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Making Judgments on Human Rights Issues

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1. It is a great pleasure to return to the University of Nottingham, especially as I have such fond memories of being a junior lecturer here, more years ago than I now care to remember. After my brief time here I went on to practise at the Bar and more recently have been on the Bench. When I was a law student in the early 1980s, a very senior barrister told me that there was no such thing in this country as human rights law. At that time it was rare for a practitioner to say that they worked in the field of human rights; and there were relatively few academic courses on the subject even in our universities. That of course has all changed, not least because of the immense contribution which this university has made to the subject. You will know better than me that a particular debt is owed to Professor David Harris for his pioneering work in establishing the Human Rights Law Centre here. It is an honour and a pleasure to have been invited to give this year's Human Rights Law Centre lecture.

2. In many ways the story of our legal system in the last 25 years has been the story of the development of human rights law in this country. In particular one can see the development of the doctrine of proportionality. That will be the main subject of my lecture this evening. At one time, in the 1990s, it seemed as if proportionality was the doctrine that dared not speak its name in English law. Now it is applied on a daily basis in the courts and tribunals of this country when adjudicating on human rights issues.

3. Before I embark on that subject, I should make two preliminary observations. First, the doctrine of proportionality is not, of course, unique to human rights law. It is well known in the administrative law of many European countries, in particular Germany, having its origins in Prussian law in the 19th century.[1] From that inspiration it has become one of the general principles of European Union (EU) law. There continues to be a lively debate in this country about whether the doctrine of proportionality is a distinct principle of English administrative law, in cases which do not involve fundamental rights in either EU law or human rights law, and in particular whether it should replace the doctrine of irrationality or Wednesbury unreasonableness.[2] In the recent case of R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs[3] the Supreme Court decided that it would be best for a five judge panel of that Court not to decide whether such a fundamental change in English administrative law should be made. However, as Lord Kerr suggested at para. 271, that question will have to be "frankly" addressed by the Supreme Court

[1] See Mary Arden, Human Rights and European Law (2015, OUP) pp.56-7.
[2] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] KB 223.
[3] [2016] 3 WLR 1665.

sooner rather than later. It is not my intention in this lecture to address that interesting question. Nor is it my intention to address another interesting question, whether the requirements of proportionality in human rights law are the same as in EU law: that question was considered by the Supreme Court last year in R (Lumsdon) v Legal Services Board,[4] a case which concerned the QASA scheme, that is the Quality Assurance Scheme for Advocates.

4. My other preliminary observation is this. Not all human rights issues depend upon the question of proportionality. When a court or tribunal is faced with a human rights case, it may have to decide other questions. One question may be whether the alleged breach of a human right falls within the scope of a relevant right at all. This may call for the interpretation of that right, particularly bearing in mind the "living instrument" character of human rights treaties. A recent example is provided by the decision of the Supreme Court in R (Catt) v Association of Chief Police Officers,[5] in which it was held that the state's systematic collection and storage in retrievable form even of *public* information about an individual amounts to an interference with the right to respect for private life in Article 8(1) of the European Convention on Human Rights (ECHR). It therefore called for objective justification under paragraph (2) of Article 8.

5. It must also be borne in mind that some human rights are absolute in nature, so that there can be no question of deciding whether an interference with them is proportionate. This is true in particular of the right to be free from

[4] [2015] UKSC 41.
[5] [2016] 2 WLR 664.

torture and inhuman or degrading treatment in Article 3 of the ECHR. It is also true of the right to freedom of thought and conscience in Article 9.

6. However, most of the Convention rights are not absolute: they are either limited or qualified rights. In particular most of the rights in Articles 8-11 can be qualified where an interference is "necessary in a democratic society" to achieve one or more of the specified legitimate aims set out in those provisions. For example, although the right to freedom of religious belief is absolute, the right to *manifest* that belief is a qualified right.

7. The daily experience of courts and tribunals which have to deal with human rights cases, for example the First-tier Tribunal and the Upper Tribunal when they deal with immigration cases, as well as the Administrative Court, is that very often the case does turn on the question of proportionality.

8. What is also clear, from my experience, is that in the last 15 or so years, since the Human Rights Act 1998 (HRA) came into full force in October 2000, courts and tribunals in this country have become well accustomed to adjudicating on these questions. When I was a law student and even when I was a practitioner before the HRA came into force, I remember that it was often questioned whether judges in this country would be well placed to decide such issues in human rights cases. Indeed this was one of the reasons sometimes advanced by those who opposed incorporation of the ECHR into domestic law.

