CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 12 – PUBLIC LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

One of the main points of feedback on this exam is that many candidates did not seem to revise a sufficient range of topics. A number of candidates obtained good marks in two questions, showing the ability to do well. However, they scored low marks in the other two questions which they answered, showing an insufficient breadth of knowledge.

Please also remember the importance of timing. Some candidates had obviously spent more than the recommended time attempting the first three questions, which meant they did not have enough time to attempt the remaining question fully. Indeed, one candidate answered only three questions. Where this happened, the last question attracted a low mark (or no mark at all), and often meant that a candidate did not do as well as might have been expected and possibly failed.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Involved analysing the separation of powers and the rule of law with reference to the judiciary. Most candidates were able to define the separation of powers and the rule of law well and the best answers were able to analyse the inter-relationship between the judiciary and the other two branches of government in a structured manner. A few candidates included an analysis of the executive/legislature relationship which was not directly relevant to the question.

The best candidates clearly distinguished between the separation of

- the judiciary from the executive, and
- the judiciary from the legislature.

However, a number of candidates did not distinguish sufficiently clearly between the different aspects of separation. Nonetheless, the question was well answered overall.

Question 2

Was a question in two parts. The first part covered how the Westminster Parliament has devolved powers to Scotland, while the second part covered how devolution has impacted parliamentary supremacy. Most candidates covered the basics of devolution well and also showed knowledge of recent development, in particular the key elements of the Scotland Act 2016. Most candidates defined parliamentary supremacy well, although some candidates struggled to analyse the impact of devolution effectively.

Question 3

Covered defamation and the freedom of the press. The best answers analysed the issues effectively, showing sound knowledge of the relevant defences in the Defamation Act 2013 and case law. They also addressed the extent to which the law on defamation placed excessive restrictions on the freedom of the press, reaching well-reasoned conclusions. The weaker answers tended to lack detail on the defences and case law, and also failed to reach a conclusion. Overall, this question was well answered.

Question 4

On the use of proportionality and irrationality in judicial review was a relatively unpopular question. The answers to this question were disappointing, citing little in the way of case law. It was possible to obtain a pass mark by defining irrationality and proportionality with reference to the leading cases of Wednesbury and Bank Mellat and explaining the proportionality test. However, the candidates who answered this question were generally unable to do this. The topic has been examined in the past and there was no obvious reason for the disappointing performance.

Section B

Question 1

This was a very popular question on police powers of search, arrest etc. Many candidates made effective use of their statute books and were able to identify the sections in PACE that related to the police powers that were being exercised in the question. Generally candidates used case law well and applied the law to the facts effectively, reaching sound conclusions as to the legality of the police conduct in question. However, some candidates did not appreciate that on the facts that it was unlikely that the police would be able to refuse an arrested person access to a solicitor; the circumstances in which access to a solicitor may be refused are limited. Also, many candidates did not appreciate that the power to search premises under s 18 PACE depends on the written authorisation by an inspector or above.

A few candidates did not refer to the relevant sections of PACE which 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

In part (a) of the question, relating to police powers to control processions and meetings and public order offences, candidates applied the law regarding police powers to the facts effectively, reaching sound conclusions in relation to the police conduct described in the question. However, some candidates did not consider the possibility that the six clear days' note usually required by s 11 might not be needed as it might not have been reasonably practicable to have given notice of that length.

The sections of the answers relating to which public order offences Damian might have committed were for the most part not of the same high standard, as candidates seemed unsure about all the elements of the possible offences.

Candidates made a reasonable attempt to apply the Contempt of Court Act 1981 to the scenario, although some candidates omitted any discussion of s 5 which the newspaper would probably have invoked in an attempt to avoid liability. Many candidates also omitted common law contempt, although the question explicitly referred to it.

Question 3

This question was answered by many candidates and was generally well answered. As well as being able to identify the relevant grounds of judicial review, the better candidates organised their answers effectively, dealing with the preliminaries first and then covering the potential grounds of review for each potential claimant; they analysed clearly which of the facts gave rise to a particular ground of review. Weaker candidates were disorganised in their answers and leapt around between the two potential claimants and while they were usually able to recite the grounds for review, they struggled to identify which grounds were relevant on the facts.

Question 4

The better candidates answered this in a structured fashion and made good use of case law in reaching their conclusions. However, some candidates' answers lacked a clear structure, and when it came to considering the issues they tended to make broad generalisations about privacy and the freedom of expression and were not able to analyse the key issues raised by the question in the depth required for a higher mark.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 12 – PUBLIC LAW

SECTION A

Question 1

Separation of powers

Montesquieu, the French philosopher developed the modern version of the doctrine in his seminal work, L'esprit des Lois (1748). The doctrine identifies three branches of government:

- The legislature, which makes the law.
- The executive, which applies and administers the law. This includes central and local government, police, armed forces, etc.;
- The judiciary, which resolves disputes about the law.

These three functions should be carried out by separate organs of state and each organ should only perform its own functions with its own personnel. Montesquieu believed that the separation of powers with 'checks and balances', allowing each branch to control the abuse of power by another branch, was critical. An independent judiciary is therefore crucial in guarding individual liberty and securing the rule of law by precluding arbitrary government.

Judicial Separation from the other branches of state

(i) The Executive

The Constitutional Reform Act 2005 ('CRA') has significantly buttressed the separation between the executive and the judiciary. For example:

- The Lord Chancellor and other cabinet ministers must uphold judicial independence (s.3 CRA).

