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The First Administrative Court in Wales Lecture

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Administrative Court in Wales: Evolution or Revolution

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1. This evening, I am glad to see so many of you here, and am only sorry we could not have accommodated more, because we have a significant waiting list. The title: "Administrative Court in Wales: Evolution or Revolution" is, perhaps overly, dramatic; but it seems to have done the trick. As the title suggests, I want to focus on the changes which are currently affecting public law in Wales. The problem is that so much is happening; and so, necessarily, I have had to be selective.

2. I am going to focus on two aspects; first, changes in practice and procedure; and, second, changes in how we go about approaching public law issues. In the second, there is no getting away from it, law raises its ugly head. Initially, I thought that I should get that out of the way first, because looking at the guest list I suspect most of you are more interested in practice and procedure than in substantive law. However, acknowledging the risk of this course, if I may, I am going to start with practical matters. So much is going on in this area, and the pace of change shows no signs of slacking. Let me mention just four matters.

3. First, there has been the transfer of immigration and asylum work from the Administrative Court to the Upper Tribunal. I have no doubt that this was a necessary step to ensure that public law work was dealt with properly and promptly, as it should be. The figures were not so startling in Wales, where the balance of work has always

been better; but in London, by last October, three-quarters of the work was asylum and immigration, the total numbers of which continued to grow exponentially. The flood of applications for judicial review appears to have caught the Home Secretary completely by surprise, although they result – you might think, quite foreseeably – from the policy of the Westminster Government to remove appeal rights from this area of government decision-making activity, which gives unsatisfied applicants no route of challenge but judicial review. The practical result has been an inability on the part of her own Department and the Treasury Solicitor to respond to claims in the 21 days allowed by the Rules, or in 42 days, or even 63 days.

4. In R (Jasbir Singh) v Secretary of State for the Home Department [2013] EWHC 2873 (Admin), last summer, I dealt with the difficulties that this has caused. In a public law context, we simply cannot impose the sort of very strict sanctions which might be imposed in private law claims, because we are dealing with the rights of individuals and the obligations of the State. If the Secretary of State fails to put in summary grounds of defence, or commits some other procedural default, we cannot simply say to the claimant that they can have indefinite leave to remain in the UK, if that is what they seek. No more can we send a claimant to his or her home country to face inhuman or degrading treatment or even death, or ignore his or her article 8 rights, because they did not apply to the court to protect their rights promptly.

5. Of course, whether appeal rights are given is a matter of policy, upon which I as a judge cannot comment. But, there is a school of thought that it might be quicker and more efficient to grant disappointed applicants a right of appeal, with a robust and properly resourced appeal system to deal with appeals quickly and efficiently. The government seem to have lost sight of the fact that a judicial review is in effect an appeal, albeit on limited grounds and with limited available relief.

6. Absent such a change of direction, it is right for the two modes of challenge to be dealt with in the same forum; as now, with minor exceptions, they are. The Upper Tribunal is now getting to grips with this huge influx of work. In Wales, I am anxious that we retain that work; and David Gardner has now become lawyer for not only the Administrative Court Office here, but also the Upper Tribunal in Wales. Procedures have been put in place to enable Upper Tribunal applications to be issued in Cardiff,

and heard in Wales by Upper Tribunal judges, including those court system judges who sit in the Administrative Court. My plea to the professions is to use that facility, and keep the work and the expertise in that work here.

7. Second, planning work. One of the problems caused by the deluge of immigration work in London is that planning cases have taken a long time to be determined, because they have had to wait for their turn in the queue. They were taking a year or more to decide. That was clearly unacceptable. As a result, last year the Sir John Thomas as President of the Queen's Bench Division instituted a protocol for planning cases, which imposes time guidelines as to the time in which they should be heard and determined; and ensures that an appropriate judge hears each case, whether in London or elsewhere.

8. I have been a great supporter of these moves. The government want planning cases to be determined quickly, because they consider, with some justification, that large developments are an important driver of the economy, both in terms of the construction work itself and the jobs created by completed development. I agree that planning cases should be determined quickly. But I also think that it is important that they are heard locally. They often give rise to strong local interest and feelings, and the principle of open access to justice is, in my view, important. Planning enquiries are held locally; planning challenges in the Administrative Court should be too.

