

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 - UNIT 12 - PUBLIC LAW

JUNE 2022

#### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

### CHIEF EXAMINER COMMENTS

There was a wide range of marks, the pass rate was disappointing, notwithstanding the relatively small cohort of candidates. There was, however, one distinction which showed that it was possible to score a high mark on this paper.

The main reasons for the comparatively poor performance are:

- **Lack of structure in answers:** Some candidates did not organise their answers in a systematic manner but tended to leap around from issue to issue and to jumble together their thoughts on different aspects of the question.
- **Poor application to the facts:** Problem questions require candidates to identify the issues and to apply the relevant law to the facts. Often candidates simply recited the law with little application. It is also essential to cite statutory authority (especially where statutes are in the statute book provided) and case law in support of answers.

- **Insufficient breadth of revision:** Candidates need to be able to answer four questions adequately to give themselves the best chance of passing. A candidate who answers two questions satisfactorily but simply writes answers of 100-150 words for the other two questions is very unlikely to pass. Whilst candidates do have a choice of questions, it is nonetheless essential to revise a sufficient range of topics to be sure of answering four questions fully.
- **Lack of analysis and evaluation:** At Level 6 essay questions require candidates to be able to analyse and evaluate key constitutional principles and develop their own views; descriptive answers will not attain high marks. In most of the essay questions, there was a lack of sufficient analysis and evaluation on the part of candidates.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

Most candidates were able to answer part (a) accurately, defining parliamentary sovereignty and the rule of law accurately, albeit on occasion superficially. The majority of answers to part (b) were poor, as candidates were unable to analyse the inter-action between parliamentary sovereignty and the rule of law adequately. The distinction candidate, however, provided an excellent answer to this part of the question, showing that it was possible to obtain a very high mark for it.

#### Question 2

This was a question in two parts. Part (a) required candidates to explain the royal prerogative and its operation. Candidates were not able to define it accurately or to explain its current role in the constitution. Part (b) of the question asked candidates to analyse how courts scrutinised the scope of the royal prerogative and its exercise, but neither candidate was able to identify what was required.

#### Question 3

This question required candidates to evaluate whether the law on privacy protected the freedom of the press. Unfortunately, the candidates wrote an essay on defamation rather than privacy, although the question clearly referred to privacy. Other candidates adopted a clear structure, enabling them to evaluate the relevant case law, albeit a bit superficially, and to reach a soundly argued conclusion.

#### **Question 4**

This question, regarding courts and administrative tribunals was attempted by one candidate who obtained low marks for it. There was no definition to what a tribunal was or anything of substance.

#### **Section B**

#### **Question 1**

The question covered police powers of search, arrest etc. Some candidates used their statute books effectively and identified the sections in PACE that related to the police powers that were being exercised in the question. Some candidates also used case law effectively and applied the law to the facts well, reaching well-reasoned conclusions regarding the legality of the police conduct in question.

However, there were some common errors in candidates' answers. Some candidates stated that the police have the power to stop and search a person under s 1 of PACE if they reasonably suspect that person has committed an offence. The correct test is in fact whether they reasonably suspect that the person is carrying stolen or prohibited articles. Also, contrary to what some candidates stated, for the purposes of s 56 PACE (right to have someone informed when arrested) an offence triable either way is deemed to be an indictable offence. Additionally, many candidates did not identify that the police have the power under s 32 PACE to enter and search any premises in which a person was immediately before they were arrested for evidence relating to the offence.

One candidate did not refer to the relevant sections of PACE at all; this was surprising as they had access to the statute book. To do well in an exam question, it is vital to cite relevant authority.

#### **Question 2**

This was answered by three candidates. Better candidates structured their answer systematically, analysing the potential grounds of review for each potential claimant; they identified clearly which facts gave rise to a given ground of review, although they did leave out the preliminary issues. The weaker candidates were disorganised in their answers and struggled to identify which grounds of review were actually relevant on the facts.

No candidates answered Question 3.

#### **Question 4**

This question required candidates to analyse a problem scenario in order to establish whether an MP had any defences to a defamation action regarding statements made inside and outside of Parliament. The stronger candidates analysed the issues effectively, showing sound knowledge of the definition of defamation, the impact of parliamentary privilege and relevant defences in the Defamation Act 2013 and case law, in particular the public interest (previously Reynolds) defence.

The weaker candidates did not analyse parliamentary privilege adequately and did not discuss sufficient case law.