- Judges are now selected by a Judicial Appointments Commission, as opposed to the Prime Minister or Lord Chancellor. This evidently reduces the scope for political interference.

Even before the CRA numerous rules and conventions protected judicial independence:

- Judges of the High Court and above hold office 'during good behaviour' and may only be removed on a vote by both Houses of Parliament. Judges have security of tenure and cannot be dismissed merely because their judgments displease politicians (s.11 Senior Courts Act 1981, s.33 CRA).

- Convention obliges ministers to desist from criticising judges although the extent to which this is still adhered to is questionable; for example, ministers have at times strongly criticised judgments, largely in human rights and Brexit-related cases.

- Judicial review enables the judiciary to scrutinise how the executive exercises its powers.

Conversely, it is difficult to reconcile the quasi-judicial responsibilities of ministers with their political roles. However, following the ECtHR decision in Stafford v UK (2002) the power to set the tariff of prisoners sentenced to life imprisonment was removed from the Home Secretary.

Moreover, litigation involving Brexit has drawn the judiciary into the political process, with some critics arguing the Supreme Court strayed into constitutionally inappropriate territory in declaring that the lengthy prorogation of Parliament in September/October 2019 was unlawful (R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland (2019)).

(ii) Legislature

There is also substantial judicial separation from the legislature. Judges cannot be MPs (s.1 House of Commons Disqualification Act 1975). Also the CRA ended the House of Lords' judicial function, establishing a new, separate UK Supreme Court in 2009. This ended the anomaly of the Law Lords being members of the legislature.

The UK judiciary accepts parliamentary sovereignty, so (unlike the US judiciary) it cannot declare statutes unconstitutional. Instead, the UK judiciary is limited to making declarations of incompatibility under the HRA which do not invalidate the incompatible statute. Nonetheless, Lord Steyn suggested obiter in Jackson v Attorney-General (2005) that judges might strike down legislation that violated the rule of law, for example by abolishing judicial review.

By convention, MPs do not criticise judges and judges avoid party politics. Also, under the sub-judice rule MPs must not discuss live court cases.

In contrast the judiciary plays a quasi-legislative role in interpreting statute and developing the common law (the legislative theory). However, Parliament may always pass legislation overriding judgments it dislikes (Burmah Oil v Lord Advocate (1965)). Further, the judiciary shows restraint in its law-making role.

The rule of law

AV Dicey provided the classic definition of the rule of law in Introduction to the Study of the Law of the Constitution (1885). His definition comprises three elements:

(i) There should be no arbitrary power; i.e. regular law should be supreme.

Citizens should not be punished or have their assets removed unless clearly sanctioned by the law ('due process' in modern terminology).

(ii) There should be equality before the law.

The government and its officials should not have any special privileges or protections from the law, in contrast to France where special administrative courts favoured the government over citizens.

(iii) The fundamental constitutional rights of individuals are derived from judicial decisions of the English courts.

Dicey also considered that the courts were a much more effective guarantor of personal freedom than a Bill of Rights, as through their decisions they developed the common law in a manner that upheld individual liberty

Arguably Dicey's view of the rule of law is now outmoded. In a modern economy public bodies need extensive discretionary powers, but this has been accompanied by a significant expansion in judicial review which has acted as an effective check on the abuse of power by public bodies. Moreover, the courts have not always successfully safeguarded individual liberty, as illustrated by Malone v MPC (1979) where the court held that, in the absence of any law prohibiting it, the police were free at common law to tap phones.

There have therefore been numerous attempts to update the concept. Thus, Raz has stressed that laws should be clear, stable and accessible to enable citizens to understand and obey them. Also, judicial independence must be secured so that judges are able to decide cases according to the law free from external pressures.

Lord Bingham provided a highly authoritative formulation in The Rule of Law (2010). Both Lord Bingham and Dicey support equality before the law and the necessity for clear and predictable laws. However, Lord Bingham goes further, for example he emphasises the importance of safeguarding human rights and abiding by international law.

Conclusion

An independent judiciary is essential to safeguard individual liberty and rule of law, as the statement suggests. The CRA 2005 has bolstered the mixture of law and convention that ensured judicial independence. Cases such as Miller/Cherry show the courts are willing to prevent executive over-reach. Accordingly, the UK judiciary is sufficiently separate from the other branches of government.

Question 2(a)

Scottish devolution

The Scotland Act 1998 created a Scottish Parliament and gave it substantial legislative powers regarding 'devolved matters'. Devolved matters comprise all issues expect for those specifically reserved to the UK Parliament ('reserved matters') and include responsibility for education, health, housing,

local government, rural affairs and transport. The Scotland Acts 2012 and 2016 extended these powers. Reserved matters are largely those having a UK-wide or international impact and include responsibility for the constitution, foreign policy and defence. Thus Brexit-related issues are largely reserved.

Nonetheless, the UK Parliament retains the power to legislate on devolved matters even if opposed by the Scottish Parliament (s.28(7) Scotland Act 1998). However, the Sewel Convention provided the UK Parliament will not normally legislate on devolved matters without the Scottish Parliament's consent.

The Scotland Act 2012 granted the Scottish Parliament the power to set a Scottish rate of income tax and to levy certain other taxes. Following the election of a Scottish National Party government in 2011, a referendum took place in 2014 on Scottish independence. Although the electorate voted against independence, the UK government agreed to grant Scotland further powers in response to the campaign. Hence the Scotland Act 2016 granted the Scottish Parliament further powers over taxation, welfare and oil and gas. It also codified the Sewel Convention and recognised that a Scottish Parliament and Government were permanent features of the UK's constitutional arrangements, and so were not to be abolished unless approved by Scottish voters in a referendum. However, in R (Miller) v Secretary of State for Exiting the EU (2017) the Supreme Court held the convention was not enforceable by the courts, despite its incorporation into statute.