9. What does this mean in practice? First, we are transferring out of London planning cases which clearly have a connection to a particular circuit. Welsh cases are transferred to the Administrative Court Office in Cardiff, to be managed here and heard wherever appropriate in Wales. We have planning cases listed for Mold, Swansea and Welshpool over the next couple of months or so. You might think that it is quite difficult for parties to say that a claim involving a site in Cardiff, where the Claimant is a South Wales company and the Defendant is a Welsh local authority should be heard in London. But it happens, and happens frequently. The usual reasons are twofold. First, it is said that there is a greater chance of getting a planning judge in London. But that simply is not so; a planning case will get an appropriate planning judge in or out of London. Second, it is said that solicitors and Counsel from London have been instructed. That is fine. Privately paying parties are entitled to

instruct legal representatives of their choice; but, if they choose lawyers who are required to travel, that is a very weak factor in the balancing exercise required on determining where a case should be managed and listed.

10. It is also said, in an increasing number of cases, that interest and emotions are running so high that it would be dangerous to have a local hearing; the hearing should be in London because it will be more difficult for protesters to get to London. This argument too is usually unimpressive. Nobody in these cases has ever disrupted my court – and, if they were to attempt to do so, the court has adequate weapons at its disposal to prevent it. But, in my experience, proper respect is usually maintained; and it is important that local people with a real interest in these issues are enabled to attend the court which hears them if possible.

11. The importance of promptness of disposal may well mean that the hearing will be fixed for a date when Counsel of first choice is not available. When we have a challenge to a large development, we are often told that all counsel who have been instructed cannot attend court for six or even twelve months. I am afraid we cannot wait. We do what we can to accommodate counsel, particularly for substantive hearings; but, if it is impossible to find a prompt date that is convenient for all counsel, we will fix it for an early date anyway; and one or more parties will have to choose again. In practice, judicial review hearings are short and, if the case is big enough, counsel of first choice usually manage to attend whenever we fix it and whatever else they may potentially have on.

12. Finally, the Government have proposed a separate planning court. I hold no strong views about this. The cases are likely to be dealt with by the same judges that hear them now; and I expect that, in any event, I will not escape. However, any new list or court will need to ensure that planning cases in Wales, and from the English regions, are heard locally. There are issues here about both local justice, and the need to keep expertise and experience in these fields outside of London, and specifically in Wales.

13. Third, in terms of the work in Wales, we are continuing to try and sit in venues other than Cardiff as and when appropriate. I have mentioned some of the places where we

are due to sit over the next couple of months. In Wales, that flexibility is important. Furthermore, this week we have held the first Administrative Court case in which submissions have been made in the Welsh language; a case brought by the Welsh Language Commissioner in respect of a alleged failure by a Crown body to adhere to its own Welsh Language Scheme, and heard by Judge Jarman and me sitting as a Divisional Court. We have not yet given judgment; but the substance of the case does not matter for these purposes. We heard the case in both languages, counsel and judges using whichever language he wished to use for the purpose, with simultaneous translation of very high quality. As the only protagonist who was not bilingual, I can say that the use of both languages in that way caused no difficulty whatsoever, although the case involved conceptually technical legal issues such as legitimate expectation. Indeed, we got through the case, listed for three days, in one day – albeit we sat from 10am until nearly 6pm – which suggests bilingual cases might reduce the length of hearings and not increase them. Both counsel were from Wales. No doubt, once judgment has been delivered, one or both parties will be disappointed; but, from my point of view - and I think I speak for Judge Jarman too – the hearing yesterday was both efficiently run and a real pleasure to sit upon.

14. We must continue to deal with the administration of public law in Wales in this flexible way. We have advantages over London, and over the regions in England, in that we understand the country and its legal needs, and we have a real dialogue with practitioners here that enables us, I hope, to provide a different and thus better service for those who use the Administrative Court in Wales.

15. Finally, on these matters of practice and procedure, of course the law in Wales is different from that in England, and, as the Senedd continues to do its work, the divergence has grown. However, until now, we have been able to work on the basis that the laws are essentially the same, the differences being relatively minor and we can easily cope with those.

16. That is about to change. Of course, radical change to the laws of Wales has been on the way for some time; it should not come as a surprise. But we must be ready for it when it arrives. I am not yet persuaded that we are.

17. The Social Services and Well-being (Wales) Bill, introduced into the Senedd in January 2013 and now at the report stage, will, when enacted, fundamentally affect the law on local authorities' duties in relation to children and others who need care and support. It is a core legislative framework bill. It will transform the way in which social services are delivered. The Housing (Wales) Bill, introduced in November, will, if enacted, fundamentally change huge areas of housing law in Wales, relating to private rented housing, local authority housing, homelessness and gypsy and traveller sites. These are enormous changes in substantive law, that will give rise to new challenges in the Administrative Court made within a new statutory framework and against an entirely different backdrop. Certainly, they will provide new challenges to the legal profession in Wales.

