

**Examining the Higher Education (HE) Freedom of Speech Bill
and its Implications for UK Universities**

*“I disapprove of what you say, but I will defend to the death your right to say it.”
– Voltaire*

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Summary:

Universities are important to expanding the education of young people. Yet in recent years, higher education institutions and the state are concerned by the ‘chilling effect’ that is being created regarding freedom of speech. Several high-profile figures within politics, academia and the media have been subject to no-platforming. The UK government proposes the Higher Education (Freedom of Speech) Bill 2021 in the endeavour to expand freedom of speech in UK universities. While there is wide agreement to broaden views expressed on campuses, criticism has been raised whether new legislation is the most appropriate action with suggestions that it will be counterproductive. From our conclusions, negative implications seem to dominate over positive ones.

Recommendations included: the provision of clarity to state protection of universities in the face of legal action and improving relations between ethnic minority communities, the state, and universities to facilitate freedom to speak.

Introduction:

Freedom of speech is hailed as a product of Western liberal democracy. Public discourse questions what is right or wrong, what should or should not be said. Universities are regarded to be institutions that rely and thrive on healthy debate to broaden students’ minds and education. However, in recent years, there has been a great deal of concern about the limitations of freely speaking, particularly on university campuses. Such concerns stem from the reporting of numerous ‘no-platforming’ of speakers occurring in the United Kingdom. No-platforming refers to the action taken to not allow an individual whose views are regarded as discriminatory to be expressed in a public forum. Due to this, the Government has felt that it is responsible to implement new legislation to curb this issue. Therefore, on 12th May 2021, Secretary of State for Education, Gavin Williamson MP introduced the Higher Education (Freedom of Speech) Bill 2021. At the time of writing, the legislation is due to be scrutinised in the Committee Stage. With a government majority of 80, it looks unlikely that this piece of legislation will not pass the House of Commons. As part of this project, we have conducted this report to examine the Bill and its implications for UK universities. We carried out secondary data analysis to understand the main aspects of the legislation. From an academic perspective, the use of secondary data analysis can help us to understand existing implications in greater detail, while discovering new ones. Our findings suggest that the Higher Education (Freedom of Speech) Bill has a greater effect on universities negatively rather than positively. Firstly, this may continue the reported self-suppression of Muslim students, when implemented and working with existing legislation. Second, in present circumstances, where higher education becomes increasingly market-driven, the Bill may cause academic freedom to be further suppressed. Third, the Bill may allow for the potential legitimisation of speech that is deemed hateful, with emphasis to Holocaust denial and anti-vaccination. To conclude, we suggest in line with current commentary, that the Government needs to provide greater clarity to the potentialities that may arise and to give reassurance to universities, their students, and their staff.

Aims of this research:

This report investigates the Higher Education (HE) (Freedom of Speech) Bill 2021 and its implications for UK universities.

The aim of this investigation is to:

1. Gain insight to the content of the Higher Education (HE) (Freedom of Speech) Bill.
2. Understand the Bill's effects on universities in the United Kingdom.
3. Explore whether the Bill will facilitate or hinder freedom of speech in UK universities.
4. Reveal insights into commentary on the Bill, and freedom of speech more generally.

Methodology:

The 'Examining the Higher Education (Freedom of Speech Bill) and its implications for UK Universities' project was based on secondary data analysis of literature. The literature review will examine Hansard, academic articles, newspaper articles, reports from various organisations such as thinktanks and unions. The analysis of secondary literature provides a preliminary insight into the key issues that arise from the potential implementation of the Bill. The research project was for a duration of four weeks. It is for that reason that secondary data analysis was conducted for convenience reasons. However, reviewing literature has its limitations. The Higher Education (Freedom of Speech) Bill has yet to be enacted into law; therefore, there are implications that may not be identified until implemented. This creates an opportunity for further research to be conducted to re-examine the Bill in its likely enactment and to unearth new implications, in addition to analysing the effects of those set out in this report.

