A obstruct the highway, does such an assembly exceed the public's right of access to the highway so as to constitute a trespassing assembly within the terms of section 14A?"

Leave to appeal refused.

14 January 1998. The Appeal Committee of the House of Lords B (Lord Lloyd of Berwick, Lord Hope of Craighead and Lord Clyde) allowed a petition by the defendants for leave to appeal.

Solicitors: Crown Prosecution Service, Chippenham; Douglas & Partners, Bristol.

[Reported by BRENDAN WRIGHT ESQ., Barrister]

C

D

REGINA v. LORD CHANCELLOR, *Ex parte* WITHAM

1997 March 5; 7 Rose L.J. and Laws J.

Statutory Instrument—Validity—Whether ultra vires—Lord Chancellor by Order repealing provisions giving poor litigants exemption from E *or reduction of Supreme Court fees—Applicant on income support unable to afford fees—Whether constitutional right of access to court—Whether removal of exemption from fees denial of access to court—Whether unlawful—Supreme Court Act 1981 (c. 54), s. 130—Supreme Court Fees (Amendment) Order 1996 (S.I. 1996 No. 3191), art. 3*

The Lord Chancellor, in purported exercise of his powers F under section 130 of the Supreme Court Act 1981,[1] by the Supreme Court Fees (Amendment) Order 1996 increased the fees for issuing a writ and other process and, in article 3, removed from litigants in person in receipt of income support their exemption from payment of such fees conferred by article 5(1) of the Supreme Court Fees Order 1980, and rescinded the Lord Chancellor's power under article 5(3) of the Order of 1980 G exceptionally to reduce or remit fees in cases of financial hardship. The applicant was an unemployed man in receipt of income support who wished to issue proceedings in person for defamation, for which legal aid was not available. He was not able to afford the fee and, by virtue of article 3, was no longer eligible for waiver. He sought judicial review by way of a declaration that article 3 was beyond the Lord Chancellor's powers under section 130 of the Act of 1981 and unlawful.

H On the application:—

Held, granting the application, that access to the courts was a constitutional right at common law which could be abrogated only

[1] Supreme Court Act 1981, s. 130: see post, p. 579E–G.

by a specific statutory provision in primary legislation or by subordinate legislation whose vires in primary legislation specifically conferred the power to abrogate; that section 130 of the Act of 1981 contained nothing to empower the Lord Chancellor to prescribe fees so as to deny the poor access to the courts; that the effect of article 3 of the Order of 1996 was to bar absolutely many persons from seeking justice from the courts; and that, accordingly, it was ultra vires and unlawful (post, pp. 581D–F, 585E–G, 586B–C, E–587A).

In re Boaler [1915] 1 K.B. 21, C.A. and *Reg. v. Secretary of State for the Home Department, Ex parte Leech* [1994] Q.B. 198, C.A. applied.

Per curiam. The class of cases where the right of access to the court can be abrogated by necessary implication is probably a class with no members (post, p. 586A).

The following cases are referred to in the judgment of Laws J.:

Airey v. Ireland (1979) 2 E.H.R.R. 305

Andronicou and Constantinou v. Cyprus (unreported), 23 May 1996, European Commission of Human Rights

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Attorney-General v. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248; [1987] 3 All E.R. 316, Sir Nicolas Browne-Wilkinson V.-C., C.A. and H.L.(E.)

Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)

Boaler, In re [1915] 1 K.B. 21, C.A.

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)

Derbyshire County Council v. Times Newspapers Ltd. [1993] A.C. 534; [1993] 2 W.L.R. 449; [1993] 1 All E.R. 1011, H.L.(E.)

Golder v. United Kingdom (1975) 1 E.H.R.R. 524

Ireland v. United Kingdom (1978) 2 E.H.R.R. 25

Raymond v. Honey [1983] 1 A.C. 1; [1982] 2 W.L.R. 465; [1982] 1 All E.R. 756, H.L.(E.)

Reg. v. Radio Authority, Ex parte Bull [1998] Q.B. 294; [1997] 3 W.L.R. 1094; [1997] 2 All E.R. 561, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Leech [1994] Q.B. 198; [1993] 3 W.L.R. 1125; [1993] 4 All E.R. 539, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Wynne [1992] Q.B. 406; [1992] 2 W.L.R. 564; [1992] 2 All E.R. 301, C.A.; [1993] 1 W.L.R. 115; [1993] 1 All E.R. 574, H.L.(E.)

