LEVEL 6 - UNIT 12 – PUBLIC LAW
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1(a)

Parliamentary sovereignty/rule of Law

Introduction

Parliamentary sovereignty means that Parliament can pass any law whatsoever. Key aims of the rule of law are to prevent arbitrary government and to protect human rights. If Parliament has the power to legislate arbitrarily and to override human rights, then it could legislate contrary to the rule of law.

Parliamentary sovereignty

The traditional definition of parliamentary sovereignty is that of AV Dicey:

(i) Parliament can make or unmake any law it chooses;
(ii) No other person or body (including the courts) has the power to override Parliamentary legislation.

There are many examples that support Dicey's view of Parliament's omnipotence. For example, statute may amend the constitution (e.g. Bill of Rights 1689, European Communities Act 1972 (ECA 1972), Human Rights Act 1998 ('HRA 1998') to list just a few constitutionally significant statutes); statute has priority over international law (Mortensen v Peters (1906) and may operate retrospectively (War Damage Act 1965).

Conversely, although Parliament remains sovereign, it cannot bind its successors, as a later Parliament may expressly repeal any Act passed by its

predecessors. Moreover, the courts have adopted the doctrine of implied repeal; where an Act of Parliament conflicts with an earlier Act, the later one has priority and the inconsistent parts of the earlier Act are repealed (Ellen Street Estates v Minister of Health (1934)).

However, in Thoburn v Sunderland City Council (2002) Laws LJ *obiter* modified the traditional doctrine by suggesting that 'constitutional' statutes such as the ECA 1972, the HRA 1998 and the Scotland Act 1998 could not, unlike ordinary statutes, be impliedly repealed. A constitutional statute is one that governs the legal relationship between citizen and state in some general, overarching manner, or changes the scope of fundamental constitutional rights.

Recently, the Supreme Court has offered obiter support to Laws LJ's opinions. In particular, in R (HS2 Action Alliance Ltd) v Secretary of State for Transport (2014), the Supreme Court suggested that there were certain fundamental constitutional principles, whether statutory or common law, that Parliament did not intend to abrogate when passing the ECA 1972. It appears, therefore, that implied repeal may not apply to conflicting constitutional statutes.

The 'enrolled Act rule' shows the courts' aversion to considering challenges to primary legislation. In Edinburgh & Dalkeith Railway v Wauchope (1842) the claimant challenged the passage of a private Act arguing that proper notice had not been given; the House of Lords rejected any attempt to challenge the validity of the Act. Pickin v BRB (1974) confirmed that the courts have no power to check whether proper parliamentary procedures have been observed.

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). There are three elements to Dicey's definition:

(i) The supremacy of regular law; i.e. the government should not be able to wield arbitrary power;
(ii) No one is above the law; i.e. there should be equality before the law; and
(iii) The basic constitutional rights of individuals are the result of judicial decisions determining the content of those rights.

Under the first element citizens should only be punished if they have broken the law proved in the ordinary courts ('due process'). Under the second element there should not only be equality between citizens, but also between public officials and citizens; Dicey opposed giving public officials special privileges or immunities. Dicey also considered that the ordinary remedies granted by the common law were more effective in securing personal freedoms, rather than formal guarantees contained in written constitutions.

Dicey's views have been criticised as outmoded. While much of his thinking remains valid, in a modern society it has been necessary to give public officials much wider discretionary powers than he envisaged. Accordingly, many legal scholars have sought to update the concept.

One of the most respected recent versions is that of Lord Bingham (The Rule of Law (2010)). There is some overlap between Lord Bingham's definition and Dicey's, as both uphold equality before the law and the necessity of clear and predictable laws. However, Lord Bingham goes beyond Dicey, for example by

emphasising the importance of defending human rights and obeying international law.

1(b) Potential conflict

Mortensen v Peters (above) and the War Damage Act 1965 arguably illustrate Parliament's ability to legislate contrary to the rule of law. In the former case the court rejected any argument that it had the power to declare an Act ultra vires because it breached international law. The War Damage Act overrode the House of Lords' judgment in Burmah Oil Co Ltd v Lord Advocate (1965) that compensation was payable to companies whose assets had been destroyed to prevent them from falling into enemy hands. This Act retrospectively removed the rights of businesses to obtain compensation.

Various *obiter* by Law Lords in R (Jackson) v Attorney General (2005) illustrate the potential conflict between the two principles. Lord Hope suggested that parliamentary sovereignty was no longer absolute and the rule of law enforced by the courts was now the UK constitution's ultimate controlling factor. In similar vein Lord Steyn suggested that in exceptional circumstances, such as an attempt to abolish judicial review, the House of Lords/Supreme Court might have to consider whether this was a constitutional fundamental that even a sovereign Parliament could not abolish.

