Written evidence from Derek Moss (HRA0072)

1. Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?

One issue that particularly concerns me, although it doesn't personally affect me, is that citizens are finding it impossible to exercise their Article 10 right to freedom of expression. NHS staff have complained that they are prohibited from sharing their experiences and concerns with the public (i.e. imparting information to others), under threat of disciplinary proceedings and there are several well-known cases of "whistleblowers" being blacklisted and having their careers ruined for speaking out about malpractice to protect patients.

The NHS is a public body to which the Human Rights Act clearly applies, yet staff are being forced to sign contracts which contain clauses prohibiting them from exercising their Article 10 rights if it may compromise or threaten the reputation of their employer, i.e. basically anything which makes the NHS look bad or incompetent. So, anyone who wants to work for the NHS and help patients is forced to surrender their Article 10 right to freedom of expression and clearly the HRA hasn't enabled them to stop this interference with their rights, or this wouldn't still be common practice 20 years after it was enacted.

Beyond the NHS and the public sector, we are also increasingly seeing employers banning their staff from expressing opinions in their private lives, outside of work, which might embarrass the company. So effectively, the only people who can exercise their Article 10 right to freedom of expression are those who are self-employed, or wealthy enough not to need employment, or the retired, whilst everyone else has to choose between working or being able to exercise their Article 10 rights.

The response to this concern that I often see is that the HRA only prevents the government interfering with citizen's rights and it doesn't impose any obligations on private companies. However, if that approach had been adopted to equality and discrimination law, some employers would no doubt still be advertising jobs that state "no blacks, no women, no disabled". The fact is, most people need to work and thus the government has a responsibility to prevent employers interfering with their employee's Human Rights, just as it has a responsibility to prevent them discriminating against people, and by failing to enact legislation to do that, the government is failing in its duty to secure its citizen's Human Rights.

On a completely separate point, I have spent the last five years trying to enforce i) my Article 10 right to access information, as elucidated by the European Court of Human Rights in *Magyar Helsinki Bizottság v Hungary* (2016) and ii) my Article 6 right to a fair hearing in the determination of my civil rights to access information, as recognised in domestic law under FOIA and HRA Article 10.

The information in question relates to my Council's plans to demolish its Council Estates and redevelop them as mostly unaffordable private housing, and I pursued three FOIA requests through the complaint and appeal process. My experiences show that the ICO is hopelessly biased in favour of public authorities and it is impossible to receive a fair hearing in the Tribunal without proper legal representation, which is unavailable to most people as there is no legal aid for FOIA appeals. So, in my experience, the HRA hasn't enabled individuals to enforce their Article 10 and Article 6 rights in the context of FOIA requests.

For reference, the relevant dates and Tribunal ref. numbers for each of the three cases are:

Case 1: FOIA request dated 16 February 2016

ICO's Decision Notice - FS50624045 - Decision dated 21 September 2016

FTT appeal - EA/2016/0250 –Decision dated 20 March 2017

Judicial Review of UT's permission decision – CO/977/2019 – Decision dated 14 May 2020

UT substantive appeal – GIA/1531/2017 - Decision dated 30 July 2020

FTT enforcement/contempt proceedings – NJ/2018/0007 – awaiting hearing of application dated 25 March 2018

UT enforcement appeal – GIA/1940/2018 – Decision dated 30 May 2020

Case 2: FOIA request dated 15 February 2016

ICO's Decision Notice - F550624753 - Decision dated 2 March 2017

FTT appeal – EA/2017/0056 – Decision dated 16 February 2018

Judicial Review of UT's permission decision – CO/3953/2019 – Decision dated 26 November 2019

Case 3: FOIA request dated 6 December 2018

ICO's Decision Notice - FS50829069 – Decision dated 17 December 2019

FTT appeal – EA/2020/0029 – Decision dated 15 October 2020

As can be seen, the proceedings became shorter in each case as I realised that I was never going to receive a fair hearing in the tribunals without representation and thus there was no point wasting my time pursuing the matter any further. The time between making my FOIA requests and the ICO deciding my complaints was between 7 months to just over a year and from the ICO's decision to my appeal being decided by the FTT, between 6 months and just under a year, so from FOIA request to FTT decision it took between 13 months and two years and in the first case, where I appealed the FTT's decision to the UT, it took over 3 years for the UT to decide my appeal. So, even if I'd won all three cases and received the information I'd requested, by the time that happened it would have been too late for it to assist residents and facilitate public debate on a matter of significant public interest, as the local elections had been held in May 2018 and the ballot on the Estate regeneration plans had been held in February 2020.

I won't go in detail about my experiences in this submission as it would take too long but I would invite the Committee to read my account of them at https://dchkingston.wordpress.com/ where the various pleadings and judgments can also be found. So far, only the first case has been documented but the pages for the other two cases should be published shortly.

For the purposes of this submission, I will just highlight some of the key findings of the Upper Tribunal in my first case, as its decision is binding on the FTT, the ICO and public authorities and these findings illustrate the difficulties which citizens face in trying to enforce their Article 6 and 10 rights in the tribunals (and in the courts).