The Scottish Parliament is not a sovereign legislature like the UK Parliament, so its legislative powers are limited. It cannot legislate on reserved matters or (for the time being) contrary to EU Law or Convention rights as defined in the Human Rights Act 1998. The courts have the power to strike down legislation beyond the Scottish Parliament's competence. In UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018 – Reference by the Attorney General and Advocate General for Scotland (2018), the Supreme Court stated that at the time of the passage of the Continuity Bill, aimed at ensuring continuity in Scottish law after Brexit, most of its provisions were within the Scottish Parliament's legislative competence. However, the subsequent enactment of the European Union (Withdrawal) Act 2018 by the UK Parliament resulted in many more sections of the Bill being outside its competence, and those sections were therefore 'not law'.

Question 2(b) Impact on parliamentary sovereignty

AV Dicey provided the classic definition of parliamentary sovereignty:

(i) Parliament can make or unmake any law whatever;
(ii) No person or body (including the judiciary) has the power to override or set aside an Act of Parliament.

Parliamentary sovereignty is a common law doctrine recognised by the judiciary, originating in the 17th century struggle between the Crown and Parliament for supremacy and culminating in the Bill of Rights 1689.

Supremacy asserts itself through Acts of Parliament, and not mere resolutions. The courts have developed the 'enrolled Act rule', whereby they will not entertain challenges to Acts of Parliament which have received Royal Assent (Pickin v British Railways Board (1974)).

Supremacy is regarded as 'continuing' in nature: a later Parliament may, if it so wishes, expressly repeal any Acts of previous Parliaments. The courts also apply the doctrine of implied repeal; i.e. a later statute will impliedly repeal an earlier statute to the extent they are inconsistent (Ellen Street Estates v Minister of Health (1934)). Accordingly, even a sovereign Parliament cannot bind its successors.

However, in Thoburn v Sunderland City Council (2002) Laws LJ obiter modified the traditional doctrine by suggesting a hierarchy of statutes - 'ordinary' statutes and 'constitutional' statutes; i.e. statutes that condition the legal relationship between citizen and state in some general, overarching manner, or change the scope of fundamental constitutional rights. Examples included the European Communities Act 1972, the Human Rights Act and the Scotland Act 1998. Laws LJ stated constitutional statutes could only be repealed by express words, not by implication.

The Supreme Court case of H v Lord Advocate (2012) supports this view, as Lord Hope indicated the Scotland Act could not be impliedly repealed because of its 'fundamental constitutional nature'. R (HS2 Action Alliance Ltd) v Secretary of State for Transport (2014) provides further support, as the Supreme Court stated obiter that there were certain fundamental constitutional principles, whether enshrined in statute or common law, to which implied repeal might not apply. As a constitutional statute, the Scotland Act (as amended) is safeguarded from implied repeal.

A noteworthy feature of the 2016 Act is the requirement for a referendum before the Scottish Government and Parliament can be abolished. This seems to be a 'manner and form' provision, an attempt to entrench an Act by imposing a procedural requirement making it more difficult subsequently to amend or repeal that legislation. The Privy Council's decision in A-G for New South Wales ('NSW') v Trethowan (1932) upheld a requirement preventing the legislature of NSW from changing the NSW constitution without a referendum approving it. However, the legislature of NSW was not a sovereign legislature, but a subordinate one subject to a constitution. In contrast the UK Parliament is a sovereign legislature. It is therefore doubtful whether an earlier Parliament can bind a future Parliament as to future procedures. Conversely, it is arguable that as the Parliament Acts 1911/49 made it 'easier' in certain circumstances for legislation to be enacted, Parliament could make it 'harder' to legislate in future.

The devolution legislation generally preserves the sovereignty of the UK Parliament as, despite the Sewel Convention, it can still legislate on devolved matters despite the Scottish Parliament's opposition. Moreover, the judgments in Miller and the Continuity Bill case uphold the traditional approach. However, the referendum requirement regarding the abolition of the Scottish Parliament and Government seems to be an attempt legally to fetter the UK Parliament's sovereignty.

Question 3

The tort of defamation aims to protect people whose reputations are harmed by untrue statements. It involves making a statement which is likely to lower the claimant in the estimation of right-thinking members of society generally and/or exposes the claimant to hatred, contempt or ridicule. There are two types of defamation, slander and libel. Slander covers defamation through speech, while libel covers defamatory statements made in a permanent form,

such as in writing or on TV. Libel is the most significant form of defamation for the press, as it restricts its freedom of expression, a right guaranteed by Article 10 of the European Convention on Human Rights. The courts must therefore balance a person's reputation on the one hand with the press's freedom of expression on the other.

To establish defamation the claimant must prove that the defendant's statement:

- is defamatory;
- refers to the claimant; and
- has been published to a third party.

Additionally, s.1 Defamation Act 2013 provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the claimant's reputation.

The issue this question raises is the extent to which defamation excessively restricts the press's freedom of speech. The risk of defamation claims potentially has a 'chilling' effect on the press. However, the judiciary has shown awareness of this risk. Local authorities and political parties cannot bring defamation actions (Derbyshire County Council v Times Newspapers Ltd (1993); Goldsmith v Bhoyrul (1997)), as the public interest dictates that they should be subject to public criticism.