Conclusion

Notwithstanding the obiter in Jackson, in strict theory at least Parliament can ignore the rule of law. However, there are only a few examples of egregious breaches of the rule of law. The examples given above are not recent and the HRA 1998, by requiring a government minister promoting a Bill to state whether it is compatible with rights contained in the European Convention on Human Rights, does force the government and Parliament to confront what it is doing when legislating contrary to human rights. The two principles coexist on the basis that Parliament will not normally legislate contrary to the rule of law, knowing that if it did so it would find judicial resistance.

Question 2

Introduction

The UK constitution is often described as 'unwritten' as there is no single authoritative constitutional document setting out the rules which establish and regulate how the country is governed. There is instead a constitutional 'jigsaw' of various sources - legislation, case law, royal prerogative and constitutional conventions – which needs to be fitted together to gain a clear picture of how the constitution operates. The main reason for suggesting that the UK constitution is flexible is that constitutional changes can be made with little formality; all that is required is an ordinary Act of Parliament.

Arguments why constitution is flexible

The major sources will be analysed in turn, starting with statutes. There are many examples of constitutionally significant statutes. The Bill of Rights 1689 strengthened Parliament's power at the Monarch's expense, while the Parliament Acts 1911 and 1949 gave the House of Commons the ability to bypass the House of Lords when passing legislation. The ECA 1972 and HRA 1998 incorporated EU

law and the European Convention of Human Rights respectively into the UK's legal system, partially limiting parliamentary sovereignty.

Parliament can change the constitution without special procedures. Statutes which make fundamental constitutional changes are enacted (and repealed) in the same way as 'ordinary' statutes. A simple majority in Parliament together with Royal Assent will suffice. This is in sharp contrast with the position in countries such as the USA where changes to the constitution require a two-thirds majority in both Houses of Congress and the agreement of three-quarters of the states.

Case law has also been responsible for some vital constitutional principles through the development of the common law and judicial interpretation of statutes. The courts have played a vital role in safeguarding basic rights. For example, Entick v Carrington (1765) established the principle that actions of the state must have legal authority. More recently, the courts have developed the rules of natural justice in the context of judicial review. Judicial interpretation of the ECA 1972 resulted in the acceptance by the UK of the supremacy of EU law (Factortame (No.2) (1991)). Subject to the doctrine of precedent, case law is by its nature flexible and the higher courts, especially the Court of Appeal and the Supreme Court, may change or interpret the law to reflect changing social standards. Case law is also flexible in another sense; if Parliament disapproves of developments in case law, it may legislate to change the law.

One of the most authoritative definitions of conventions is that of Marshall and Moodie: 'rules of constitutional behaviour which are considered to be binding by and upon those who operate the constitution but which are not enforced by the law courts'. Participants in the UK constitution accept them as binding, although they are not set out in any statute and the courts, while recognising them, will not enforce them (Re Amendment of the Constitution of Canada (1982)).

Some important conventions relate to the monarch's role. For example, although legally the monarch could withhold assent to a Bill, by convention she will not refuse assent to a Bill which has passed through its parliamentary stages. Other conventions help to ensure effective government. The convention of collective responsibility ensures that the Government speaks with one voice, enabling it to be held to account for its actions. Accordingly, while ministers may disagree vehemently in cabinet meetings, once a position is adopted they must support it in public. If they cannot, then convention dictates that they should resign; e.g. Robin Cook over the Iraq war.

Conventions can be highly flexible as they can appear and disappear without any special procedure or be adapted to reflect society's changing needs. For example the convention of collective responsibility was suspended during the 1975 and 2016 referendums on EU membership. On both occasions ministers were allowed to argue the case for and against membership according to their personal views in public, although it was official government policy that the UK should remain a member.

The royal prerogative comprises those powers once exercised by the monarch which are now 'legally' left in the hands of the Crown. The extent of the prerogative may be limited by statute; for example, the Fixed-term Parliaments Act 2011 removed the monarch's power to dissolve Parliament. All that is required to abolish a prerogative power in an Act of Parliament.

Arguments why constitution is not flexible

It is not legally impossible, but practically difficult to repeal some statutes. The current Conservative government has proposed replacing the HRA 1998 with a British Bill of Rights, but it has proved politically tricky to repeal a statute which gives basic civil rights to citizens. However, for many years it was argued that repealing the ECA 1972 would be difficult for economic and social reasons, although the referendum on EU membership undermines this argument.

It would also be politically very hard to repeal the devolution legislation. Taking back the powers given to Scotland would provoke a political crisis, though this has been done in Northern Ireland. Similarly repealing Acts of Independence would be politically difficult and ineffective.

Pressure on Parliamentary time and lack of political will can also frustrate constitutional reform. The coalition government found it impossible to persuade Parliament to enact legislation providing for an elected House of Lords.

Many conventions are deep-rooted. If the monarch refused royal assent to a Bill, a constitutional crisis would ensue.

