



# A Difference in Kind – Proportionality and *Wednesbury*

by Veena Srirangam

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## Abstract

Is there a difference between proportionality review under the Human Rights Act and *Wednesbury* unreasonableness review? Recent Supreme Court decisions have tended to answer this question in the negative stating that there is little difference. In particular, the relative weight given by the decision-maker to the considerations before them, and the balance struck by the decision have been said to be reviewable even under *Wednesbury* unreasonableness. By reviewing case-law where *Wednesbury* unreasonableness was applied, it is argued here that the courts did not consider the relative weight or the fair balance struck by the decision. These elements are unique to proportionality review. Proportionality review should be preferred, as a result, because it affords better protection to human rights. The concern underlying this paper is that, in the face of the possibility of a new human rights regime, insufficiently distinguishing between these standards of review will lead to an erosion of the protection afforded to human rights under proportionality. \*

## Keywords

Proportionality – *Wednesbury* unreasonableness – human rights – UK Bill of Rights

## Introduction

*Wednesbury* unreasonableness and proportionality review under the Human Rights Act 1998 have a long history of academic debate and judicial discussion. The similarities between the standards of review have received much scholarly attention. As Professor Elliott notably stated, the difference between them is “one of degree rather than kind.”<sup>1</sup> More recently, number of legal scholars and judges have advocated that the ‘relative weight’ and ‘balance’ struck by the decision-maker with regard to the material considerations – previously considered to lie exclusively in the domain of proportionality review – can be, and have been, reviewed by the courts under rationality or unreasonableness review.<sup>2</sup>

This paper explores whether these standards of review do, in fact, operate alike. It is argued that proportionality review in the context of the European Convention on Human Rights (ECHR) goes much further than *Wednesbury* unreasonableness in requiring the court to consider whether a ‘fair balance’ has been struck as between the rights of an individual and the interest of the community. There is no counterpart to this limb of proportionality in *Wednesbury* review.

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\*Veena Srirangam, BA Law (Hons) (Cantab), LLM (Harvard). Supervisor in Law, Downing College, University of Cambridge. I am grateful to Professor David Feldman QC (Hon), FBA for his insightful comments on this paper. Any errors that may remain are my own.

<sup>1</sup> M. Elliott, *The Human Rights Act 1998 and standard of substantive review* (2001) 60 C.L.J. 301, 308, 313.

<sup>2</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 19, [2015] 3 W.L.R. 1665; *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] A.C. 455.

By ‘proportionality review’, one may refer to the standard as developed in European Union law, or public international law. It merits emphasising at this stage that this paper makes reference to proportionality as a ground of review under the Human Rights Act 1998 where Convention rights are engaged. Proportionality in this context requires the striking of a “fair balance... inherent in the whole [European] Convention [on Human Rights]” between the interests of the community and the rights of an individual.<sup>3</sup>

There are important distinctions to be drawn between these standards of review based on their conceptual underpinnings. Review of unreasonableness and proportionality is substantive as the reviewing court is concerned with the content of the decision. Notwithstanding, *Wednesbury* review is concerned with the process of reasoning employed in adopting the particular decision in that the focal points are the reasons advanced for a decision. By contrast, proportionality, in the context of rights, is concerned with the outcome of a decision. A perfectly reasoned decision may still have a disproportionate impact on the right of an individual and therefore be unlawful. The inquiry into the proportionality of a measure does not pertain merely to whether it was justified by adequate reasons, but with whether any infringement of a Convention right is commensurate to the aim seeking to be achieved by the measure.

Further, the burden of proof varies as between these standards. Under *Wednesbury* unreasonableness review, it is for the claimant to show that the measure they are challenging is unreasonable. Whereas under proportionality review, once the claimant has alleged that a measure interferes with their Convention right, it is for the government to demonstrate that the measure is proportionate to the aim that it seeks to achieve.<sup>4</sup>

It is not contested that both standards of review apply more or less intensively depending on the context. Neither *Wednesbury* unreasonableness nor proportionality are monolithic standards. The argument made in this paper is not that proportionality offers a more intensive kind of review. Rather the aim of the following discussion is to illustrate that proportionality review is unique because of the balancing exercise that it mandates. There is a qualitative difference between *Wednesbury* unreasonableness and proportionality.