Main Body:

1. FREEDOM OF SPEECH AND ACADEMIC FREEDOM IN THE UK:

Before examining the Higher Education (Freedom of Speech) Bill, it is critical to define what freedom of speech is. While one might expect freedom of speech to be the allowance of whatever goes, the notion is often constrained by law. At large, freedom has theoretical groundings in the work of Isaiah Berlin. From Berlin's viewpoint, freedom of speech aligns with negative liberty, where individuals can act in their own manner without anyone else interfering with you, apart from the state (Berlin, 1966). As argued by Malcolm, freedom of speech 'has both a *scope* and a *guarantee*' (Malcolm, 2021, p.523). In the United Kingdom, freedom of speech is defined to be 'anything within the law' (Department of Education, 2021). In comparison to European nations and the United States of America (USA), there is no legal protection for academic freedom in the United Kingdom constitution (Karren and Mallinson, 2017; Heinze, 2018). In relation to Article 10 of the European Convention of Human Rights, further enacted into UK jurisdiction with the Human Rights Act (UK) 1998 declares that 'everyone is entitled to the right of freedom of expression'. Under the Education (No.2) Act 1986, universities must 'ensure that freedom of speech within the law is secured for members, students and employees of the establishment and visiting speakers'. Universities do so with the publication of regulations pertaining to freedom of speech. Further to this, under the Higher Education and Research Act 2017, universities became duty bound to register with the regulatory body, the Office for Students. Upon registration, universities must follow the body's regulations.

This report will discuss both freedom of speech and academic freedom. Both concepts will be implicated by the Higher Education (Freedom of Speech) Bill. Academic freedom concerns knowledge production that is exhibited through teaching and research (Simpson, 2020). Freedom of speech concerns the varying forms of advocacy that take place on campus (Simpson, 2020).

2. BACKGROUND TO THE HIGHER EDUCATION (FREEDOM OF SPEECH) BILL 2021:

In current circumstances, freedom of speech is thought to have descended into a political tool for ideologically right-wing politicians to espouse views that contribute to the pursuit of personal and more than often, political goals (Oleksiyenko and Jackson, 2020). This may be thought with consideration to the background to this amending legislation.

In their 2019 General Election Manifesto, the Conservative Party made a commitment to ‘strengthen academic freedom and free speech in universities’ if re-elected (Conservative Party, 2019, p.37). In line with recent evidence, the Government argues that there is a ‘chilling effect’ regarding freedom of speech and academic freedom at universities and student unions; therefore, the Department of Education feel that it is necessary to implement new legislation to tackle the issue (KCL Policy Institute, 2019; Department of Education, 2021, p.4). With an emphasis to the 2010s, there has been a growing number of incidents concerning freedom of speech. While concerns exist, a WonkHE survey discovered during the academic year of 2019/20, six of near 10,000 events were cancelled (Kwarteng et al., 2021, p.8). Professor Jo Phoenix of the Open University who was scheduled to give a lecture on transgender rights in prison in December 2019 received hostility both online and offline from students and staff of Essex University (Fazackerley, 2020). Similarly, the then Home Secretary and Member of Parliament Amber Rudd had her discussion cancelled thirty minutes before its start by University of Oxford’s Feminist Society because of her role in the Windrush Scandal (BBC News, 2020). No-Platforming as an action comes from the official No-Platform policy created by the National Union of Students in 1974. Regarded as a ‘very specific and narrow policy’, it enables student unions to deny speakers with racist or fascist views to speak on campuses (NUS, 2017). While guest speakers have been no-platformed, the action is not illegal.

Students’ views towards freedom of speech have influenced the creation of the Bill. Research conducted by the King’s College London Policy Institute (2019) finds that political identity influences a student’s freedom to express themselves. 53 per cent of students who identify as right-wing do not feel comfortable to share their own views in anticipation of being silenced, in comparison to above 20 per cent those who are left leaning (Grant et al, 2019). Yet, it has been suggested that evidence to justify the Higher Education (Freedom of Speech) Bill 2021 is not significant. For example, Jess Phillips MP stated that freedom of speech as not a relevant issue in UK universities compared to sexual violence (Hansard, HC., 12th July 2021). Similar criticism came from Lillian Greenwood MP who inquired if the Bill was ‘evidence-based’, in which the Secretary of State stated that the statutory tort is based on ‘principles’ (Hansard, HC., 12th July 2021).