9. It is now well established that a court or tribunal, when faced for example with an argument that there has been a breach of the right to respect for private or family life in Article 8 of the ECHR, should consider the following questions and should do so in a structured way:

(1) Has there been an interference with the right in question?

(2) If so, was that interference authorised by law? Sometimes the terminology used in the Convention is slightly different: it may be whether it is "in accordance with law", "prescribed by law" or some other formula of that sort. Nevertheless the principle of substance is clear. Sometimes, although not often, the case will be decided at this stage. This will be where, for example, there is no law in place governing the exercise of the discretionary power which the executive has purported to use in order to interfere with a human right. If that is the case, then the legislature will be expected to fill that gap and enact a law to govern the matter in hand. It is important to note that the purpose of this requirement that an interference with a right must be in accordance with law is not merely to ensure that there is an ascertainable legal basis for it in domestic law. As Lord Sumption put it in Catt, at para. 11, it "also ensures that the law is not so wide or indefinite as to permit interference with the right on an arbitrary or abusive basis."

(3) If the interference is authorised by law, the next question that has to addressed is: does it satisfy the requirements of the principle of proportionality?

10. The principle of proportionality itself in turn requires assessment of a number of issues. It includes a number of component parts, to which I will return. Before I do so I will briefly consider the early case law in Strasbourg.

11. The fundamental principles of the doctrine of proportionality were established by the European Court of Human Rights in the mid-1970s. Those fundamentals were laid down in particular in the two cases of Handyside v United Kingdom;[6] and Sunday Times v United Kingdom.[7] Both of those cases concerned the right to freedom of expression in Article 10.

12. Particular emphasis was placed on the significance of the word "necessary" when it came to the assessment of whether a restriction on a fundamental right, such as the right to freedom of expression in Article 10, is permissible. The Court said that an interference with such a right must correspond to a "pressing social need"; the reasons given for it must be "relevant and sufficient"; and the interference must be "proportionate to the legitimate aim pursued".

13. In those early cases the Court of Human Rights also made it clear that the concept of "necessity" was neither so strict as to be synonymous with "indispensable" nor does it have the flexibility of such expressions as "useful", "reasonable" or "desirable": see para. 59 of its judgment in Sunday Times.

[6] (1976) 1 EHRR 737, paras. 48-50.
[7] (1979) 2 EHRR 245, para. 62.

14. As is well known, in the text of many of the Convention rights what is required in order to justify an interference with a fundamental right is that the limitation must be necessary "in a democratic society". As the Divisional Court, of which I was a member, put it in R (BBC) v Secretary of State of Justice,[8] at para. 49:

> "It is important not to lose sight of the phrase 'in a democratic society'. These words, which appear in many of the articles of the Convention, are not superfluous. The framers of the Convention, arising as it did out of the ashes of European conflict in the 1930s and 1940s, recognised that not everything that the state asserts to be necessary will be acceptable in a democratic society. The jurisprudence of the European Court of Human Rights has frequently stressed that the hallmarks of a democratic society are pluralism, tolerance and broad-mindedness ..."

15. As the Divisional Court went on to say, at para. 50, the European Court has also said in many cases that, since freedom of expression constitutes one of the essential foundations of a democratic society, "it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population": see the Sunday Times case, at para. 65.

16. When I first started in practice at the Bar, in the early 1990s, long before the HRA was on the statute book, the leading authority on this subject was the decision of the House of Lords in R v Secretary of State for the Home Department, ex p. Brind.[9] That case concerned the Government's prohibition of the broadcasting of any matter consisting of or including words spoken by persons appearing or being heard on programmes where

[8] [2013] 1 WLR 964.
[9] [1991] 1 AC 696.

such persons represented a proscribed organisation. This famously included representatives of Sinn Fein, although it was not itself a proscribed organisation. The public could therefore see images of Gerry Adams on the news but could not hear his voice: often his words were dubbed by an actor. This was of course long before the Belfast Agreement of 1998 and well before Sinn Fein entered government in the devolved administration of Northern Ireland.