18. We need to be ready for this. It is important that both the profession and judges are acquainted with these new laws, and get to grips with the new issues of public law involved. This requires access – they are on the web – but also education and learning. Hopefully, Welsh academic lawyers will assist. Texts on these new areas will be needed. Educating judges in these new provisions is already being planned.

19. I am going to leave practice and procedure there. That, I think, is enough to be going on with. I now move on to the law.

20. In public law, we expend most of our time interpreting statutes, regulations and policies; and I thought I might possibly expound upon the interpretation of one or two such provisions. I am sure that some of you have only attended this evening in case I might have more to say about the Waste (England and Wales) Regulations 2011; but most of you will be delighted that I don't, my entire learning on those regulations and the directive that spawned them being expended in R (UK Recyclate) Ltd v The Welsh Ministers and Others [2013] EWHC 425 (Admin).

21. Sometimes we get so close too the details of our work – and much of that work does depend upon a detailed textual analysis of the relevant provisions – that we don't step back and see the bigger picture and the broader issues. It is one of those issues I just want to touch upon now.

22. Administrative law in England & Wales is relatively new. It grew out of the exercise by the Crown, and then judges on behalf of the Crown, of its prerogative, and applications were made until the 1970s by way of prerogative writ. The writs were varied, depending mainly on the relief sought. It was not until the end of the 1970s that these became incorporated into one claim for judicial review.

23. The court was still, however, exercising a supervisory jurisdiction. The courts were keeping an eye on the performance of duties and the exercise of powers of the state, just as the monarch used to do. That is perhaps why, historically, the Administrative Court has been so metrocentric.

24. What the courts could do, and what was outside their remit was clear; and we all knew where the line was drawn, although we spent many a happy hour trying to persuade a court that a particular case fell on one side of that line or the other. Classically, Lord Clyde set out the nature and scope of the supervisory jurisdiction of the courts in Reid v Secretary of State for Scotland [1999] 2 AC 512 at page 541F-542A:

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to have been perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or though a failure for any reason to take into account a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, a court may not set about forming its own preferred view of the evidence."

25. There are innumerable similar expositions. And we knew where we were. The courts were concerned with *process*, not the *merits* of the decision which were entirely a matter for the decision-maker, appointed ultimately by Parliament to make the decision, because he or she was expert in balancing the relevant factors. Of course, as

Lord Greene MR taught us in Associated Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 233, a decision might be outside the scope of any possible reasonable decision and thus unlawful – but otherwise the decision-maker had a discretion – usually, wide – and, if he or she did not go outside that broad band of legitimate decisions, then the court would respect the decision and not interfere with it. Hence, the references to being outside that scope as "Wednesbury unreasonable", or, as my father put it, "bonkers as a matter of law". Although not a lawyer, he was entitled to express that robust view having not only come from Wednesbury, but in fact having graced the cinema in the case every Saturday as a boy. It is perhaps as good a term as any.

26. Administrative law was of course subject to the principle of precedent, to which the common law rigorously attaches. Planning law is said to be difficult; but the first principle for many involved in planning cases is to identify the point in issue, find a case where that point has been determined by Sullivan LJ, and follow it. Simple.

27. Indeed, the conventional principles to which I have referred are firmly maintained in the field of planning law. The courts themselves have long-recognised that town and country planning involves acute, complex and interrelated social, economic and environmental implications, and that Parliament has consequently entrusted its regulation to administrative decision-makers with planning experience and expertise, namely planning authorities (whose planning officers and committees also have local knowledge), and on appeal the Secretary of State acting through inspectors. Certainly, the courts have eschewed any suggestion that they should engage with the merits of planning decision-making, leaving such decisions to the appointed decision-makers, on the basis of guidance promulgated by the Secretary of State. It is well-recognised by the courts that planning decisions quintessentially require planning judgments of fact and degree, the merits of which are a matter entirely for the appointed administrative decision-makers. The limited role of the court in these circumstances has been emphasised in innumerable cases, the usual citations being R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, and R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC 74 (Admin), the latter of course being a judgment of Sullivan J as he then was, to which the usual principle in

planning cases to which I have alluded applies.). This substantive principle was forcefully emphasised by Lord Hoffmann in the following passage from Tesco Stores Ltd v Secretary of State for the Environment [1995] UKHL 22 at [56]-[57]:

> "56… The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
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> 57. This distinction between whether something is a material consideration and the weight it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or Secretary of State."