Traditionally, the common law safeguarded freedom of expression through the defences available to defamation claims. The common law defences have been replaced by the five defences contained in the Defamation Act 2013. The defences which are especially significant in protecting press freedom are truth, honest opinion and publication on a matter of public interest.

Truth (s.2 2013 Act) provides a complete defence to a defamation claim if the defendant can demonstrate that the alleged defamatory statement is substantially true.

The defence of honest opinion (s.3 2013 Act) provides a defence if the defendant satisfies three conditions:

- The statement complained of must be an expression of opinion;
- The statement complained of must indicate the basis of the opinion;
- The opinion must be one that an honest person could have held on a factual basis.

Accordingly, if the defendant is plainly expressing an opinion rather than stating a fact and shows the factual basis for that opinion, the readers themselves can decide whether they agree with the opinion based on those facts. The claimant can defeat the defence by showing that the defendant did not hold the opinion. This defence, by permitting open debate, plays a vital role in securing the freedom of the press. The requirement for serious harm introduced by s.1 of the 2013 Act has also enhanced the press's protection.

However, the press cannot invoke this defence when reporting an issue of fact rather than stating an opinion. Either they must prove the truth of the facts reported, or they will have to invoke the defence of publication on a matter of public interest (below).

Pursuant to s.4 of the 2013 Act, it is a defence if the defendant shows that the statement was made regarding a matter of public interest and the defendant reasonably believed that publishing the statement was in the public interest. Section 4 also requires the court to have regard to all the circumstances of the case when deciding these points. Additionally, the court must make appropriate allowance for editorial judgment in determining the reasonableness of the belief. This defence covers both statements of fact and statements of opinion.

An analysis of the case law on the common law Reynolds defence is helpful in considering the extent to which s.4 protects the press's freedom of expression. Although s.4 abolished the Reynolds defence, the explanatory notes accompanying the Act state that the case law on it provides helpful (albeit non-binding) guidance to interpreting the statutory defence.

In Reynolds v Times Newspapers Ltd (1999), the House of Lords recognised the vital role of a free press within any democratic society and acknowledged that newspapers should be protected by privilege if they satisfied a test of public right to know and responsible journalism. The press could rely on this defence even if allegations were false and particularly damaging to the claimant. The defence aimed to protect serious investigative journalism. Whether the defence applied depended on the 'duty-interest' test; i.e. whether the publisher had a legal, moral or social duty to publish the material, and the recipients (which could include the general public) had a genuine interest in receiving the material.

Lord Nicholls identified ten (non-exhaustive) factors which the court should consider when applying the test, including:

- The seriousness of the allegation
- The source of the information
- Steps taken to verify the information
- The urgency of the matter
- Whether comment was sought from the claimant
- Whether the article contained the gist of the claimant's side of the story
- The tone of the article
- The circumstances of publication, including the timing.

The Court of Appeal applied the duty-interest test in Loutchansky v Times Newspapers (2002), describing it as one of 'responsible journalism', stating that the interest was that of the public in a modern democracy in free expression and a free and vigorous press. The corresponding duty on the journalist was to discharge that function by behaving responsibly.

Another significant reform introduced by the 2013 Act is to limit the award of damages, restricting the ability of juries to award claimants unduly high damages.

The reforms in the Defamation Act 2013 aim to strike a fair balance between the rights of individuals to protect their reputation and the press's freedom of expression. Cases such as Reynolds show that the judiciary share that aim, so legislation and case law are moving in the same direction, showing that that the law on defamation does not place excessive restrictions press freedom.

Question 4

Introduction

Traditionally judicial review in England does not question the merits of a decision, but merely reviews its legality or fairness. Lord Diplock identified the traditional grounds of review used by English courts in CCSU v Minister for the Civil Service (1985) as illegality, irrationality and procedural impropriety. The courts have set the threshold of irrationality at a very high level. In the landmark case of Associated Provincial Picture Houses v Wednesbury Corporation (1948) Lord Greene MR stated that a decision would only be quashed for unreasonableness if it was 'so unreasonable that no reasonable authority could have come to it…' In CCSU Lord Diplock used the term 'irrationality' to describe 'Wednesbury unreasonableness', and applied it to a decision 'so outrageous in its defiance of logic or accepted moral standards that no sensible person…could have arrived at it'.

Proportionality is a particular feature of German public law, giving judges wider powers to examine the merits of a decision than the traditional English approach. The principle entered the English legal system via the European Convention on Human Rights (ECHR) and EU law. During the UK's membership of the EU, British judges were under a duty to apply the principle in cases involving EU law, and there is a debate whether it should supplant irrationality as a ground of review.

An early mention of proportionality by the European Court of Human Rights (ECtHR) is in Handyside (1976) where the ECtHR stated that any restriction on the freedom of expression 'must be proportionate to the legitimate aim pursued'

Proportionality and the ECHR

Proportionality has had its greatest influence in human rights claims. Section 6(1) Human Rights Act 1998 provides that it is unlawful for a public authority to act incompatibly with a Convention right. Consequently, where a public authority violates an individual's Convention rights, they may challenge the authority's actions through judicial review. Proportionality plays a key part in assessing whether an interference with a qualified Convention right, such as freedom of expression (Article 10), is justifiable. To be justifiable, an interference must be prescribed by law, justified by a legitimate aim as set out in the applicable Convention article, and be 'necessary in a democratic society'. There must be a pressing social need and the interference must be proportionate. Often the outcome of a case will turn on proportionality.

