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Proportionality: the way ahead?

by

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No-one can possibly quarrel with the basic idea of proportionality as a legal concept. Simply put, the proportionality principle for the purposes of this lecture means that no state or official or institution can interfere with an individual's rights under the European Convention on Human Rights ("the Convention") or under EU law, unless it shows that the interference with those rights is justified.² The logic of the proportionality principle is impeccable. Its attraction is irresistible.

Indeed, proportionality is so logical that one would expect it to be found in the common law. But in fact it is not derived from the common law or from any UK statute. One writer not so many years ago commented that he could only find one piece of case law about proportionality, which was a dictum of Lord Diplock, describing proportionality as meaning "[i]n plain English, 'you must not use a steam hammer to crack a nut, if a nutcracker would do'."³

¹ Member of the Court of Appeal of England and Wales. This speech was given on 12 November 2012 at King's College London as the Annual Address of the United Kingdom Association for European Law (UKAEL).

² The proportionality principle also applies in other fields of law outside the scope of this lecture, such as international law. I shall restrict my examples to civil law, but proportionality also has important implications in criminal law. For a recent and absorbing account of proportionality, see Aaron Barak, *Proportionality* (Cambridge, 2011).

³ *R v Goldstein* [1983] 1 WLR 151, 155B.

Today lawyers and judges in England and Wales⁴ have to understand proportionality primarily because it is part and parcel of the jurisprudence of the European Court of Human Rights (“the Strasbourg court”) and of the jurisprudence of the Court of Justice of the European Union (“the Luxembourg court”).⁵ My starting point in this lecture, therefore, is to examine the nature of that jurisprudence and show the differences of approach between the two European supranational courts. We shall find that the concept has its complexities and that it is not as simple as it looks.

When I have explained those differences, I will take a look at the way those differences have been reflected in the domestic legal order in four cases where the courts are grappling with “multi-level judging”: that is, they are aiming either to make English law (in the case of human rights) compatible with the Convention or (where EU law is invoked) to make it conform with EU law in accordance with the UK’s Treaty obligations. I will use these cases to throw further light on the nature of the proportionality principle and the problems it brings.

I shall next address the difference between that form of unreasonableness which English lawyers call “*Wednesbury* unreasonableness” and proportionality. *Wednesbury* unreasonableness is the usual test for judicial review of administrative action in English law in the absence of illegality or procedural impropriety.

In the final part of this lecture I will get out my crystal ball: I will turn to look at the way ahead. I hope that, by that stage, I will have convinced you that there are

⁴ References in this lecture to England should be read as including references to Wales, even though Wales is not expressly mentioned, and cognate expressions should be treated accordingly.

⁵ Proportionality is today also applied by the common law and statute law in certain other situations, mainly by extension of the principles derived from the jurisprudence of the Strasbourg and Luxembourg courts, but this lecture is not concerned with those situations.

aspects of proportionality that need to be addressed at the highest level in the UK. In addition, there is a further issue to be addressed at that level as well. For some years, there had been a call for the test of unreasonableness to be replaced. Those making this call often also suggest that proportionality should be used instead of unreasonableness. For instance, Lord Diplock, in *Council for Civil Service Unions v Minister for the Civil Service*⁶ contemplated the possibility of:

“...the ... adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; ...”

So I will turn to explain the source of the pros and cons of that idea before drawing the threads together and leaving you with some parting thoughts of my own in order that you can - judge for yourself!

A historical diversion

Before we start the hard work, I propose to start with a little historical diversion. It will enable us to identify what I will call the “badges” of proportionality.

I have already said that proportionality is not a common law concept. (The common law tends to like bright line rules whereas proportionality requires evaluation). However, one can say that proportionality is a very ancient concept. Precisely how ancient is a matter of debate as academics have for years disputed its precise origin. It may be as old as Hammurabi⁷ (of “an eye for an eye and a tooth for a tooth” fame). For our purposes, it is sufficient to note its origin in the administrative law in Prussia at the end of the nineteenth century. It started as a principle of

⁶ [1985] AC 374, 410E.

⁷ The Code of Hammurabi, a Babylonian code, dates from about 1772 BC.

necessity applied to policing. In a notable case, *Kreutzberg*,⁸ the Prussian Supreme Administrative Court developed the notion that the state required special permission in order to interfere with a citizen's civil liberties. The police sought to rely on a specific provision of the law empowering the police to adopt such measures "as are necessary for the maintenance of public order". The court held that, to test this reliance, it had to examine whether the police measures exceeded in intensity what was required by the pursued objective. This principle evolved into a proportionality principle. In due course, proportionality became a constitutional principle, so that the legislature was also bound by it.

The Federal Constitutional Court of Germany, which was established after World War II, adopted and developed the proportionality principle. It had three elements:

- (1) *Suitability*: the measure should be suitable for the purpose of facilitating or achieving the desired objective;
- (2) *Necessity*: the measure should be necessary (and, at this stage, I am not going to say anything about *how far* it had to be necessary), and
- (3) *Fair balance*: the measure should not be disproportionate to the restriction which it involved.

The Federal Constitutional Court applies the proportionality principle as a generalised head of review for administrative action, and so the proportionality principle plays a key role in administrative law in Germany. The Federal Constitutional Court has, for instance, held that the police cannot enforce an absolute

⁸ 14 June 1882, Pr OVG, 29, 253.

ban and must allow exceptions from measures when it is not absolutely necessary to have a blanket rule.

Likewise the Federal Constitutional Court uses proportionality in cases in which there are conflicts between individual rights. These rights may not be qualified to a further extent than is necessary to reconcile them.⁹

Even today there is nothing about proportionality in the German Basic Law.

The badges of proportionality

I am now ready to identify the “badges” of proportionality that it is helpful to keep in mind when examining proportionality. As we have seen, they are suitability, necessity and fair balance. Courts have also held that there is a prior question, namely whether the desired objective of the act or measure was a legitimate aim. It is important to identify the legitimate aim in order to assess the suitability of the act or measure. This is not always treated as a separate test as it is implicit in suitability. Absence of a legitimate aim is likely to be a knock-out point.