In Alconbury, having considered the relevant European Court authorities, Lord Hoffmann (at [129]) said that those cases did not require the court to substitute its decision for that of the administrative authority, and that such a requirement would not only be contrary to the jurisprudence of the European Court but "profoundly undemocratic".

28. Hence, according to this principle, in any challenge to such a planning decision, the courts are restricted to considering the legality of the decision-making process. The principle is well-established. Indeed, hardly a challenge to an inspector's decision goes by without the party seeking to uphold it referring to that passage from Lord Hoffmann's opinion in Tesco Stores, and relying upon it as incontrovertibly establishing that principle.

29. The quotation I gave from Reid is not arbitrary for, although plenty of cases say similar things, Lord Clyde said that in 1999, when the Human Rights Act brought the European Convention on Human Rights into direct effect. The European Convention was drafted in the shadow of the atrocities of the Second World War: the atrocities of that conflict led to the stark realisation, across nations, of the dangers that unrestrained popularism might pose to minorities. Some rights are absolutely

protected: articles 3 and 4 prohibit torture, inhuman or degrading treatment, slavery and forced labour, which cannot under any circumstances be justified. Although we may argue about definitions – what constitutes inhuman or degrading treatment, for example – that is clear enough. But most rights are not absolute: they are subject to caveats. For example, the right to respect for private and family life prohibits the interference with that right "except such as is accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."

30. Although drafted by an Englishman, the Convention has embedded into it fundamentally European concepts. I refer to two.

31. First, the European Convention, like so many similar international documents, does not set out rights which are to be simply, literally and directly applied; it sets out normative principles that are intended to act as guidance and influence behaviour and in particular States' behaviour.

32. In R (Fariborz Rostami) v SSHD [2013] EWHC 1494 (Admin) I had to consider the right to work under the Charter of Fundamental Rights of the European Union. I had to consider what was meant in it by "the right to work". Article 15(1) provides: "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation". To a common lawyer that instinctively means that each EU citizen has a right to, and each EU state has a reciprocal obligation to provide, a job. However, as I explained in that judgment, the Charter was intended to emphasise and publicise the "universal values of human dignity, freedom, equality and solidarity". As such, it was normative: it was not itself intended to – and did not – create any new powers and rights, or to affect the scope of European competence as set out in the Treaties, or to affect the principle of subsidiarity.

33. Second, the European Convention on Human Rights introduced the principle of "proportionality". This is a modern concept, deriving from Germany, but well established as a principle of European Community law by the 1990s, being enshrined first in the 1993 Treaty of Maastricht. By the principle, the acts of Community organs

and states could not go beyond that which was necessary to achieve the objects of the Union; that principle being extended to national measures which affect fundamental rights or freedoms established by the EC Treaty (including those established by the ECHR) which would be found incompatible with Community law and thus unlawful unless necessary to achieve a legitimate aim. This requires an exercise involving the extent to which those fundamental rights are adversely affected, balanced against the rights of others and the public interest which will be furthered but only if the fundamental rights of individuals are jeopardised. This is the balancing exercise referred to in cases such as Huang v SSHD [2007] UKHL 11.

34. Who has to perform that exercise? Well, on a challenge to a decision for breach of human rights, the House of Lords have held that, where the proportionality of the impact of a decision on human rights is at issue, that is a substantive question to be objectively determined by the court, and not a procedural one that requires the court to investigate the decision-making process (see, e.g., R (SB) v Governors of Denbigh High School [2006] UKHL 15: and Miss Behavin' Ltd v Belfast City Council [2007] UKHL 19).

35. Thus, in SB, Lord Bingham said (at [29]):

> "The focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated";

and, consequently, what matters in any case is "the practical outcome, not the quality of the decision-making process" (at [31]).

36. The question of the court's role in such a case was directly in issue in Miss Behavin'. The case concerned an application for a licence for a Belfast backstreet sex shop, in the face of determination by the council that the appropriate number of sex shops in that area was "nil". The sale of pornography - one would have thought only just - engages the right to freedom of expression in article 10. In refusing a licence for the sex shop, the council failed to take into account the harm to those rights that a refusal of a licence would entail. The Northern Ireland Court of Appeal held that they erred in failing to do so, and they set aside the decision ([2005] NICA 35), the judgment of the court finding, in traditional judicial review terms (at [65]):

> "We have also concluded that the appellant's rights under article 10 of ECHR and article 1 of the First Protocol to the convention were engaged and that the council failed to conduct the necessary balancing exercise in order to determine whether interference with those rights could be justified. The circumstances of the case are not such as would enable the conclusion to be reached that, if the council had considered the matter properly, it is inevitable that the application would have been rejected.