17. In Brind the House of Lords was invited to hold that, even in the absence of incorporation of the ECHR into domestic law, the Court should apply the doctrine of proportionality rather than Wednesbury unreasonableness, where such an important right as the right to freedom of expression was concerned. Their Lordships declined that invitation and confirmed that, even in such cases, the doctrine of proportionality had no place in domestic law. In his speech, Lord Lowry was at particular pains to stress that to move away from the Wednesbury principle and to accept a doctrine of proportionality would be to depart from a fundamental feature of the role of the courts in judicial review cases in this country: see pp. 765-767. One of the reasons which he gave for taking that view was the following (p. 767):

> "The judges are not, generally speaking, equipped by training or experience or furnished with the requisite knowledge and advice, to decide the answer to an administrative problem where the scales are evenly balanced, but they have a much better chance of reaching the right answer where the question is put in a Wednesbury form. ..."

Lord Lowry was of the clear view that to depart from the conventional judicial review approach would be to risk trespassing into what he called "the admittedly forbidden appellate approach."

18. In a subsequent comment on Brind, Lord Hoffmann once remarked that Lord Lowry's speech amounted to saying that either the doctrine of proportionality was the same as the doctrine of irrationality, in which case English law did not need it; or it was something different, in which case it would be dangerous to import it.

19. At the time it might have been thought that the cogent views expressed in Brind would settle the issue. In fact the law continued to be restless. During the course of the 1990s, and well before the enactment by Parliament of the HRA, the courts began to develop a principle of "heightened scrutiny" when Wednesbury review was taking place in the human rights context. Despite the apparently emphatic decision in Brind, the House of Lords itself heralded this development in a number of important decisions of the 1990s. The principle was perhaps most famously summarised by Sir Thomas Bingham MR in R v Ministry of Defence, ex p. Smith.[10] That case concerned the then prohibition on any homosexual from being a member of the armed forces of this country. The test, formulated by David (now Lord) Pannick QC on behalf of the applicants, which was accepted to be "an accurate distillation" of the relevant principles laid down by the House of Lords was as follows (p.554):

[10] [1996] QB 517.

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

Nevertheless, as the outcome of that case itself illustrated, there were still important limits to the ability of domestic courts to adjudicate on human rights questions within the constraints of domestic law alone. In setting out his conclusion on this issue at p. 558, the Master of the Rolls said that the existing policy could not in his judgment be stigmatised as irrational. He said:

> "The threshold of irrationality is a high one. It was not crossed in this case."

20. As is well known, when that case went to Strasbourg, the European Court of Human Rights held that there had indeed been a violation of the ECHR. Interestingly, the Court held that there was not only a violation of the right to respect for private life in Article 8 in the Convention but also that there was a breach of the right to an effective remedy in domestic law, as set out in Article 13. This was because, in that context, it found that the doctrinal constraints on the domestic courts were such that they could not provide an effective remedy to a person whose Convention rights had arguably been breached. For many people there could have been no clearer example of the need for the incorporation of the ECHR than the case of Smith. In Strasbourg the case was

known as Smith and Grady v United Kingdom:[11] see paras. 112 (the finding of a violation of Article 8); and para. 138, where the Court stated (in finding a violation of Article 13):

> "In such circumstances, the Court considers it clear that, even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention."

21. As I have said, since the HRA came into full force in the year 2000, there has been a complete transformation in this area of law. The courts have adopted a structured approach to the assessment of proportionality by asking a series of questions. Those questions have been borrowed from Commonwealth jurisprudence on domestic charters of rights: for example, an early decision of the Supreme Court of Canada on the Canadian Charter of Fundamental Rights and Freedoms, R v Oakes.[12] Another influential decision was that of the Constitutional Court of South Africa in Government of the Republic of South Africa v Sunday Times Newspaper.[13] Those cases were considered in a case in Zimbabwe called Nyambirai v National Social Security Authority[14] and by the Privy Council in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing[15] to develop a threefold test:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to

[11] (2000) 29 EHRR 493.
[12] [1986] 1 SCR 103.
[13] [1995] 1 LRC 168.
[14] [1996] 1 LRC 64.
[15] [1999] 1 AC 69.

> meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

22. That threefold test was adopted for use under the HRA by the House of Lords. However, it appeared that the Privy Council's summary of what had been said in particular by the Supreme Court of Canada in Oakes had left out an important fourth requirement. That was clarified by the House of Lords in Huang v Secretary of State for the Home Department,[16] since when it has been clear that the doctrine of proportionality generally requires four questions to be addressed:

    (1) Is the legislative objective sufficiently important to justify limiting a fundamental right?

    (2) Are the measures which have been designed to meet it rationally connected to it?

    (3) Are they no more than are necessary to accomplish it? and

    (4) Do they strike a fair balance between the rights of the individual and the interests of the community?