The following additional cases were cited in argument:

Ashingdane v. United Kingdom (1985) 7 E.H.R.R. 528

Marcel v. Commissioner of Police of the Metropolis [1992] Ch. 225; [1992] 2 W.L.R. 50; [1992] 1 All E.R. 72, C.A.

Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.)

Reg. v. Hammersmith and Fulham London Borough Council, Ex parte M., The Times, 19 February 1997; Court of Appeal (Civil Division) Transcript No. 267 of 1997, C.A.

Reg. v. Ministry of Defence, Ex parte Smith [1996] Q.B. 517; [1996] 2 W.L.R. 305; [1996] 1 All E.R. 257, C.A.

Reg. v. Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants [1997] 1 W.L.R. 275; [1996] 4 All E.R. 385, C.A.

A *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720, H.L.(E.)
Zimmermann and Steiner v. Switzerland (1983) 6 E.H.R.R. 17

APPLICATION for judicial review.

By an amended notice of motion, the applicant, John Witham, applied, pursuant to leave granted by Lightman J. on 19 February 1997, for judicial B review of a decision of the Lord Chancellor to introduce the Supreme Court Fees (Amendment) Order 1996 which, by article 3, repealed provisions in the Supreme Court Fees Order 1980 relieving litigants in person in receipt of income support and not in receipt of legal aid from the obligation to pay a fee to initiate proceedings in the High Court and permitting the Lord Chancellor to reduce or remit the fees in any particular case on grounds of undue financial hardship in exceptional C circumstances. The applicant sought a declaration that article 3 was beyond the power conferred on the Lord Chancellor by section 130 of the Supreme Court Act 1981 on the ground that its effect was to deny him a constitutional right of access to the court.

The facts are stated in the judgment of Laws J.

D *Peter Duffy* for the applicant. The Order of 1996 is ultra vires the Lord Chancellor in that it is in breach of the presumption of legislative intent that access to the courts is not to be denied save by clear words in a statute: see *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909; *Marcel v. Commissioner of Police of the Metropolis* [1992] Ch. 225; *Reg. v. Secretary of State for the Home Department, Ex parte Leech* [1994] Q.B. 198 and *Reg. v. Secretary of* E *State for the Home Department, Ex parte Wynne* [1992] Q.B. 406. The fact that section 130 of the Supreme Court Act 1981 authorises the setting of fees should not be taken, without express words, as authorising the denial of access to the courts by impoverished people because the words of a statute are to be read restrictively when they limit fundamental rights: see *Reg. v. Radio Authority, Ex parte Bull* [1998] Q.B. 294 and *In re Boaler* [1915] 1 K.B. 21. Article 3 of the Order cuts down the statutory right of a F litigant to pursue litigation in person: see section 28 of the Courts and Legal Services Act 1990; R.S.C., Ord. 5, r. 6: *Reg. v. Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275 and *Reg. v. Hammersmith and Fulham London Borough Council, Ex parte M.*, The Times, 19 February 1997.

If valid the Order would infringe the European Convention for the G Protection of Human Rights and Fundamental Freedoms: see *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524; *Airey v. Ireland* (1979) 2 E.H.R.R. 305; *Ashingdane v. United Kingdom* (1985) 7 E.H.R.R. 528; *Andronicou and Constantinou v. Cyprus* (unreported), 23 May 1996, European Commission of Human Rights; *Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25 and *Zimmermann and Steiner v. Switzerland* (1983) 6 E.H.R.R. 17. [Reference H was also made to *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.]

Stephen Richards for the Lord Chancellor. The power conferred by section 130 of the Act of 1981 to prescribe fees is not subject to any implied limitation. The judgment the Lord Chancellor makes is open to

scrutiny on *Wednesbury* grounds only: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. The case is far removed from the kind of direct interference with the right of access to the court in issue in *Raymond v. Honey* [1983] 1 A.C. 1 and *Reg. v. Secretary of State for the Home Office, Ex parte Leech* [1994] Q.B. 198. The decision of the majority in *Reg. v. Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275 does not lay down any broader principle but is based on a particular statutory context.

Recourse to the European Convention does not advance the applicant's case. *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696 remains good law. The Lord Chancellor's exercise of discretion cannot be impugned on the ground of failure to take the Convention into account: see *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517.