In assessing proportionality, the English courts apply the fourfold approach used in Bank Mellat v HM Treasury (No 2) (2013), consolidating the tests previously used in R (Daly) v Home Secretary (2001) and Huang v Home Secretary (2007):

The test asks whether:

- the objective of the measure complained of is sufficiently important to justify limiting a fundamental right;
- the measure is rationally connected to the objective; i.e. is the action taken by the public authority going to help to achieve the objective?

- a less intrusive measure could have been used; i.e. could the same objective have been achieved without interfering with the Convention right?

- having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

Daly confirmed that, where Convention rights are engaged, courts should use proportionality. This is significant as under proportionality the intensity of review is more exacting compared to irrationality as proportionality requires the court to assess the balance the decision-maker had struck. The court must examine the relevant weight accorded to the interests and considerations and has to decide whether the interference with the right really was proportionate. Nevertheless in Daly Lord Steyn commented – as happened in that case - that most cases would be decided in the same way whether irrationality or proportionality was employed.

In Peck v UK (2003) the ECtHR also confirmed this approach, stressing that irrationality did not provide adequate protection when considering the legitimacy of an interference with a Convention right. The threshold set by English courts for challenging a decision on grounds of irrationality was so high that it excluded effective consideration of the question of whether an interference with a Convention right was proportionate.

In human rights cases the courts have often applied proportionality, a notable example being A v SoS for the Home Department (2001). Under anti-terrorism legislation, the government had detained several foreign suspected terrorists without trial as it was not possible to deport them. The House of Lords held that the detention of these suspects breached their Article 5 ECHR rights (right to liberty) and was disproportionate.

Proportionality and irrationality

Some critics have suggested the use of proportionality may lead to the courts reviewing the merits of decisions, diverging from the traditional approach in judicial review. In Daly Lord Steyn was clearly alert to the legality versus merits debate and the impact that proportionality could have on the courts' traditional role. He stressed that there had not been a shift to merits-based review as the roles of judges and administrators remain fundamentally distinct. While the courts apply proportionality extensively in cases involving [retained] EU law and Convention rights, in purely 'domestic' cases irrationality remains the appropriate test. However, it seems proportionality may have been extended to other cases involving fundamental rights (Youssef v Secretary of State for Foreign and Commonwealth Affairs) (2016) UKSC

In R (Keyu) v Foreign Secretary (2015) the Supreme Court considered whether proportionality should supplant irrationality as a ground of judicial review. Lord Kerr suggested that a final conclusion on this question may have to be 'frankly addressed by [the Supreme Court] sooner rather than later'. Lord Neuberger considered this would involve profound constitutional implications and so could only be taken by a panel of nine Supreme Court justices.

Conclusion

Where Convention rights are engaged, English courts must use proportionality in assessing whether an interference is justifiable. The use of proportionality triggers a greater intensity of review in these cases compared to Wednesbury unreasonableness. Rather than retaining this dichotomy between situations where the courts use proportionality and where they use Wednesbury unreasonableness, proportionality should arguably supplant Wednesbury unreasonableness.

SECTION B

Question 1

All statutory references in the answer are to the Police and Criminal Evidence Act 1984.

Tuesday 4.30 pm

Entry of flat

PC Wright broke down the door of Peter's flat to arrest him for robbery. Section 17(1) authorises PC Wright to enter private property to arrest a person for an indictable offence. Section 117 permits the police to use reasonable force, if necessary, in the exercise of a police power. PC Wright entered the flat to arrest Peter for an indictable offence, armed robbery. Also, as Peter had refused him entry, he was acting lawfully in breaking in.

Arrest

PC Wright then arrested Peter. The arrest will only be lawful if PC Wright has the power to arrest Peter, the arrest is necessary and is carried out correctly.

His power of arrest comes from s.24(3) which provides that where a constable has reasonable grounds for believing an offence has been committed, he may arrest anyone whom he has reasonable grounds to believe is guilty of that offence. He has been told by his superior officer to arrest Peter for armed robbery based on the descriptions of the robber. Peter was also limping.

PC Wright therefore has the power within s.24 (3) provided that he can show that the arrest is necessary for any of a number of specific reasons (s.24(5)). Here, PC Wright could argue that arrest is necessary to allow the prompt and effective investigation of the offence or of the conduct of the suspect (s.24(5)(e) or possibly to prevent Peter's disappearance (s.24(5)(f)).

However, to be lawful, the manner of arrest must be correct. PC Wright must tell Peter that he is under arrest and why he is under arrest, even if obvious (s.28(2) and (4)). PC Wright has told Peter of the fact of the arrest, but has not told him the grounds; this information should be provided at the time of the arrest or as soon as practicable afterwards (s.28(3)). The police should use simple, non-technical language that the arrested person can understand, rather than vague or technical language (Abbassy v MPC (1990), Taylor v CC of Thames Valley (2004)). However, PC Wright's words do not adequately inform Peter what he is being arrested for. Accordingly, he has breached s.28

as he could have given the information immediately. Peter's arrest is therefore unlawful.

Tuesday 5pm

Arrest

The custody sergeant has the power to arrest Peter, as above, and exercises it correctly. The arrest is now lawful.

Detention

Section 37 gives the custody sergeant the power to detain Peter to secure or preserve evidence relating to an offence for which he is under arrest. Given there is probably insufficient evidence to charge Peter and he should have the chance to provide his own account of events, Sergeant Lloyd probably has reasonable grounds for believing that detention without charge is necessary to obtain evidence by questioning (s.37(2)).