23. This has now become the settled test. As Lord Sumption explained in Bank Mellat v HM Treasury (No. 2), these four questions call for an "exacting analysis of the factual case" advanced in defence of a measure.[17] Of course answering these questions calls for judgment. People will often disagree about what the particular outcome should be in a given case after applying these principles. However, that is not unusual in any legal system. Judges are

[16] [2007] 2 AC 167.
[17] [2014] AC 700, para. 20. Lord Reed's dissenting judgment, at paras. 68-76, is also essential reading for anyone interested in the concept of proportionality.

well used to applying broad concepts and abstract principles. They are entirely familiar with the notion that decisions are often fact-sensitive and the specific application of general principles may vary with the context.

24. Having said that, it is clear that the question of proportionality is not a question of fact alone. This explains why it is possible for appellate courts, including the Supreme Court, to adjudicate on that question.

25. In what was perhaps the most important case yet decided under the HRA, A v Secretary of State for the Home Department[18] (often called the "Belmarsh case" because that is where the applicants were detained), Lord Bingham recognised the fundamental change to our law which had been made by that Act. In that case, which concerned the provisions of the Anti-terrorism, Crime and Security Act 2001 which permitted the executive to authorise the detention without charge of suspected international terrorists but only where they were foreign nationals, Lord Bingham said at para. 40 that Smith and Grady had held that the traditional Wednesbury approach to judicial review afforded inadequate protection to human rights under the Convention. He continued:

> "It is now recognised that 'domestic courts must themselves form a judgment whether a Convention right has been breached' and that 'the intensity of review is somewhat greater under the proportionality approach' ..."

26. Famously in what has been described as a "magisterial" passage, at para. 42 Lord Bingham said:

[18] [2005] 2 AC 68.

> "I do not ... accept the distinction ... between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. ... But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself."

27. The Belmarsh case is also important because it provides a vivid illustration of the link between the concept of proportionality and the principle of equality.

28. As is well known Article 14 of the ECHR does not create a freestanding right to equality, in contrast (for example) to Article 26 of the International Covenant on Civil and Political Rights. It does protect people from discrimination in the enjoyment of the other Convention rights. As is also well known, this does not mean that there must be a breach of another Convention right before there can be a breach of Article 14. So long as a case falls within the "ambit" of another Convention right, there can be an issue which arises under Article 14. If there is, on the face of it, a breach of the principle of equality, that discrimination will have to be objectively justified. In order to justify it the state will have to show that there is a legitimate aim and that it has complied with the principle of proportionality. In this way we can see that one returns to the importance of that principle in human rights law.

29. The reasons for the importance of the principle of equality were set out eloquently in Ghaidan v Godin-Mendoza[19] (another case about gay rights), at para. 132 by Baroness Hale of Richmond. In that famous passage she

[19] [2004] 2 AC 557.

emphasised that democracy is founded on the principle that each individual has equal value. Treating some people as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. In perhaps one of the most famous passages in modern law, she concluded that:

> "Democracy values everyone equally even if the majority does not."

30. In this context an important decision by the European Court of Human Rights was Gaygusuz v Austria.[20] That case concerned a form of emergency assistance which depended upon a national insurance scheme in Austria. The applicant was a Turkish national who was refused an advance on his pension in the form of such emergency assistance because he did not have Austrian nationality. He made a complaint under Article 14 read with Article 1 of the First Protocol, which guarantees the right to peaceful enjoyment of possessions. It is well established that, in certain circumstances, a social security benefit, in particular a contributory benefit, can fall within the ambit of Article 1. In Gaygusuz the Court of Human Rights, in deciding in the Applicant's favour, said at para. 42, that "very weighty reasons" would have to be put forward to justify a difference of treatment based exclusively on the ground of nationality.

31. That approach was applied in the domestic courts under the HRA by the House of Lords in A v Secretary of State for the Home Department. In that case the House of Lords made a declaration of incompatibility in respect of Part 4 of the Anti-Terrorism, Crime and Security Act 2001, which permitted

[20] (1997) 23 EHRR 364.

the Secretary of State to authorise the detention without charge of suspected international terrorists but only if they were foreign nationals. That distinction was regarded as unacceptable discrimination on grounds of nationality. At para. 68 Lord Bingham of Cornhill emphasised that:

> "... Any discriminatory measure inevitably affects a smaller rather than larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. ..."