Duffy replied.

7 March. LAWS J.

Introduction

In these proceedings for judicial review brought with leave granted by Lightman J. on 19 February 1997 the applicant seeks a declaration that article 3 of the Supreme Court Fees (Amendment) Order 1996 is ultra vires section 130 of the Supreme Court Act 1981 and unlawful.

The applicant is unemployed, has no savings, and receives income support of £57·90 per week. He wishes to bring proceedings for malicious falsehood and libel. Much detail of his prospective claim is given, but I do not consider it necessary to go into any of it for the purpose of resolving the issues raised on this application. Legal aid is not available for actions wholly or partly in respect of defamation, and the applicant seeks to bring the proceedings as a litigant in person. Time for bringing such proceedings will expire very shortly. With effect from 15 January 1997 the Order of 1996 amended the Supreme Court Fees Order 1980 (S.I. 1980 No. 821 (L. 12)) so that it now provides as follows in the following material respects. The fee of £120 for issuing a writ, which was prescribed by the Order of 1980, becomes a minimum fee for issuing a writ for claims limited to £10,000 or less: article 6(*b*). The fee for issuing a writ where no monetary limit is specified is £500: article 6(*b*). More pertinently, article 3 of the Order of 1996 repeals provisions contained in article 5(1) and (3) of the Order of 1980 which relieved litigants in person who were in receipt of income support from the obligation to pay fees, and permitted the Lord Chancellor to reduce or remit the fee in any particular case on grounds of undue financial hardship in exceptional circumstances.

It is said that the applicant is in consequence unable to issue proceedings, as he cannot afford to pay a fee of either £500 or of £120. Not only is legal aid not available for proceedings in relation to defamation, by virtue of section 14(1) of, and paragraph 1 of Part II of Schedule 2 to, the Legal Aid Act 1988: in addition the applicant cannot sue in the county court. Section 15(2) of the County Courts Act 1984 provides: "A county court shall not, except as in this Act provided, have jurisdiction to hear

A and determine ... (*c*) any action for libel or slander." And section 18 provides:

> "If the parties to any action ... agree, by a memorandum signed by them or by their respective legal representatives, that a county court specified in the memorandum shall have jurisdiction in the action, that court shall have jurisdiction to hear and determine the
B action accordingly."

The applicant's evidence shows that his prospective defendants will not consent to his claim being brought in the county court.

In addition to the facts pertaining to the applicant himself, the court has evidence from his solicitor, Mr. Grosz, and also from Miss Ashton of the Public Law Project, describing other categories of case where persons
C on very low incomes are prevented by the terms of the Order of 1996 and in particular article 3 from taking process in the courts. The principal categories are certain types of debt and housing cases. They include by way of example a person on income support who cannot afford the £10 fee to apply to set aside a default judgment, and another person on income support threatened with eviction as a consequence of possession proceedings by her landlord's building society who cannot afford the £20
D fee to be joined in the proceedings as an interested party. The Lord Chancellor has not put in any evidence in reply to this material, partly because it was served late and partly because Mr. Richards for the Lord Chancellor says it is irrelevant. I see no reason not to accept what is said in these affidavits. In my view, it is clear on the evidence before us that there is a wide-ranging variety of situations in which persons on very low
E incomes are in practice denied access to the courts to prosecute claims or, in some circumstances, to take steps to resist the effects of claims brought against them.

The actual or purported vires for the Order of 1996 is to be found in section 130 of the Supreme Court Act 1981 which provides:

> "(1) The Lord Chancellor may by order under this section
F prescribe the fees to be taken in the Supreme Court, other than fees which he or some other authority has power to prescribe apart from this section. (2) The concurrence of the Treasury shall be required for the making of any order under this section; and in addition—(*a*) the concurrence of the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor or of any three of them, shall be required for the making of any such order not
G relating exclusively to fees to be taken in connection with proceedings in the Crown Court ... (4) Any order under this section shall be made by statutory instrument, which shall be laid before Parliament after being made."

All four Heads of Division, as well as the Treasury, concurred in the making of the Order of 1996. The argument as to its vires asserts no want
H of necessary formality, nor that the language of section 130 does not appear on its face to permit what has been done. Rather the primary submission is that there exist implied limitations upon the Lord Chancellor's power to prescribe the fees to be taken in the Supreme Court.