**SUGGESTED POINTS FOR RESPONSE**

**LEVEL 6 - UNIT 12 - PUBLIC LAW**

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Dicey’s definition of parliamentary sovereignty, including               <ul style="list-style-type: none"> <li>- Parliament’s unlimited legislative competence</li> <li>- No person/body can question an Act of Parliament</li> </ul> </li> <li>• Express/implied repeal</li> <li>• Definition of implied repeal (<u>Ellen Street Estates v Minister of Health</u> (1934))               <ul style="list-style-type: none"> <li>- Qualification of doctrine in relation to ‘constitutional statutes’ (<u>Thoburn v Sunderland City Council</u> (2002))</li> <li>- Definition of constitutional statutes</li> </ul> </li> <li>• Definition of the rule of law (Dicey)               <ul style="list-style-type: none"> <li>- An absence of arbitrary power;</li> <li>- Equality before the law; and</li> <li>- Basic constitutional rights of individuals derived from judicial decisions</li> </ul> </li> <li>• Modern definitions of the rule of law; e.g. Lord Bingham’s version: emphasis on human rights/international law</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Practical examples of parliamentary sovereignty; e.g. Acts of Parliament override constitutional conventions, the royal prerogative and case law</li> <li>• Limitations on parliamentary sovereignty; e.g. practical difficulties in repealing fundamental constitutional principles</li> </ul> <p>The extent to which the rule of law is values-based rather than simply content-based</p>	16



Question Number	Suggested Points for Responses	Marks (Max)
<b>1(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Reasons for potential conflict: Parliamentary sovereignty means that Parliament can legislate contrary to the rule of law</li> <li>• Examples of conflict; e.g. <u>Mortensen v Peters</u> (1906) – breach of international law; War Damages Act 1965 – retrospective legislation</li> <li>• Judicial opinion; e.g. <u>Jackson v A-G</u> (2005) – whether UK courts would strike down Acts breaching the rule of law</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Internal Market Bill, controversy regarding the Northern Ireland Protocol</li> </ul>	<b>9</b>
<b>Question 1 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>2(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Definition: residue of powers legally vested in the Crown</li> <li>• Examples: treaty-making, deployment of armed forces, prerogative of mercy</li> <li>• Relationship with statute</li> <li>• prerogative powers may be modified or abolished by statute; e.g. Crown Proceedings Act 1947, Fixed-term Parliaments Act 2011</li> <li>• statute may impliedly curtail prerogative powers (<u>R (Miller) v Secretary of State for Exiting the European Union</u> (2017); <u>A-G v De Keyser’s Royal Hotel</u> (1920))</li> <li>• Prerogative and statutory powers may co-exist (<u>R v SoS for the Home Dept ex p. Northumbria Police Authority</u> (1988))</li> <li>• Role of constitutional conventions; e.g. government normally exercises prerogative powers on the monarch’s behalf</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Superiority of statutory powers: government may not use prerogative powers inconsistently with statutory powers (<u>Laker Airways v Department of Trade</u> (1977), <u>R v Home Secretary, ex p. Fire Brigades Union</u> (1995))</li> <li>• Revival of prerogative powers after being in abeyance (<u>A-G v De Keyser’s Royal Hotel</u>),</li> </ul>	<b>13</b>

Question Number	Suggested Points for Responses	Marks (Max)
<b>2(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Approach of courts to judicial review of the prerogative: Historically courts have been willing to adjudicate on the scope and extent of prerogative powers, but not their exercise</li> <li>• Courts have held that no new prerogative powers can be created (<u>Case of Proclamations</u> (1611), (<u>BBC v Johns</u> (1964))).</li> <li>• Shift in approach of courts: now willing to review the exercise of prerogative powers (<u>CCSU v Minister for the Civil Service</u> (1984)) if justiciable; see also <u>R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland</u> (2019)</li> <li>• Examples of justiciable prerogative powers: renewal of passport (<u>R v Foreign Secretary, ex p. Everett</u> (1989), aspects of the prerogative of mercy (<u>R v Home Secretary, ex p. Bentley</u> (1994))</li> <li>• Courts reluctant to review matters of 'high policy' (<u>R (CND) v Prime Minister</u> (2002))</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Parliamentary accountability and the review of prerogative powers</li> </ul>	<b>12</b>
<b>Question 2 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>3</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• No right to privacy in English law (<u>Wainwright v Home Office</u> (2006))</li> <li>• Human Rights Act 1998: Horizontal effect of Convention rights (<u>Douglas v Hello! Ltd</u> (2005))</li> <li>• Analysis of case law such as <u>Murray v Express Newspapers Ltd</u> (2007) regarding circumstances leading to a reasonable expectation of privacy</li> <li>• Analysis of proportionality: how the courts use proportionality in adjudicating the conflict between Articles 8 and 10</li> <li>• Evaluation of case law in which the courts strike a balance between an individual's Article 8 rights against a newspaper's Article 10 rights (<u>Campbell v MGN</u> (2005))</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Development of tort of misuse of private information</li> </ul>	<b>25</b>
<b>Question 3 Total:25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Leggatt Report: need to bring coherence to the tribunal system</li> <li>• 2007 Act: new, unified tribunal system created as an executive agency of the Ministry of Justice</li> <li>• Independence of tribunals and their judicial nature (s 1 2007 Act), but with specific jurisdiction</li> <li>• Appointment of Senior President</li> <li>• Main tribunals, the First-tier Tribunal with an appeal to the Upper Tribunal and, with permission, to Court of Appeal; position of Employment Tribunal</li> <li>• Composition; e.g. staffed by persons with specialist expertise</li> <li>• Procedures: intended to be cheaper and simpler than courts; e.g. legal representation, rules of evidence</li> <li>• Judicial review: Upper Tribunal amenable to judicial review (<u>R (Cart) v The Upper Tribunal</u> (2011)), subject to Judicial Review and Courts Bill</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Ouster clauses do not protect decisions by tribunals which exceed their jurisdiction (<u>Anisminic v FCC</u> (1969))</li> </ul> <p>Level of tribunal fees must not deny access to justice (<u>R (Unison) v Lord Chancellor</u> (2017))</p>	25
<b>Question 4 Total: 25 marks</b>		

## SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include: [N.B. All section numbers are from PACE]</p> <ul style="list-style-type: none"> <li>• <b>Stop and Search</b> <ul style="list-style-type: none"> <li>- Power to stop and search for stolen articles in public place (s 1(2))</li> <li>- Reasonable grounds for suspicion (s 1(3))</li> <li>- Conduct of search (s 2(2) and (3); e.g., officer's name and station, the object of the proposed search and the grounds on which it is made</li> <li>- Reasonable grounds exist, but conduct of search unlawful</li> </ul> </li> </ul>	25



	<ul style="list-style-type: none"> <li>• <b>Search of classroom/seizure of cocaine</b> <ul style="list-style-type: none"> <li>- Power to enter and search premises in which suspect was in when arrested or immediately before arrest for evidence relating to the offence, provided offence indictable (s 32(2)(b))</li> <li>- Reasonable grounds for belief that there is evidence in premises relating to that offence (s32(6))</li> <li>- Search of classroom therefore lawful</li> <li>- Police may seize anything which is on the premises if reasonable grounds for believing (s 19(1) and (2)) <ul style="list-style-type: none"> <li>○ that it is evidence in relation to an offence being investigated or any other offence; and</li> <li>○ that it is necessary to seize it on specified grounds</li> </ul> </li> </ul> </li>   <li>• <b>Arrest</b> <ul style="list-style-type: none"> <li>- Power of arrest – s 24(3) PACE: reasonable grounds for suspecting an offence has been committed</li> <li>- Arrest necessary – s 24(5) PACE - to allow prompt and effective investigation of the offence (s 24(5)(e))</li> <li>- Manner of arrest – fact of arrest and grounds, even if obvious (s 28)</li> <li>- PC Budd does not state the grounds of arrest adequately</li> </ul> </li>   <li>• <b>Detention at police station</b> <ul style="list-style-type: none"> <li>○ Arrest lawful once s 28(4) complied with</li> <li>○ Reason given for Andy’s ongoing detention complies with s 37 – to enable police to obtain evidence of the offence by questioning him</li> <li>○ Detention reviews not carried out every six hours (s 40)</li> </ul> </li>   <li>• <b>Refusal to inform brother</b> <ul style="list-style-type: none"> <li>○ Section 56 – Andy entitled to have someone told that he has been arrested and detained at police station</li> <li>○ Police may delay Andy’s right for up to 36 hours if certain conditions satisfied: <ul style="list-style-type: none"> <li>- indictable offence? Yes – theft and possession of controlled drugs</li> <li>- authorised by inspector or above? No</li> <li>- reasonable grounds for believing that telling named person of arrest <b>will</b> lead to alerting of other suspects who have not yet been arrested (s 56(5)). Possibly satisfied – brother might be accomplice or tip accomplice off</li> </ul> </li> </ul> </li> </ul>	
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	<p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Section 117: Search of Andy unlawful, so police cannot use reasonable force.</li> <li>• Police complied with s 30: Andy taken to police station promptly after arrest</li> </ul>	
<b>Question 1 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>2</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Amenability/ Eligibility <ul style="list-style-type: none"> <li>- The Agency is a public body <ul style="list-style-type: none"> <li>○ Public law matter</li> <li>○ Standing</li> <li>○ Timing</li> <li>○ Remedies – see below</li> </ul> </li> </ul> </li> <li>• LTC <ul style="list-style-type: none"> <li>- <i>Procedural ultra vires</i> : mandatory or directory requirement – approach of the courts; e.g. <u>Howard v Boddington</u> (1877)</li> <li>- Illegality: Failing to take into account relevant considerations – emails from local charities regarding crisis/ inability to cope (<u>Roberts v Hopwood</u> (1925))</li> <li>- Irrationality: definition of <u>Wednesbury</u> (1948) unreasonableness</li> </ul> </li> <li>• Zechariah <ul style="list-style-type: none"> <li>- Procedural impropriety: Right to be heard: Legitimate expectation - where the applicant’s interest was some <b>ultimate benefit</b> which they hoped to attain or retain <u>Department of Education and Employment, ex parte Begbie</u> (2000); <u>Schmidt v Home Secretary</u> (1969)</li> <li>- Illegality: Rule against delegation (no power to sub-delegate to the Home Office (<u>Lavender v MHLG</u> (1970))</li> <li>- Illegality: Ulterior purpose: discouraging the employment of foreign nationals (<u>Congreve v HO</u> (1976) and/or irrelevant consideration (<u>Padfield v Minister of Agriculture</u> (1968))</li> </ul> </li> <li>• Remedy: quashing order</li> </ul>	<b>25</b>