Conclusion

It is true that little constitutional formality is required to change the UK constitution, because those factors that inhibit change are largely political, economic and social rather than legal. However, that does not necessarily mean it is easy for the constitution to be changed. Many constitutional principles are deeply embedded and while legally they may be easily changed, politically it would be difficult to do so.

However changes to the constitution made by legislation in the 2010-2015 Parliament, such as the introduction of fixed term Parliaments, show that the UK constitution is much more flexible than that (say) of the USA.

Question 3(a)

Arrest without Warrant - PACE

The Police and Criminal Evidence Act 1984 ('PACE') sets out in systematic form the law relating to police powers of arrest. It deals not only with the powers of arrest, but also the procedures the police must follow. PACE is supplemented by Codes of Practice which give guidance to the police concerning how they should exercise their powers.

Arrests are of three kinds: (a) with warrant; or (b) with warrant under PACE; or (c) without warrant under common law powers. This question focuses on (b) and (c).

Section 24(1) PACE grants a constable the power to arrest without warrant:

(i) anyone who is about to commit an offence;
(ii) anyone who is in the act of committing an offence;
(iii) anyone whom he has reasonable grounds for suspecting is about to commit an offence;

(iv) anyone whom he has reasonable grounds for suspecting to be committing an offence.

Under s. 24(2), if a constable suspects an offence has been committed, he may arrest anyone whom he has reasonable grounds to suspect of being guilty of it, while under s.24(3), if an offence has actually been committed, he may anyone who is guilty of the offence or whom he has reasonable grounds for suspecting to be guilty of it.

However, PACE seeks to ensure that the police only exercise their powers if necessary, so they are exercisable only if at least one of the reasons set out in s2.4(5) PACE exists. These reasons include obtaining the name and address of the person concerned, preventing him causing physical injury to himself or another, causing loss of or damage to property, to protect a child or other vulnerable person from the person, the prompt and effective investigation of the offence and the prevention of any prosecution of the offence being hindered by the person's disappearance.

In practice this means that the police should not arrest anyone who is cooperative and where the investigation would not be hampered if they were interviewed voluntarily at a later date. Nevertheless, it will be difficult to establish that an officer did not have reasonable grounds for believing that an arrest is necessary.

The Court of Appeal analysed s.24(5) in Hayes v Chief Constable of Merseyside Police (2011)) and set out a two-stage test for deciding whether the necessity criterion is satisfied - firstly, that the constable actually believes that arrest is necessary for an identified s. 24(5) reason, and, secondly, that objectively that belief was reasonable. However, there was no requirement for the constable to consider possible alternatives to arrest. Moreover, the decision of the arresting officer as to necessity will only be unreasonable if no reasonable arresting officer could reasonably have reached that conclusion.

3(b) Arrest without Warrant - Common Law Powers

Some residual common law powers continue in force. At common law the police may act to prevent an actual or reasonably apprehended breach of the peace, provided in the latter case it is imminent (R (Laporte) v CC of Gloucestershire (House of Lords) (2006)). This may involve arrest, even though it is not a crime to breach the peace. In R v Howell (1982) the Court of Appeal defined a breach of the peace as occurring whenever harm is done or likely to be done to a person or, in his presence, to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. However, Laporte established that the police must reasonably apprehend an 'imminent' breach of the peace before they can act to prevent a breach of the peace; otherwise their action will be premature and arbitrary.

In Bibby v Chief Constable of Essex (2000) the Court of Appeal stated that the exercise of the common law power of arrest was 'exceptional' and should only be used if

(i) there is a sufficiently real and present threat to the peace;
(ii) the threat to the peace comes from the person arrested;

(iii) his conduct must clearly interfere with the rights of others and its natural consequence must be 'not wholly unreasonable violence' from a third party;
(iv) his conduct is unreasonable.

However, the police also have a positive duty to protect the exercise of freedom of expression (Article 10 European Convention on Human Rights). So where a speech or meeting might trigger violent opposition, the police's first duty is to act against those using violence. Only in the last resort should they arrest a speaker (Redmond-Bate v DPP (1999)).

3(c) The Manner of the Arrest

An arrest must be carried out properly. Section 28 PACE provides that the constable must tell the person arrested that he is under arrest and give him the grounds for the arrest, even if obvious (s.28(2) and (4)). The fact of the arrest should be given as soon as practicable after the arrest (s.28(1)) and the grounds should be given at the time of or as soon as practicable after the arrest (s.28(3)). In Abbassy v MPC (1990) and Taylor v CC of Thames Valley (2004) the courts held that the police did not have to use precise legal terms, provided they conveyed the essential information to the arrested person in simple, non-technical language. If the requisite information is not provided at the time of the arrest or as soon as is practicable thereafter, the arrest is unlawful. Where reasons are given after the arrest but with unreasonable delay, the arrest ceases to be unlawful when reasons are given (Lewis v Chief Constable of South Wales (1991)).