Section 130 does not permit him to exercise the power in such a way as to deprive the citizen of what has been called his constitutional right of access to the courts. Such a constitutional right (a notion which will itself require further elaboration) is said to derive from two sources: the common law, and article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969).

Constitutional right of access to the courts

Mr. Richards's skeleton argument for the Lord Chancellor does not grapple with the question whether the common law recognises such a thing as a constitutional right, or, if it does, what it means. His approach to what has been called the "access to justice" issue is a conventional one. It may, of course, be none the worse for that. This is how it is put:

> "The power conferred by section 130 of the Act of 1981 is not subject to any implied limitation of the kind for which the applicant contends. Parliament has conferred on the Lord Chancellor a wide discretion to prescribe fees for the Supreme Court, subject to the concurrence of the Treasury and the Heads of Division. Subject to such concurrence, the level and structure of fees are matters of judgment for him. The judgment that he makes is open to scrutiny on *Wednesbury* grounds [see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223] but is not limited as a matter of vires. In particular, the section does not remove or limit his power to prescribe fees in the case of persons on low incomes. On the contrary, it empowers him to decide what is appropriate in the case of such persons as in relation to litigants generally. He decided on this occasion, with the necessary concurrences, to exclude the exemptions and powers of remission previously included. He was plainly entitled so to do.
>
> "The setting of reasonable court fees of general application does not constitute interference with an individual's right of access to the court. Whether court fees are set at a reasonable level is a *separate* question from whether it is appropriate for a particular individual, having regard to his financial and other circumstances, to be given *financial assistance* in respect of some or all of those fees and whether such an individual will be denied effective access to the court in the absence of such assistance. Furthermore, court fees are but one element in the total costs of litigation, which will depend upon a host of factors such as procedural complexity, need for and costs of legal representation, evidential requirements, cost of transcripts, liability to pay other party's costs if unsuccessful, and costs of any appeal. The provision of financial assistance for the purposes of ensuring effective access to the court needs to be looked at in that wider context. The provision of such assistance is the function of the legal aid system. There is nothing in section 130 of the Act of 1981 or in the statutory context to support the view that it is also a necessary function of the court fees regime, such that the Lord Chancellor *lacks the power* to prescribe court fees (or to prescribe) court fees beyond some level) in those cases where assistance is said to be required. Nor is there anything in section 130 or the statutory context that enables one to

A determine what precisely those cases would have to be. Yet a precise definition of the limits of the power is essential to any argument based on the vires as opposed to the rationality, of the measure that is impugned."

The last sentence is plainly right; and it suggests the unspoken question, what is the precise nature of any constitutional right such as might be B outwith the power of government, acting under a provision such as section 130, to abrogate?

The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face C of it no hierarchy of rights such that any one of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound in the protection which the law affords to it. Where a written constitution guarantees a right, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it. There may of course be other difficulties, such as whether on the constitution's true interpretation D the right claimed exists at all. Even a superficial acquaintance with the jurisprudence of the Supreme Court of the United States shows that such problems may be acute. But they are not in the same category as the question: do we have constitutional rights at all?

In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, E the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it. I shall explain in due F course what I mean by a requirement of specific provision, a concept more elusive than it seems.

Mr. Duffy for the applicant cited a number of authorities to support the proposition that access to the courts is a right of a kind such as I have sought to describe. *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909 was a decision of their G Lordships' House whose facts were far distant from those of the present case. It concerned the reach of the High Court's power to control the conduct of arbitrators. But Lord Diplock said, at p. 977:

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. H Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a

constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."

It is to be noted that many of the cases cited in Miss Ashton's affidavit before us concerns not plaintiffs, but defendants, whose access to the court has in effect been barred by the provisions contained in article 3 of the Order of 1996.