With my historical diversion now ended, I now return to my main theme. What I want to do is to show what we can learn by approaching proportionality not through our own cases but by looking in a broad way at the Strasbourg and Luxembourg jurisprudence from which it is derived. I turn first to the Strasbourg jurisprudence.

⁹ See Southern, *Tax Law Developments – the movement from private law to public law*. Paper given at Queen Mary, University of London, 12 October 2012; see also Schwarze, *European Administrative Law Developments* (Sweet & Maxwell, 2006). I am also indebted to Hugh Mercer QC for bring this work to my attention.

Strasbourg Jurisprudence – a focus on fair balance

The Convention, like the administrative law of Prussia, makes no reference to proportionality by that name. It has, however, been adopted as a general concept of Strasbourg jurisprudence.

Some rights, like article 8 (right to respect for private and family life), are expressly qualified by such matters as the rights of others. Article 8 is in these terms:

Article 8 ***Right to respect for private and family life***

- 1** Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2** There shall be no interference by a public authority with the exercise of this right except such as is in 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 for the protection of the rights and freedoms of others

It is well-established that, when the Strasbourg court is required to determine whether an interference with private life is necessary for one of the purposes permitted by article 8(2), it is not enough that the interference is for one of the specified purposes. It must also be a proportionate means of achieving that aim.

Not every article in the Convention is qualified by an express provision for interference. Article 6, for instance, which guarantees the right of access to court

makes no reference to any permitted restriction on that right.¹⁰ However, the Strasbourg court will in appropriate circumstances treat such a restriction as implied.

In order to reach a view as to whether something is *necessary* in a democratic society for one of the specified reasons, and therefore proportionate, the interests of the individual have to be *balanced* with the rights of others or of the rest of the community. The word “necessary” can be read as implying that the rights of the individual can only be interfered with when this is strictly necessary and no more than is absolutely necessary. However, this is not how that expression works in practice. In some situations, the Strasbourg court will take the view that the national authorities are better placed to assess whether the interference is necessary when the interests of

¹⁰ **Article 6**
Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

the individual are balanced with those of the community. The decision is then said to be within the “margin of appreciation” of the contracting state.

A good example of the margin of appreciation being applied to what is necessary in a democratic society is the controversial decision of the Strasbourg court in *Otto-Preminger-Institut v Austria*.¹¹ In that case the applicant managed a private cinema and the cinema wished to show an anti-religious film containing what the court described as “provocative portrayals of objects of religious veneration”. The film was a distinctly minority interest: one of the problems was that it was to be shown in the staunchly Roman Catholic area of the Tyrol. The Austrian authorities considered that the film was distasteful and would lead to disturbances. A court order was made for the seizure and destruction of the film.

The applicant complained that this was a violation of the Institut’s freedom of expression. The right to freedom of expression contained in article 10 of the Convention is, like article 8, a qualified right.¹² The qualification is, so far as

¹¹ App.No.13470/87.

¹² Article 10 provides:

Article 10
Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

material, the same as that in article 8(2). By a majority of 6-3, the Strasbourg court rejected the applicant's case and held that there had been no violation of article 10.

The majority relied on the margin of appreciation and held that there was no violation. Their reasoning was that the right of the Institut to freedom of expression had to be balanced against the rights of others in Austria, under article 9 of the Convention (freedom of thought, conscience and religion), to respect for their religious feelings. The majority accepted that the right to freedom of expression was applicable to ideas that shock or disturb. However, there was also an obligation to avoid so far as possible expressions that were gratuitously offensive to others. Any prevention of improper attacks on objects of religious veneration had to be proportionate to the legitimate aim to be pursued. In the opinion of the majority, since religion had different significance in the various contracting states, the national authorities were best able to determine whether an outright ban was necessary in the interests of society. The position would, therefore, have been different if there had been consensus among the contracting states, for example that this sort of film should not be banned.

The majority gave no guidance as to how the national authorities were expected to carry out their task.

The judgment of the minority is, to my mind, more instructive. In essence, the minority rejected the idea that the ban fell within the margin of appreciation of the national authorities, and took the view that, since there were less restrictive measures available for dealing with the showing of the film, the ban was not proportionate.

The minority's process of reasoning is important. Unlike the majority, the minority proceeded on the basis that, to carry out the proportionality exercise, it was not sufficient simply to conclude that two Convention rights were in conflict. The minority made an assessment of the importance of each right. They pointed out that freedom of expression was a fundamental feature of a democratic society and added:

“There is no point in guaranteeing this freedom only as long as it is used in accordance with accepted opinion.”

They held that article 10(2), permitting an interference with freedom of expression had to be narrowly interpreted. Accordingly, the state's margin of appreciation under this provision could not be a wide one. A state could legitimately set limits to the public expression of abusive attacks on the reputation of a religious group. Moreover, “tolerance works both ways”: those seeking to exercise freedom of expression had to limit the offence they might cause.

Then the minority subjected the facts to critical examination. They held that any measures to restrict the exercise of the right to freedom of expression had to be *proportionate*. A complete ban could only be justified if the behaviour of those seeking to exercise their freedom of expression led to a high level of abuse. It was also necessary to weigh up the interference with each right having regard to the particular circumstances under consideration. On the facts of the case, the minority concluded that, as there could only be a small, paying audience in an “art cinema”, the film should not have been subjected to an outright ban.

