

WHITE PAPER CONFERENCE 2024

PARLIAMENTARY PRIVILEGE AND
JUDICIAL REVIEW

Sarah Hannett KC

Matrix

13 June 2024

INTRODUCTION

- Parliamentary privilege—the basics.
- Who decides on the parameters of Parliamentary privilege.
- What constitutes proceedings in Parliament?
- What constitutes impeaching or questioning?
- When may use be made of Parliamentary materials in judicial review litigation?
- Practical tips for litigation.
- Judicial review claims that impinge on the making of legislation.
- Current thorny issues in Parliamentary privilege.

PARLIAMENTARY PRIVILEGE: THE BASICS

- Article 9 provides (using modern spelling):
 - The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.
- Basis for parliamentary privilege is based on two principles articulated by Stanley Burnton J in *Office of Government Commerce* [2010] QB 98 (“OGC”) at [46]:
 - “... the need to avoid any risk of interference with free speech in Parliament”;
 - “... the principle of the separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with or criticise the proceedings of the legislature”
- *Wheeler v. Office of the Prime Minister* [2008] EWHC 1409 (Admin) at [46]-[47]:
 - “the courts exercise a self-denying ordinance in relation to interfering with the proceedings of Parliament”; “it behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so”.

WHO DECIDES WHETHER A MATTER FALLS WITHIN THE SOLE JURISDICTION OF PARLIAMENT?

- “... the extent of parliamentary privilege is ultimately a matter for the court”: *R v. Chaytor* [2010] UKSC 52 at [16].
- But, “... the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority”; *Chaytor* at [16].
- The observations of Speaker’s Counsel are entitled to the “*highest respect*”: *R (Shaw) v. Secretary of State for Education* [2020] EWHC 2216 (Admin) at [149].

WHAT CONSTITUTES “PROCEEDINGS” IN PARLIAMENT?

- Often obvious:
 - The procedures adopted by the two Houses; the courts may not challenge the means by which legislation was passed or decisions reached;
 - Parliamentary debates, questions and answers: *OGC* at [47].
 - The work of select committees: *OGC*.
- Where unclear if an act constitutes proceedings in Parliament:
 - (i) is a particular act sufficiently connected to the core business of Parliament; and
 - (ii) is privilege required so as to protect the core or essential business of Parliament.
- Courts will take a narrow approach to identifying “proceedings in Parliament”.

- *Chaytor*, per Lord Phillips (emphasis added):
 - “47. ... [the case law] supports the proposition... that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in Parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament”.
 - “61. There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted—freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown’s judges...”
- Submission of claim forms for allowances and expenses by MPs did not qualify for the protection of privilege.

- *R v. Parliamentary Commissioner for Standards, ex p Al-Fayed* [1998] 1 WLR 669:
 - The work of the PCA was part of proceedings in Parliament, notwithstanding that it is not carried out in the course of the business in the Chamber or in the course of debate.
 - Functions of the PCA are one of the means by which the select committees set up by the House carries out its functions, and those functions are part of the proceedings of the House.
- *Miller No 2* [2019] UKSC 41 at [68]:
 - The prorogation of Parliament was not a “proceeding” in Parliament.
 - “It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside... This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.”
- *R (Warsama and Gannon) v. FCO* [2020] EWCA Civ 142:
 - Non-statutory inquiry into child sexual abuse in St Helena; report published by Parliament via the “motion for an unopposed return” procedure.
 - Constituted a proceeding in Parliament [60].

WHAT CONSTITUTES IMPEACHING OR QUESTIONING?

- *Prebble v. Television New Zealand* [1995] 1 AC 321, 337 (PC) (at 332, 337):
 - “... suggesting... that the actions or words were inspired by improper motives or were untrue or misleading”.
- *OGC*:
 - “... the accuracy or veracity of something said in Parliamentary proceedings” [39].
 - “[T]he courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament” [47]
- *R (Reilly) v. SSWP* [2016] EWCA Civ 413:
 - The courts should not be asked to “approve” the findings of select committees (at [109]).
- The key is to identify the purpose for which evidence of proceedings in Parliament is adduced.