Reg. v. Secretary of State for the Home Department, Ex parte Leech [1994] Q.B. 198 concerned a prisoner whose complaint was that correspondence with his solicitor concerning litigation in which he was involved or intended to launch was being censored by the prison authorities under the Prison Rules 1964 (S.I. 1964 No. 388). The Court of Appeal held that section 47(1) of the Prison Act 1952 (which empowered the Secretary of State in general terms to make rules for the regulation of prisons and the treatment of prisoners) did not authorise a rule which created an impediment to the free flow of communication between a solicitor and client about contemplated legal proceedings. Steyn L.J., giving the judgment of the court, said, at p. 210:

"It is a principle of our law that every citizen has a right of unimpeded access to a court. In *Raymond v. Honey* [1983] 1 A.C. 1, 13, Lord Wilberforce described it as a 'basic right.' Even in our unwritten constitution it must rank as a constitutional right. In *Raymond v. Honey*, Lord Wilberforce said that there was nothing in the Prison Act 1952 that conferred power to 'interfere' with this right or to 'hinder' its exercise. Lord Wilberforce said that rules which did not comply with that principle would be ultra vires. Lord Elwyn-Jones and Lord Russell of Killowen agreed ... It is true that Lord Wilberforce held that the rules, properly construed, were not ultra vires. But that does not affect the importance of his observations. Lord Bridge of Harwich held that the rules in question in that case were ultra vires ... he went further than Lord Wilberforce and said that a citizen's right to unimpeded access could only be taken away by express enactment ... It seems to us that Lord Wilberforce's observations rank as the ratio decidendi of the case, and we accept that such rights can as a matter of legal principle be taken away by necessary implication."

I would at this stage make two observations about the impact of this reasoning upon the issues this court must decide. First, Mr. Richards submitted that the present case is not analogous to a situation where access to the court is directly interfered with, as by placing impediments upon a litigant's communications with his solicitor. I do not understand how that can be so. In *Ex parte Leech* a general rule-making provision was relied on as authorising a regulation which permitted the censorship of a prisoner's correspondence. Nothing in the Prison Act 1952 (or the rule) made specific reference to the position where a prisoner was communicating with his solicitor. Here likewise, section 130 makes no specific reference to the position where a person is prevented from access to the court because he cannot pay the fee prescribed by the rule. If anything the present case

A is a fortiori *Ex parte Leech*: it was not the consequence of the rule there under assault that the prisoner was disabled from going to court altogether. Secondly, as the passage I have cited shows, the Court of Appeal accepted (given the ratio in *Raymond v. Honey* [1983] 1 A.C. 1) that the right of unimpeded access could be abrogated by a necessary implication arising from the words used in the relevant primary legislation. But the Court of Appeal held that the general words of section 47(1) of the Prison Act 1952 B did not suffice on that basis. As it seems to me there is a question what is meant by "necessary implication" in such a context; and I think it is the same question as what is meant by the requirement, which I have suggested would be mandatory if we are to have any conception of constitutional rights, for a specific permissive provision before a statute may be held to allow abrogation of a constitutional right by the executive. To this I shall C return.

The next case was *Reg. v. Secretary of State for the Home Department, Ex parte Wynne* [1992] Q.B. 406. The Court of Appeal was there concerned with the circumstances in which prison authorities might be obliged to secure the attendance of a prisoner at court in order to prosecute a case brought by him. The court dismissed the prisoner's appeal against the D decision of the Divisional Court, though the reasoning of their Lordship differed. However they granted leave to appeal to the House of Lords. The prisoner had refused to make a formal application to the prison governor for his production at court as was required by section 29(1) of the Criminal Justice Act 1961. The imposition of such a requirement could not conceivably be said to infringe any fundamental right, and in any case it was imposed by main legislation. Accordingly, as their Lordships' House E found [1993] 1 W.L.R. 115, the application was doomed to failure. Indeed their Lordships considered that leave should not have been granted by the Court of Appeal: see *per* Lord Goff of Chieveley, at p. 119, with whom their other Lordships agreed). The case is thus of interest, with respect, only for the competing obiter dicta in the Court of Appeal upon the merits of requiring the prisoner, had he made his formal application to be F conveyed to court, also to pay or contribute to the cost of taking him there. In *Ex parte Wynne* [1992] Q.B. 406 Lord Donaldson of Lymington M.R. referred to article 6 of the Convention of 1953 and indicated his view, at p. 423H, that "the minister should be very careful to ensure that the sum payable is one which is reasonable in the light of the prisoner's ability to pay." He said, at p. 424A: "There can be no balancing G of the interests of justice against the cost to public funds."