Otto-Preminger-Institut is a striking case. There are a number of points that I want to draw out of it:

- *The minority judgment tells us how the proportionality exercise in Strasbourg jurisprudence works:* it consists of two separate steps:
 1. *Qualitative assessment:* The minority carried out a qualitative assessment of each of the rights in issue. They determined that the right to freedom of expression had great weight and accordingly they rejected a solution that gave it no weight. Any risk that the restrictions on exhibiting the film would not be adequate to prevent public disorder was thus outweighed by the value placed on the applicant's right to freedom of expression.
 2. *Application to the specific facts:* The minority examined the facts closely to see whether the two rights could be reconciled. This shows that striking the balance in an individual case does not end with the theoretical exercise involved in a qualitative assessment but involves a practical application of that assessment to the actual facts of the case.

- *The majority's judgment throws light on factors which tend to support the appropriateness in any case of the margin of appreciation:* The decision to leave a matter to the margin of appreciation to the national authorities depends of course on an assessment of the circumstances of the case. Where the particular issue thrown up by those circumstances is one on which views in the contracting states may legitimately differ, such as the protection of religious feelings, the Strasbourg court generally allows a wide margin of appreciation. If, however, the problem is in an area where there is a common value shared by all the contracting states, for example the protection of journalistic sources from disclosure, the Strasbourg court is *unlikely* to find that there is any margin of appreciation.

- *Treatment of the “necessity” badge of proportionality:* Neither the majority nor the minority makes any reference at all to “no more than necessary” or “least intrusive means” or strict necessity as a criterion of proportionality. In Strasbourg jurisprudence, least intrusive means is a factor to be weighed in the balance, but it is not insisted on in every case. This is a point to bear in mind when we consider the more structured test in EU law. The flexibility in Strasbourg jurisprudence is consistent with the subsidiary role of the Strasbourg court: it is well-established that primary responsibility for giving effect to Convention rights rests with the contracting states.
- *Modern trend is to give guidance to the national court:* The minority’s rejection of the margin of appreciation is consistent with the more recent trend in Strasbourg cases to lay down criteria that the national courts must consider, and then to say that, provided that they do so, it would require a strong case for the Strasbourg court to interfere.¹³

Luxembourg jurisprudence on proportionality – a structured approach

The Luxembourg court has borrowed the proportionality principle principally from the Federal Constitutional Court of Germany. Again the principle is not expressly set out in the EU treaties.

The proportionality principle is used when testing the legitimacy of a departure from one of the fundamental rights vouchsafed by EU law, such as the right

¹³ See, for example, *Axel Springer AG v Germany* (App. No.39954/08 at [88]).

to freedom of movement of goods and services, and it is applied in a structured way. To be proportionate, the departure must be suitable and necessary for the purpose of achieving the legitimate aim. As a corollary of the requirement for necessity, it must *in general* be shown that the departure is the least intrusive means of interfering with the freedom in question. Even if this test of necessity is met, the court must still go on to balance the right against the departure and be satisfied that the interference is appropriate on the facts of the case. The final step is that of balancing. This step is to be carried out by a court.

However, the Luxembourg court does not in my view always carry out the necessity test or the suitability test itself, or do so to the maximum intensity. In certain cases, such as those where the impugned measure is a national measure directed at public health or national security, the Luxembourg court is content to find that a measure is suitable and necessary if it is not manifestly unsuitable, or “not manifestly inappropriate”, as it is put.¹⁴ This “not manifestly inappropriate” test does not, of course, protect the state if what it is doing, under the cloak of the proportionality test, actually amounts to achieving some quite different objective from its stated legitimate aim.

The proportionality principle in Luxembourg jurisprudence is thus flexible. As I have said elsewhere,¹⁵ the Luxembourg court recognises the diversity of regulatory systems and national values within the EU. For instance, not all member states will seek to protect public health in the same way. EU law allows for that choice to be

¹⁴ See, for example, *R v Minster of Agriculture, Fisheries and Food, ex parte Fedesa and others* Case C-331/88 [1990] ECR I-4023, and *Campus Oil v Ministry for Industry and Energy*, Case-C72/83 [1984] ECR 2727.

¹⁵ In *R(o/a Sinclair Collis Ltd) v Secretary of Health* [2011] EWCA Civ 437, [2012] QB 394 at [127].

made by the national legislature, not free from EU control but with a much less intensive level of scrutiny than under a strict test of proportionality. This is admirable judicial restraint.

Judicial restraint is further demonstrated by those cases in which the Luxembourg court does not carry out the proportionality exercise itself but leaves it to the national court to define whether the circumstances are sufficient to exclude the application of a fundamental freedom. This has occurred in the context of national security and criminal penalties¹⁶ and in the context of the public policy exception from the fundamental freedoms: see, for example, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*,¹⁷ (which concerned a decision of the German courts as to the constitutionality of an act of the Bonn police authority). In those circumstances, the Luxembourg court may or may not provide guidelines for the national court.

As Lord Bingham CJ said in *R v Secretary of State for Health, ex parte Eastside Cheese Co*¹⁸ the extent of the flexibility allowed by the Luxembourg court depends on the nature of the case. There are, moreover, in my view, not just two points, but many points, on the spectrum.¹⁹ Moreover, the Luxembourg court would generally apply a higher level of intensity of review to an act of a national institution than to that of a EU institution. However, this is not always the case. The Luxembourg court has recognised in the field of public policy, as applied to

¹⁶ see, for example, *Criminal proceedings against Richardt*, Case C-367/89, [1991] ECR I-4621, [24].

¹⁷ Case C-36/02 [2004] ECR I-9609.

¹⁸ [1993] Eu LR 968 at [48].

¹⁹ See para 48 of the judgment of Lord Bingham CJ.

distasteful recreational games and to gaming, that national cultures and attitudes on such matters differ; that there is no need for European Union law to require uniformity on these matters; and that the proper body to decide these matters is the relevant national institution: see (in the case of recreational games) the *Omega* case²⁰ and (in the case of gaming), *Sporting Exchange Ltd v Minister van Justitie*.²¹

I know that others have rejected my view on the existence of the “not manifestly inappropriate” test, notably my distinguished colleague, Lord Justice Laws. More recently, the Inner House of the Court of Session²² have held that this lower test applies only to measures of EU institutions or national measures implementing EU law.²³ Again this is contrary to the view that I have expressed judicially.²⁴ This is not the place to pursue that difference. The question whether the “not manifestly inappropriate” test applies in EU law and, if it does, its scope is important and it is clearly one which the Supreme Court should now address.

