# PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

## Sixth Delegated Legislation Committee

# DRAFT HUMAN RIGHTS ACT 1998 (REMEDIAL) ORDER 2019

*Wednesday 1 July 2020*

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

**not later than**

**Sunday 5 July 2020**

**The Committee consisted of the following Members:**

*Chair:* Sir Charles Walker

† Brereton, Jack *(Stoke-on-Trent South)* (Con)
† Chalk, Alex *(Parliamentary Under-Secretary of State for Justice)*
† Charalambous, Bambos *(Enfield, Southgate)* (Lab)
† Eastwood, Mark *(Dewsbury)* (Con)
Evans, Chris *(Islwyn)* (Lab/Co-op)
Fletcher, Katherine *(South Ribble)* (Con)
† Holden, Mr Richard *(North West Durham)* (Con)
Hopkins, Rachel *(Luton South)* (Lab)
† Kyle, Peter *(Hove)* (Lab)
† Lewer, Andrew *(Northampton South)* (Con)
McKinnell, Catherine *(Newcastle upon Tyne North)* (Lab)
McDonagh, Siobhain *(Mitcham and Morden)* (Lab)
Mangnall, Anthony *(Totnes)* (Con)
† Moore, Robbie *(Keighley)* (Con)
† Pursglove, Tom *(Corby)* (Con)
† Stevenson, Jane *(Wolverhampton North East)* (Con)
Thompson, Owen *(Midlothian)* (SNP)

Dominic Stockbridge, *Committee Clerk*

**† attended the Committee**

The following also attended, pursuant to Standing Order No. 118(2):

Jones, Mr David *(Clwyd West)* (Con)

# Sixth Delegated Legislation Committee

*Wednesday 1 July 2020*

[Sir Charles Walker *in the Chair*]

## Draft Human Rights Act 1998 (Remedial) Order 2019

2 pm

**The Parliamentary Under-Secretary of State for Justice (Alex Chalk):** I beg to move,

That the Committee has considered the draft Human Rights Act 1998 (Remedial) Order 2019.

It is a pleasure to serve under your chairmanship, Sir Charles. The draft remedial order was laid before this House on 15 October 2019, in the last Session of Parliament. It was laid to implement the decision of the European Court of Human Rights in the case of Hammerton *v.* United Kingdom.

The draft order amends section 9(3) of the Human Rights Act 1998 to enable damages to be awarded under the Human Rights Act in respect of a judicial act done in good faith which is incompatible with article 6—the right to a fair trial—of the European convention on human rights. It provides the power to award damages where a person is detained and would not have been detained for so long, or at all, were it not for the incompatibility.

The Government consider this limited amendment to be an appropriate balance that implements the judgment of the European Court of Human Rights and takes into account the views of the Joint Committee on Human Rights, while also respecting the important constitutional principle of judicial immunity and the constraints provided by section 9(3) of the Human Rights Act, namely the right to an effective remedy.

To turn to the background of Hammerton *v.* United Kingdom, the particulars of the case are that, in 2005, Mr Hammerton was committed to prison for three months for contempt of court, after breaching an injunction and undertaking during child contact proceedings. However, he was not legally represented at the committal proceedings, due to procedural errors. The Court of Appeal quashed the finding of contempt and the sentence, finding that he had spent extra time in prison as a result of procedural errors during his committal proceedings, which were such that his rights under article 6, the right to a fair trial, were breached.

In 2009, Mr Hammerton lodged a claim for damages in respect of his detention. The High Court held that the lack of legal representation had led to Mr Hammerton spending about an extra four weeks in prison. However, he was unable to obtain damages to compensate for the breach of article 6 in the domestic courts, because section 9(3) of the Human Rights Act does not allow damages to be awarded in proceedings under the Act in respect of a judicial act done in good faith, except to compensate a person to the extent required by article 5(5) of the convention, which is on deprivation of liberty.