32. The consequence of that unacceptable discrimination in that case was not only that there was a violation of Article 14 but also the Government was unable to show that the underlying measure conformed to the principle of proportionality. It was not possible to demonstrate that detention without charge was necessary in circumstances where it was used only against certain people and not others who were logically in the same position. This is sometimes known, in American jurisprudence, as an "under-inclusive" measure. We can therefore see that, in certain circumstances, a measure will be held to be disproportionate not because it is "overbroad", in other words it goes further than is necessary, but because it is "under-inclusive", that it does not go as far as it would if it were truly necessary.

33. The underlying rationale for this approach can be appreciated from an extreme illustration, which is difficult to conceive would occur in modern Europe but which would have been entirely plausible in the 1930s. Suppose there is a national emergency such as an economic crisis and the state deprives people of their property, perhaps without compensation. In certain circumstances, that may be objectively justified as being a proportionate

interference with the right to peaceful enjoyment of possessions in Article 1 of the First Protocol. However, suppose that the state deprives only some people of their property in order to meet the apparent needs of the emergency and does so on racially discriminatory grounds, for example confiscating the property only of Jewish people. In that scenario, as Lord Bingham emphasised in the Belmarsh case, what needs to be justified is not only the underlying measure but the discrimination. The principle of proportionality will be much more difficult to satisfy where there is such discrimination, if indeed that discrimination could be justified at all.

34. However, in recent years the picture seems to have become less clear cut. In Stec v United Kingdom[21] the European Court of Human Rights had to consider a complaint that there had been sex discrimination in the context of certain social security benefits. At para. 62 of its judgment the court said:

> "... As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. ... The Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."

35. That test of "manifestly without reasonable foundation" was originally formulated in cases where it was alleged that there had been a violation of the underlying right, not discrimination cases, in other words the right to peaceful enjoyment of possessions in Article 1 of the First Protocol.

[21] (2006) 43 EHRR 1017.

36. Nevertheless it has now become clear that the test has become applicable in Article 14 cases too, for example in R (RJM) v Secretary of State for Work and Pensions,[22] at para. 54 in the opinion of Lord Neuberger of Abbotsbury.

37. In Humphreys v Commissioners of Revenue and Customs [23] the Supreme Court had to consider the application of these principles in the context of alleged sex discrimination to child tax credit. Lady Hale noted that the phrase "manifestly without reasonable foundation" originates from the decision of the European Court of Human Rights in James v United Kingdom,[24] which concerned the compatibility of leasehold reform with Article 1 of the First Protocol. However, Lady Hale went on to observe that in Stec the court had clearly applied that test to the decision as to when and how to correct inequality between the sexes in state pension ages.

38. Lady Hale continued:

> "... It seems clear from Stec ... that the normally strict test for justification of sex discrimination in the enjoyment of the Convention rights gives way to the 'manifestly without reasonable foundation' test in the context of state benefits."

39. This approach was more recently applied by the Court of Appeal in R (MA) v Secretary of State for Work and Pensions,[25] which concerned the so called "bedroom tax".

[22] [2009] 1 AC 311.
[23] [2012] 1 WLR 1545.
[24] (1986) 8 EHRR 123.
[25] [2013] PTSR 1521.

40. The principles in this area of law may still be developing. Although, at first sight, the distinction between deprivation of a person's property and the refusal to confer social security benefits upon them appears clear enough it is not always so in the context of discrimination law.

41. For example, in the employment situation, it is not uncommon for there to be a bonus or other discretionary payment made where there is no underlying right to the payment at all. There may be no right to that bonus payment under the contract of employment. Nevertheless, if an employer chooses to give the bonus payment only to men and not to women, or even if some bonus payment is given to women but only at a lower rate than to men, it may well be difficult to show that there is objective justification for that sex discrimination. This is where one returns to the fundamental requirements of proportionality.

42. In conclusion I would simply draw together some of the threads:

(1) Although 25 years ago it was thought by many people, including Lord Lowry in Brind, that it would be inappropriate for judges in this country to adjudicate on issues of proportionality in the context of human rights, that has now become commonplace, as a result of the will of Parliament in enacting the Human Rights Act in 1998.

(2) The requirements of proportionality, at least in the context of human rights law, are now well established in the case law of the House of Lords and more recently the Supreme Court.

(3) A powerful adjunct to the substantive Convention rights themselves is provided by the right to equality in the enjoyment of those rights in Article 14. This in turn often requires analysis of whether an apparently discriminatory measure is objectively justified, by reference to the doctrine of proportionality.

(4) The application of the principle of proportionality calls for judgement, which is fact-sensitive, and may vary with the context.

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