Refusal to allow access to solicitor

Peter is entitled to consult a solicitor (s.58(1)). However, where a person has been arrested for an indictable offence, a superintendent or above may authorise delay for up to 36 hours if he has reasonable grounds for believing that any of the circumstances in s.58(8) might arise. The relevant provision here is that the exercise of the right would lead to the 'alerting of other persons suspected of having committed such an offence but not yet arrested'.

It seems unlikely that other suspects would be alerted if Peter consults a solicitor. In Samuel (1988) the Court of Appeal held that the police must have factual evidence that a particular solicitor is corrupt or could he tricked into tipping off other suspects before refusing access to that solicitor. Superintendent Shore has given written authorisation, but is unlikely to have had reasonable grounds.

Even if reasonable grounds existed for delaying access to Peter's usual solicitor, the police should offer an alternative, e.g. the duty solicitor.

Refusing Peter access to a solicitor may also violate his right to a fair trial under Article 6 ECHR. The ECtHR has ruled that it was incompatible with Article 6 ECHR to deny an arrested person access to a solicitor, unless valid grounds for doing so existed (Averill v UK (2000) and Magee v UK (2000)).

Search of flat

Section 18 grants the police the power to enter premises occupied or controlled by a person arrested for an indictable offence. The police must have reasonable grounds for suspecting that there is evidence in those premises relating to that offence or to a connected or similar indictable offence. The search must be authorised in writing by an inspector or above (s.18(4)).

Peter has been arrested for an indictable offence, armed robbery. PC Wells may well have grounds for reasonably suspecting that there is evidence on the premises relating to the armed robbery, given the phone call from the witness about the man carrying a gun. However, it does not seem she has obtained written authorisation. If she has not, her search is illegal.

Seizure of jewellery

Section 19 gives PC Wells the power to seize anything in the flat if she has reasonable grounds for believing that it has been obtained in consequence of the commission of an offence and that it is necessary to seize it to prevent it being concealed, lost, damaged, altered or destroyed. She may well have reasonable grounds as the jewellery matches the description of jewellery stolen from a local jewellers. However, the power under s.19 only arises if she is lawfully on the premises. Given the absence of written authorisation, her search is unlawful.

Thursday 4am

A person may not be kept without charge in police detention for more than 24 hours unless a superintendent or above has authorised it as being necessary for the investigation of an indictable offence (s.42). Peter has been detained for 35 hours before charge, and there is no evidence of any authorisation. The detention for this length of time is unlawful.

Question 2(a)

Has Damian committed any criminal offences?

Section 11(1) Public Order Act 1986 ('POA) requires the organisers of a public procession intended as a protest to give the police six clear days' notice, unless it is not reasonably practicable to do so. Public processions are defined in s.16 POA as 'a procession in a public place'; 'public place' includes 'any highway', so FMF's march is a procession. Here Damian has only given one day's notice, but he would argue that longer notice was not reasonably practicable given the march was an immediate response to the government's announcement of an increase in student fees. Damian has probably not committed an offence in relation to s.11.

As the march is a public procession, the police have power to control the march by giving directions under s.12 POA. If the senior police officer (before the march this is the Metropolitan Police Commissioner ('MPC') in London) reasonably believes that the march may result in (amongst other things) serious disruption to the life of the community, she can give such directions as appear to her necessary to prevent such disruption. The MPC may therefore re-route the march, provided that she reasonably believes that any disruption will be serious. The facts only mention 'disruption' so the rerouting may be unlawful. If the MPC's condition is lawful, then Damian will be committing a criminal offence when he leads the march along the original route. However, if the condition is unlawful he will not have committed any offence.

The conduct regarding Isabel may constitute violent disorder (s.2 POA). The offence is committed if three or more persons used or threatened to use violence and the conduct of them (taken together) is such as to cause a person of reasonable firmness, if present, to fear for his safety. Such a person does not actually need to be present and a police officer is regarded as a person of 'reasonable firmness'. Accordingly, even though Isabel does not seem to have been affected, Damian has committed the offence.

In the absence of actual violence, the offence of riot (s.1 POA) has not been committed. Nor has the offence of affray (s.3 POA), as where a person only

threatens unlawful violence rather than actually using it, the conduct must go beyond the use of words.

If the prosecution could not prove violent disorder, under s.4(1) POA an offence is committed if a person uses towards another person threatening words with intention to cause that person to believe immediate unlawful violence would be used against him. Damian could therefore be convicted under s.4(1). Failing that, Damian could be guilty under s.4A(1) since he uses threatening words with intent to cause Isabel harassment, alarm or distress.

Question 2(b) The Argus - contempt of court

Section 1 Contempt of Court Act 1981 creates strict liability for criminal contempt of court. However, it is necessary to analyse the various elements contained in s.2 to decide whether 'the strict liability rule' applies.

Firstly, the strict liability rule applies only to 'publications' (s.2(1)). The editorial in The Argus is undoubtedly a 'publication'.

Secondly, the strict liability rule will only apply to a publication if it falls within s.2(2); i.e. if it creates a 'substantial risk' that the course of justice in the proceedings will be 'seriously impeded or prejudiced'. The House of Lords stated in Re Lonrho plc (1989) that in the case of a jury trial, the possibility of prejudice by advance publicity regarding an issue which the jury will have to decide is obvious. The wording of the article is highly prejudicial. It mentions Damian by name and also that he is a 'rabble-rouser'. It also states that the court should 'deal harshly' with demonstrators and hopes that 'the jury does its job!' Thus it is almost certain that the article will cause 'serious prejudice'.

Thirdly, the relevant proceedings (i.e. Damian's prosecution) must be active (s.2(3)). In Damian's case (a criminal one), proceedings became 'active' when he was arrested (s.2(4) and Schedule 1).