The discussion proceeds in three parts. Firstly, the significance of the issue is addressed. In the second part, a number of cases where *Wednesbury* unreasonableness review was applied are reviewed and divided into four categories. It is argued here that these cases did not turn on the courts’ assessment of the relative weight given to competing considerations or the balance struck as between them by the decision-maker. Thirdly, the ‘fair balance’ limb of proportionality is discussed and it is posited that this is the crux of the standard of review.

## Part I – The Significance of the Issue

In the run-up to the general election in May 2015, the Conservative Party manifesto promised to ‘scrap the Human Rights Act and introduce a British Bill of Rights’.<sup>5</sup> The Secretary of State for Justice and Lord Chancellor Elizabeth Truss MP has recently confirmed that this reform remained a priority for government.<sup>6</sup>

In a Conservative party paper entitled *Protecting Human Rights in the UK*, published in October 2014, the Human Rights Act was subject to much criticism. Among the purported shortcomings of the Act was the application of the doctrine of proportionality which was described as

<sup>3</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167, [19] citing *R. (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 A.C. 368, [20].

<sup>4</sup> I am grateful to Professor Feldman for pointing this out to me.

<sup>5</sup> The Conservative Party Manifesto 2015, 62, available at [www.conservatives.com/manifesto](http://www.conservatives.com/manifesto).

<sup>6</sup> *UK bill of rights will not be scrapped, says Liz Truss*, The Guardian, 22 August 2016, available at: [www.theguardian.com/law/2016/aug/22/uk-bill-of-rights-will-not-be-scrapped-says-liz-truss](http://www.theguardian.com/law/2016/aug/22/uk-bill-of-rights-will-not-be-scrapped-says-liz-truss) (last accessed 30 October 2016).

being problematic because “it can amount to an essentially political evaluation of different policy considerations”.<sup>7</sup> It remains unclear at the time of writing what a British Bill of Rights might entail and what standard of review will apply under it.

It is often stated that *Wednesbury* unreasonableness and proportionality review may not result in differing outcomes even though the process of reasoning may be different.<sup>8</sup> However, even if the outcome does not differ in a given case based on which standard is applied, at a higher level of abstraction, adequate processes need to be in place to ensure that fundamental rights are properly protected by the law as a general public interest is pursued. Applying the appropriate standard of review forms a crucial part of that agenda.

Furthermore, there have been a number of recent Supreme Court judgments which suggest that review under *Wednesbury* and proportionality are different only in name. Such an approach tends to erode the qualitative differences between these standards of review. Therefore, in light of this development and the incumbent British Bill of Rights, the issue of which standard of review is better suited to protecting rights is of pressing significance.

### The Standards of Review

As substantive grounds of review, *Wednesbury* unreasonableness and proportionality review engage with the content of the decision albeit in different ways.

*Wednesbury* unreasonableness is the general standard of review for rationality of an administrative decision in English law. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* Lord Greene MR famously stated that a decision will be substantively unreasonable if it were “a conclusion so unreasonable that no reasonable authority could ever have come to it”.<sup>9</sup> Lord Diplock observed in the *GCHQ* case that *Wednesbury* unreasonableness,

“applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”<sup>10</sup>

Before the incorporation of the ECHR via the Human Rights Act 1998 into domestic law, where fundamental rights were engaged, the courts held that the review under *Wednesbury* unreasonableness must be more intensive. Lord Bridge in *Bugdaycay* described it as “anxious scrutiny” whereas the Court of Appeal in *Smith* held that “more would be needed by way of justification” where such rights are engaged.<sup>11</sup> Following the enactment of the Human Rights Act 1998, where a decision does not engage a Convention right, *Wednesbury* unreasonableness is the appropriate standard of review.

Proportionality review, as applied to human rights, has been part of English public law since the seminal case of *Daly*. In that case, Lord Steyn reiterated the elements of proportionality review stating,

“in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the

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<sup>7</sup> The Conservative Party, *Protecting Human Rights in the UK*, October 2014, 4.

<sup>8</sup> See, for example, *R. v Chief Constable of Sussex, ex p International Trader's Ferry* [1998] 3 W.L.R. 1260, [1999] 2 A.C. 418, 439 (Lord Slynn).

<sup>9</sup> [1948] 1 KB 223, 234.

<sup>10</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 W.L.R. 1174, [1985] A.C. 374, 410.