Accordingly a key feature of the PACE approach to regulating the exercise of police powers of is the emphasis on 'due process'. Procedural requirements must be strictly complied with if an arrest is to be lawful. Where an arrest is unlawful the arrested person may be able to bring a claim against the police for false imprisonment and/or assault.

Question 4

The doctrine of proportionality is found in the jurisprudence of the European Court of Justice and the European Court of Human Rights ('ECtHR') and is a particular feature of German public law. It gives judges greater scope to consider the merits of a decision compared to the traditional English grounds. The principle entered the English legal system via the European Convention on Human Rights ('the Convention') and EU law. Since the UK's accession to the EU in 1973, the ECA 1972 has obliged British judges to apply the principle in cases involving EU law.

The field of UK law in which proportionality has had its greatest impact is human rights, and it is raised in most applications for judicial review relating to rights contained in the Convention. Section 6(1) of the HRA 1998 makes it unlawful for a public authority to act incompatibly with a Convention right. Accordingly, where a public authority breaches an individual's Convention rights, they may challenge the authority's action by way of judicial review. Proportionality plays a key role in assessing whether an interference with a qualified Convention right, such as freedom of expression (Article 10), is justifiable. To be justifiable, an interference with a qualified Convention right must be prescribed by law, justified by reference to a legitimate aim as set out in the relevant Convention article, and be 'necessary in a democratic society'. There must be a pressing social need and the

interference must be proportionate. Frequently the outcome of a case will depend on the proportionality of the interference.

In R (on the application of Daly) v Secretary of State for the Home Department (2001), Lord Steyn adopted a three-fold approach for proportionality (previously employed by the Privy Council in De Freitas v Permanent Secretary of Ministry of Agriculture (1999)), namely that:

(1) there must be a legislative objective which is sufficiently important to justify limiting a fundamental right;

(2) the measures designed to meet the legislative objective must be rationally connected to it; and

(3) the means used to impair the right/freedom must be no more than necessary to accomplish the objective.

Whether or not a decision is proportionate is a matter for the court, not the decision maker (R (Begum) v Governors of Denbigh High School (2006) UKHL and Belfast City Council v Miss Behavin' Ltd (2007) UKHL).

Lord Steyn said in Daly that the proportionality approach was likely to lead to a greater intensity of review than that required by 'Wednesbury unreasonableness', because proportionality requires the court to assess the balance the decision-maker has struck. The court would therefore look at the relevant weight accorded to the interests and considerations and would have to decide whether the interference with the right was 'necessary in a democratic society' and, if so, really was proportionate. Nonetheless, Lord Steyn denied that this represented a shift to 'merits review' as the roles of judges and administrators remain fundamentally distinct. He also observed – as indeed the outcome in Daly itself reflected - that most cases would be decided in the same way whether the traditional approach or the proportionality approach was used.

In Peck v UK (2003) the ECtHR also confirmed that proportionality should be used in assessing interferences with Convention rights. It stated that judicial review failed to 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 effectively precluded any consideration by them of the proportionality of an interference with a Convention right.

R v CC of Sussex ex p. International Trader's Ferry (1998) provides an example of the use of proportionality in an EU law context. The Chief Constable decided to provide police protection to live animal exports on only two days a week. This effectively meant that exports could only take place on those two days owing to animal rights protests. ITF applied for judicial review of this decision, arguing that the lack of police protection on the other days interfered with its free movement rights. The court examined the relative weight afforded by the Chief Constable to competing interests, i.e. the policing needs of the people of Sussex, ITF's business activities and the rights of the protesters to participate in peaceful protest. The House of Lords concluded that the Chief Constable was best placed to decide upon the allocation of resources.

In the human rights context, there are numerous cases in which the courts have applied proportionality, a noteworthy 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 unable to deport them. The House of Lords held that the detention of these suspects was incompatible with their Article 5 ECHR rights (right to liberty) and disproportionate.

Conversely R (Lord Carlile of Berriew) v SoS for the Home Department (2014) provides a different perspective. The government refused, on national security grounds, to grant a visa to an Iranian woman who had been invited to address members of Parliament. The Supreme Court held that, where a decision of the executive engaged Convention rights, the court had to decide whether any interference was justified and proportionate. However, the court was entitled to attach special weight to the judgment of a decision-maker with special institutional competence. This shows a degree of judicial 'deference' even in human rights cases.

Daly effectively confirms that, where Convention rights are engaged, the proportionality approach must be used in assessing whether an interference is justifiable. The courts also apply proportionality extensively in cases involving EU law, particularly where interferences with rights of free movement are concerned. The significance of this is that 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, it may instead be appropriate for proportionality to supplant Wednesbury unreasonableness.