In 2016, the European Court of Human Rights considered the case and found a breach of article 6. The court also found that the applicant's inability to receive damages in the domestic courts in the particular circumstances of his case led to a violation of article 13, the right to an effective remedy, and awarded a sum in damages. That sum has been paid. We are obliged, as a matter of international law, to implement the judgment of the European Court of Human Rights and, in this case, to take steps to implement the judgment in respect of the breach of article 13, to ensure that similar violations will not arise in the future.

To set the draft order in context, the Human Rights Act gives individuals the ability to bring proceedings to enforce their convention rights, or to rely on those rights in other proceedings, and gives courts and tribunals the ability to grant any relief or remedy within their powers, as they consider just and appropriate. I pause to note, as I am sure is not lost on anyone in the Committee, that the European Court of Human Rights is completely different from the European Court of Justice, which of course has no jurisdiction over the United Kingdom any more.

The award of damages is often not necessary to afford just satisfaction for breaches of convention rights. In the majority of cases in which a judicial act done in good faith leads to a violation of an individual's convention rights, it can readily be remedied by an appeal and other forms of relief, such as release from custody. Therefore, it will be only on rare occasions that the statutory bar in section 9(3) of the Act will constitute a barrier to a victim receiving an effective remedy, as required by article 13 of the convention.

The bar on paying damages in cases such as this one is in primary legislation and, to implement the judgment, it is necessary to amend the relevant primary legislation, in this case the Human Right Act 1998. The Act sets out the procedure for remedial orders, such as the one we are discussing today, and in 2018 the Government laid a proposal for a draft remedial order to make a narrow amendment to section 9 of the HRA.

That amendment provided for damages to be payable in respect of a judicial act done in good faith where, in proceedings for contempt of court, a person does not have legal representation, in breach of article 6, that person is committed to prison, and the breach of article 6 results in the person being detained for longer than he or she otherwise would have been. The Government considered that that addressed the specific findings of the court, while at the same time taking account of the need to preserve the important principle of judicial immunity—a constitutional principle that should rightly be preserved.

In November 2018, the Joint Committee on Human Rights reported on the draft remedial order and was of the view that the proposed amendment was too narrow and did not fully remove the incompatibility of section 9 with article 13. It recommended that we consider redrafting the order to make damages available for any breach of human rights caused by a judicial act where otherwise there would be a breach of article 13, whether or not that leads to a deprivation of liberty. In other words, the Committee said we were not extending it enough and should go broader than the specific facts of the case.

In response, the Government accepted the point that other situations could arise outside committal proceedings where a judicial act done in good faith could potentially

amount to a breach of article 6, where that breach could result in the victim spending longer in detention than they should, and where damages would be unavailable, contrary to article 13. The order before the House today is slightly wider in scope, taking into account the need to balance addressing the incompatibility identified by the European Court of Human Rights with the need to protect the principle of judicial immunity. I am grateful to the Joint Committee on Human Rights for its scrutiny of the order and its careful consideration of the more recent draft order issued, and we welcome the Joint Committee's recommendation that Parliament approve the order.

Hon. Members will have heard me mention just now the need to protect the principle of judicial immunity, and I want to say a few words about that. Judicial independence and the principle of judicial immunity must be protected, and any intrusion needs to be stringently justified. That is why we engaged with the judiciary to ensure that it was fully sighted on the judgment and our plans for the remedial order.

Finally, given that the Human Rights Act 1998 applies to the whole of the United Kingdom, the order would apply UK-wide. Officials have worked closely with the devolved Administrations during the process.

The order ensures that, in certain limited additional circumstances where our domestic courts find that a judicial act done in good faith has breached an individual's article 6 rights to a fair trial and led to them spending longer in detention than they should, the courts are able to determine and properly consider whether an award of damages should be made for any such breach.

2.7 pm

**Peter Kyle** (Hove) (Lab): It is good to serve under your chairmanship once again, Sir Charles, and to see the Minister as well. Take this as you will, Sir Charles, but I seem to spend more time with the Minister than with my friends and family these days.

The Labour party supports the remedial order, which amends the Human Rights Act 1998. The case of Hammerton *v.* United Kingdom showed a situation none of us would have expected. Mr Hammerton's rights were violated by a judicial act done in good faith, and there was no effective remedy for the wrong suffered as a result of that violation. It is only right and fair that when someone's rights are violated, they can seek redress through the courts.