The judicial difference of view on the “not manifestly inappropriate” test illumines another important point. The Luxembourg jurisprudence on proportionality can be confusing. For instance, sometimes the words “necessary” and “suitable” may be used interchangeably.²⁵ It is as well to bear that in mind when studying the case law.

²⁰ Case C-36/02 [2004] ECR I-9609, above at [130].

²¹ Case C-203/08 [2010] CMLR 41.

²² See the Opinion of the Court delivered by the Lord Justice Clerk (Lord Carloway) in *Sinclair Collis Ltd v the Lord Advocate* [2012] CSIH 80.

²³ Cf *R (o/a Sinclair Collis Ltd) v Secretary of State for Health*, footnote 15 above, at [129].

²⁴ See *R (o/a Sinclair Collis Ltd) v Secretary of State for Health*, footnote 15 above.

²⁵ See, for example, *Rosengren v Riksåklagaren* (Case C-170/04) [2007] ECR I-4071, where the Luxembourg court speaks of a public health measure not being “necessary in order to achieve the declared objective”, a clear reference on the facts of the case to the badge of suitability rather than that of necessity. The Luxembourg court held that the protection of child health was a legitimate aim but that the total prohibition on imports of alcoholic beverages into Sweden was disproportionate because

Common lawyers often have difficulty with Luxembourg case law in any event because of the Luxembourg court's style of judgment writing: propositions are sometimes set out and repeated without full explanation or necessary qualification in the manner of tablets of stone, but that is an issue for another day.

If I am right that there are different levels of intensity of review in EU law, then there must be at least a constitutional question whether, when judges of the national system are applying the proportionality principle in EU law, they should apply any different level of intensity than the Luxembourg court would do. That may be a particularly acute question when the issue before the court is one of the legitimacy under EU law of an enactment of Parliament. This question is analogous to the question whether the courts should treat Strasbourg jurisprudence as a ceiling or a floor.²⁶

In undertaking the proportionality exercise, there is a range of factors that can be taken into account. They include the nature of the decision-maker, but go far beyond this. The subject-matter of the decision is clearly relevant: does it relate to policy or strategy, or is it about the implementation of a policy decision, which has already been taken? If it is a policy decision, does the decision fall into one of the areas that are generally left to member states, such as national security, domestic economic policy or public health?

it barred all imports to the benefit of the state monopoly for the supply of alcohol. There was evidence that the age restrictions would be difficult to use effectively.

²⁶ See *R v Horncastle* [2010] 2 AC 373.

Sometimes a government decides to introduce a measure on its view of the scientific, or other technical, evidence in a novel situation where its accuracy is not clear. The Luxembourg jurisprudence provides guidance on this. In these situations, the Luxembourg court applies a “precautionary principle”. It leaves it to the decision-maker to decide which facts or opinions to act on and will not in the ordinary course seek to determine for itself whether the government is right in the view that it has formed. Under the precautionary principle, where there is uncertainty as to the existence or extent of risks to human health, the institution may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.²⁷ It must however, provide the court with a risk assessment.

This brief survey serves to show that proportionality is not a simple judicial tool. Rather it is a highly sophisticated tool. It provides the flexibility to enable courts to use it in a way which reflects their own constitutional tradition of judicial restraint. The basic position, however, is that the Luxembourg court tends to apply a more structured test than Strasbourg.

Proportionality in the domestic legal order

I now turn to consider four cases in which our domestic courts have sought to apply the proportionality principle while grappling with what I called “multi-level judging”, that is, they are determining domestic law is compatible with the Convention, or whether it is in conformity with the rights conferred by EU law or applying either Strasbourg or Luxembourg jurisprudence. The first case involved primary legislation which the lower court had declared to be incompatible with the

²⁷ See *R v Minister for Agriculture, Fisheries and Food ex parte National Farmers Union and others* Case C-354/195, [1998] 1 CMLR 195.

Convention. In the next two cases the court was asked to strike down secondary legislation and in a third case, to declare primary legislation incompatible. In the last case, the Supreme Court achieved compatibility with the Convention by means of statutory interpretation.

(1) *R (F a child) v Home Secretary*²⁸

In this case the appellants were offenders who had been sentenced for sexual offences of sufficient gravity to be subject by primary legislation to having to notify their address and provide certain personal information to the police for an indefinite period of time. They applied for judicial review on the basis that the notification requirements constituted a disproportionate interference with their article 8 rights. The Supreme Court held that, in the absence of a right of review, the measure could not be justified. There had been no research on whether it would be possible to distinguish those who posed no significant risk of re-offending. In those circumstances, the Supreme Court did not consider that the situation was within the precautionary principle. As Lord Phillips, with whom the other members of the Supreme Court agreed, explained:

“[56] No evidence has been placed before this court or the courts below that demonstrate that it is not possible to identify from among those convicted of serious offences, at any stage in their lives, some at least who pose no significant risk of reoffending. It is equally true that no evidence has been adduced that demonstrates that this is possible. This may well be because the necessary research has not been carried out to enable firm conclusions to be drawn on this topic. If uncertainty exists can this render proportionate the imposition of notification requirements for life without review under the precautionary principle? I do not believe that it can.”

²⁸ [2010] UKSC 17, [2011] 1 AC 33.

“[57] I have referred earlier to a number of situations in which the degree of risk of reoffending has to be assessed in relation to sexual offenders. I think that it is obvious that there must be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence can be discounted to the extent that continuance of notification requirements is unjustified. As the courts below have observed, it is open to the legislature to impose an appropriately high threshold for review. Registration systems for sexual offenders are not uncommon in other jurisdictions. Those acting for the first respondent have drawn attention to registration requirements for sexual offenders in France, Ireland, the seven Australian States, Canada, South Africa and the United States. Almost all of these have provisions for review. This does not suggest that the review exercise is not practicable.”