SECTION B

Question 1(a)

The Scottish government's opposition

Although the Scotland Act 1998 devolves power to the Scottish Parliament, nothing in it prevents the UK Parliament from legislating on devolved matters (s. 28(7)). Therefore, under the principle of parliamentary sovereignty, the Westminster Parliament could legislate on Scottish educational matters without the Scottish government's consent. Technically, therefore, the Scottish government's opposition does not have legal validity.

However, the Sewel Convention applies when the UK Parliament proposes to legislate on devolved matters. Under the Convention, this will happen only if the Scottish Parliament has given its consent. The Sewel Convention has now been put on a statutory footing by s.2 Scotland Act 2016 which provides that it is recognised that the Westminster Parliament will not normally legislate regarding devolved matters without the Scottish Parliament's consent. The use of the word 'normally' implies that the Westminster Parliament retains the legal power to legislate for Scotland, even on devolved matters, without the Scottish Parliament's consent.

While constitutional conventions are not legally binding, if the Westminster Parliament were to legislate for Scotland without the Scottish Parliament's consent, a constitutional crisis would probably ensue.

1(b) Delegated legislation scenarios

Sometimes Acts of Parliament contain provisions ('Henry VIII clauses') enabling primary legislation to be amended or repealed by delegated legislation. In both scenarios, the Secretary of State may be able to rely on Henry VIII clauses.

There are two types of statutory instrument ('SI'):

- Affirmative instruments: These require the approval of both Houses of Parliament to come into force.

- Negative instruments: These must be laid before Parliament and will become law without a debate or a vote, unless annulled by a resolution of either House of Parliament within 40 days.

In both cases, Parliament has a limited role. It can accept or reject an SI, but cannot amend it.

(i) Reducing red tape

The Legislative and Regulatory Reform Act 2006 ('the LRRA') aims to remove or reduce burdens from legislation, and it gives ministers the powers to make orders removing or reducing such burdens.

The LRRA allows changes to primary legislation to be made by a special type of SI, a Legislative Reform Order ('LRO'). LROs are scrutinised by parliamentary committees to ensure that the proposed LRO meets the criteria provided for by the LRRA; e.g. the effect of the provision is proportionate to the policy objective.

In addition to the affirmative and negative procedures, a special super-affirmative procedure applies to LROs. When an LRO is laid before Parliament, the Minister must recommend the negative, affirmative or super-affirmative procedure for its adoption. Even if the Minister has recommended the negative procedure, the relevant committees may require that it be upgraded to the affirmative or super-affirmative procedure. Where the super-affirmative procedure applies, the Minister must have regard to any representations, any resolution of either House of Parliament and any committee recommendations that are made within 60 days of laying. The Minister then decides whether to proceed with the LRO and, if so, whether as originally drafted or amended. The super-affirmative procedure also requires both Houses to approve the LRO.

Jane, as Secretary of State, can therefore use delegated legislation to amend the 2010 Act provided the LRRA's criteria are met. However, Parliament may be able to block the LRO as outlined above.

(ii) EU Directive

Section 2(2) ECA 1972 gives the government power to implement any EU obligation by adopting delegated legislation, such as SIs. Significantly for the Secretary of State, such SIs can amend an Act of Parliament (s.2(4)), as the delegated legislative power includes the power to make such provision as might be made by Act of Parliament.

When making SIs under s.2(2) of the ECA 1972, the affirmative or negative resolution procedure may be used. The role of Parliament therefore depends on the procedure being used.

1(c) The DEA's contract

Government contracts have been justiciable since the Crown Proceedings Act 1947 came into force. Hence the DEA needs legally valid grounds for cancelling the contract. The facts indicate that two possible grounds exist.

The first ground is that Parliament is unlikely to appropriate it further funds. The DEA has already spent its budget for the current year, it needs further funds but the Treasury is unable to give it any further funding due to Parliament's unwillingness to vote it extra funds DEA. However, Parliament's refusal to appropriate the required funding does not provide adequate grounds for a government to cancel a contract (New South Wales v Bardolph (1934)).

The second ground is that the DEA needs the funds to meet a large backdated pay award agreed with the teachers' unions. Case law shows that executive necessity can provide a justification for overriding a contract, and so can provide a defence to a claim for breach of contract (The SS Amphitrite v R (1921)). The DEA may therefore try to rely on executive necessity, as the Crown cannot be prevented by an existing contract from exercising powers vested in it either by statute or common law. However, SS Amphitrite concerned the detention of a ship under wartime regulations and is distinguishable from the present case which involves a standard commercial contract. Notwithstanding the Westminster government's plans (supported by a majority of MPs) to reduce the budget deficit, the case law does not support the cancellation of an unrelated commercial contract to meet a backdated pay award to teachers on the grounds of executive necessity.

Even were the executive necessity argument successful, if Espin had completed some work under the contract, the DEA would have to account to Espin and make a quantum meruit payment, unless it could argue that the work had been defective in whole or in part.