The right to an effective remedy is protected by article 13 of the European convention on human rights. Mr. Hammerton was committed to prison for contempt of court, despite having no legal representation. At a family court hearing, he was unrepresented, as his legal aid certificate was under review following receipt of a post-divorce financial award. The lack of inquiry into that, and other procedural errors, meant that the court breached article 6 of the European convention on human rights—the right to a fair trial.

Mr Hammerton went to prison for six and a half weeks, which would not have been the case if he had been represented. We should thank him for persevering with his case since his imprisonment in 2005. By taking it to the European Court of Human Rights, he has made us examine how we view our courts. Judges are only human, so, in very rare cases, their decisions will result in the need for remedy. It is only right that damages can be claimed in those extremely rare cases where no other remedy is possible.

Mr Hammerton could not receive damages, owing to the operation of section 9(3) of the Human Rights Act, which prevents damages as a result of a judicial act done in good faith. The rationale behind section 9(3) is to preserve the judicial immunity that promotes the judicial independence we all value so much.

In Mr Hammerton's circumstances, the damage done to him by being imprisoned could not be rectified by an appeal or other routes, as he had already spent time in custody by the time the errors were realized. Damages were the only appropriate remedy for what he had gone through. The Human Rights Act in this case explicitly prevented the courts from awarding him the damages he sought and that he deserved.

It is a shame that the Government attempted to address this incompatibility with the draft Human Rights Act 1998 (Remedial) Order 2018. That draft order laid out extremely narrow circumstances where damages could be awarded. The circumstances were so specific that they only applied to Mr Hammerton's case and other circumstances if they were identically replicated. The Joint Committee on Human Rights rightly rejected that draft order. As it pointed out, other situations could occur that could result in the need for damages.

It is important to stress that judges will not be personally liable for any award of damages as a result of this remedial order. The Labour party champions the independence of our judiciary and the immunity of the judiciary is key. However, as stated by the Joint Committee, depriving judges of the power to award damages against the state does not strengthen independence. The new remedial order, now redrafted, allows damages to be awarded to judicial acts done in all proceedings and in relation to all breaches of article 6 that have led to a person spending time in prison or being detained.

The Joint Committee on Human Rights concluded that the remedial order before us today adequately addresses the incompatibility between the European convention on human rights and section 9(3) of the Human Rights Act. We agree with the Joint Committee's conclusion and therefore support the order. However, we also agree with the Joint Committee that circumstances might arise in the future where further incompatibility could be found beyond the scope of the order and hope that the Government will address that point, too.

I pause to note the correspondence that many of us have had in recent days from Professor Richard Ekins of Oxford University. He was concerned that, on assessing the secondary legislation before us, only fresh primary legislation would fulfil the demands of the Court. The Labour party accepts the recommendations of the Joint Committee, but I wanted to note Professor Ekins' points, and I invite the Minister to reassure the Committee that those points have been taken into account.

I would also like reassurance from the Government that the championing of the judiciary that they displayed in their response to the Joint Committee on the order is a course that they will stay on. It was welcome to hear in the Government's response to the Joint Committee's report into the first draft remedial order, a reaffirmation that an

"independent and impartial judiciary is one of the cornerstones of a democracy".

*[Peter Kyle]*

I hope that is a view they keep to when they return to the constitution, democracy and rights commission that they announced in their manifesto, with comments about how judicial review can be used,

"to conduct politics by another means or to create needless delays."

Our judicial system is the best in the world, which means that cases such as Mr Hammerton's are incredibly rare, but it is right that the order legislates for errors that can occur and allows victims to receive damages where it is appropriate.

2.14 pm

**Mr David Jones** (Clwyd West) (Con): Thank you, Sir Charles, for giving me the opportunity of addressing the Committee, although I am not a member of it.

I have concerns about the draft order. My objection is not to the substance of the change that the order would make, but rather to the lawfulness and constitutional propriety of making such changes in this way.

