

Article 9, Parliamentary Privilege and Judicial Review

Jenni Richards QC
5 April 2017

Article 9, Bill of Rights 1688

- *That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.*
- “ancient origins and archaic language”?
- Or “continuing relevance and value” and “a cornerstone of parliamentary democracy”?
- “the single most important parliamentary privilege”
(Joint Committee on Parliamentary Privilege, First Report, 1999)

Who decides?

- Who decides whether a matter falls within Parliament's sole jurisdiction?
- Lord Phillips in *R v. Chaytor*: *“the extent of parliamentary privilege is ultimately a matter for the court”*

Report of Joint Committee on Parliamentary Privilege (July 2013)

- Significant increase in recent years in the number of references made in court to parliamentary proceedings
- Three main categories
- *Pepper v Hart*: reliance upon ministerial statement in Parliament as an aid to interpretation when resolving ambiguity in primary legislation
- Where parliamentary proceedings are referenced as a matter of history or as part of a narrative to explain what happened, without the content as such being questioned
- Judicial review: “*the third and more problematic area*”

Report of Joint Committee on Parliamentary Privilege (July 2013) continued

- *“in an adversarial system, the admission of evidence derived from committee reports in submissions from one party will necessarily lead to its questioning by the other party, thus contravening Article 9”*
- *“the judges are questioning what was said by a Minister in Parliament to discover whether the Minister meets the legal test of rationality or meets the legal test of relevance. This raises the possibility of a chilling effect, in that Ministers may be deterred from presenting policies and decisions clearly and honestly before Parliament, for fear of judicial review.”*

Three recent decisions

- *Smith v Lancashire Teaching Hospitals NHS Trust* [2016] EWHC 2208 (QB)
- *R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin)
- *R (Conway) v Secretary of State for Justice* [2017] EWHC 640 (Admin)

Smith v Lancashire Teaching Hospitals NHS Trust

- C cohabited with the deceased for 11 years but was not entitled to bereavement damages. Sought declaration reading down Fatal Accidents Act s. 1A(2)(a), alternatively a declaration that the provision is compatible with C's Convention rights
- Court needed to be careful, in examining the history of sections 1 and 1A of the FAA, to avoid contravening Article 9.
- Court could evaluate the decisions made in Parliament/made by Ministers and announced in Parliament for a very limited purpose, namely to determine compatibility with the ECHR

Smith v Lancashire Teaching Hospitals NHS Trust

- Approval of the approach of Stanley Burnton J in *Office of Government Commerce v Information Commissioner* [2010] QB 98, namely that:
- Courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in parliamentary proceedings
- Opinions expressed by parliamentary select committee are irrelevant to an issue that falls to be determined by the courts
- Courts can receive evidence of proceedings where simply relevant historical facts or events

Smith v Lancashire Teaching Hospitals NHS Trust

- No breach if courts decide legislation is incompatible under HRA
- Legitimate to consider proceedings in Parliament to consider what the social policy of the provisions was, for the purpose of considering compatibility.
- Court can consider information provided by a minister or other member of either House in the course of a debate on a Bill.
- By doing so the Court is not “questioning” proceedings in Parliament but merely placing itself in a better position to understand the legislation.

R (Justice for Health Ltd) v SOS for Health

- Judicial review based on Ministerial statement made to Parliament
- Legitimate to consider the statement for the purpose of (a) construing it (the interpretation of the statement being a matter for the court) and (b) determining if the SoS was acting ultra vires
- SOS accepted that the Court was entitled to examine the statement to Parliament for the purpose of deciding whether the SOS acted perversely, irrationally and unlawfully

R (Justice for Health Ltd) v SOS for Health

- Claimant also argued that the SOS's statement breached the principles of transparency, clarity and good administration
- SOS argued that consideration of this argument (but not the Claimant's other arguments) involved breach of Article 9 of Bill of Rights
- Court held that no issue of parliamentary privilege arose. The subject of the judicial review was a statement taken by the SOS outside Parliament (but communicated to Parliament).
- The Court could examine the reasons given by the SOS even if set out only in a Parliamentary statement

R (Justice for Health Ltd) v SOS for Health

- If the Court could not consider this ground, *“bizarre consequences” would arise which would hamper challenges to the “legality of executive decisions ... by ring-fencing what ministers said in Parliament” and making “ministerial decisions announced in Parliament ... less readily open to examination than other ministerial decisions”.*
- *“It would be an ironic consequence of article 9. Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts.”*
- *“Ms Richards QC for the junior doctors likened this to the Minister donning a Harry Potter invisibility cloak”.*

R (Conway) v Secretary of State for Justice [2017] EWHC 640 (Admin)

- Following the decision of the Supreme Court in *R (Nicklinson) v Ministry of Justice* [2015] AC 657, C sought a declaration that s. 2 Suicide Act 1961 is incompatible with his rights under Articles 8 and 14 ECHR
- Permission to apply for judicial review refused by Burnett LJ and Jay J (Charles J dissenting)

Conway (continued)

- Following Nicklinson, Parliament considered the issue of assisted dying
- “Parliament has decided, at least for the moment, not to provide for legislative exceptions to section 2(1) of the 1961 Act”
- Article 9 *“prevents a court from relying upon or analysing the content of debates in Parliament with a view to judging their quality or agreeing or disagreeing with them. It is not for a court to scrutinise the content of a debate, with resulting praise, approbation or criticism.”*

Conway (continued)

- Court observed that:
 - There are very limited and well known circumstances in which a court may refer to proceedings in Parliament
 - In the context of a consideration of proportionality under the HRA, it is the outcome of Parliamentary proceedings, not their content, which falls to be considered.
 - *“fallacious to suppose that what occurs on the floor of either House of Parliament, or in committee, represents the four corners of the consideration, thought, debate and materials upon which members form their personal judgments before voting”*
 - Parliament having considered the matter, *“it remains institutionally inappropriate for a court to make a declaration of incompatibility”*

Conway (continued)

- Dissenting judgment of Charles J
- Arguable that the Supreme Court in *Nicklinson* decided that, without any breach of Article 9 of the Bill of Rights, the court could in the future consider what Parliament had done and could conclude that what had been done was not enough to exclude consideration of the compatibility of section 2 of the Suicide Act with the ECHR
- Suggested that there could be a preliminary issue on institutional competence and the extent of Parliamentary consideration and conclusions that could be taken into account

Government Response to the Joint Committee on Parliamentary Privilege (Dec 2013)

- “The Government continues to be of the view that the current situation whereby the courts can use proceedings in Parliament as long as they are not questioned or impeached is satisfactory. However, should we see any increase in the rare instances where there has been inappropriate judicial questioning of proceedings in Parliament, as evidenced by the Committee, we believe it would be sensible to revisit this issue”.
- “We therefore agree with the Committee that in the absence of serious infringements a better approach in the near term is to build on the current good relations between the judiciary and the Parliamentary Authorities to ensure continued good practice.”

A note of caution

- *R (Reilly) v Work and Pensions Secretary (No 2)* [2016] 3 WLR 1641 (CA)
- Judge was placed in a difficult position by the Secretary of State's reliance in his evidence on the justifications for the legislation advanced in Parliament and by the extent of the parliamentary materials placed before her: *"That made the line between criticising the Secretary of State's case and questioning proceedings in Parliament hard to identify or observe"*.
- *"It has become relatively commonplace in public law proceedings for every last word spoken or written in Parliament to be placed before the court. In particular, debates are relied upon extensively when they should not be and, furthermore, the conclusions of select committees are prayed in aid with the court being asked to "approve" them ... That should not happen"*.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

