HRA protects and does not undermine the fact that it is the task of the courts to interpret and to give effect to Parliament's legislation. Such, at any rate, is the theory. In practice, the high ideals of this theory have not always been adhered to. This is a problem, and the Government is right to seek to address it. The problem is best exemplified by considering two cases, *Ghaidan v Godin-Mendoza* [2004] UKHL 30 and *DPP v Ziegler* [2021] UKSC 23.

Ghaidan is a relatively early case, but it remains the leading authority on the meaning, application and limits of s.3, and of its relation to s.4. It is generally regarded as a good decision, in that it distanced the law from some of the wilder dicta (of Lord Steyn) in *R v A*

that had suggested that s.3 mandated "strained" readings of legislation which could not be justified linguistically by reference to the words Parliament had chosen to use. The Court of Appeal in *Re S* also stretched the meaning of s.3 (in a manner that was correctly overruled by the House of Lords). It was in this context that *Ghaidan* was decided.

Ghaidan does not go as far as Lord Steyn had gone in *R v A*, nor as far as the Court of Appeal had gone in *Re S*. In these respects it is to be welcomed. However, it should not be under-estimated how far the majority of the House of Lords in *Ghaidan* was still prepared to go in terms of giving the courts licence to stretch the meaning of legislation. Lord Nicholls, giving the leading speech in *Ghaidan*, said the following:

- Even if there is no doubt or ambiguity about the meaning of legislation, s.3 of the HRA may none the less require legislation to be given a meaning different from that which it would have under ordinary canons of construction (para 29).
- As such, "the interpretative obligation decreed by section 3 is of an unusual and far-reaching character" (para 30).
- Section 3 may require a court to depart from the unambiguous meaning legislation would otherwise bear (para 30) – "in the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the [statutory] language in question, [whereas] s.3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation" (para 30).
- "The mere fact [that] the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under s.3 impossible" (para 32).
- "Section 3 … is … apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant" (para 32). However, such a reading cannot be "inconsistent with a fundamental feature of the legislation"—words implied into the legislation must "go with the grain of the legislation" (rather than cut across it) (para 33).

Lord Millett dissented. He focused on the fact—surely incontrovertible!—that s.3 requires courts to <u>read</u> and to give effect to legislation compatibly with Convention where this is possible (his emphasis: para 63). This is a power to <u>interpret</u> legislation: it is not a power to re-legislate. It must be possible to read the legislation Parliament has enacted compatibly with Convention rights—if such a reading is impossible, the remedy lies in s.4 (the declaration of incompatibility), not in stretching the judicial power of interpretation in s.3 so that it becomes, in effect, a power to re-legislate. The reading offered by the court must be possible, Lord Millett stressed, "by a process of interpretation alone" (para 66).

I would respectfully submit that, in this part of his judgment, Lord Millett was correct. It should be noted, however, that he then went on to say the following:

> "I respectfully agree with … Lord Nicholls that, even if, construed in accordance with ordinary principles of construction, the meaning of legislation admits of no doubt, s.3 may require it to be given a different meaning. It means only that the court must take

> the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point …" (para 67).

I would respectfully submit that, in these dicta, even Lord Millett's dissent in *Ghaidan* goes too far. In my view, no court in the United Kingdom should regard itself as having licence to do any violence, let alone "considerable violence", to the words Parliament has enacted onto the statute book. Legislation must be interpreted faithfully—to seek to give it a meaning that is either "unnatural" or "unreasonable" is constitutionally inappropriate.

Even if it is the case, therefore, that the House of Lords was more cautious in terms of the reach of section 3 in *Ghaidan* than it had been in *R v A* (or than the Court of Appeal had been in *Re S*), it is none the less the case that *Ghaidan v Godin-Mendoza* is authority for propositions of law which should have no place in the United Kingdom. Our constitution is founded on two core principles: that the United Kingdom Parliament may make or unmake any law whatever, and that no court or tribunal may override or set aside Parliament's properly enacted legislation. Section 3 of the Human Rights Act should always have been read and given effect in the light of, and subject to, those core principles. That has simply not happened—as *Ghaidan v Godin-Mendoza* amply illustrates—and Parliament should now legislate to correct this matter.

The much more recent case of *DPP v Ziegler* [2021] UKSC 23 illustrates why this is so. This is a case that shows the real power of the HRA. The Highways Act 1980, s.137, provides that "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence". By majority of three votes to two, the Supreme Court reinterpreted that provision in effect to mean as follows: "If a person wilfully obstructs the highway in a manner that disproportionately obstructs free passage along it, he may be guilty of an offence but only if that would not be a disproportionate interference with his or her right to freedom of peaceful assembly under Article 11 ECHR."

What had happened in the case was this: Ziegler blocked an access road to London's Excel Centre for ninety or more minutes. The road was blocked in both directions, but it was only an access road to the Excel Centre (where an arms fair was taking place, against which Ziegler was protesting). Ziegler was charged with the offence contrary to s.137. The Divisional Court upheld the charge, but the Supreme Court, by majority, overturned the Divisional Court on the basis that to charge Ziegler in these circumstances was a disproportionate interference with their right to freedom of assembly under Article 11 ECHR. The length of the obstruction (ninety+ mins), the nature of the road, and the reasons for the protest all needed to be weighed up—only if the police concluded that Ziegler's right to protest was outweighed by the public's right to use the highway for passage would a charge under s.137 be proportionate.