In the light of the approach taken by the minority in *Otto-Preminger-Institut* to an absolute ban, the result in this case is not surprising. However, this case led to a furious reaction from politicians. In due course, however, the law was changed so that offenders had a right of review.

For my purposes, this case is particularly interesting because of the evidence on which it turned. The Supreme Court examined Parliamentary material, such as the Committee debates, for background information to explain why the Act contained no right to a review of the notification requirements. It found none. Had it found an explanation, it would no doubt have taken it into account.

(2) *R (o/a Aguilar Quila) v Home Secretary*²⁹

In this case, the question for determination by the Supreme Court was the proportionality of a measure raising from 18 to 21 years the age at which a foreign national married to a British citizen could apply for a marriage visa so that he or

²⁹ [2011] UKSC 45, [2012] AC 621.

she could enter the UK for the purpose of living with their spouse and the age at which their spouse could sponsor them for this purpose. Similar provision applied to civic partners, and proposed spouses and civil partners. The Secretary of State had a discretion to grant the visa outside the measure, but only in compassionate or exceptional circumstances.

The purpose of the measure was to deter forced marriages. The raising of the ages was explicitly permitted by an EU Directive (although not one binding on the UK) for the purposes of promoting social integration and of reducing the number of forced marriages. Several other member states had in consequence raised the age for both parties to 21 years.

A Parliamentary select committee had urged the government to undertake research to establish whether raising the age would deter forced marriages, but the Secretary of State did not implement this recommendation. The Secretary of State issued a consultation document but the responses were said to be almost equally divided on the question whether raising the ages would deter forced marriages.

The issue of proportionality arose on the Secretary of State's argument that the measure fell within article 8(2). (The Secretary of State also argued unsuccessfully that article 8 was not engaged, but I am not concerned with that issue). Raising the ages obviously interfered with the right to marry of persons who were not parties to a forced marriage. On the other hand, there was some evidence that, if the ages were raised, there would be fewer forced marriages since there would be more time to reflect.

The Supreme Court held, by a majority, that the measure was not proportionate. The majority applied all four badges of proportionality, including the requirement for the interference to be no more than necessary to enable the aim of the measure to be achieved. The majority declined to give weight to the judgment of the Secretary of State. Nor, in their judgment, could weight be given to the approval of the measure by Parliament as Parliament had limited scope to propose amendments to immigration rules. The majority concluded that the Secretary of State had no “robust” evidence that raising the age would deter forced marriages.

A further select committee report had become available by the time of the appeal to the Supreme Court. It found that a number of persons had been assisted to resist forced marriage by the new measure. However, no actual number was given and the select committee had clearly received evidence to the contrary, that is, that the measure had had no impact on the number of forced marriages.

Lord Wilson, giving the leading judgment, concluded that the number of forced marriages deterred by raising the age was highly debateable and that it was vastly exceeded by the number of unforced marriages which it obstructed. The Secretary of State had not addressed that imbalance. Even if it had been correct to say that the scale of the imbalance was a matter for the judgment of the Secretary of State, rather than for the court, it was not a judgment which on the evidence before the court the Secretary of State had ever made. She had therefore failed to establish that the amendment was no more than necessary to accomplish the

legitimate aim, or that it struck a fair balance between the rights of the parties to *unforced* marriages and the interests of the community in preventing forced marriages.

Lady Hale delivered a concurring judgment. Lord Phillips and Lord Clarke agreed with the judgments of both Lord Wilson and Lady Hale.

Lord Brown entered a powerful note of dissent. He took the view that the balance of the evidence in the more recent report of the Parliamentary select committee was in favour of raising the ages. He also referred to comparative material from other EU countries supporting the change. He considered that there was sufficient evidence that raising the ages was widely regarded as helping to prevent forced marriages.³⁰ He concluded that “unless demonstrably wrong, the judgment [as to the deterrent effect of the measure and the effect on unforced marriages] should be rather for government than for the courts.”³¹ He considered that the value to be attached to deterring *forced* marriages as opposed to deferring *unforced* marriages should be left to elected politicians, not judges. He considered that the courts could give appropriate weight to the judgment of the minister on the measure.³²

In the result, the measure was set aside, and in due course the Secretary of State abandoned the idea of raising the age for marriage visas.

For my purposes, this case raises some interesting points:

³⁰ At [90].

³¹ At [91].

³² At [91].

- This was another case in which the Supreme Court had to make a proportionality assessment on imperfect material.
- At one level it might be thought that the measure was unsupportable because it was *ineffective* to achieve the desired aim. But the position was not that the measure was shown to be ineffective but rather that it was *not* shown to be *effective* in terms of hard numbers of forced marriages prevented. There was somewhat understandably a dearth of hard numbers. There was rudimentary information that showed, for instance, that the total number of marriage visas sought in the age group of 18 to 21 years was small – some 3,940 in 2006 and 1,945 in 2007 - and that the rate of forced marriage was highest in the 17-20 years age group. Nonetheless, there was, as Lord Brown pointed out, the EU Directive already mentioned, which had specifically permitted the age to be raised to 21 years to assist in the prevention of forced marriages, and the fact that some other member states had already raised the ages. This must have been some evidence that the raising of ages had appropriate effects.
- In the circumstances, the majority made no detailed qualitative judgment of the interests of the community in preventing forced marriages or of the interests of parties to unforced marriages. The effects on the latter had not been researched and were regarded as “colossal”. As Lord Brown pointed out, that qualitative assessment would have required value judgments to be made on social issues, such as the value of preventing a forced marriage.
- The most striking point in this case, however, is that the majority did not consider that it was open to them to give weight to the Secretary of State’s judgment on the value of the measure. Lord Brown took the contrary view, exposing a significant point of difference in law between the majority and

minority judgments. This can only be resolved now by the Supreme Court. The point is significant because, unless some variation in the level of intensity, or depth, of judicial review is developed domestically, as the Luxembourg court has developed it for the purposes of EU law, it may be very difficult for measures of social or healthcare reform to be implemented, even on an experimental basis for a short period of time. In that event, the effect of the proportionality principle for the future may be that it prevents governments from making decisions that do not meet the template of proportionality. On that basis, the proportionality principle will have ushered in a constitutional change of a profound kind. There can be no doubt that the Luxembourg court has introduced varying levels of intensity of review at the least in relation to acts of the EU institutions.