On that basis, the Council would have to reconsider the licence application, this time properly performing the balancing exercise that proportionality required.

37. However, the House of Lords held that this was the wrong approach for the court to have taken. Baroness Hale said (at [31]):

> "The first, and most straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."

Lord Hoffmann put it even more bluntly. It did not matter, he said, whether the council had or had not indulged in any "formulaic incantation" with regard to proportionality:

> "Either the refusal infringed the respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol" (at [13]).

The fact that the council had not engaged with the proportionality exercise they, as a public authority performing public functions, were required to perform by virtue of section 6 of the Human Rights Act 1998, was not an error which was of any legal moment – because the court was bound to conduct that exercise itself, in any event. Unsurprisingly perhaps, on the facts of the case, each of their Lordships had no difficulty in finding that that the restriction of such activities on social policy grounds was an entirely proportionate interference with the rights of the pornography peddling licence applicants.

38. But, in coming to that conclusion, they of course considered the merits, and gave the weight they considered appropriate to the various material considerations, including social policy of not having sex shops in that part of Belfast (a good deal) and to the harm to the right of freedom of expression (not much). In doing so, they reflected the comments of Lord Steyn in (R (Daly) v Secretary of State for the Home Department [2001] UKHL 26 at [27], that, when a court considers proportionality, it may be necessary to attend to "the relative weight accorded to interests and considerations" by the primary decision-maker.

39. It can therefore be seen that, where the courts are required to adjudicate upon a planning decision where article 8 is engaged, there is, at first blush, tension between well-established planning jurisprudence and now equally well-established human rights principles with regard to the correct approach. The tension is compounded by the uncontroversial fact that, where article 8 rights are engaged in a planning matter, they are a material consideration that the decision-maker must take into account.

40. That was an issue with which I grappled in R (Stevens) v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin). In that case, a gypsy and traveller had built around her caravan to such an extent it comprised a development for planning purposes. She had to apply for restrospective planning permission. She appealed under section 288 of the Town and Country Planning Act 1990, under which the principles applied are the same as judicial review. The site was in Surrey greenbelt, and her arguments on the traditional planning issues were far from strong. Indeed, they were particularly weak. However, the appellant said that she had two children, at school, and, following ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 and HH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority [2012] UKSC 25, their interests (including their article 8 rights) were at least primary if not paramount.

41. The planning counsel before me were frankly appalled by the prospect of SB and Miss Behavin' being applied, i.e. me balancing all of the planning material considerations and coming up with a planning judgment as to whether to allow the development or not. They said, with force and sense, that that was a matter for the authority and on appeal an inspector – but not me. They each suggested if the principles of those two cases were applied to planning cases then the planning regime of the country would

effectively collapse. I saw the obvious force in that. It was about the only matter they agreed upon. The problem, of course, is that Miss Behavin' was a planning case, or at least a licensing case akin to planning.

42. However, although the conceptual basis of an exercise in proportionality and traditional process based challenges in common law has been emphasised in some cases (e.g. Daly), there is less difference than some believe. Wednesbury recognises that there is a band of legitimate decision making for any particular decision; and Strasbourg also recognises that states have a margin of discretion in how they ensure that article 8 rights are respected. Kerr LJ could have said in Miss Behavin' that the Council had not taken article 10 rights into account, but, if they had, the result would necessarily have been the same. Hence, the Council's error was immaterial. That would have been the traditional approach. Or, if the decision would not necessarily have been the same, they could have sent it back to the Council for re-decision.