Although executive necessity is a public law issue, Espin's claim would be for breach of contract and so is suitable for a civil law action despite the public element (Roy v Kensington and Chelsea Family Practitioner Committee (1992)). There are therefore no grounds upon which the DEA could effectively defend a claim by Espin for breach of contract.

Question 2

Amenability/ Eligibility

The Locksmiths Regulation Authority ('the LRA') is a public law body as it was established by the Locksmiths Act 2015 and is exercising its powers pursuant to that Act. Awarding certificates of competence pursuant to statute is a public rather than private law matter, so the LRA is amenable to judicial review (O'Reilly v Mackman (1983)).

A claimant must have 'sufficient interest' in a decision to lodge a judicial review claim (s.31(3) Senior Courts Act 1981 ('SCA')). Eki and Rebecca are directly affected by the decisions, as their applications have been rejected; they will

therefore have standing. The standing of the Forum, as a pressure group, requires further analysis.

Cases such as R v Foreign Secretary, ex p. World Development Movement Ltd (1995) summarise the factors the courts consider -

- The need to uphold the rule of law
- Whether any other body was likely to bring a challenge
- The role of the pressure group involved.

The Forum, as an organisation set up with the remit of promoting the level of skills and ethics within the industry, is not a 'busy-body' and the court would be unlikely to reject a valid claim simply on the grounds of standing. Also, as its claim concerns potential bias, the rule of law comes into play.

Timing

All the claims must be brought promptly and in any event within three months (s.31 SCA 1981 and CPR r 54.5). Nonetheless, although the Forum's claim is late, the court will probably grant it an extension as it has a good reason for the delay (R v Stratford-upon Avon DC, ex p. Jackson).

Grounds

Lord Diplock identified the traditional grounds of review as illegality, irrationality and procedural impropriety (CCSU v Minister for the Civil Service (1985)); these will be applied as relevant:

(i) Eki

Illegality

Fettering of discretion

The LRA when exercising its statutory discretion may adopt a policy concerning how it will exercise its discretion, but the policy must be reasonable and permit exceptions.

The policy seems reasonable as it provides an appropriate means of ensuring that the LRA grants certification to suitable applicants who are willing to work at weekends. However, while the LRA may adopt a policy, it should be prepared to listen to anyone with something new to say (British Oxygen v Minister of Technology (1970)). Eki has provided ample evidence of experience, and the fact that it was obtained outside the UK/EU should not preclude the LRA from considering it.

Also, in disregarding her evidence of experience, the LRA may have ignored a relevant consideration in coming to its decision (Roberts v Hopwood (1925)).

(ii) The Forum

Procedural impropriety

Rule against bias

A decision can be challenged if the decision-maker is biased. In this case, a senior employee of the LRA is the father of the successful applicant for a certificate. The father's interest probably falls short of a direct interest which would automatically disqualify him, as there is no evidence that he has a financial stake in Graham's business (Dimes v Grand Junction Canal (1852)).

Accordingly, the Forum would need to argue that it was still sufficient to lead a fair-minded and impartial observer to conclude that there was a 'real possibility' that the decision-maker had been biased (Porter v Magill (2002)). On the facts this may well be the case.

Irrationality

Having regard to relevant considerations only, the decision may be so unreasonable that no reasonable body could have reached it (Associated Provincial Picture Houses v Wednesbury Corporation (1948)). Although the threshold is high, it could arguably be reached, as Graham is a highly unsuitable applicant. The decision also seems to be outrageous in its defiance of logic (CCSU).

(iii) Rebecca

Legitimate expectation

The concept of legitimate expectation is commonly regarded as an extension of natural justice or procedural fairness; if a public body has stated that it will act in a given way, then in principle it should abide by its implied promise. Rebecca should argue that the LRA should be held to its guidelines for granting certificates of competence.

Lord Woolf clarified the concept in R v North and East Devon Health Authority, ex p. Coughlan (2001). The court may decide:

(1) that the public authority need only bear in mind its previous policy or other representation and the court's function is simply to review whether the decision is rational;

(2) that the promise or practice creates a legitimate expectation of, for example, being consulted before an adverse decision is taken.

(3) that, as the promise or practice has created a legitimate expectation of a benefit that is substantive, the court will decide whether it is an abuse of power to frustrate that expectation. In deciding this, the court will balance the requirements of fairness against any overriding interest submitted for the change of policy.

Legitimate expectations can either be 'substantive' or 'procedural' (per Laws LJ in R (Niazi) v Secretary of State for the Home Department (2008)). A substantive legitimate expectation (Lord Woolf's third category) is only likely to arise where

the public body concerned had made a specific undertaking, directed at a particular individual or a small group of people, that the relevant policy would be continued. Here the LRA has issued general guidelines and it is doubtful that its conduct will fall into the third category. However, the court will scrutinise the rationality of its decision.