That is fine, one may think (or one may not), but it is clearly not what s.137 says. Yet it is what the Supreme Court pretended s.137 says. The ruling has been condemned by senior police officers, who worry that obstruction of the highway has become more or less

unpoliceable as a result of the ruling. It may very well be that the Home Office will have to bring forward fresh legislation to clarify the matter. Regardless, the point for present purposes is plain: under s.3 of the HRA the courts regard themselves as having licence to rewrite the statute book, and that is simply and straightforwardly inappropriate in the United Kingdom's constitution.

Conclusion on s.3: Section 3 of the HRA should, in my view, be amended so that it reads along the following lines:

(1) In general, legislation should be read and given effect in a way that is compatible with the Convention rights.

(2) Subsection (1) is a power to interpret legislation. It is not a power enabling courts or tribunals to rewrite legislation. In particular, subsection (1) should not be read or given effect such that it would enable legislation to be given an unnatural or unreasonable meaning.

(3) Where legislation cannot be read or given effect compatibly with the Convention rights, the courts may consider whether a declaration of that incompatibility should, in all the circumstances, be made.

(4) A declaration of incompatibility does not affect the validity, continuing operation, or enforcement of the provision or provisions in respect of which it has been made.

Freedom of expression in today's United Kingdom

The Government is right to identify freedom of expression as a particularly important, indeed foundational, human right. The Government is also right to note that this freedom is under direct attack in today's United Kingdom. The threat to free speech comes not from any public institution—and not from case law—but from the rising tide of intolerance and censoriousness that marks a number of areas of contested public debate in today's Britain. Two examples will suffice as illustrations: debates about transgender identity and trans rights; and discussion of Israel, Palestine, Zionism and antisemitism.

In my final six months as an MSP I was elected Convener of Holyrood's Justice Committee. As Convener, I helped to steer through its parliamentary passage the single most controversial piece of legislation the Scottish Parliament has yet enacted—the Hate Crime and Public Order (Scotland) Act 2021. This legislation attracted a higher number of written submissions of evidence than any previous Bill introduced into the Parliament. During its passage the Bill was substantially amended. As enacted I do not consider the legislation to be a threat to free speech—but as first introduced the Bill certainly would have been. In the end, I was unable to vote for the Bill for other reasons, unconnected to its treatment of freedom of expression. What follows is a dispassionate and objective analysis of what the Act does, and how it seeks to protect free speech.

The controversy relating to the Bill concerned the extension of the stirring-up offences. Since 1965 it has been an offence in English and Scots law alike to stir up racial hatred. That stirring-up offence was consolidated in the Public Order Act 1986 and has been twice extended for England and Wales (but not for Scotland) to cover hatred on grounds of sexual orientation and religion. After the repeal of the Offensive Behaviour at Football (Scotland)

Act in 2018, the Court of Session judge Lord Bracadale reviewed hate crime in Scots law; he recommended that it be updated and consolidated. Hence the Hate Crime and Public Order (Scotland) Bill. Among other matters, the Bill extended the stirring-up offences in Scots law not only to race, but also to age, disability, religion, sexual orientation and transgender identity (but not, it is to be noted to sex or gender otherwise). As introduced, it would have been an offence to use threatening, abusive or insulting words or behaviour to stir up hatred on any of these grounds, even if the person using the words or behaviour did not intend to stir up hatred.

As many witnesses pointed out, and as Holyrood's all-party Justice Committee formally reported, this would have run afoul of the law of freedom of expression, which extends not only to speech that is inoffensive, but also to speech that is irritating, contentious, eccentric, heretical, unwelcome, or provocative (provided that it does not provoke violence). As Sedley LJ put it in *Redmond-Bate v DPP* [2000] HRLR 249, "freedom only to speak inoffensively is not worth having". Similarly, and quoting directly from the ECtHR, Lord Rodger said as Lord President that the right to freedom of expression extends and applies to words that "offend, shock or disturb" (see, e.g., *Handyside v UK*).

In order to render the Bill's provisions compatible with Article 10 ECHR, it was amended in the following ways. First, other than as regards race, the stirring-up offences can be committed only if a person uses threatening or abusive words or behaviour (not threatening, abusive or insulting). Secondly, and again other than as regards race, the stirring-up offences can be committed only if the person using the threatening or abusive words or behaviour intended to stir up hatred. Thirdly, the words or behaviour used must be such that a reasonable person would consider them to be threatening or abusive (this is an objective test—it is not enough that a person simply *feels* threatened or abused). Fourthly, the Act specifies that, when considering whether a stirring-up offence has been committed, "particular regard must be had to the importance" of the fact that the right to freedom of expression applies to information or ideas that "offend, shock or disturb". And fifthly, the Act copies and pastes from English law notions that mere "discussion or criticism" of matters relating to age, disability, sexual orientation, or transgender identity are "not to be taken to be threatening or abusive". (With regard to religion, it is not merely discussion or criticism that is not to be taken as threatening or abusive: it is also "expressions of antipathy, dislike, ridicule or insult".)

Conclusion on free speech: In my view, strengthening the ways in which free speech is protected in our human rights laws can learn a number of useful lessons from this Scottish experience (not least because the Law Commission of England and Wales is also looking at hate crime). In particular, it should be written into primary legislation that the right to freedom of expression applies not only to ideas that are officially approved, but extends also to ideas that offend, shock or disturb. There is the world of difference, it seems to me, between using words in such a way as threatens or abuses someone with the intention of stirring-up hatred or provoking violence, and using words in such a way as others may find upsetting, hurtful, offensive, shocking or disturbing. Yet, because of the rising tide of intolerance and censoriousness that we see in the United Kingdom—and not only on certain

university campuses—the time has come for Parliament formally, robustly, and clearly to restate this all-important distinction as a matter of primary law.

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