(3) *R (o/s Sinclair Collis Ltd) v Secretary of State for Health*³³

This was a decision of the Court of Appeal about proportionality in EU law. It also concerned a social and healthcare measure, namely a measure to reduce underage smoking. The principal issue was whether a legislative ban on tobacco vending machines (“TVMs”) was a disproportionate interference with economic rights guaranteed by the Treaty on the Functioning of the European Union. Again the evidence about what would happen in the future was imperfect, and there was an issue as to the level of intensity of review to be applied to the decision of the Secretary of State to introduce the measure.

The ban was imposed by secondary legislation. By section 3A of the Children and Young Persons (Protection from Tobacco) Act 1991, as amended by the Health

³³ [2011] EWCA Civ 437, [2012] QB 394.

Act 2009, the Secretary of State was empowered to make regulations prohibiting the sale of tobacco from TVMs. The regulations had to be laid before Parliament under the procedure known as the affirmative resolution procedure. The Secretary of State exercised that power in the Protection from Tobacco (Sales from Vending Machines) (England) Regulations 2010. Regulation 2(1) provided that, on coming into force, “the sale of tobacco from an automatic machine is prohibited.” TVMs were mostly imported from other member states.

The owners of the machines contended that Regulation 2(1) was disproportionate. They adduced evidence of the substantial cost to them of the measure. They argued that the Secretary of State should have adopted one of the other policy options considered to reduce smoking, in particular the fitting of the vending machines with age restriction mechanisms (“ARMs”) which meant that a person could not use a TVM until his age had been verified. They wanted to have a voluntary code for using age restriction mechanisms on the machines, instead of a ban.

At first instance, the Administrative Court (Sir Anthony May PQBD) dismissed the application for judicial review on the grounds that the Secretary of State in adopting the Regulations was implementing the will of Parliament, and was therefore entitled to a very broad margin of discretion. Further, the measures adopted by the Secretary of State were not manifestly unreasonable or inappropriate.

The Court of Appeal, by a majority (Lord Neuberger MR and myself) upheld the decision of Administrative Court, and held that the outright ban imposed by

section 2(1) of the Regulations was proportionate to the legitimate public health aim of reducing the sale of tobacco to young people. It is to be noted that the deterrent effect of banning TVMs on under-age smoking was not capable of proof. The appellants argued that the effect would be minimal as under-age smokers would turn to illicit sources of supply, and also that the ARMs would be as effective as a total ban. The majority did not accept these arguments. In particular, the majority considered that, if TVMs were banned, it was open to the Secretary of State to conclude that there would be less under-age smoking, as that source of supply had been stopped.

In addition, I held that the proportionality principle applied with varying intensity depending on the nature of the case. The appropriate standard to be applied to the issue of public health in this case was that the act would only be disproportionate if it was manifestly inappropriate.

There was a subsidiary issue as to the identity of the decision-maker and the effect on the proportionality exercise of this being the minister, and not Parliament. Lord Neuberger MR held that Regulation 2(1) must be taken to be the decision of the Secretary of State. The fact that this was a decision pursuant to powers conferred by Parliament entitled the decision to a broader margin of appreciation than a decision not pursuant to Parliamentary powers. Nevertheless that margin of appreciation was not as broad as the respect to be accorded to Parliamentary action.

I took a different approach. I held that, while, in general, the margin of

appreciation applying to regulations issued by the Secretary of State would be less broad than that that applying to enactments by Parliament, in this case, the question of the breadth of the margin was to be answered taking into account all the relevant factors. In that case, among such factors were the overlapping responsibilities of the Secretary of State and Parliament for public health, and it followed that they were entitled to the same margin of appreciation.

Lord Justice Laws, dissenting, held that, regardless of the margin of appreciation applied to the decision maker, the standards of proportionality applied without dilution. Therefore, even though the Secretary of State was entitled to a broad margin of appreciation, the failure to consider or to adopt the less restrictive alternative failed the requirements of the doctrine of proportionality.

On the subsidiary question in *Sinclair Collis* of the identity of the decision-maker, the Lord Justice Clerk (Lord Carloway), delivering the Opinion of the Inner House of the Court of Session in a subsequent similar case in Scotland, usefully put the issue in the context of devolution. He observed that the legality of a measure for the purposes of EU law ought not to depend on whether it is primary or secondary legislation, or the legislation of the Westminster Parliament or of a devolved legislature, or some person or body with authority delegated to it by the Westminster Parliament or a devolved legislature.³⁴ I would add that devolution is a matter for the internal constitutional arrangements of the UK.³⁵

³⁴ At [61].

³⁵ See *R (Horvath) v Secretary of State for the Environment, Food & Rural Affairs* (Case C-428/07) [2009] ECR I-6355.

Sinclair Collis was an important case, and it illustrates potential differences of approach in the domestic courts when dealing with the proportionality principle in EU law.

(4) *Manchester City Council v Pinnock*³⁶

This case is important for the purposes of this lecture because in it we see the Supreme Court, like the majority in *Otto-Preminger-Institut*, granting a margin of appreciation to the decision-maker. However, in this case, unlike *Otto-Preminger-Institut*, it was given on the basis that it could be displaced.