As set out by the Department of Education (2021), the legislative proposals are:

- I. Legislate to require the OfS to introduce new registration conditions on freedom of speech and academic freedom, with the power to impose sanctions for breaches
- II. Legislate for a Director for Freedom of Speech and Academic Freedom within the OfS with a remit to champion freedom of speech and academic freedom on campus, and responsibility for investigations of infringements of freedom of speech duties in higher education which may result in sanctions or individual redress via a new complaints scheme
- III. Strengthen the freedom of speech duties to include a duty on HEPs to promote lawful freedom of speech and academic freedom in higher education
- IV. Extend the freedom of speech duties to apply directly to SUs at approved (fee cap) providers
- V. Extend the remit of OfS to regulate SUs in relation to their freedom of speech duties
- VI. Introduce a statutory tort for breach of the duties, enabling individuals to seek legal redress for loss they suffer as a result of breach of specified freedom of speech duties

3. THE IMPLICATIONS OF THE BILL:

At the time of writing, the Higher Education Freedom of Speech Bill has yet to be enacted into law; thereby, much of the implications can be viewed as theoretical. Universities UK (2021) have expressed concern over what the unforeseen ramifications might be.

3.1 GENDER POLITICS:

It is thought that the Bill may be effective to broadening the debate concerning gender politics. In recent years, the debate surrounding women's rights has been met with contesting views, with an emphasis to the distinction between sex and gender. In public discourse, there exists a small group in the feminist movement who only regard women to be women if their sex at birth is female (Anon, 2021). They are known as 'Trans-exclusionary feminists' or TERFs. In the United Kingdom, few incidents of no-platforming have occurred in response to the invitation of predominant feminist figures who are regarded as 'trans-exclusionary'. A commonly cited incident (including by numerous MPs during the Second Reading) is that of Germaine Greer who was invited to Cardiff University but faced calls for her appearance to be cancelled based on holding transphobic views. Greer's no-platforming is regarded as unique as she was not necessarily cancelled but was met with strong criticism by campaigners (Packham, 2015). A similar event referenced by MPs was of the no-platforming of Oxford University's Professor Selina Todd whose views were deemed transphobic by activist groups (BBC News, 2020; Hansard, HC Deb., 12th July 2021).

Members of Parliament welcomed the Bill to allow such figures to be protected from no-platforming in the future. For example, Joanna Cherry MP of the Scottish National Party stated that those who are gender-critical should be given platforms to discuss women or rather sex-based rights, and that it is important for 'women's concerns are heard in important debates' (Hansard, HC Deb., 12th July 2021). Similarly, Tonia Antoniazzi MP of the Labour Party said that 'women across the UK are being censored, harassed, and threatened for simply trying to debate and discuss their rights' (Hansard HC Deb., 12th July 2021). Theresa O'Keefe examines the no-platforming of women as a representation of patriarchal violence (O'Keefe, 2016). She considers the action to echo existent silencing of women. As a result, no-platforming does not provide an effective contribution to the feminist movement (O'Keefe, 2016). As noted by the

National Union of Students, ‘trans lives are not “contentious subjects” (NUS UK Liberation Committee, 2021). An amendment made to the National Union of Students’ no-platforming policy in 2015 gives the right for universities and student unions to mitigate the opportunity for those who possess sexist or transphobic views to be invited onto campuses.

3.2 PREVENT DUTY:

It has been found that due to the Counter-Terrorism and Security Act 2015, students of the Muslim faith do not feel able to express their views (Traianou, 2015; Guest et al, 2020; Cheruvalli-Contractor, 2020; Malcolm, 2021). The specific tort, section 26 (1), commonly known as the Prevent duty that allows universities to monitor students, and if need be, report them to the relevant authorities such as the Home Office has led to the increased surveillance of minority populations (Traianou, 2015). Universities and College Union (2015) regard the Government’s wider Prevent strategy as an existing hindrance to academic freedom and freedom of speech, particularly amongst Muslim students. Following 9/11 and the subsequent ‘War on Terror’, previous research has found that Muslim people are depicted as a threat to national security in the media; thus, contributing to the self-censorship of Muslim students because of ‘fears of being labelled as extremist’ (Guest et al., the Guardian, 2019). Faculty staff have faced concerted efforts to limit learning more about Islam in academia (Cheruvalli-Contractor, 2020). The primary purpose of the Prevent Duty is to protect individuals from radicalisation. Universities in England, Wales and Scotland are duty bound to the Office for Students, Department of Education and Home Office to take measures to assess both prospective speakers and external examiners are also assessed to ensure that they have not participated in terrorism or encouraged the radicalisation of students (Traianou, 2015).