- Asking the court to rule on the correctness of the matters referred will be likely to contravene Article 9. OGC at [59] (emphasis added):
 - “If it is wrong for a party to rely on the opinion of a Parliamentary Committee, it must equally be wrong for a Tribunal itself to seek to rely on it, since it places the party seeking to persuade the Tribunal to adopt an opinion different from that of the Select Committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the Tribunal either rejects or approves the opinion of the Select Committee it thereby passes judgment on it.”
- A court may take uncontentious but not contentious conclusions of a Select Committee into account: OGC at [64]; *Wilson v. Commissioner of Police for the Metropolis* [2021] UKIPTrib IPT/11/167/H/2021 (Annex 5).
- *Kimathi v. FCO* [2017] EWHC 3379 (QB) at [20]:
 - “... [The Claimants seek] to rely on what was said in Parliament to prove (a) that facts which occurred extraneous to Parliament but were mentioned in Parliament were true and (b) that the person who related those facts in Parliament believed them to be true... [H]ere the defendant does not admit those underlying facts, in which case the claimants cannot rely upon Hansard for the truth of what was said. If they were able to rely on it for that purpose, the Court would then be in a position of having to decide the accuracy of the content of the proceedings in Parliament, so as to determine if those facts had been proven. This is expressly forbidden.”

WHEN MAY USE BE MADE OF PARLIAMENTARY MATERIALS IN LITIGATION?

- The CA in *Heathrow Hub* [2020] EWCA Civ 213 identified 6 circumstances following submissions from counsel to the Speaker of the House of Commons [158].
- **(1) The courts may admit evidence of proceedings in Parliament to prove what was said or done in Parliament as a matter of historical fact where this is uncontentious:**
 - *Prebble* at 337.
- **(2) Parliamentary material may be considered in determining whether legislation is compatible with the ECHR.**
 - *Wilson v. First County Trust Ltd* [2003] UKHL 40.
 - *R (SC) v. SSWP* [2021] UKSC 26.

- *Wilson*, per Lord Nicholls:
 - When deciding if legislation is proportionate, reference could be made to Parliamentary debates and other Parliamentary material, and in doing so “the court would not be ‘questioning’ proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation” [63]-[64].
 - “... occasions when resort to Hansard is necessary as part of the statutory ‘compatibility’ exercise will seldom arise”, and “the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament” [66].
 - “The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate... Lack of cogent justification in the course of parliamentary debate is not a matter which ‘counts against’ the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister’s exploration of the policy options or of his explanations to Parliament. The latter would contravene Article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute” [67].

- **SC, per Lord Reed:**
 - In deciding the compatibility of legislation: “... If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court's assessment... If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent” [182].
- **Lord Reed identified two caveats:**
 - “... the courts should go no further than ascertaining whether matters relevant to compatibility were raised during the legislative process, if they are to avoid assessing the adequacy or cogency of Parliament's consideration of them... The distinction between determining whether, as a matter of historical fact, an issue was before Parliament, on the one hand, and determining the cogency of Parliament's evaluation of that issue, on the other hand, is real and must be respected” [183].
 - “... the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility” [184].

- **(3) The courts may have regard to a clear ministerial statement as an aid to the construction of ambiguous legislation:**
 - *Pepper v. Hart* [1993] AC 593, 638.
- **(4) The courts may have regard to Parliamentary proceedings to ensure that the requirements of a statutory procedure have been complied with.**
 - *Heathrow Hub*: s.9 of the Planning Act 2008 required a national planning statement to be laid before Parliament in a prescribed manner.
- **(5) The courts may have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege, on which it is important for Parliament and the courts to agree if possible.**
 - OGC: references to Joint Committee on Parliamentary Privilege report to examine scope of privilege acceptable [61].
 - Many of the leading cases on Parliamentary privilege refer to the Joint Committee Reports of 1999 and 2013 on Parliamentary privilege.

- (6) **“An exception has also been identified for the use of ministerial statements in judicial review proceedings. The Speaker accepts that such an exception exists but contends that the scope and nature of this exception has not yet been the subject of detailed judicial analysis. It calls for careful consideration of the constitutional issues involved. We respectfully agree”.**
 - In *Wilson* Lord Nicholls referred to the “established practice by which courts, when adjudicating upon an application for judicial review of a ministerial decision, may have regard to a ministerial statement made in Parliament” [60], giving the example of *Brind* [1991] 1 AC 696.
 - This and subsequent cases has been taken to establish that “a minister’s statement [may be] relied upon to explain the conduct occurring outside of Parliament, and the policy and motivation leading to it” *Toussaint* [2007] UKPC 48 at [17].
 - Some cases suggest that this is so even when the aim is to show conduct involving the improper exercise of power: *R (Justice for Health) v. Secretary of State for Health* [2016] EWHC 2338 at [161].
 - Green J rejected the argument that an executive decision was immune from challenge merely because the Minister had announced it in Parliament: there was no “Harry Potter ‘invisibility cloak’” [151-165].