Staughton and McCowan L.JJ. expressed themselves differently, essentially holding that the minister enjoyed a discretion as to the conditions under which a prisoner should be produced at court in order to conduct litigation in person. In the House of Lords [1993] 1 W.L.R. 115, Lord Goff of Chieveley, while holding that the appeal was inopportune, considered that such problems as arose in connection with the production H of prisoner litigants at court might be resolved by various practical means. With deference I do not consider that this case offers any substantial assistance upon the issues which we must decide. All that in truth emerges from it is that a prisoner has no settled, certainly no absolute, right to be

brought to court for the purpose of conducting litigation in person; so much, I apprehend, Mr. Duffy would not deny.

Mr. Duffy next went back in time to *In re Boaler* [1915] 1 K.B. 21, a decision of the Court of Appeal which was concerned with the then statutory provisions relating to vexatious litigants. The question was whether a person prohibited under the Act from instituting "legal proceedings" was thereby prevented from bringing criminal proceedings by laying an information before a magistrate. The court held by a majority that he was not. I need, I think, cite only two short passages from the judgment of Scrutton J. who was in the majority, at pp. 36–37:

> "One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension ... I approach the consideration of a statute which is said to have this meaning with the feeling that unless its language clearly convinces me that this was the intention of the legislature I shall be slow to give effect to what is a most serious interference with the liberties of the subject."

Mr. Richards says that this case was about an ambiguity in the statute, as to the meaning of the term "legal proceedings;" and he cited passages from their Lordships' judgments to show that that was the basis upon which the court proceeded. I agree, for it is quite plain, that the court was concerned with what meaning should be accorded to "legal proceedings," there being more than one available. But the principle which the case vouchsafes is that the citizen's right of access to the courts is not to be cut down save by clear words. And this, again, seems to me to engage the question what is the quality, required by the common law, which a statutory provision must possess if its lawful effect is to abrogate the right to justice.

Mr. Duffy referred next to the recent decision of the Court of Appeal in *Reg. v. Radio Authority, Ex parte Bull* [1998] Q.B. 294. The question was whether on the proper construction of section 92(2)(*a*)(i) of the Broadcasting Act 1990 the British Section of Amnesty International had been lawfully prohibited by the relevant regulatory authority from advertising on the radio. The subsection prohibits such advertisement where the potential advertiser's objects are "wholly or mainly of a political nature." Lord Woolf M.R. held that the statutory provision constituted a restriction on freedom of communication, and referred to the Convention of 1953; and he said that the words "wholly or mainly" should be construed restrictively, so as only to apply the statutory restriction "to bodies whose objects are substantially or primarily political." In the event the court dismissed Amnesty's appeal.

A This case is some grist to Mr. Duffy's mill, but Mr. Richards would have no difficulty in accepting the broad proposition that a statute which interferes with freedom of expression is to be strictly construed. I doubt whether, for present purposes, this authority has any longer reach.

We were referred also to certain passages in *de Smith, Woolf and Jowell on Judicial Review of Administrative Action*, 5th ed. (1995), which is of course the recently published edition of Professor de Smith's distinguished B book, edited and to a considerable extent re-written by Lord Woolf and Professor Jowell; though it certainly retains the qualities of de Smith's original work. The authors say, at pp. 231–232, para. 5-017: "It is a common law presumption of legislative intent that access to the Queen's courts in respect of justiciable issues is not to be denied save by clear words in a statute."

C Mr. Duffy relied also on the jurisprudence of the European Court of Human Rights, and referred to *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524, *Airey v. Ireland* (1979) 2 E.H.R.R. 305, *Andronicou and Constantinou v. Cyprus* (unreported), 23 May 1996, a decision of the European Commission of Human Rights, and *Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25. For my part I do not find it necessary to refer to these cases, since I consider that the issue may correctly be resolved by D reference to the substance of our domestic law. As regards the E.C.H.R. jurisprudence I will say only that, as it seems to me, the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg. That is, if I may say so, unsurprising. The House of Lords has held the same to be true in relation to the right of freedom of expression: *Attorney-General v. Guardian* E *Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1296F–1297F, *per* Lord Templeman, *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283–284, *per* Lord Goff of Chieveley and *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534, 551F–G, *per* Lord Keith of Kinkel. I cannot think that the right of access to justice is in some way a lesser right than that of free expression; the circumstances in which free speech might justifiably be curtailed in my view run wider than any in which the F citizen might properly be prevented by the state from seeking redress from the Queen's courts. Indeed, the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage.

