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Proportionality – what has it done for us so far; what might it do to us next?
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A. Introduction

1. This afternoon I will address two matters. *First* (and shortly) to try to identify some of the practical consequences of Human Rights Act proportionality for public authority decision-making. *Secondly*, taking account of the encouragement given by the Supreme Court in its judgments in *Kennedy v Charity Commission* [2014] 2 WLR 808, and in *Pham v Home Secretary* [2015] 1 WLR, that the common law adopt proportionality for itself.

2. What might common law proportionality look like? What I will suggest is that where we could be heading is an EU law-style approach, perhaps with some or all of the features described by Lord Reed and Lord Toulson in their recent judgment in *R(Lumsdon) v Legal Services Board* [2015] UKSC 41.

B. Human Rights Act proportionality ... so far.

3. The most recent "definitive" statement of proportionality, Human Rights Act style proportionality is in the judgment of Lord Sumption in *Bank Mellat v HM Treasury* [21014] AC 700.

4. He described it in terms of *"… an exacting analysis of the factual case advanced in defence of the measure in order to determine …"*

   (1) Is the objective sufficiently important to justify the limitation of a fundamental right

   (2) Is the measure rationally connected to the objective

   (3) Could a less intrusive measure have been used

   (3) Has a fair balance been struck between the individual's rights and the interests of the community (taking account of the consequences of the measure for the individual).

5. What then have been the consequences of this for public authorities? The first is a point of context – the consequences only bite on decisions that affect Convention rights. For most local authorities, the rights most often in play are likely to have been article 6, and article 8.

6. The second point is that the prospect of proportionality testing in Convention rights cases is an amber light, not red light to decision-making. No doubt there may be greater caution before taking adverse decisions, in terms of the factual basis for the decision and of the

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assessments that have gone into the decision (perhaps a greater likelihood of prior engagement with persons potentially affected). But the prior impact need not be more than that.

7. A third point is that the approach to proportionality under the Human Rights Act provides a recognisable structure for testing decisions. Finally, the prospect of scrutiny encourages better evidence-bases for decisions. Put bluntly, have you (the decision-maker) got a "good story" to tell? If you have, there is a much better chance that your decision will survive scrutiny.

C. A move to common law proportionality?

8. Lord Mance's judgments in *Kennedy* and in *Pham*, both encourage the idea that the common law should adopt proportionality as part of its own approach to whether decisions taken by public authorities are lawful.

9. In *Kennedy* Lord Mance made (the perhaps rather obvious) point that *Wednesbury* reasonableness was not restricted only to rigid irrationality, because the intensity of review depended on the nature of the decision under challenge. Starting from this, he went on to say that the language of proportionality should be acquired by the common law because it is language that provides a structure to enable the court to review decisions. Nevertheless (he said), using the language of proportionality did not mean that common law judicial review would become merits review (so the court would not simply put itself in the shoes of the decision-maker and ask if it would have reached the same decision). In *Pham* he repeated the points he had made before, and he also he also repeated that applying a proportionality approach did not mean a more intense level of review. But (he said) applying proportionality would be to expand the reach of the common law beyond rationality-based review and in certain cases ... it does allow the court to assess the relative weight of competing considerations arising from the decision under challenge.

10. So far as what is thought to be "wrong" with the common law, and what is "better" about proportionality, this seems to boil down to three broad points.

11. The first point is the perception that *Wednesbury* principles are too rigid and this can only be addressed by incorporating elements of a proportionality approach. This is a strange premise for two reasons. (1) Because it equates common law only with rationality testing and ignores all the other *Wednesbury* principles (relevance; proper purpose; fairness and so on). (2) Because for as long as I can remember it has been taken as read that rationality is a flexible standard that is either more or less permissive depending on the nature and context of the decision under challenge.

12. The second point is that because the *Wednesbury* principles are insufficiently sensitive or that they provide tools which are insufficiently precise. This is a rather different criticism. The premise now is that *Wednesbury* either is not or has ceased to be a rigid standard.

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The criticism instead is that it does not provide the tools for principled closer scrutiny. Proportionality is better, so the argument goes, because it provides a framework within which to assess the relative weight to be attached to competing considerations, and the balance (or imbalance) of benefits and advantages.

13. This seems to me to be an argument that is difficult to swallow. The nature of many – if not all public law decisions is that they involve striking a balance between matters that are incommensurate. Take the facts of *Pham*, by way of example, where the "balance" to be struck was between the importance to the claimant of retaining British nationality, and the general public interest in safeguarding the national security of the UK, which the Home Secretary contended, required that Mr. Pham lose British nationality. These matters are simply incommensurable. It seems to me to be clear that none of Lord Sumption's four *Bank Mellat* stages provides any objective measure by which a court can undertake an evaluation without risk of over-stepping the line and performing a political role.

14. This is something which some members of the Supreme Court recognised in the *Lord Carlisle* case. That case was a challenge to a decision to refuse entry to the UK to a person who was the leader of an organisation previously proscribed by the UK as a terrorist organisation. She wanted to come to the UK at the invitation of a group of Parliamentarians in order to address a meeting in Parliament. In that case the opposing considerations were freedom of speech and the possible repercussions for UK personnel in the middle east if she was allowed to enter the UK. When it came to the court considering the balance between both Lord Neuberger and Lord Clarke accepted that the Court was in a position to do no more than ask whether the risk of repercussion was <u>feasible</u>. There was nothing wrong with that conclusion in the circumstances of that case, but it all does rather go to show that proportionality, no more than *Wednesbury* rationality, does not provide a routemap for the appropriate role of the Court from case to case.

