

Proportionality and Legitimate Expectation Jonathan Moffett

Introduction

1. This paper seeks to summarise the key points that emerge from the recent case law on proportionality and legitimate expectation. Recently, the Supreme Court seems to have taken advantage of every available opportunity to say something about proportionality (regardless of whether or not the issue has been argued before it), and the Privy Council has recently adopted a similar approach in the context of legitimate expectation.

Proportionality

2. There have been seven recent Supreme Court decisions in which the concept of proportionality has been discussed in various respects, each arising in very different factual contexts:
 - (1) *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 involved a challenge to an Order-in-Council prohibiting trading with an Iranian bank, in the context of sanctions on Iran directed at preventing nuclear proliferation.
 - (2) *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 concerned a challenge to the refusal of the Charity Commission to provide to a journalist information about its investigation into George Galloway's Mariam Appeal.
 - (3) *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 was a challenge to restrictions imposed on an Iranian dissident entering the United Kingdom in order to speak to Parliamentarians.
 - (4) *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] PTSR 322 concerned a challenge to the Secretary of State's decision as to how EU structural funds should be distributed.
 - (5) *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 was a challenge to a decision by the Secretary of State to deprive a person of his British citizenship on the ground that he was suspected of involvement in terrorism.
 - (6) *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697 involved a challenge to the quality assurance scheme for advocates appearing in criminal trials on the ground that it was said to breach EU Regulations.
 - (7) *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2015] 3 WLR 1665 was a challenge to a decision not to hold a public inquiry into the shooting by the British Army of 24 unarmed people in Malaya in 1948.

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3. None of these cases is straightforward, and any attempt to summarise the reasoning in them will inevitably fail to do justice to their various nuances and subtleties. That said, however, it is possible to draw out some themes by reference to three main topics:
 - (1) proportionality under the European Convention of Human Rights,
 - (2) proportionality under EU law, and
 - (3) the interrelationship between proportionality and irrationality at common law.

(1) Proportionality under the European Convention of Human Rights

4. The most straightforward point to take from the recent case law is that there can now be no doubt that the domestic courts will apply the conventional four-part test for proportionality under the Convention (see, for example, *Bank Mellat*, paragraphs 68-76 and 92-97 *per* Lord Reed):
 - (1) Is the objective of the measure under challenge sufficiently important to justify the limitation of the relevant protected right?
 - (2) Is the measure rationally connected to the objective that is sought to be achieved?
 - (3) Could a less intrusive measure have been adopted without unacceptably compromising the achievement of the objective?
 - (4) Does the severity of the measure's effects on the rights of the persons to whom it applies outweigh the importance of the objective (to the extent that the measure will contribute to achieving that objective)?
5. The Supreme Court has expressly recognised that the application of this four part test involves a value judgement on the part of the court. In particular, at the fourth stage it involves striking a balance between the importance of the objective pursued and the value of the right intruded upon (see, for example, *Bank Mellat*, paragraph 71 *per* Lord Reed).
6. However, this does not mean that the courts can simply substitute their own assessment for that of the primary decision-maker. The primary decision-maker has an area within which its judgement will be respected and, in particular, the court must allow room for the exercise of judgement by the decision-maker when it comes to the evaluation of complex facts or controversial considerations, and judicial opinions should not be substituted for legislative and policy opinions (see, for example, *Bank Mellat*, paragraphs 93-98 *per* Lord Reed).
7. So far, this is fairly uncontroversial. However, what the courts had not previously articulated in any detail was why, if the question of whether there has been a breach of Convention rights is a matter for the courts to decide, they should not simply substitute their decisions for those of primary decision-makers.
8. The conceptual basis for the courts' approach was discussed by Lord Sumption in the *Lord Carlile* case (see paragraphs 19-33). He reaffirmed that, although the courts can decide

anything that is relevant and necessary for an adjudication to be made on a claim that there has been a breach of Convention rights, that does not mean that in human rights cases the court is entitled to substitute its own decision for that of the body that has the constitutional function of taking the relevant decision. Lord Sumption analysed this in terms of the evidence that is available to the courts. In particular, he said that the key issue is the weight that is to be attributed to the decision-maker's assessment. Although the decision-maker's assessment of the implications of the facts is not conclusive, it might - depending on the circumstances - be entitled to have great weight attached to it. The circumstances that will affect the weight to be attached to a decision-maker's assessment include the nature of the decision, the decision-maker's expertise, and the decision-maker's sources of information.