Accordingly, the next issue to consider is whether The Argus has any defence.

Section 3 provides a defence of innocent publication, and would apply if The Argus had no knowledge of or reason to suspect that the proceedings were active. The content of the editorial makes it clear that The Argus was well aware of Damian's impending trial.

Section 4 provides a defence for contemporaneous and good faith reports of legal proceedings, but this is inapplicable as the trial has not yet started.

Additionally, s.5 provides that a publication which is made as (or as part of) a discussion in good faith of public affairs or other matters of public interest does not infringe the strict liability rule if the risk of prejudice is merely incidental to the discussion. In A-G v English (1983), the House of Lords stressed that s.5 was not intended to prevent bona fide public debate merely because there were legal proceedings going on in which some aspect of the matters under debate might be in issue. In that case, though, the article in question made no reference to specific proceedings. In contrast, as the Argus's article mentions Damian by name and the fact that he is going to come before the court, it seems unlikely it could rely on s.5.
Overall, it is likely that The Argus will be guilty under the strict liability rule in s.1.

Common law contempt targets action which is intended to interfere with the administration of justice, including interfering with imminent court proceedings. If The Argus has any intent to prejudice the jury against Damian, it could also be liable for criminal contempt at common law (A-G v Hislop (1991)).

Question 3

Amenability/ Eligibility

Cradock and Brackenfell City Council's decisions are clearly subject to judicial review. As local authorities, they are public bodies exercising statutory functions derived from the Urban Centres (Regeneration) Act 2019 ('the Act'). Awarding fast-track planning permission pursuant to statute is a public rather than private law matter, so judicial review is the correct procedure (O'Reilly v Mackman (1983)).

Alquist Developments plc ('Alquist') has standing to apply for judicial review because its application for planning permission has been rejected. It is directly affected by the decision, and so has 'sufficient interest' a required by s.31(3) Senior Courts Act 1981 ('SCA'). SOC is not directly affected so its standing requires additional consideration.

Cases such as R v Foreign Secretary, ex p. World Development Movement Ltd (1995) provide guidelines the courts should consider, including -

- The importance of the matter
- The need to uphold the rule of law
- Whether there was any other likely challenger
- The role of the pressure group involved.

SOC most likely will have standing, as standing is closely linked to the merits of the claim and SOC has solid grounds for a claim (discussed below). SOC is a nationwide pressure group and so is not a 'busy-body'. Accordingly, the court would be unlikely to reject its claim simply on the grounds of standing where it has an otherwise valid claim. The regeneration of town and city centres is an important matter and the allegation of bias raises concerns regarding the rule of law.

Ouster clause

There is, however, an ouster clause which purports to prevent Cradock City Council's decision being challenged. The courts have found ways of counter-acting legislative attempts to exclude their jurisdiction. The House of Lords' decision in Anisminic v FCC (1969) made it clear that complete ouster clauses will not protect decisions that were never valid ('nullities') and so it is for the courts to rule on a decision's validity. In R (Privacy International) v Investigatory Powers Tribunal (2017), the Supreme Court declined to enforce an ouster clause that would exclude the High Court's jurisdiction to review excess of jurisdiction or error of law. The ouster clause here is similar and is highly unlikely to prevent the potential claimants from bringing proceedings, particularly as Brackenfell City Council has exceeded its jurisdiction.

Timing

Judicial review claims must be made promptly and in any event within three months (s.31 SCA 1981 and CPR r 54.5). SOC is currently within time, but it must proceed quickly. However, Alquist is outside the time limit. The court has a discretion to grant leave even where the claimant exceeds the time limit where sound reasons for doing so exist. Sound reasons include excusable ignorance of the decision (ex p. World Development Movement Ltd (above)). However, even though Alquist's chief executive, Lydia, was injured in a car crash, the company should have taken steps to monitor her correspondence, so the ignorance of the decision is unlikely to be excusable.

Grounds

Illegality, irrationality and procedural impropriety, the categories of review that Lord Diplock identified CCSU v Minister for the Civil Service (1985), should be applied where applicable:

(i) Alquist

Illegality

Ulterior purpose/Irrelevant considerations

Public bodies will be acting illegally if they use their powers for an improper or unauthorised purpose (Congreve v Home Office (1976)). The purpose of the Act is regeneration of town and city centres.

The City Council's response shows the decision had the purpose of discouraging trade with the oppressive regime in Sangala. The council therefore to have has an ulterior motive (Sydney Municipal Council v Campbell (1925)).

Decision-makers must take into account those factors which are relevant, but not those which are not. The council has taken into account the irrelevant consideration of discouraging trading links with Sangala (Padfield v Minister of Agriculture (1968)).

Unauthorised delegation

The council states that it granted the licence on the directions of the Foreign Affairs Committee. This appears to be a failure to exercise a discretion (Lavender v MHLG (1970)). The power was not granted to the committee so it should not dictate the council's decisions.

(ii) SOC

Illegality

'Jurisdictional' challenge

Brackenfell City Council has given McGill planning permission using the fast-track procedure to build a retail development on the outskirts of Brackenfell. The Act only gives power to use the fast-track procedure for developments in city centres. Thus the council has acted without legal authority (AG v Fulham Corp (1921)).
Procedural Impropriety

Rule against bias

As the Chair of the Council's planning committee is the father of the CEO of McGill Plc, he may possibly have a direct financial interest in the decision. If so, this would be a direct interest in the case and the refusal of the licence would automatically be quashed (Dimes v Grand Junction Canal (1852)). However, it is more likely on the facts that the interest is an indirect one. The test for apparent bias established in Porter v Magill (2002) is satisfied. On the facts, a fair-minded and impartial observer would conclude that there was a real possibility of bias.