43. I dealt with the issue thus (at [43]-[45]):

> "82. Therefore, although the lawfulness of process is not determinative, process may well be important to the court's determination of whether the human rights of the person challenging the relevant decision have in fact been breached; because, if the decision-maker (say, an inspector appointed to deal with a section 78 planning appeal) gets the process right, then the courts will give deference to his decision, and afford him a wide margin of error in making it. As Lord Hoffmann put it in Miss Behavin' (see paragraph 79 above), in those circumstances, it will take "very unusual facts" for a finding to be made by a court that there had been a disproportionate restriction on Convention rights.
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> 83. Where a decision-maker is required to perform a decision-making exercise involving a number of public interest and private rights, one of which demands a proportionality balance to be performed, this overlap in approach is obviously helpful. In any event, problems deriving from the approach required by SB and Miss Behavin' are, in practice, likely to be few. In any proceedings, the court will be faced with a single question, namely whether the challenged decision disproportionately infringes an individual's human rights. In considering that question, it will give due deference to the decision of the primary decision-maker, because he has been assigned the decision-making task by Parliament, and he will usually have particular expertise and experience in the relevant decision-making area. Such a decision-maker will be accorded a substantial margin of discretion. The deference and margin of discretion will be the greater if he has particular expertise and experience in the relevant area, and/or if he is acting in a quasi-judicial capacity. If the decision-maker has clearly engaged with the article 8 rights in play, and considered them with care, it is unlikely that the court will interfere with his conclusion.

> 84. Nevertheless, there may be cases where he has clearly not done so at all, or not done so properly. In those cases, I do not consider that, in every case where the primary decision maker has not properly engaged with the human rights issues, Miss Behavin' requires the court itself to grapple with the weight of those issues compared with public interest factors, irrespective of the area of administration involved and irrespective of the expertise and experience of the primary-decision-makers assigned to that task. In areas of high complexity where primary decision-making has been carefully assigned by Parliament, it seems to me that it would defy logic, and democratic principles, if the court was required to enter into an arena reserved to that decision-maker and in doing so to give appropriate weight to all sorts of social policy factors, as well as private rights and interests, no matter how ill-suited to the task the court might be, how expert the primary decision-maker might be and how relatively small the human rights issue is in the context of the decision-making process as a whole. In my view, it is arguable, even after Miss Behavin', that there are some cases in which it would be appropriate and lawful for the court to quash the primary decision-maker's decision and, effectively, require him to re-make that decision, this time properly taking into account the human rights in play as a material factor.

46. In my view, now that we have lived and worked with the Human Rights Act for 15 years, it is time to step back and review where we are; and particularly the respective roles of Parliament, the executive government and the judiciary. Much in the human rights field – and particularly article 8 – involves the balancing of highly political matters, including the proper weight to be given to individual rights compared with the public interest (e.g.) in having an enforceable and enforced immigration policy. They are, first, matters for Parliament and the executive government.

47. Therefore, whilst some have criticised them, I guardedly welcome the attempt of the Home Secretary to set out the article 8 rights of those seeking leave to enter or remain in the United Kingdom in paragraph 276ADE of and Appendix FM to the Immigration Rules. They attempt to give guidance, based on policy, as to where the line should be drawn. The courts have made clear that that is entitled to considerable respect and deference: see, e.g., Izuazu (Article 8 New Rules) Nigeria [2013] UKUT (IAC) in which the Upper Tribunal said: "For reasons we have clearly explained this is not to adopt a general test of exceptional circumstances but to identify the need for weighty factors in favour of the Applicant in this class of case"; and MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, in which Lord Dyson MR said that the test is whether "... there are circumstances which are sufficiently compelling and therefore exceptional to outweigh the public interest in deportation". That was, of course, a deportation case; but, from it, it is clear that "exceptional" in this general context both imports rarity and requires suitably

compelling matters to be put forward sufficient to outweigh the public interest, whether that public interest be specifically in respect of deportation or in some other aspect of having a coherent, enforceable and rationally enforced immigration policy.

48. In the R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) at [30], Sales J helpfully added this to the analysis in Izuazu:

> "The only slight modification I would make for the purposes of clarity is to say that if after the process of applying the new Rules and finding that the claims for leave to remain under them fails, the relevant official or Tribunal Judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8 it would be sufficient simply to say that. They would not have to go on in addition to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to article 8 there would be no point in introducing full separate consideration of article 8 again after having reached a decision on application of the Rules."

49. With that, I respectfully agree. Whilst the courts must have a residual function in protecting the fundamental rights of individuals – if necessary, against populist wishes – the cases in which it will be necessary and thus appropriate for the courts to do so are likely to be rare where those who are elected or otherwise democratically-accountable have made their views as to the appropriate balance between individual rights and the relevant public interests clear.

50. These are matters which will be revisited I am sure. They are particularly relevant in Wales, where there are signs that the Welsh Government are taking a clearer and firmer rights-based approach to policy. But that is a whole subject in itself, and one for a different day. For now, I hope these few thoughts on the background issues will prompt others to think further about these challenging issues.