9. Lord Sumption was of the view that this approach, which he described as "pragmatic", is consistent with the democratic values at the heart of the Convention, as it reflects an expectation that in a democracy a person charged with making assessments of this kind should be politically responsible for them.

(2) Proportionality under EU law

10. In the *Lumsdon* case, Lords Reed and Toulson delivered something of a treatise on proportionality under EU law. Whilst they stressed that only the CJEU can authoritatively set out EU law, it must be unlikely that the CJEU will ever do so in quite such a helpful way, and *Lumsdon* should now be the first port of call for anyone with a proportionality issue arising under EU law.
11. The first point that Lords Reed and Toulson made is the sometimes-overlooked fact that the test for proportionality under EU law is *not* the same as that under the Convention (see paragraph 26).
12. They then went on to explain that the test for proportionality under EU law has two, or sometimes three, limbs, although the CJEU does not always expressly articulate the third limb (see paragraph 33):
 - (1) Is the measure in question suitable or appropriate to achieve the object pursued?
 - (2) Is the measure necessary to achieve that object or could it be attained by a less onerous method?
 - (3) Is the burden imposed disproportionate to the benefits secured?
13. However, the key point that Lords Reed and Toulson dealt with is the fact that the test is flexible in nature, and that it is applied in different ways in different types of cases (see paragraphs 40-74). This part of the judgement repays careful examination, but in general terms it is possible to identify three broad classes of case:
 - (1) Challenge to EU measures. These cases are almost exclusively the domain of the CJEU and not the national courts, and the CJEU will usually only intervene if the measure is "manifestly inappropriate".

- (2) Challenges to national measures that derogate from rights under EU law. In these cases, the measure must be justified by imperative requirements in the general public interest, and this will be scrutinised with differing degrees of intensity depending on the context.
- (3) Challenges to national measures that implement EU law. In these cases, exercises of discretion at the national level are also subject to the “manifestly inappropriate” test.

(3) *The relationship between proportionality and irrationality at common law*

14. There has been a long-running debate as to whether proportionality should be recognised as a ground of review at common law but, in light of the long-standing decision of the House of Lords in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, it has been held that only the Supreme Court could recognise it as such (see, for example, *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, paragraphs 32-37 *per* Dyson LJ). The strongest hints yet (and, as the relevant comments were *obiter*, they are just hints) that the Supreme Court might take such a step were given in the *Kennedy* and *Pham* cases
15. In *Kennedy*, Lord Mance (at paragraphs 51-56) emphasised the advantages of the proportionality approach, stating that it involved a structured approach and directed attention to factors such as suitability or appropriateness, necessity, and the balance or imbalance of benefits and disadvantages. He pointed out that the common law no longer insists on a rigid test of irrationality and that it is not appropriate to apply a general but vague principle of reasonableness. He held that in some cases, depending on the facts, a proportionality approach would be the correct one, and that this was the right approach in the *Kennedy* case: the information requested was of general public interest and was sought for important journalistic purposes.
16. In *Pham*, Lord Mance repeated the comments that he had made in *Kennedy* (see paragraphs 51-56), and Lord Sumption echoed Lord Mance’s approach (see paragraph 107). Lord Sumption expressed the view that it was not that clear how different proportionality under the Convention was from irrationality review. In particular, he stated that it was for the court to decide how broad the range of permissible rational decisions is in a particular case, and that will depend on the significance of the right interfered with, the degree of interference involved, and the extent to which the court is competent to reassess the balance that the decision-maker was required to strike.
17. Lord Reed adopted a slightly different approach in *Pham*, an approach that appears to be based more on statutory interpretation. He expressed the view that, where Parliament has authorised significant interferences with important legal rights, the courts might interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim pursued (see paragraph 119).
18. In *Kennedy* Lord Carnwath doubted Lord Mance’s approach, commenting that “it is at best uncertain to what extent the proportionality test...has become part of domestic public law”

(see paragraph 46), but by the time of *Pham*, he seems to have been converted, as there he appears to endorse Lord Mance's comments in *Kennedy* (see paragraph 60).