(para.67-69): what HMG might have said to the ECtHR about the domestic courts being able to "take into account" a decision of the Grand Chamber, in order to persuade the Court that the applicant hadn't exhausted domestic remedies and thus their application should be declared inadmissible, is irrelevant when the Tribunal is considering whether the domestic courts can in fact take that decision into account;

(para.70-71): where the UK is allowed to intervene as a third-party in cases before the ECtHR, it isn't a "party" to those proceedings and thus the international law obligation under Article 46 of the European Convention on Human Rights, which obliges the UK to "abide by" decisions of the ECtHR to which it was a party, doesn't apply;

(para.72-75): the Supreme Court's obiter findings take precedence over any subsequent decisions by the Grand Chamber, and thus the Tribunal cannot "take into account" the latter if they conflict with the former and it has to wait until the Supreme Court gives effect to the Grand Chamber's decision in domestic law, after which the Tribunal can follow the domestic authority;

(para.120-124): even if *Magyar* does apply in domestic law AND the *Magyar* criteria are met by a particular request such that the Article 10 right to access information is engaged AND s.12 interferes with that right, the tribunals cannot provide any effective remedy for that breach as they are bound to apply the s.12 limit; they cannot use their powers under s.3 HRA to read down or interpret away the appropriate limit; they cannot disapply or vary the limit, even though it is set by regulations; they cannot make a declaration of incompatibility and even if they could, this wouldn't provide an effective remedy for any breach;

(para.150-152): even though the FTT had admitted and relied on last-minute ex post facto evidence from a non-party and the UT had found all my arguments to be wrong or even "fanciful", I wasn't disadvantaged by having to represent myself against the experienced solicitors and barristers representing the ICO and the Cabinet Office, because tribunal proceedings are not adversarial and the tribunals use their specialist expertise to assist litigants where necessary;

(para.153-154): it is very doubtful whether the Article 6 right to a fair hearing applies to FOIA requests, complaints or appeals, other than where the FOIA request relates to the requestor's personal or private situation [such information can't actually be obtained by making a FOIA request, it would have to be sought by making a Subject Access Request under the Data Protection Act/GDPR];

(para.155-158): despite what s.57-s.58 FOIA and APPGER [2011] at [48] say, the FTT's role is not to consider whether the ICO's Decision Notice is "in accordance with the law", it is to conduct "*a full merits consideration of whether, on the facts and the law, the public authority dealt with the request for information in accordance with Part I of FOIA*";

(para.159-160): the ICO and the FTT are not limited to determining whether the public authority dealt with the request in accordance with FOIA in the time up to the conclusion of the internal review, nor are they limited to considering evidence which existed when the

internal review process was concluded and when deciding a complaint the ICO can consider whether the public authority *could have* aggregated multiple requests for the purposes of s.12, not just whether it did in fact do so;

(para.161): aggregation had always been in issue [despite the fact that the Council never mentioned it prior to its statement dated 8 March 2017] and therefore there was nothing unlawful about the ICO submitting last minute ex post facto evidence from a non-party [which she'd solicited from the Council shortly before the hearing] and nothing improper about the FTT accepting and relying on that evidence;

(para.162): because I'd argued on appeal to the FTT that the ICO had erred in treating my requests as aggregated when dismissing my complaint [because the Council had never mentioned aggregation and the evidence showed that it had treated my requests as relating to separate issues], it was therefore "crystal clear" that I knew aggregation was an issue on appeal and thus it was "fanciful" to argue that I was ambushed or disadvantaged by the ICO submitting a last minute statement from the Council, which wasn't a party to the proceedings, in which it said for the first time that it had aggregated my requests because of a "common theme" of regeneration to them, using the exact same words as the ICO had used in her response three months earlier;

(para.163-164): it was untenable to argue that the Council hadn't aggregated my requests when considering them in early 2016 even though its internal review decision of 13 July 2016 referred to "three separate issues" [and it never mentioned aggregation prior to 8 March 2017], because its letter to the ICO dated 19 August 2016 stated that the estimate it had given me in July 2016 of 23 hours 45 minutes "took into consideration all three aspects of his complaint".

(para.165): there was nothing improper about the ICO's correspondence with the Council in the month before the FTT hearing and she was merely trying to establish whether the Council had aggregated part 4 of my request with the other parts [even though it had never mentioned aggregation prior to this correspondence and the FTT found that it hadn't considered part 4 of my request at all, contrary to what it stated in its email of 8 March 2017 about including part 4 in its estimate].

2. How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?

I've seen several legal opinions and court decisions which suggest that any breach of the Article 6 right to a fair hearing by a public authority is remedied by the fact that judicial review is available. In effect this means that no public authority has any obligations under Article 6 when determining citizen's civil rights (even though s.6 HRA seems to say that they do), because if anyone manages to challenge their decision by seeking judicial review, the court will be of the opinion that the fact that they have been able to access a court has remedied any breach of Article 6 by the public authority, such that there is no argument to be heard. This creates the absurd situation where the only people who could argue that the public authority breached their Article 6 rights are those who are unable to access a court for whatever reason and thus are unable to argue anything.

This issue arose in a recent judicial review that I brought against Royal Borough of Kingston upon Thames (CO/3914/2019), where the Court refused permission for my Article 6 ground, finding that "*access to judicial review is sufficient to satisfy the requirements of Article 6*".

There must be numerous instances of public authorities breaching citizen's Article 6 rights when determining their civil rights which are never challenged, because the victim is unable to do so. In the absence of a large increase in legal aid funding, to enable all citizens who suffer a breach of their Human Rights to seek judicial review without having to pay for the privilege and put their life savings at risk, perhaps the only way to remedy this situation is to enable victims to bring claims in the County Court at no, or very low, cost and no risk of an adverse costs order.

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