It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of G access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. A statute may give the permission H expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. In *Ex parte Leech* [1994] Q.B. 198 the Court of Appeal accepted, as in its view the ratio of their Lordships' decision in *Raymond v. Honey* [1983] 1 A.C. 1 vouchsafed,

that it could also be done by necessary implication. However for my part I find great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated. The class of cases where it could be done by necessary implication is, I venture to think, a class with no members.

It follows that I would reject Mr. Richards's submission that there is no vires argument here, and that the only question is whether the Order of 1996 transgresses *Wednesbury* bounds: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. Section 130 contains nothing to alert the reader to any possibility that fees might be imposed in circumstances such as to deny absolutely the citizen's right of access to the Queen's courts. Mr. Richards says that the Order of 1996 contains or implies no such absolute bar; other factors may bear on the impecunious litigant's position, in particular the possibility of assistance by way of legal aid, which, if granted, pays the court fees. But there is no legal aid for a defamation plaintiff nor, in effect, from many others affected by the Order of 1996.

Mr. Richards submitted that it was for the Lord Chancellor's discretion to decide what litigation should be supported by taxpayers' money and what should not. As regards the expenses of legal representation, I am sure that is right. Payment out of legal aid of lawyers' fees to conduct litigation is a subsidy by the state which in general is well within the power of the executive, subject to the relevant main legislation, to regulate. But the impost of court fees is, to my mind, subject to wholly different considerations. They are the cost of going to court *at all*, lawyers or no lawyers. They are not at the choice of the litigant, who may by contrast choose how much to spend on his lawyers.

In my judgment the effect of the Order of 1996 is to bar absolutely many persons from seeking justice from the courts. Mr. Richards's elegant and economical argument contains an unspoken premise. It is that the common law affords no special status whatever to the citizen's right of access to justice. He says that the statute's words are unambiguous, are amply wide enough to allow what has been done, and that there is no available *Wednesbury* complaint. That submission would be good in a context which does not touch fundamental constitutional rights. But I do not think that it can run here. Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically—in effect by express provision—permits the executive to turn people away from the court door. That has not been done in this case.

Mr. Duffy advanced certain further arguments. I do not think it necessary to go into them.

I would allow this application and grant the relief sought, which is a declaration that article 3 of the Order of 1996 is unlawful.

ROSE L.J. I agree. By section 130 of the Supreme Court Act 1981, Parliament conferred on the Lord Chancellor a simple power, subject to

the concurrence of the Treasury and judicial Heads of Division, to prescribe Supreme Court fees.

There is nothing in the section or elsewhere to suggest that Parliament contemplated, still less conferred, a power for the Lord Chancellor to prescribe fees so as totally to preclude the poor from access to the courts. Clear legislation would in my view be necessary to confer such a power and there is none.

Accordingly, this application succeeds and we shall make the declaration sought.

Application granted.
Leave to appeal refused.

Solicitors: Bindman & Partners; Treasury Solicitor.

[Reported by ALISON SYLVESTER, Barrister]

[COURT OF APPEAL]

ECONOMIDES v. COMMERCIAL ASSURANCE CO. PLC.

1997 May 2; 22

Simon Brown and Peter Gibson L.JJ. and Sir Iain Glidewell

Insurance—Indemnity—Household contents—Assured's declaration as to replacement cost and proportion of valuables to sum insured—Honest belief in accuracy of valuation—Valuables stolen in burglary—Insurer seeking to avoid liability on grounds of misrepresentation and non-disclosure—Whether necessary for assured's representations to be objectively reasonable—Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 20(5)[1]

In 1988 the plaintiff stated on the proposal form for a household contents policy with the defendants that the full cost of replacing the contents of his flat was £12,000 and that the total value of valuables did not exceed one-third of the sum insured. He also declared that the statements and particulars given on the form were to the best of "his knowledge and belief, true and complete." In 1990 the plaintiff's parents came to live with him and brought with them chattels including both jewellery and silverware. The plaintiff's father suggested that the household contents insurance policy should be increased by £3,000–£4,000 to take account of the value of those chattels and when the policy was renewed in January 1991 the sum insured was increased to £16,000. In October 1991 the plaintiff's flat was burgled. Most of the items stolen were valuables belonging to his parents. The

[1] Marine Insurance Act 1906, s. 20(5): see post, p. 598c.