This case concerned an order for possession of residential premises let by a local authority to a tenant under a form of tenancy known as a demoted tenancy, a form of tenancy that confers very little security on the tenant. It was virtually the last in a sequence of cases in which the House of Lords and then the Supreme Court had had to consider whether domestic possession proceedings were Convention-compliant.

By statute, the court has to make an order for possession in the case of a demoted tenancy in certain specified circumstances. The question for the Supreme Court was whether there would be a violation of articles 6 and 8 of the Convention if the court were to make a possession order as directed by statute in this case, or indeed in any other case, in favour of a local authority without

³⁶ [2010] UKSC 45, [2011] 2 AC 104.

considering and, where appropriate, giving effect to the tenant's rights under the Convention under a procedure which enabled the court to make findings of fact. Traditional judicial review was available but would not meet the requirements of the Convention. The tenant's right under article 8 of the Convention included the right to respect for his home.

The Supreme Court held that a possession order would engage the tenant's article 8 right and so, to be Convention compliant, the court would have to go on to consider whether it was proportionate nonetheless to make the possession order. It was not sufficient merely to consider whether grounds were shown for judicial review of the local authority's decision to seek a possession order. The Supreme Court concluded that the statutory provisions in question could be interpreted to allow the proportionality exercise to be undertaken by the county court judge hearing the possession proceedings instituted by the local authority.

However, the Strasbourg court had made it clear that, if the tenant had no contractual or statutory right to remain in possession, it would only be in an exceptional case that it would be proportionate not to make a possession order. Accordingly, the Supreme Court held that, if the tenant sought to rely on article 8, the county court judge should first decide whether there was any case to be investigated. The county court judge should in addition proceed on the basis that the local authority was acting in accordance with its statutory duties to manage and allocate its housing stock, and that this presumption should only be displaced by cogent evidence to the contrary.

The point of this case for my purposes is that the Supreme Court ruled that the proportionality exercise had to be conducted on the basis that, in general, weight would be given to the decision of the local authority to seek an order for possession. In other words, the court would have to treat the local authority's decision as within its area of discretionary judgment until the contrary was shown. This, therefore, is an instance of a UK court introducing a margin of appreciation at the domestic level, and according weight to a non-judicial body.

What problem areas do the cases reveal about the proportionality principle?

I have already made the point that there are important issues of law in the area of proportionality that need resolution at the Supreme Court level. I will now mention a number of other points that the discussion so far throws up. I will deal with these points under two topic headings.

Relationship between the court and the decision-maker

1. *Law and politics*: The *F* case shows that the proportionality review can lead to confrontation with the legislature. It can bring the courts close to that borderline between the law and politics where judges have to take care (and I am not of course suggesting that they did not do so in the *F* case). The first point then is that proportionality can intensify judicial scrutiny of administrative or legislative acts, and calls for judicial restraint in appropriate circumstances. We often say that in the law context is everything. That is no doubt true, but, in the world of public law, the

dividing line between law and politics is also everything, or at least is ever-present. It calls for vigilance.

2. *Value judgments*: Proportionality requires value judgments to be made, and to be made explicitly, by courts. The *Aguilar Quila* case is an example of this. What is required in balancing is weighing up the values to be attributed to different rights. It is not about counting heads. Where it is difficult to predict the effect of a particular course of action in the future, one answer may be to apply a lower intensity of review and leave the matter to the decision-maker.
3. *A domestic margin of appreciation*: The *Pinnock* case shows that, under the Convention, there is room for a margin of appreciation to be given to the decision-maker; in that case, the decision-maker was the local authority. Again, in this context, there is in my view scope for subtle variation in the intensity of review.

Technical points

1. *Evidential problems*: The *Sinclair Collis* case shows (among other things) the difficulty of making evidential judgments in the course of the proportionality exercise. The material may be unsatisfactory in ways not covered by the precautionary principle. A common law court may here be at a distinct disadvantage as compared with a civil law court: the latter is likely to find it easier to direct a party to serve any additional evidence which it requires. In some cases, the courts may have a choice: either to decide that the measure is disproportionate or to find that the proportionality test is not satisfied, so as to leave it to the government to

decide whether to provide better evidence next time or to abandon the measure. This is a larger issue than I have time to deal with since it involves “polycentric” adjudication.³⁷

2. *Precedent*: the question arises whether a decision that a measure is disproportionate binds a later court. This needs detailed consideration, but at first blush it would not seem that a later court ought to be bound by a prior decision that a measure was, or was not, shown to be proportionate, if new evidence is adduced.
3. It is tempting to conclude from the points just made about evidence and precedent that a determination of proportionality is only as good as the evidence adduced in the particular case. That must necessarily be so, which necessarily places limits on the proportionality exercise.
4. *Procedural proportionality?* In *Aguilar Quila*, the Supreme Court decided against the Secretary of State on an alternative “procedural” ground, namely that the Secretary of State had not formed the appropriate judgments on issues involved in the measure, and therefore had failed to take all the relevant considerations into account. The dissenting judgment of Lord Justice Laws in *Sinclair Collis* (the tobacco vending machine case) can also be read as developing a form of procedural proportionality review: if there is a point which the minister has not on the evidence considered, the case should be remitted to him or her for further consideration. That may in some situations be the best solution in any given case, but for my own part, if, at least, the context is purely domestic,

³⁷ See, generally, Lon L. Fuller, *The Forms and Limits of Adjudication*, (1978) 92 Harv. L. Rev. 353.

I would prefer to use conventional judicial review principles rather than to introduce a further qualification into proportionality.

5. *Interested third parties*: In the *Aquilar Quila* case the court had the benefit of representations from interested third parties. Where a measure is challenged there will obviously be cases where this is very desirable because of the potentially wide effect of the decision on the proportionality exercise. This is a point that practitioners might usefully bear in mind.
6. *Law or fact?* The question whether an appeal against a finding that a measure or step was proportionate or not involves a question of fact or law remains to be fully worked out. That could have important practical consequences for parties.
7. *Material before the decision-maker*: It is not clear whether in the proportionality exercise the court is restricted to the information that was before the decision-maker.³⁸ Since the court is making its own assessment, there would appear to be no reason in principle why it should not consider other material as well, but there may be exceptions to this.