	<p>Responses could include</p> <ul style="list-style-type: none"> <li>• Right to be heard Zechariah had no opportunity to refute the allegations (<u>Fairmount Investments Ltd v Secretary of State for the Environment (1976)</u>)</li> </ul>	
<b>Question 2 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>3(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Definition of freedom of expression – Article 10(1): the right to impart information and ideas without interference by public authority</li> <li>• Qualified right – limitations in Article 10(2) <ul style="list-style-type: none"> <li>- Prescribed by law - must have clear legal basis, viz Dangerous Jumping (Banning of Videos) Act 2021</li> <li>- Justified by reference to legitimate aim; e.g. protection of health</li> <li>- Necessary/proportionate</li> </ul> </li> <li>• Proportionality – application of <u>Bank Mellat (2013)</u> test: <ul style="list-style-type: none"> <li>• Objective sufficiently important to limit fundamental right? <i>Yes; preventing death/serious injury to children</i></li> <li>• Measure rationally connected to objective? <i>Connected – yes; ban on videos likely to prevent ‘copycat’ actions</i></li> <li>• Do measures go further than necessary? <i>Yes; blanket ban on videos disproportionate; age restrictions more proportionate</i></li> <li>• Fair balance struck between the rights of the individual and the interests of the community? <i>Balance probably too far in favour of the community</i></li> </ul> </li> </ul> <p>Responses could include:</p> <p>‘prescribed by law’ means any public interest limitation must be accessible and sufficiently clear to enable the citizen to regulate their conduct</p>	<b>13</b>

Question Number	Suggested Points for Responses	Marks (Max)
<b>3(b)</b>	<p>Responses should include</p> <ul style="list-style-type: none"> <li>• Section 6 HRA: court as public authority should act compatibly with Conventions rights ((s 6(1) &amp; (3) HRA)</li> <li>• Provisions of HRA 1998 courts should consider: <ul style="list-style-type: none"> <li>- Section 2: decisions of ECtHR persuasive: Court of Appeal must take into account ECtHR jurisprudence</li> <li>- Section 3: interpretative obligation on courts: <u>Ghaidan v Godin-Mendoza</u> (2002) – s 3 requires a broad, purposive approach based on the importance of the fundamental right involved</li> <li>- Section 4: declarations of incompatibility – s 4 empowers Court of Appeal to make such a declaration, but incompatible legislation remains in force. Abimbola’s conviction would therefore stand.</li> </ul> </li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Section 7 HRA: Abimbola a ‘victim’, so can invoke Convention rights</li> <li>• If court issues declaration of incompatibility, Abimbola could take proceedings before ECtHR</li> </ul>	<b>12</b>
<b>Question 3 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>4</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Definition of defamation/slander (publication in transient form) including need to prove damage: application to the facts</li> <li>• Proceedings in Parliament: Article 9 Bill of Rights 1689 – freedom of speech/ absolute privilege for money-laundering allegations</li> <li>• Allegations of cover-up: identification of relevant defences in Defamation Act 2013 – replacing common law defences</li> <li>• Truth (s 2) – explanation and application to facts; still applicable provided statement substantially true</li> <li>• Honest opinion (s 3) – explanation and application to facts; whether claim that Oscar’s conduct was a serious threat to public health and that he put profit before people comes within s 3</li> <li>• Publication on matter of public interest (s 4) – explanation and application to facts: <u>Reynolds</u> defence as guide to interpretation of s 4; analysis of factors relevant to speech by MP</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Importance of freedom of expression (Article 10 ECHR)</li> <li>• Alignment of slander and libel in Defamation Act 2013</li> </ul>	<b>25</b>
<b>Question 4 Total: 25 marks</b>		