On Twitter, the director of civil liberties’ advocacy group Big Brother Watch Silkie Carlo shared thoughts that the Prevent Duty is ‘counter-terror-spying-lite’ which has amounted to the ‘undue suspicion of young Muslims and speech-vetting’ (Carlo, 2021). Citing her own experiences as a Muslim student, Zarah Sultana MP told parliamentarians that for Muslims within academia, whether it be students or staff, ‘freedom of speech and academic freedom are routinely denied’ (Hansard, HC., 12th July 2021). With consideration of previous literature, it is evident that the Bill appears to go against the aims of the Government, when we consider its effect on ethnic minority students and academics. As such, the combination of existing statutory duties and the Higher Education (Freedom of Speech) Bill could pave the way for a further barrier for Muslim students; thereby, perpetuating a greater feeling amongst this population to be unwilling to express their views on campus. It would be naïve not to suggest that Muslim students’ self-censorship is a cause for concern, particularly as they are an underrepresented group at UK universities, with an estimated population of 230,000 (Guest et al., 2020). However, the Minister for Universities, Michelle Donelan suggested otherwise during the Second Reading by saying that ‘[the Bill] does not supersede the Prevent duty or the Equality Act’ (Hansard, HC., 12th July 2021).

3.3 HATE SPEECH:

The representative body of over 140 universities in the United Kingdom, Universities UK has been expressed that the Bill may provide a platform for views that ‘promote conspiracy theories or “alternative facts” (Universities UK, 2021, p.2). O’Keefe states that hate speech can be given credibility when ‘treated as equal and subject to the same terms and conditions as other positions’ (O’Keefe, 2016, p.113). Similar views were echoed by the Labour Party who

expressed the Bill gives rise to hate speech, with an emphasis to Holocaust deniers and anti-vaccination (Weale, 2021). This claim stems from clause 3 which would allow for external speakers to claim compensation if denied a platform at universities and/or student unions (Department of Education, 2021; Hansard, HC., 12th July 2021).

Universities' solution to mitigating harm to marginalised groups have been found through the organisation of 'safe spaces'. For example, the University of Cambridge utilised them to allow for 'those with similar experiences to meet for productive discussion' (University of Cambridge, 2017, p.2). The provision of safe spaces has not been met without criticism. In 2017, then Prime Minister Theresa May criticised the approaches taken by universities to have safe spaces, citing them to potentially influence to hindering the progression of the United Kingdom socio-economically (Mason, 2017). Ms May argued that safe spaces do not provide students with the ability to challenge their own views. Consequently, she believed that students would not be prepared to face the spectrum of views that exist upon graduation (Mason, 2017)

On behalf of their membership of 140 universities, Universities UK conveyed that there is a fear that the expression of views that are deemed hateful but are not protected under law will be allowed (Universities UK, 2021). As with the Prevent Duty, universities seek clarification ~~on to~~ how this tort will work simultaneously with existing legislation. At present, speech that directs hate to a person's characteristics is illegal under the Public Order Act 1986, Racial and Religion Hatred Act 2006 and Criminal Justice and Immigration Act 2008. While deemed as offensive, there is no legislation in the United Kingdom that deems either Holocaust denial or anti-vaccination to be illegal. The Secretary of State for Education, Gavin Williamson MP explicitly stated that the Bill would not allow for the expression of views that pertain to Holocaust denial. In the same vein, the Minister for Universities, Michelle Donelan MP said that 'the Bill does not override the existing duties under the Equality Act in relation to harassment and unlawful discrimination' (Hansard, HC. 12th July 2021).

3.4 INTERFERENCE OF THE STATE IN HIGHER EDUCATION INSTITUTIONS:

The relationship between the state and universities in the United Kingdom is constantly changing. Anna Traianou's (2015) examination of academic freedom in the UK found that there is an increase in the interference of the state in higher education institutions in the United Kingdom. Due to the increasing marketisation of the university model, higher education institutions are found to be existing for profit. As a result, there is no longer a great distinction between the university and government suggesting that the Bill will create a further influence ~~on~~ not only on freedom of speech but academic freedom as well (Traianou, 2015). As a concept, academic freedom allows for universities to be self-governing without the need to subscribe to state intervention in matters relating to academia (MacGregor, 2012). Jo Grady, General Secretary of Universities and College Union (UCU) argues that the Government is utilising the Higher Education (Freedom of Speech) Bill to wield authority on universities and student unions (UCU, 2021).