19. In the *Rotherham* case (which concerned proportionality under EU law), Lord Sumption made an important point in relation to the applicability of a proportionality test in practice. The claimant local authorities contended that the effect of the decision under challenge was to impose a disproportionate burden on them. However, Lord Sumption pointed out that this begged the question: proportionate to what? He pointed out that proportionality is a test for assessing the lawfulness of a decision-maker's choice between a legal norm and a competing public interest, the principle being that where a decision-maker derogates from a legal standard in pursuit of a recognised but inconsistent public interest, the question arises whether the derogation is worth it. As Lord Sumption pointed out, the claimant local authorities had no entitlement to EU structural funds and therefore there was nothing to which the proportionality principle can be applied (see paragraph 47).
20. This point was picked up on by Lord Kerr in the *Keyu* case, where he envisaged a "more loosely structured proportionality challenge" where a fundamental right is not involved, referring to the testing of a decision in terms of its "suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages" (see paragraph 282; see also paragraph 304 *per* Baroness Hale).
21. It seems, however, that we are likely to have to wait for proportionality to be recognised as a ground of review at common law. In *Somerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734, the House of Lords rejected an invitation to consider whether proportionality should be recognised as a ground of review because the issue did not arise on the facts (see paragraph 56 *per* Lord Hope) and, more recently, in *Keyu*, the Supreme Court held that an argument that proportionality should be a ground of review in common law "potentially has implications which are profound in constitutional terms and very wide in applicable scope", and that such an argument would have to be considered by a panel of nine Justices (see paragraph 132 *per* Lord Neuberger). Note, however, that in *Keyu*, Lord Kerr expressed the view that "this question will have to be frankly addressed by this court sooner rather than later" (see paragraph 271), and he flagged up some of the issues that might have to be resolved if it were to do so (see paragraph 278).

Legitimate Expectation

22. The concept of legitimate expectation is well-recognised. A legitimate expectation may arise where a public body has a discretionary power and it represents that it will exercise that power in a particular way. Such representations may be express, in the form of an explicit promise or statement, or they may be implicit, in the form of, for example, a consistent past practice. Where a legitimate expectation arises, the public body will be required to give effect to it unless circumstances entitle the public body to resile from it.
23. Legitimate expectations are broadly categorized as either procedural legitimate expectations, where the expectation is that the public body will follow a particular procedure before it takes a decision (such as giving notice, allowing representations to be made, affording a hearing, or engaging in consultation), or substantive legitimate expectations, where the expectation is that the public body will reach a particular decision as a matter of substance (such as to grant a licence or to keep open a residential care home). The

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existence of the latter category of legitimate expectations was only put beyond doubt by the decision of the Court of Appeal in *R v North and East Devon Health Authority, ex p Coughlan* [1999] EWCA Civ 1871, [2001] QB 213, where it was held that the claimant had a legitimate expectation that a health authority would not close a residential care home at which she had been promised a home for life.