- Rationale: if such reference were not permitted, it would enable Ministers to avoid challenge by announcing a decision and its reasons in Parliament, *Justice for Health* at [162], [164].
- Some suggestion in the commentary/case law of a rowing back:
 - 2013 Joint Committee: they “do not concur with the recommendation of [the 1999 Joint Committee] that ‘article 9 should not be interpreted as precluding the use of proceeding in Parliament in court for the purpose of judicial review of government decisions’. Such an unlimited disapplication of Article 9 in respect of judicial review cases could lead to [damaging consequences]” [132].
 - *Heathrow Hub*: CA saw “force” in the Speaker’s submissions on the limits to which *Toussaint* could be put (at [159]-[169]).
 - *Project for the Registration of Children as British Citizens* [2021] EWCA Civ 193:
 - “... this use of ministerial statements is permitted for the limited use of identifying the Government’s purposes and reasons for taking or proposing the action which is being challenged in the proceedings. Those are the purposes or reasons which have been formulated outside Parliament and explain action taken outside of Parliament...” (per Singh LJ at [105]).

PRACTICAL POINTS FOR LITIGATION

- Material is admissible if it has been repeated outside of Parliament: *Heathrow Hub* [2019] EWHC 1069 (Admin) (Div Ct) [149] (or confirmed in writing, for example in a witness statement in the proceedings).
- The underlying evidence presented to (say) a Select Committee is in principle admissible.
- Notification of the Speakers' Counsel.
- *Heathrow Hub* (CA) [171]:
 - “... there will be circumstances in which the proper assertion of Parliamentary privilege has the consequence that a piece of evidence must be excluded from court proceedings and the result—serious though that may be—is that the case must be decided in the absence of that evidence...”

JUDICIAL REVIEW CHALLENGES THAT IMPINGE ON THE MAKING OF LEGISLATION

- A court will not make orders which either directly or indirectly require a MP to introduce a bill or which would prevent a MP from doing so.
- “Indirectly” includes making a declaration that would have this effect.
 - *Wheeler*: “... the introduction of a Bill into Parliament forms part of the proceedings of Parliament” and “[t]o order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament” [47].
 - Declaration? *Wheeler*: “[a] declaration tailored to give effect to the claimant’s case would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order...” [47].
 - *R (Unison) v. Secretary of State for Health* [2010] EWHC 2655 (Admin)—relief would require consultation to be undertaken which would impact on the parliamentary timetable. “The courts cannot forbid a Member of Parliament from introducing a Bill...” [10].

- The principles in *Wheeler* and *Unison* apply equally to secondary legislation, subject to the point that the enactment of secondary legislation may require compliance with a prior statutory step (such as undertaking consultation or the PSED):
 - *R (Scott) v. SSJ* [2017] EWHC 1948 (Admin) at [53].
- This distinction starkly illustrated in *Adiatu* [2020] EWHC 1554 (Admin):
 - Div Ct held that the PSED applies to the decision-making process by Government departments which led to the making of secondary legislation [216]-[228].
 - Primary legislation: “... it would be a breach of parliamentary privilege and the constitutional separation of powers for a court to hold that the procedure that led to legislation being enacted was unlawful...” [230].
 - “... the courts cannot question the legitimacy of an Act of Parliament (or an amendment to an Act of Parliament” [235].
 - The PSED was inapplicable to “the actions of a government department leading up to an amendment to primary legislation” [236].

- Clarification of the width of *Adiatu* in R (A) v. SSHD [2022] EWHC 360 (Admin):
 - “[t]he procedure that led to legislation being enacted” in *Adiatu* was not confined to the Parliamentary process, but included “the prior decision-making procedure, culminating in a substantive decision relating to substantive design of amendments to legislation” [21(iii)].
- Decision by the executive on when to lay secondary legislation protected by Parliamentary privilege, see *Shaw*:
 - “... the judicial exclusion zone applies to decisions to lay delegated legislation as well as primary legislation before Parliament, except in cases where statute and not merely parliamentary convention bestows upon the court authority to intervene. Unless there is some specific statutory obligation affecting the laying of secondary legislation, the decision when to lay an instrument is as much taken in the political capacity of Member of Parliament as the decision whether to lay one” [150] (emphasis added).

CURRENT THORNY ISSUES IN PARLIAMENTARY PRIVILEGE

- The scope of the exception for the use of Ministerial statements in judicial review proceedings.
- Does Parliamentary privilege apply to the proceedings of statutory inquiries?
 - A statutory inquiry is not a court; is it a “place out of Parliament” within the meaning of Article 9?
 - See note by CTI to the Infected Blood Inquiry dated 11 January 2023/Final Report, Vol 1, footnote 26.
 - See also note by CTI to the Covid Inquiry dated 30 January 2023.
 - Post Office Inquiry.
- The status of reports from committees of Parliament with a statutory basis, e.g. the Intelligence and Security Committee, established by the Justice and Security Act 2013.

ma
tr
ix

SARAH HANNETT KC

sarahhannett@matrixlaw.co.uk

Griffin Building, Gray's Inn
London WC1R 5LN