<sup>11</sup> *R. v Secretary of State for the Home Department, ex p Bugdaycay* [1987] 2 W.L.R. 606, [1987] A.C. 514, 531; *R. v Ministry of Defence, ex p Smith* [1996] 2 W.L.R. 305, [1996] QB 517, 554.

means used to impair the right or freedom are no more than is necessary to accomplish the objective.”<sup>12</sup>

Unlike proportionality applied in other areas, such as European Union law, where Convention rights are engaged the courts must form a view of the fairness of the balance. Accordingly, it was clarified in *Huang* that as well as these three prongs there is a requirement of “fair balance” to be struck “inherent in the whole Convention” which the measure must satisfy in order to be proportionate.

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### Treating *Wednesbury* and Proportionality alike

Professor Craig’s seminal article, *The Nature of Unreasonableness Review*<sup>14</sup>, has been cited with approval in the Supreme Court in support of the proposition that *Wednesbury* unreasonableness can operate like proportionality review because both require judicial consideration of ‘weight’ and ‘balance’ of the decision.

Of these, three cases are noteworthy – *Pham*, *Keyu* and *Kennedy*. In these cases, the Justices of the Supreme Court emphasised the common ground between *Wednesbury* unreasonableness and proportionality. In particular, the issue of whether the ‘relative weight’ and ‘balance’ struck by the decision-maker can be reviewed under unreasonableness has been discussed at length in these judgments. That discussion and some background to the cases are summarised below.

#### A. *Keyu*

*Keyu*<sup>15</sup> was a judicial review challenge brought by relatives of civilians who were killed by the British Army in 1948 in the Federation of Malaya. They challenged the decision of the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence to not order an inquiry by refusing to exercise their discretion under s 1(1) of the Inquiries Act 2005. The Supreme Court dismissed the appeal and rejected the claim.

The case engaged a range of issues including jurisdiction and the critical date as to when the Convention came into force in the UK but, for our purposes, the focus will be the discussion of *Wednesbury* unreasonableness review.

In the majority were Lords Neuberger and Kerr. Lord Neuberger dismissed the claimants’ argument that proportionality review should replace *Wednesbury* unreasonableness in all cases where there was review of decisions of the executive.<sup>16</sup> Such a move would have “potentially profound and far-reaching consequences” as the courts would be considering the merits of the decision including the balance struck by the decision-maker.<sup>17</sup> Further, he emphasised that there was an indication that irrationality was moving ever-closer to proportionality in some cases as evidenced by the courts’ decisions in *Kennedy* and *Pham*.<sup>18</sup> Lord Kerr considered that the difference between rationality and proportionality as standards of review was not as “stark as it is sometimes portrayed”.<sup>19</sup> He did not, however, make a final determination on issues such as whether proportionality and

<sup>12</sup> [2001] UKHL 26, [2001] 2 A.C. 532, [27], citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] 3 W.L.R. 675, [1999] 1 A.C. 69 per Lord Clyde, 80.

<sup>13</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167, [19] citing *R. (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 A.C. 368, [20].

<sup>14</sup> P. Craig, *The Nature of Unreasonableness Review*, *Current Legal Problems* Vol. 66 (2013), 131-167.

<sup>15</sup> *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 19, [2015] 1 W.L.R. 1591.

<sup>16</sup> *Ibid.*, at para [131]-[140].

<sup>17</sup> *Ibid.*, at para [133].

<sup>18</sup> *Ibid.*, at para [133]; *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2014] UKSC 20, [2015] A.C. 455, [51]-[54]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591, [96], [113] and [115].

<sup>19</sup> *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 19, [2015] 1 W.L.R. 1591, [271].

rationality were mutually exclusive, whether there were arguments for ‘pure irrationality’ to be the standard of review and whether proportionality review provides better structure and transparency.<sup>20</sup>

Baroness Hale dissented and concluded that she would have allowed the appeal. On the proportionality argument advanced by the claimants, she considered that even applying the *Wednesbury* standard of unreasonableness, the decision-maker’s approach could be meaningfully reviewed by the court. Baroness Hale set out ‘salient points’ about the background history that a rational decision-maker would take into account and, the advantages and disadvantages of conducting an inquiry into the deaths of the civilians, against that background. She believed that the secretaries of state did not ‘seriously consider’ the most cost-effective form the inquiry could take or the wider context of the issue:

“the public interest in properly inquiring into an event of this magnitude; the private interests of the relatives and survivors in knowing the truth and seeing the reputations of their deceased relatives vindicated; the importance of setting the record straight – as counsel put it, balancing the prospect of the truth against the value of the truth.”<sup>21</sup>

The operative words in this excerpt of the judgment are ‘seriously consider’. It may be that that Baroness Hale believed that the secretaries did not actually turn their minds to these issues but merely stated that they had considered them. On the other hand, she may be indicating that the secretaries did not attach sufficient weight to these concerns despite having considered them. The latter approach, as will be discussed at length below, is more difficult to reconcile with the approach that courts have taken under *Wednesbury*.