The LRA has also refused to give Rebecca reasons for its decision. While there is no general duty on decision-makers to give reasons (Cannock Chase DC v Kelly (1978)), if, in the absence of reasons, a decision appears to be irrational, a lack of reasons may provide grounds for challenge. In R v Civil Service Board, ex p. Cunningham (1991), the court stated that natural justice requires that a decision-maker should give reasons for a seemingly aberrant decision to ensure that a claimant had an effective right to challenge that decision. As Rebecca meets the LRA's guidelines for a certificate, it appears that the decision may be wrong and so she is entitled to reasons. In the absence of reasons, the court may infer that the decision is irrational.

Remedy

Each claimant should seek a quashing order.

Question 3

The conduct of the police

(i) The March

The Public Order Act 1866 ('POA') gives the police the power to impose conditions on public processions, defined in s.16 POA as 'a procession in a public place'; 'public place' includes 'any highway'. The march by the trade union protestors is clearly a public procession and so is covered by the POA.

Section 11(1) POA provides that the organisers of a public procession intended to demonstrate opposition to the views or actions of any person must give the police six clear days' notice, unless it is not reasonably practicable to do so. Here no notice has been given, but the organisers would argue that notice was not reasonably practicable because the march was an immediate response to Lancelot's unexpected announcement of his intention to ban trade unions in Bathurst City Council. PC Norton was therefore probably acting unlawfully when he stopped the march.

Section 12 POA does, however, allow the police to impose conditions on public processions. If the 'senior police officer' reasonably believes serious public disorder/ damage/ disruption may occur or the organisers have intimidatory purpose, he may make directions imposing conditions necessary to prevent such consequences occurring. The conditions may relate to the route of the procession or prohibit it from entering specified public places. For conditions imposed during the procession, the senior police officer is the most senior officer present which would be PC Norton. Marching on Lancelot's house might lead to serious disorder, so PC Norton may have given lawful directions.

(ii) Stop and Search

PC Norton may exercise a power to stop Spencer and search him for prohibited articles (Police and Criminal Evidence Act 1984 ('PACE'), s.1(2)). The definition of

prohibited articles includes offensive weapons (s.1(7)). PC Norton must have 'reasonable grounds' for suspecting that he will find prohibited articles (s 1(3)). The fact that Spencer was wearing sunglasses on a cloudy winter day seems unlikely to provide him with such grounds. Thus, PC Norton's suspicion is not based on an objective assessment of the circumstances (Code A).

Moreover, PC Norton does not carry out the stop and search correctly. He must comply with the s.2 safeguards by taking reasonable steps before searching Spencer to inform him of his identity and the reasons for the search. In Osman v DPP (1999) the court applied s.2 strictly, so PC Norton has breached s.2, as what he said fell short of the required standard.

(iii) The Gathering outside City Hall

Section 14 POA permits the senior police officer to impose conditions on a public assembly if the appropriate reasonable belief (based on essentially the same grounds as are set out in s.12) exists. A public assembly is one where two or more persons gather in a public place that is wholly or partly in the open air (s.16). The site of the meeting, the square, appears to fall within this definition.

Conditions may be imposed relating to the place of the meeting, its maximum duration and the maximum number of persons who may attend. During the meeting, the senior police officer is the most senior in rank of the police officers present, probably Sergeant Chapman.

It seems unlikely that these conditions may be satisfied, as the chanting, while hostile towards Lancelot, is what might reasonably be expected in a demonstration of this nature. Moreover, the conditions should be imposed by Sergeant Chapman and not by PC Merriman.

The police also have a number of common law powers to deal with breach of the peace (i.e. where there is violence, or a person has a reasonable fear of violence (R v Howell (1982)), including power to disperse a meeting and to enter private premises to police a public meeting, but only where a breach of the peace is imminent (R (Laporte) v CC of Gloucestershire Constabulary (2006)). This seems unlikely on the facts.

Spencer's conduct

(i) Obstruction

It is an offence under S.89(2) Police Act 1989 to wilfully obstruct a constable in the execution of his duty. In Lewis v Cox (1984) the defendant persistently opened the rear door of a police van to ask where his arrested friend was being taken. It was held that this amounted to obstruction. Spencer has therefore obstructed PC Norton.

However, a further crucial aspect to the offence is whether the constable was acting in the execution of his duty and therefore acting lawfully at the time when the alleged offence occurred. As explained above the search was unlawful, so PC Norton was not acting in the execution of his duty at the time Spencer obstructed him. Spencer has therefore not committed this offence.

(ii) Violent disorder

The scenario suggests the possibility of violent disorder (s.2 POA). The essence of that offence is that 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 Lancelot seems to have been unperturbed, the offence has been committed.

The offence of riot (s.1 POA) has not been committed, as no actual violence has been used. Nor has the offence of affray (s.3 POA) as, for affray, where the violent conduct consists of threats, it must go beyond the use of words.