15. The third point is the contention that applying proportionality removes arbitrary distinctions between common law claims and other claims. So said Lord Sumption in *Pham*. The distinction is not arbitrary; rather the application of proportionality to specific classes of case – Human Rights Act cases – is the consequence of legislative choice. That choice, in cases where Convention rights are in play does not of itself justify the proposition that the common law needs to "level up" or to modify its own principles.

16. Yet despite all of this, the direction of travel is towards some form of proportionality for common law cases. What should this type of proportionality look like?

17. Not, I think Human Rights Act style proportionality, i.e. an approach that uses a notion of proportionality as a basis for scrutinising justifications put forward by public authorities for interferences with legal rights. That works perfectly well in the context of the Human Rights Act. The Act sets out the Convention Rights, and then requires any interference with, any derogation from the set of legal rights to be justified. Thus the question that arises in the context of any Human Rights Act claim is whether X [the decision taken] is proportionate to Y [the extent of the interference with the Convention Right]. But simply saying that the

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common law requires consideration of proportionality does not allow that approach to be mapped on to common law challenges, because there is no set of common law standards to play the part that the Convention Rights play in Human Rights Act cases. Most public authority decisions are taken in exercise of specific duties or powers. Save for situations in which Convention rights are also in play there is no set of universal common law protected interests to use as yardsticks to measure the legality of the decisions that have been taken. Instead the common law, through the *Wednesbury* principles, has probed the legality of decisions by way of testing whether relevant matters and irrelevant matters have been properly separated [and treated accordingly]; whether a proper purpose [for example, consistent with the statutory power being used] ... has been pursued; and so on.

18. Common law *Wednesbury* principles are not, therefore, directed to the protection of specific rights; rather, they are aimed at ensuring that all public power is exercised without excess and without mis-use. Thus, control by the Courts at common law has objectives that are different from legislative schemes such as the Human Rights Act. It follows from this, that in the common law context, proportionality must mean something else; and something that is less prescriptive than under the Human Rights Act.

19. Perhaps then the answer can be found in the approach to proportionality in EU law, which can be boiled down to the general proposition that the exercise of the power should be proportionate – using the term in a more general sense – proportionate to the end being pursued. This is the way that Lord Reed put it in his judgment in *Pham* (though other judges were less clear on the point). And once the matter is put in this way it is apparent that a common law approach to proportionality could be more by way of a general/overall assessment of a decision and its impacts, and in that respect not that different to what the Courts have come to do when applying the common law, *Wednesbury*, principles. The *Wednesbury* principles has always required the Courts to engage in substantive evaluation. So, for example, the court will always consider the requirement to have proper regard to relevant matters; the requirement disregard the irrelevant; the requirement to act for a proper purpose; and the requirement to reach an outcome which is rational (which necessarily requires some form of consideration of what the alternative outcomes might have been).

20. The joint judgment of Lord Reed and Lord Toulson in *Lumsdon* demonstrates the flexibility that is inherent in the EU approach to proportionality. They stated that the two basic questions posed were (1) is the measure suitable to achieve the objective pursued; and (2) could it be obtained by a less onerous method?

21. A notion of "suitability" opens up a range of possible approaches to the evaluation of the decision under challenge, from outright merits review (which has never been the position under EU law); to an approach that would look at suitability by reference to considerations such as whether or not all relevant matters (and only relevant matters) had been taken into account, and whether or not a proper purpose had been pursued. In other words, an approach that might not differ too much from the present common law principles.

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22. The same observations and the same possible conclusions also apply to the "less onerous method", because the notion of a fair balance ... is perfectly capable of being expressed by reference to criteria such as relevance and proper purpose. It does not necessarily require the Court to step into the shoes of the decision-maker.

23. And these themes are developed further in the course of the judgments – as the slides that follow demonstrate.

24. It is also apparent from the judgment in *Lumsdon* that proportionality need not prescribe any specific level of scrutiny. Perhaps what a new form of common law proportionality could do would be (like Human Rights Act proportionality) to place a greater importance on the need for an explanation of the decision taken, the reasons for it, its perceived impact, and the basis on which the decision was considered to strike a "fair balance" between the individual interest and the common interest. Better explanation of decisions may well become the norm, so that, for example, the court is satisfied that the judgements made by the decision-maker were taken when the decision-maker was properly informed. Yet such closer examination need not of itself mean that the court comes closer to sitting on the shoulder of the decision-maker. There is no reason why the relationship between the courts and the decision-maker could not remain demonstrably at arm's length, with the court being prepare to give the decision-maker the benefit of the doubt on matters of general judgement.

25. Thus in *Rotherham MBC and others v Business Secretary* [2015] PTSR 322, the Supreme Court emphasised the following.

- Proper respect to be afforded to the primary decision-maker
- The extent of that respect depending on the nature of the decision under review; the extent to which the decision engaged particular responsibilities; or the expertise of the decision-maker

In that case, the decision challenged was a decision on the allocation of funds to support social and economic development, and a wide margin was given to the Secretary of State. The proportionality standard applied in that case was described as being equivalent to whether the decision taken was "manifestly wrong" – i.e. one that no reasonable government could have taken. And none of that suggests radical departure; assuming of course that the words and the practice coincide.

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