Open Rights Group response to the Ministry of Justice Human Rights Act Reform: A Modern Bill of Rights

In this submission

8 March 2022

Executive Summary

Open Rights Group is worried by the proposals put forward by the Ministry of Justice consultation to the Human Rights Act Reform. While the Government rightly point out the long tradition the UK had in establishing and promoting human rights around the world, the proposals in this consultation would go against this tradition and result in a significant roll back in human rights legislation.

ORG expertise encompasses freedom of expression and the right to privacy and data protection. As such, we provide answers to questions 5 and 23.

In our answer to question 5, we outline our assessment of Government proposals to strengthen the right to freedom of expression. While the objective may be laudable, we find an overall lack of analysis by the Government that either justifies legislative intervention or describes the desired outcome of these changes. Instead, the Government rely on a baseless reading of ML v. SLOVAKIA to reach the conclusion that the European Court of Human Rights would have elevated the right to be forgotten above the right to free speech — which is in fact wrong.

In our answer to question 23, we explain why the proposal to give “great weight” to the view of Parliament ultimately defeats the scope of the European Convention of Human Rights, which is to provide a remedy against legislative measures that do not meet the human rights standards set out by the Convention. We also analyses the impact that this proposal in the field of data protection, and express our concern for the abuse that it would enable.

Question 5:

The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

Firstly, it is worth mentioning that the Government expressed their intent to restrict freedom of speech by giving “great weight” to Parliament’s views of what is necessary in a democratic society. We emphasise that a first and effective step to “confine the scope for interference with Article 10 to limited and exceptional circumstances” is not to give great weight to the views of the Parliamentary majority of the day. We further develop this criticism in our answer to Question 23.

Coming to Government reasoning underpinning the HRA proposals, the consultation document does not explain why and how the European Court of Human Rights would fail to limit interferences to Article 10 to exceptional circumstances, or be inadequate to protect free speech, or would fail to strike a fair balance with the right to a private life. On the other hand, the Government use ML v Slovakia and conclude that "the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy". This argument needs be rejected for at least two reasons.

Firstly, reforming the right to free speech without any analysis but the mere belief that a wrong judgment was handed down by the ECtHR is a hollow, meaningless and ultimately unsound approach to policy making. Human Rights reforms cannot be underpinned by unsubstantiated arguments but need be preceded by a sound understanding of the root causes of an issue and the corresponding solutions. In this regard, it is clear that the Government haven't laid out any explanation as to why they believe that the proportionality test or the balancing criteria developed by the case-law of the ECtHR would not adequately limit "interference with Article 10 to limited and exceptional circumstances", nor they presented any actual proposal.

Secondly, referencing ML v Slovakia reveals that Government criticisms of the Strasbourg Court on the balancing between private life and freedom of expression are underpinned by a distorted and baseless reading of this judgment. Indeed, the Government fail to capture the circumstances of this case, where a deceased

priest was being accused of paedophilia and sexual abuse by a journalist who lacked any evidence to support their claim. Thus, the Court did not elevate the "right to be forgotten" above the right to free speech. Instead, they did find that "frivolous and unverified statements... beyond the limits of responsible journalism" (ML v Slovakia, §47) and "distorted facts and the expressions... capable of considerably and directly affecting ... a mother of a deceased son" (§48) with "sensational and, at times, lurid news" (§53) that "could hardly be considered as having made a contribution to a debate of general interest" (§54) do not trump the right to private life under Article 8 of the ECHR.

Finally, it is worth reminding that Article 10 ECHR already confines the scope of any interference with the right to free speech to limited and exceptional circumstances. In particular, the Court developed a three-step test[1] summarised below:

- **The rule of law test**: the exercise of freedom of speech may be subject only to restrictions that are "prescribed by law". The HCtHR have clarified this requirement in HUVIG v. FRANCE and KRUSLIN v. FRANCE, holding that the domestic legal system must sanction the infraction, the relevant legal provision must be publicly accessible, the legal provision must be sufficiently precise to foresee the consequences which a given action may entail, and the law must provide adequate safeguards against arbitrary interference.

- **The legitimacy test**: interferences must be justified "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". The Court also clarified that these exceptions must be narrowly construed (KLASS AND OTHERS v. GERMANY).

- **The democratic necessity test**: interferences with the right to free speech must be "necessary in a democratic society". It follows that interferences to the right to free speech must be justified by a "pressing social need", "proportionate to the legitimate aim pursued", the grounds must be "relevant and sufficient" (OBSERVER AND GUARDIAN v. THE UNITED

1 See Council of Europe, Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression, Updated 30 April 2021. Available from: https://echr.coe.int/Documents/Guide_Art_10_ENG.pdf
See also Council of Europe, Human rights files No. 15, The exceptions to Articles 8 to 11 of the European Convention on Human Rights, 1997. Available from: https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf

KINGDOM), and the necessity for a restriction must be "convincingly established" (AUTRONIC AG v. SWITZERLAND).

Further, the ECtHR clarified in AXEL SPRINGER AG v. GERMANY the criteria to consider for the balancing between the rights protected under Article 8 (Private Life) and Article 10 (Freedom of Expression). Namely:

- **Contribution to a debate of general interest**.
- **How well known is the person concerned, and what is the subject of the report**, including the role or function of the person concerned and the nature of the activities being reported.
- **Prior conduct of the person concerned**.
- **Method of obtaining the information and its veracity**, such as whether journalists are acting in good faith and on an accurate factual basis and provide reliable and precise information in accordance with the ethics of journalism.
- **Content, form and consequences of the publication**.
- **The severity of the sanction imposed**, as a factor to be taken into account when assessing the proportionality of an interference with the right to free speech.