As the hon. Member for Hove pointed out, in a paper published by Policy Exchange only last month, Professor Richard Ekins of Oxford University made a powerful case for the proposition that the Human Rights Act does not authorise its own amendment in the way that is proposed today. I suggest, therefore, that the order, if made, would be of doubtful legal validity. Section 10 of the Act is an extraordinary power that authorises Ministers to amend primary legislation by executive order. Traditionally, the courts have interpreted such powers narrowly. The order would be lawful only if section 10 of the Act applies to the Act itself.

As we have heard, the Human Rights Act gives effect to the European convention on human rights in UK law on terms prescribed by Parliament. If the Government's reading of the Act is correct—that is, that it permits amendment of the Act itself—I suggest that that opens the door to allow any future Government to undo the terms of the Act. For example, the Act was intended to apply to events that took place only after it came into force, in October 2000. Applying the Government's apparent reasoning, there would be nothing to prevent them from making the Act totally retrospective by application of the section 10 power.

Similarly, if Parliament were to legislate in future to limit the application of the Act, the order, if made, would set a precedent whereby a future Government could simply undo Parliament's changes by another order. That cannot be right. If the scheme of the Act is to change, it should be only when Parliament has agreed to it after proper scrutiny. With respect, the process for approving statutory instruments does not provide adequate scrutiny or debate for that purpose. It seems clear to me that, as Professor Ekins argues in his Policy Exchange paper, the order is of doubtful validity and, at the very least, is a startling use of the section 10 power. There are serious issues for concern and the matter needs fuller debate.

My concerns are made all the greater by the fact that the order, as we have heard, concerns the scope of judicial immunity, which is relevant to the principle of judicial independence. Parliament should think carefully before permitting any Government to make changes to the Human Rights Act that possibly undermine judicial independence by an executive order. If the Government think that the Act should be amended—and, as I say, I have no issue with the mischief that the order seeks to address—they should introduce a short Bill that would allow for the sort of scrutiny that is not possible in the time available to the Committee today.

I shall be grateful for the Minister's observations on those points.

2.18 pm

**Alex Chalk:** I thank the hon. Member for Hove and my right hon. Friend the Member for Clwyd West (Mr Jones) for their helpful observations, which I will deal with in turn. On the reassurances that were sought about the Government's adherence to the principle of an independent, impartial judiciary, I am more than happy to give those cast-iron assurances.

Indeed, it was because of specific concerns about the need to uphold the impartiality and independence of the judiciary that we were extremely careful to ensure that, in so far as there was any encroachment on judicial immunity, it was as modest and proportionate as possible. On that basis, the JCHR actually asked us to go further, but we are taking a small C conservative approach in that regard, because we recognise that a key bulwark of our freedoms in a free democratic society is the impartial judiciary which is, in the overwhelming majority of cases, of unimpeachable integrity. Long may that continue.

The steps that we are taking today are modest and proportionate. They are designed simply to ensure that our convention obligations are adhered to. On the points helpfully made by my right hon. Friend, it is absolutely right to say that Professor Ekins has identified an issue in the legislation, but some important countervailing representations can be made. First, in respect of the section 10 power that he refers to, which provides to Ministers the power to ensure that in effect legislation takes effect only in so far as it is in compliance with the convention, it would be odd if that power were to exist in respect of all other legislation but not the Human Rights Act itself.

Secondly, when the Human Rights Act was enacted, its whole purpose was to ensure that the legislative framework that existed in the UK was compatible with the convention. That is why it creates powers for making declarations of incompatibility and so on. Again, it would be curious if the very vehicle that is intended to ensure compatibility is itself a roadblock to compatibility. That cannot be right and cannot have been the intention of Parliament in 1998.

The third point that we would pray in aid is that the Joint Committee on Human Rights, which, as the hon. Member for Hove said, considered the matter with care, also reached the conclusion that the Government have the power—the vires, to use the jargon—to amend the Human Rights Act in this way. Overall, the steps that we are taking are modest, proportionate and calibrated. This House should see its way to making these modest adjustments in the way that I have set out.

*Question put and agreed to.*

2.21 pm

*Committee rose.*