When university funding by the state has fallen, legislative control of higher education has increased (Traianou, 2015; Malcolm, 2021; MacGregor, 2012). In the UK, the increase of university tuition fees (notably to £9,000 in 2012) has been met with a decline in funding of the arts and humanities over time (Traianou, 2015; MacGregor, 2012). To date, several studies linked the funding of university subjects to significant effects on the ability for universities to execute research to pursue research and teaching, and in turn, its freedom to negate 'academic

or extra-curricular encroachment' (Martin-Sardesai et al., 2017; MacGregor, 2017, p.60). The marketisation and commercialisation of higher education has shaped the priority of universities to create students that can enter the job market immediately upon graduation (Traianou, 2015). Under the current economic modelling of higher education, the erasure by funding of academic departments has disempowered academics as their ability to teach their expertise has been curtailed over recent years (Traianou, 2015; Martin-Sardesai et al., 2017). The media has recently reported that the UK Government is due to cut funding for these departments by under half of its current budget to invest money to predominantly STEM based courses (Weale, 2021). The Government appears to contradict its aim to 'protect freedom of speech' (Department of Education, 2021). If protecting freedom of speech is the government's endeavour, then adequate funding is necessary so that all academic departments can work to fulfil the government's aims.

A STEP TOWARDS AUTHORITARIANISM?

Bills proposed by the current UK government are raising questions as to whether the United Kingdom is turning into an elected authoritarian state. Proposed and enacted legislation such as the Police, Crime, Sentencing and Courts Bill 2021, the Higher Education (Freedom of Speech) Bill 2021, Covert Human Intelligence Sources (Criminal Conduct) Bill and the Coronavirus Act 2019 challenges the framework of democracy; therefore, suggesting that democracy and authoritarianism are dichotomous. This can be exemplified by Hungary whose government is 'democratically backsliding' with its stern measures towards freedom of speech in universities (Enyedi, 2018).

In contrast, during the COVID-19 pandemic, the UK government's implementation of the Coronavirus Act 2019 enabled enhanced interventionism. Demonstrated by the Black Lives Matter protests in June 2020, the aim to protect public health and the exercise of the right to protest coincided (Webber, 2021). The increase in power given to the police by the Coronavirus Act 2019 had a disproportionate effect on black and ethnic minority communities that the Network for Police Monitoring explicitly stated was an infringement on the right to protest (NetPol, 2020). From this, it is almost certain that the Higher Education (Freedom of Speech) Bill 2021 is a further intervention regarding the right to express one's opinion. The introduction of a Director of Freedom of Speech and Academic Freedom may cause concern for what is perceived as free speech in its legal boundaries.

3.5 UNIVERSITY REPUTATION:

As set out previously, universities and student unions who violate the requirements set out the Higher Education (Freedom of Speech) Bill 2021 will face potential consequences including monetary fines by the Office for Students (Department for Education, 2021). In addition, speakers who have had their invitation rescinded by students and/or student unions will be allowed by law to gain compensation. Universities are concerned with an impending toxic culture that may arise from the prospect of legal action to be taken against them (Universities UK, 2021). As such, universities' priorities may shift if embroiled in legal proceedings; thereby, creating financial implications and harm to reputation. As it stands, Universities UK (2015) argue that this statutory tort is unclear and does not provide formal assurance that universities will be protected if such events occur. Universities may become hamstrung by legal action leading to significant implications to their reputation and finances. An example of this is the rise in media attention that universities already face. Examples of this include incidents of sexual harassment on campuses, no-platforming, or budget cuts to academic departments.

Conclusion and Recommendations:

From our research, it is evident that freedom of speech in UK universities remains a contentious issue. With the enactment of the Higher Education (Freedom of Speech) Bill, upholding legislation made by central government and institutions means encouraging the expansion of debate but within legal parameters. This can be seen in the case of *Maya Forstater v Centre for Global Development*. Ms Forstater took legal action against her former employer due to being dismissed for tweets regarding transgender people. It was decided in the employment tribunal of (R (on the application of 'Maya Forstater v Centre for Global Development', 2021) that her views are a widespread 'philosophical belief' that is protected under the Equality Act 2010. Due to her views not '[amounting] to the harassment of, or discrimination against trans people', they could be expressed'. However, the judge found that while legislation protects persons who share views such as Ms Forstater's, it also protects transgender people. Therefore, in the context of UK universities, insofar as speakers' views do not descend into discriminatory views towards individuals' identities or encourage radicalisation, the responsibility on universities and student unions is to safeguard students while broadening the variety of opinion. As mentioned previously, this could be achieved with safe spaces.