24. The law in relation to procedural legitimate expectations is well-settled and is generally uncontroversial. Indeed, most of the cases concerning procedural legitimate expectations turn on their facts (see recently, for example, *R (Enfield London Borough Council) v Secretary of State for Transport* [2016] EWCA Civ 480).
25. The approach to substantive legitimate expectations laid down by the Court of Appeal in *Coughlan* was thought to have been largely settled and has been applied - or at least it has been sought to be applied - in a wide range of circumstances. For example, in *R (C) v Westminster City Council* (unreported, 23 October 2015), Westminster was held to have breached a substantive legitimate expectation that it would fund a three-year residential placement for a young adult with special educational needs.
26. However, recent indications from the Privy Council suggest that its application is narrower than might have been thought.
27. In *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383, Lord Neuberger set out a helpful summary of the law relating to legitimate expectation (see paragraphs 37-39). However, Lord Carnwath, in a concurring judgment, embarked on a much fuller review of the case law. In particular, he emphasised the particular factual circumstances of *Coughlan*: an express promise by the authority for its own purposes, made in unqualified terms to a small group of people with whom it had an established relationship, and relied upon by them, and given for the specific purpose of persuading them to move out of premises which the authority wished to have available for other purposes. In this context, Lord Carnwath emphasised, the authority's promise was intended to promote its statutory functions and keeping the promise would involve no inconsistency with them (see paragraph 111).
28. In light of this, Lord Carnwath expressed the view that in *Coughlan* the Court of Appeal went further than it needed to by seeking a "grand unifying theory" for all the previous authorities loosely grouped under the heading of legitimate expectation (see paragraph 112). In particular, he doubted whether the approach adopted in tax cases was particularly relevant in other contexts (see paragraphs 114-115). He expressed particular concern about potential for the concept of substantive legitimate expectations, as articulated in *Coughlan* and subsequent cases, to come into conflict with the discretion of public bodies to formulate and re-formulate their own policy.
29. Lord Carnwath also analysed the earlier decision of the Privy Council in *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1, and noted similarities with the factual matrix in *Coughlan* (see paragraph 120). In particular, there was a clear promise by the public authority, made to a defined group in return for specific action by them within a defined timescale, and designed to further the authority's own purposes, and there were no wider political or economic considerations at issue. In this context, he referred to there being "a similar mutuality of specific commitments".

30. Drawing the threads together, Lord Carnwath held that *Coughlan* should be narrowly interpreted. In particular he held that the courts should only require a substantive legitimate expectation to be honoured where (see paragraph 121):
- (1) There is a promise or representation which is clear, unambiguous and devoid of relevant qualification.
 - (2) The promise was given to an identifiable defined person or group by a public authority.
 - (3) The promise was given by the public authority for its own benefit, either in return for action by the relevant person or group or on the basis of which the person or group has acted to its detriment.
 - (4) The authority cannot show good reasons, judged by the court to be proportionate, to resile from the promise.
31. In *R (Veolia ES Landfill Ltd) v Revenue and Customs Commissioners* [2016] EWHC 1880 (Admin), Nugee J considered whether HMRC had breached a claimed substantive legitimate expectation on the part of waste operators that the “fluff” waste that they used to protect the linings of cells in landfill sites was not waste subject to landfill tax. He held that there had been a clear and unambiguous representation to the relevant effect, but that HMRC had been entitled to resile from it. In reaching this conclusion, Nugee J dealt with a number of points of potentially wider application:
- (1) When deciding whether a public authority has made a clear and unambiguous representation, it is for the court to conduct an objective exercise of deciding how the relevant statement would have been reasonably understood by the persons to whom it was directed. In particular, the interpretation of the statement cannot be affected by what the authority intended it to mean, or thought that it meant (see paragraph 111).
 - (2) Although (particularly in the tax context), a person can only rely upon a representation if that representation was made after the person had put all his cards face up on the table, there is no general principle that a person seeking to rely upon a legitimate expectation must come to the court with clean hands (see paragraph 135).
 - (3) The fact that the authority wishes to change its position because it has revised its view of the law is not a trump card entitling it to resile from a legitimate expectation; rather it is one of the factors that is to be taken into account when deciding whether or not the authority is so entitled (see paragraph 162).
 - (4) The question of whether it is lawful for an authority to resile from a substantive legitimate expectation is to be judged by reference to the decision that the authority actually took and its reasons for that decision at the time, not by reference to matters that have only arisen *ex post facto* (see paragraph 166).

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