Irrationality

To succeed on this ground SOC would need to prove that the decision (the grant of planning permission) is one which is so unreasonable that no reasonable decision-maker would come to it (Associated Provincial Picture Houses v Wednesbury Corporation (1948)) or is outrageous in its defiance of logic (CCSU). As the threshold is high, SOC is better off relying on other grounds.

Remedy

Each claimant should apply for a quashing order. Quashing orders would also compel the councils to reconsider their decisions.

Question 4

Emily cannot sue the Daily Globe ('the Globe) directly for breach of her Convention rights, as there is no general right of privacy in English law (Wainwright v UK (2006)). Emily would have to take a 'vehicle action' to bring her case before the court – suing the Globe in the tort of breach of confidence/ misuse of private information. Once the case is before the court, the court, as a 'public authority', has a duty under s.6 Human Rights Act 1998 to protect the Convention rights of those before it, i.e. both Emily and the Globe.
Consequently Emily may be able sue the Globe under the 'horizontal effect' principle developed in cases such as Venables v News Group Newspapers Ltd (2001) and Douglas v Hello! Ltd (2005), if she can show that publication of the information amounts to a breach of confidence or misuse of private information on the part of the Globe.

In Douglas, publication of unauthorised photographs of Michael Douglas's wedding constituted a breach of confidence, because the photographs were private and personal information. Subsequently, in Vidal-Hall v Google Inc. (2014) the Court of Appeal held that misuse of private information, a new tort which did not depend on a confidential relationship, had been created.

Emily would claim that the Globe's revelations interfere with her Article 8 right to privacy and that the court must protect this. In turn, the Globe will argue that its Article 10 right to freedom of expression would be interfered with if Emily succeeds.

Emily must establish before the court that her right to privacy under Article 8 has been engaged (Campbell v Mirror Group Newspapers Ltd (2005)/ Murray v Express Newspapers Ltd (2007)). This is an objective question and takes account of all the circumstances of the case, including the attributes of the claimant, the nature of the activity being engaged in, the place at which it

happened, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant and the circumstances in which, and purposes for which, the information reached the hands of the publisher.

The Daily Globe published the following regarding Emily:

(a) An article alleging that she was a gambler, and

(b) A photograph of her leaving a Gamblers Anonymous meeting.

The facts of Emily's case are quite similar to Campbell where a newspaper had published a story revealing that the 'supermodel' Naomi Campbell was a drug addict and receiving treatment for her addiction; it also published photographs of her leaving a Narcotics Anonymous meeting. The court accepted that Ms Campbell's Article 8 rights were engaged as she had a reasonable expectation of privacy concerning the details published as they pertained to her health, a subject that attracted a very high degree of protection. Likewise, both items published about Emily pertain to health issues and so are likely to be considered private.

As Emily has a reasonable expectation of privacy, the court will then have to balance her right to privacy (Article 8) with the Globe's freedom of expression (Article 10); Article 10 is also clearly engaged as the Globe is in principle free to print what it wishes.

As qualified Convention rights are engaged the court will then consider whether the dissemination of this information was:

Prescribed by law: Yes, the Globe was exercising its Article 10 ECHR rights

For a legitimate aim in Article 8(2) - in particular the protection of rights and freedoms of others: The Globe will argue that Emily's right to privacy should be limited to protect the Globe's right to freedom of expression under Article 10. [In turn Emily will argue that it is necessary to limit the Globe's right to freedom of expression for one of the aims set out in Article 10(2) - the protection of the rights and freedoms of others, namely Emily's Article 8 rights.]

Proportionate: As Baroness Hale commented in Campbell, where two Convention rights are engaged (e.g. Articles 8 and 10), the position is far more complex than when only one is engaged. The proportionality of interfering with one (e.g. privacy) has to be balanced against the proportionality of restricting the other (e.g. freedom of expression). Neither right takes precedence over the other. In Campbell Baroness Hale set out a three-part 'balancing' test. It is necessary to -

- Consider the relative importance of each right claimed.

The information about Emily's gambling addiction is an important part of her private life. As for the Globe's Article 10 rights, freedom of expression is crucial to any democracy. Arguably, given Emily's status, there is a public interest in the information published.

- Consider the justifications for interfering with/restricting each of those rights.

The Globe is likely to argue that publishing the information is justified as Emily has been a prominent campaigner against gambling. Thus the Globe is 'setting the record straight' (Campbell)

- Apply the proportionality test to each.

Applying the proportionality test, the degree of intrusion into Emily's private life is serious. However, as regards Emily being a gambler, the 'setting of the record straight' argument by the newspaper is likely to succeed by analogy with Campbell.

The main issue concerns the photograph of Emily leaving the Gamblers Anonymous meeting. The majority in Campbell held that the photograph of Ms Campbell near her rehab centre went too far in 'setting the record straight'.

The balance would probably come down in favour of privacy, as the photo of Emily was obtained without her consent and she is clearly trying not to be recognised. The Globe would argue that the photo adds weight to its article, but its publication is probably disproportionate, particularly as it may deter her from continuing with her treatment. There would probably be other photos of Emily which could be used.

Accordingly, the Globe was probably entitled to print the article, but the publication of the photograph constitutes misuse of private information. Since the balance comes down in favour of Emily's Article 8 rights in relation to the photograph, she should win the case.