In the UK, the socio-political climate has changed dramatically since the referendum to leave the European Union on 26th June 2016. Given universities are populated by young people, I argue that more research needs to be conducted to understand where young people position themselves politically, with an emphasis to the demographic known as Generation Z (those born between 1997 and 2012). Often government policy can appear incompatible to younger populations whose hold differences in political ideology. To hear from those born between 1997 and 2012 would gain a better understanding of the generational differences, especially when it comes to politics. This can already be exemplified from the climate change movement and the resurgence of the Black Lives Matter movement last year.

In popular culture, the terms 'woke' and 'cancel culture' stemmed from the community of Black Twitter. As phrases once used to identify who is enlightened to injustice, they have become euphemized by politicians and media pundits fragmenting debate and stagnating progressive conversation. Although there is evidence of a 'chilling effect' on campuses, government ministers' 'war on woke' appears not to be based on substantial evidence rather on political motives. The exaggeration of freedom of speech as an issue requiring further legislation minimises the need to act on evidence-based issues such as sexual misconduct that continue to exist on campuses. However, the ambition to facilitate freedom of speech with new legislation does not appear convincing when the UK Government propose to cut funding for the arts and humanities.

It must be reiterated that freedom of speech does not mean freedom of consequences. Existing legislation set out by the National Union of Students gives student unions the right to no-platform. If students do not feel that speakers are appropriate to speak at their university based on views that are discriminatory, then one cannot deny that no-platforming is not a useful and effective mechanism of student protest. With that said, universities are encouraged through legislation to welcome speakers who possess alternative views, recognising that some views 'may shock or offend' (Department of Education, 2021). While students may not align with the beliefs of speakers, their viewpoints are protected under Article 10 of the European Convention of Human Rights.

With consideration of the literature analysed, the proposal of the Bill suggests that further legislation may not be the appropriate measure to facilitate freedom of speech and academic freedom, given the numerous acts [Human Rights Act 1998; Education Act 1998; Equality Act 2010; Counter-Terrorism and Security Act 2015] universities are currently obligated to follow. While the Government is concerned with freedom of speech, the diversity it seeks to encourage needs to involve students and staff beyond political ideology, instead ethnicity and religion. Examples of this of how this could be achieved is by inviting speakers from underrepresented backgrounds, providing spaces where students can talk openly without fear that their identity is up for debate and hiring academics of ethnic minority backgrounds. These actions would help encourage students as they would be able to see individuals who share similarities in characteristics, particularly in the atmosphere of a predominantly white institution.

AREAS TO CONSIDER IN FUTURE:

- In a climate of media scrutiny and increased legislation, what must universities do to allow for voices to be heard, without the fear of their reputations being tainted?
- In the event of speakers coming to campus whose views are not widely welcomed, what must universities do to ensure that students are protected?
- Where the government has been ambiguous in its detail, in line with Universities UK (2015), we argue that greater effort needs to be made to ensure clarity is given to universities regarding protection from legal action.
- With reference to the Prevent Duty, the concern of self-suppression from Muslim students suggests a concerted effort must be made to establish a level of trust between the state, students of colour and universities to reverse such actions.

As mentioned previously, the Higher Education (Freedom of Speech) Bill 2021 has not yet to be enshrined into law, there is more to discover with this piece of legislation. Further research might examine several implications that have not be found. In addition, researchers could assess how this statutory tort affects universities with the provision of definitive evidence. Universities are self-governing institutions, the Higher Education (Freedom of Speech) Bill 2021 raises a final concern about how they will operate in years to come.

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EMPLOYMENT APPEAL TRIBUNAL the HONOURABLE MR JUSTICE CHOUDHURY

(PRESIDENT) MR c EDWARDS MRS M v MCARTHUR BA FCIPD MAYA FORSTATER

APPELLANT (1) CGD EUROPE (2) CENTER for GLOBAL DEVELOPMENT (3) MASOOD

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