While freedom of expression ought to be protected and strengthened, interventions in this field cannot be underpinned by unsound methodology and baseless opinions. The consultation document fails to articulate why and how any of the criteria listed above would fail to adequately protect the right to free speech, or to strike the correct balance with the right to privacy. Assuming that the intended result of the HRA consultation is not to elevate "lurid journalism" over the right to privacy and reputation of others, we can only advise the Government to develop and clarify their thinking and proposals before proceeding any further.

Question 23:

To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

The Government propose to significantly extend the "margin of appreciation" that Government and Parliament would enjoy when enacting laws that interfere with the rights enshrined in the Convention. Our answer focuses on the impact of this proposal on data protection and the rights afforded by Article 8 ECHR, but it is worth recollecting what the European Convention of Human Rights is intended to achieve.

While the Government correctly capture in their consultation that the Convention was meant to prevent the most serious human rights violations which had occurred during the Second World War, context is noticeably lacking. Fascism in Italy and Nazism in Germany were both the result of governing parties using their majorities in Parliament to subvert democratic order — hence, the need for a supranational human rights instrument that would hold to account the Parliament of a Contracting State that seeks to violate these rights.

This understanding is well-rooted in YOUNG, JAMES AND WEBSTER v. THE UNITED KINGDOM, where the Court expressed the following

> "pluralism, tolerance and broadmindedness are hallmarks of a democratic society... Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a

majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".

Giving "great weight" to the decisions of the Government of the day and their respective Parliamentary majorities ultimately defeats this purpose. This becomes even more apparent by comparing different statements and examples that the Government bring in the consultation document to support their proposals, such as the ECtHR ruling in favour of a terrorist that was being deported without a fair trial,[2] and other judgments in favour of individuals who the Government do not deem worthy of protection. In a democratic society, rule of law prevails over "tit for tat", and one's criminal conduct is no justification for the State to violate the laws and fundamental rights it is meant to uphold.

Having made these general remarks, it is worth noticing that the same concept of necessity of the ECHR is heavily relied upon by the UK GDPR. For instance:

- Data minimisation (Article 5(1)c) personal data can be used when “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”;
- In storage limitation (Article 5(1)e) personal data can be “kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed”;
- The legality of processing for the lawful bases of “the performance of a contract” (Article 6(1)b), “compliance with a legal obligation” (Article 6(1)c), “protect[ing] the vital interests of the data subject (Article 6(1)d), “the performance of a task carried out in the public interest”(Article 6(1)e) and “for the purposes of the legitimate interests pursued by the controller or by a third party” (Article 6(1)f).
- Most conditions for the processing of special category of personal data and data related to criminal offences (Article 9, 10 of the UK GDPR; Schedule 1of the UK Data Protection Act).
- Restrictions to data protection rights, that must respect “the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society” (Article 23(1)).

2 See reference to Othman (Abu Qatada) v United Kingdom (2012) 55 EHRR 1 at §100 in the Ministry of Justice, Human Rights Act Reform: A Modern Bill Of Rights – A consultation to reform the Human Rights Act 1998

Similarly to what we emphasised beforehand, it is clear that interpreting this concept by giving "great weight" to Parliament's views would significantly undermine data protection rights in the United Kingdom. In turn, widespread and increasing reliance on automated systems means that reducing safeguards over the use of personal data will make it easier to violate the rights enshrined in the ECHR.

Where a public body were to collect and use personal data for the performance of a task carried out in the public interest, such public interest is likely to be enshrined in a law enacted by Parliament. For instance, the Cabinet Office runs a programme known as the National Fraud Initiative, where data from different records are matched to identify and prosecute frauds. This exercise is underpinned by the Local Audit and Accountability Act 2014.

Where necessity should be a measure for what is objectively necessary to achieve a given purpose when using personal data, giving great weight to Parliament's views would make necessity a measure of what Parliament deem necessary to achieve a given purpose. This effectively opens the gate for arbitrary and excessive uses of personal data that are carried out under the pretext of "public interest": in the example above of the National Fraud Initiative, necessity and proportionality of Government data matching exercises would ultimately be measured on what the Government deemed necessary when enacting the law, as opposed to what is reasonably necessary. Needless to say, the standard of judgement of the necessity test should not be set by those who have a vested interested in passing such test.

It follows that Government proposed "guidance" to the application of the necessity test is erroneous in principle, and would remove an important safeguard from the UK Human Rights system in practice. Thus, we urge the Government not to go forward with their proposal.

About Us

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Type of organisation or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)

• Human Rights Organisation

Date: 8 March 2022

What region are you in?

• Greater London

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Open Rights Group (ORG) is a UK-based digital campaigning organisation working to protect fundamental rights to privacy and free speech online. With over 20,000 active supporters, we are a grassroots organisation with local groups across the UK. We were heavily involved in the process leading up to the enactment of the Data Protection Act 2018 ("DPA 2018"), and we worked on issues such as data retention, the use of personal data in the COVID-19 pandemic, data protection enforcement, online advertising and the use of personal data by political parties. We have litigated a number of sucessful data protection and privacy cases, ranging from challenges to the lawfulneess of the Regulation of Investigatory Powers Act at the European Court of Human Rights,[3] being a party at the Watson case against UK data retention, through to the recent challenge against the Immigration Exemption in the Data Protection Act.[4] We are also supporting complaints made to the Information Commissioner regarding Adtech and the use of data by political parties.

3 Open Rights Group, *Court Rules UK Mass Surveillance Programme Unlawful*. Available at: https://www.openrightsgroup.org/campaign/court-rules-uk-mass-surveillance-programme-unlawful/

4 Open Rights Group, *Immigration Exemption judged unlawful, excessive, wrong by Court of Appeal.* Available at: https://www.openrightsgroup.org/press-releases/immigration-exemption-judged-unlawful-excessive-wrong-by-court-of-appeal/