If the prosecution were unable to prove violent disorder, an offence is committed under s.4(1) POA 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. Spencer could therefore be convicted under s.4(1). Failing that, Spencer could be guilty under s.4A(1) as he uses threatening words with intent to cause Lancelot harassment, alarm or distress.

Question 4(a)

The right to respect for private and family life is protected by Article 8 of the European Convention on Human Rights ("ECHR"). Harold will therefore claim that the article published in the National Mercury ("the Mercury") infringes his right to privacy. The Mercury will defend publication by relying on Article 10 ECHR. Both rights are qualified rights.

However, there is no general right of privacy in English law (Wainwright v UK (2006)). While it is unlawful for a public authority to act incompatibly with Convention rights (s.6(1) HRA 1998 , the prospective defendant, the Mercury, is a private body. Harold cannot therefore directly rely on Article 8.

Nonetheless, the HRA 1998 has done much to enhance the protection of an individual's Article 8 rights, particularly through the development of breach of confidence/misuse of private information. Accordingly, Harold may be able to bring a claim against the Mercury under the 'horizontal effect' principle developed in cases such as Venables v News Group Newspapers Ltd (2001) and Douglas v Hello! Ltd (2005), if he can show that publication of the information amounts to a breach of confidence on the part of the Mercury. In Douglas, the court held that unauthorised photographs of Michael Douglas's wedding constituted a breach of confidence, as the photographs constituted private and personal information.

Another leading case is Campbell v Mirror Group Newspapers Ltd (2005). A newspaper had published an article 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 in relation to what had been published. However, the court also had to balance her rights against the newspaper's right to freedom of expression under Article 10 ECHR.

The Mercury published the following in relation to Harold:

(a) An article that he has sent his son to a private school, and

(b) A photograph of Harold standing at a bus stop near the school.

The key issue for Harold is whether the courts will protect his conduct. As regards both items, Harold will need to establish a reasonable expectation of privacy. The education of a person's children is very likely to do so. Cases such as Murray v Express Newspapers Ltd (2007) show that information relating to children attracts a high degree of protection.

Murray is also relevant to photographs. A newspaper had published a photograph of infant son of JK Rowling while he was on the street with his parents. The Court of Appeal held that it was at least arguable that the child had a reasonable expectation that he would not photographed in circumstances where his parents would object.

Based on Murray and Campbell, Harold has a strong argument that he has a reasonable expectation of privacy regarding the photographs. Accordingly, his Article 8 rights are therefore engaged. The court will then have to balance his right to privacy (Article 8) with the Mercury's freedom of expression (Article 10). As both are qualified rights, the proportionality of interfering with the one (privacy) has to be weighed against the proportionality of interfering with the other (freedom of expression). Neither right takes precedence over the other.

In Campbell v MGN the House of Lords held that the newspaper was entitled to reveal details of Ms Campbell's drug addiction. As she had previously denied taking drugs, the newspaper could therefore 'set the record straight' by publishing that she was an addict who was receiving treatment. However, by a 3-2 majority the House of Lords held that the newspaper had gone too far in publishing details of the treatment and photographs of her leaving a Narcotics Anonymous meeting. This amounted to a disproportionate interference with her Article 8 rights.

In Harold's case, he has set out his own position on private education, calling for their abolition yet at the same time sending his son to a private school. The Mercury would argue that it is entitled to expose his hypocrisy.

Applying the proportionality test, the degree of intrusion into Harold's private life is serious. Conversely, s.12(4) HRA 1998 provides that the court must have 'particular regard' to the importance of freedom of expression. However, s.12(4) does not give Article 10 priority over Article 8.

Overall, as regards sending his son to a private school, the 'setting of the record straight' argument by the newspaper is likely to succeed by analogy with Campbell. As the article covers an important topic, the structure of education in this country, then the article is likely to attract greater protection than one, say, concerning the sex life of a celebrity.

The main issue here concerns the photograph of Harold at the bus stop. The majority in Campbell held that the photograph of Ms Campbell near her Narcotics Anonymous meeting went too far in 'setting the record straight'. However, Harold's argument is much weaker than Ms Campbell's as his health is not involved. Moreover, the photograph lends weight to the story so the Mercury has probably not acted disproportionately in publishing it.

Accordingly, the Mercury was probably entitled to print the article and the photograph.

(b) Contempt of court

An injunction is a remedy to secure or prevent certain actions from taking place. A person who deliberately disobeys an injunction will have committed a civil contempt of court.

Here the injunction was addressed to the Sunday Chronicle, not the National Mercury. However, if a third party who has knowledge of an order intentionally does an act to defeat the purpose of that order, then he is guilty of contempt as this involves 'knowing interference with the administration of justice' (Attorney-General v Punch Ltd (2003)).

If the Court considers that the breach was intended to impede or prejudice the administration of justice, it has power to impose a fine and/or a sentence of imprisonment.