Proportionality as compared with unreasonableness

Before I move to my final section, I need to make the point, which will be very familiar, that, in the purely domestic context the usual test for judicial review of administrative action where there is no illegality or procedural irregularity alleged is unreasonableness, known as “*Wednesbury* unreasonableness”. That means that the court does not intervene and set aside an administrative decision unless it is

³⁸ In *Aquilar Quila*, however, the Supreme Court took account of Parliamentary material not available to the decision-maker when the measure was introduced.

perverse.³⁹ The House of Lords has held that the *Wednesbury* unreasonableness test does not apply to the violation of a Convention right.⁴⁰ In fact it adopted the three-part test laid out by the Privy Council in *De Freitas v Permanent Minister of Agriculture, Fisheries, Land and Housing*⁴¹ for violations of constitutional rights, namely, that the legislative objective must be sufficiently important to justify limiting the constitutional right, the measures in question must be rationally connected to the legislative objective and the means used to impair the right or freedom must be no more than is necessary to accomplish the objective. Subsequently, in *Huang v the Secretary of State*,⁴² a fourth requirement was added for article 8 cases, namely that the measure must achieve a fair balance between the interests of the individuals affected and the wider community. It was of course the four-part test established in this case that the Supreme Court applied in *Aguilar Quila*.

In *Daly*, Lord Steyn observed that there was a material difference between proportionality and unreasonableness. In particular it required a closer scrutiny of the act in question. Nonetheless the court was not required to undertake a “merits” review.

While *Wednesbury* continues to be the usual test for judicial review in “non-rights” cases, there are one or two categories of case where proportionality is applied, such as where disciplinary sanctions are imposed. This would include exclusion of a child from school.

³⁹ That is, “so unreasonable that no reasonable authority could ever come to it.” per Lord Greene MR in *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 to 230.

⁴⁰ *R (o/a Daly) v Home Secretary* [2001] 2 AC 532.

⁴¹ [1999] 1 AC 69.

⁴² [2007] 2 AC 167.

Proportionality – the way ahead?

Now it is time for me to get out my crystal ball and consider the way ahead. I hope that I have demonstrated that there are some important legal issues for determination: the way ahead for the most significant of those issues is at Supreme Court level. But in this final section, I want to touch on another debate. This also needs to be resolved, if it is to be resolved, at that level.⁴³

I started this lecture by praising the logic of proportionality. It is, as we have seen, a general principle of EU law and of Strasbourg jurisprudence. In those circumstances, so goes the argument, there is much to be said for aligning *the generalised head of judicial review* in English law with that of proportionality.

A notable protagonist of the view that *Wednesbury* unreasonableness ought to be replaced by proportionality is Professor Paul Craig.⁴⁴ I would not presume to summarise all his arguments but certain arguments seem to me to be prominent. Professor Craig points to other important advantages of proportionality, namely that it requires reasoned justification and shifts the onus of showing that the decision was proportionate on to the decision-maker. Professor Craig argues that *Wednesbury* unreasonableness is an unclear test, that it involves a less detailed inquiry than proportionality and that on occasions *Wednesbury* unreasonableness is incoherent and insufficiently analytical. Proportionality is a more structured test that facilitates more accountability. Professor Craig accepts that the adoption of proportionality as a generalised head of review would still leave a number of other grounds for judicial

⁴³ See *R (Association of British Civilian Internees (Far East Region)) v the Secretary of State for Defence* [2003] QB 1397.

⁴⁴ See, for example, Paul Craig, *Proportionality, Rationality and Review* [2010] NZLR 265; c.f. Michael Taggart, *Proportionality, Deference, Wednesbury* [2008] NZLR 423, and Tom Hickman, *Problems and Proportionality* [2010] NZLR 303.

review in place, such as interference with legitimate expectations and the question whether the decision-maker had taken the relevant considerations into account.

The issue that Professor Craig has raised is of great importance and it deserves to be considered widely and deeply. Unless a lower intensity of review is adopted, as for instance in EU law in relation to particular situations, the level of scrutiny involved in the proportionality exercise is generally higher than that demanded by *Wednesbury* unreasonableness. As I have said, it appears that the adoption of proportionality as a generalised head of review can now only be decided at the level of the Supreme Court.⁴⁵ Some people thought that the Supreme Court might deal with it in *Aquilar Quila* but that did not happen. So where do we stand on this argument?

Drawing the threads together

The question of whether proportionality should replace *Wednesbury* is an issue which I said that I would like to leave you to consider and to judge for yourself.

In my view, there is much in principle to be said for the more disciplined and transparent analysis imposed by proportionality. On the other hand, you have in the course of this lecture heard about the problem areas of proportionality, how it involves the attribution of values, how from time to time it calls for judicial restraint and the difficulties in forming a view on the evidence in some situations in a purely adversarial environment. Certainly there is a strong argument that *Wednesbury* unreasonableness speaks to a bygone age, but the points I have just made would call for a cautious approach, and one that should be developed on an incremental basis.

⁴⁵ See footnote 43, above.

I am not going to express a concluded view. I will instead end by making the suggestion that there is something to take away today in a point made by Lord Cooke of Thorndon in *Daly*. In a pithy judgment, he criticised *Wednesbury* unreasonableness and spoke in terms of a sliding scale:-

“32 ...I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.”

His insight was, I think, this. The options open to the law are not *Wednesbury* or no *Wednesbury*: there are plenty of points in between. In addition more than one point can be chosen: it may be that different issues may require a subtly different approach, and there is room for this. Indeed, I would suggest that we can take a leaf out of the book of the Strasbourg court and of the Luxembourg court by approaching proportionality as a sophisticated and flexible judicial tool. We can adapt our domestic law to modern conditions by developing legal concepts in an equally creative way.