## B. *Pham*

In *Pham*, Supreme Court held that their conclusion that proportionality review did not apply on the facts, could not preclude them from considering the relative weight and balance struck by the decision-maker. *Pham* was a person of Vietnamese origin – who had obtained British citizenship in 1995 – alleged to have participated in terrorist activities in Yemen. The Home Secretary sought to revoke *Pham*’s citizenship in 2011 under s 40(2) British Nationality Act 1981 on the ground that it would be conducive to the public good. The Vietnamese government refused to accept that he was a national. *Pham* challenged the decision on the grounds that he was not a Vietnamese national in 2011 and risked being rendered stateless by the Home Secretary’s decision.

The Supreme Court unanimously dismissed the appeal, remitting the case to be decided by the Special Immigration Appeals Commission (SIAC). Citing Professor Craig’s views that relative weight can and is assessed under unreasonableness review, understood in the “umbrella sense”, the Supreme Court considered that unreasonableness review may be very similar to proportionality review.<sup>22</sup>

Lord Sumption observed that the difference between unreasonableness and proportionality is that, in the former, the court asks whether the decision was within the “range of rational balances that might be struck” whereas under proportionality review, the court has to form its own view of the balance struck by the decision-maker. Since the court has to decide what the range of reasonable decisions might be, it decides for itself to some degree the balance of the decision struck.<sup>23</sup> Indeed, Lord Sumption went so far as to describe the ‘anxious scrutiny’ variant of *Wednesbury*

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<sup>20</sup> *Ibid.*, at para [278].

<sup>21</sup> *Ibid.*, at para [312].

<sup>22</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591, [60] (Lord Carnwath).

<sup>23</sup> *Ibid.*, at para [107] (Lord Sumption).



unreasonableness “proportionality at common law”, and cited Professor Craig and *Kennedy* in support of this proposition.<sup>24</sup>

### C. *Kennedy*

*Kennedy* concerned a journalist who sought disclosure from the Charity Commission of certain documents relating to an inquiry it had conducted.<sup>25</sup> The Commission refused disclosure on the grounds that it was within the exemption provided for in s 32(2) Freedom of Information Act 2000. The claimant argued that the exemption must be read down to be compatible with Article 10 (freedom of expression) ECHR. The Supreme Court rejected the claim.

Discussing the differences between unreasonableness review and proportionality, Lord Mance stated that even though proportionality and unreasonableness may have similar elements of reasoning to them in both engaging review of ‘weight’ and ‘balance’,

the advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.<sup>26</sup>

Lord Mance highlighted, however, that these factors may be relevant outside the Convention too, i.e. even where *Wednesbury* applies. He relied on the arguments advanced in Professor Craig’s seminal article *The Nature of Unreasonableness Review* in support of his view that unreasonableness and proportionality review are substantively similar.

### D. Craig, *The Nature of Unreasonableness Review*

In this article, Professor Craig analyses a number of cases to illustrate that courts do weigh the considerations taken into account by the decision-maker while reviewing for unreasonableness in the *Wednesbury* sense. Professor Craig has argued that relative weight can be and is assessed under unreasonableness review.<sup>27</sup> Three Justices of the Supreme Court in *Pham* expressly supported Professor Craig’s argument that unreasonableness review involves the consideration of weight and balance.<sup>28</sup>

Professor Craig’s article is discussed in detail below. He refers to a number of cases in support of the proposition that unreasonableness review must involve weighing up the considerations before the court. These cases are reviewed and an alternative hypothesis is put forward to explain them. The same cases are used to ensure a consistent data-set.

## Part II – Reviewing the case-law: How far can *Wednesbury* go?

By analysing cases like *Rafferty*, *Bancoult*, *Wagstaff*, *O*, *Lord Saville of Newdigate*, *ITF*, *AA (Afghanistan)*, and *Brind*, *inter alia*, where the courts applied unreasonableness review, Professor Craig has illustrated that judges do consider the relative weight to be accorded to competing interests

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<sup>24</sup> *Ibid.*, at paras, [107], [109].

<sup>25</sup> *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] A.C. 455.

<sup>26</sup> *Ibid.*, at para [54]. See also: *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591, [94].

<sup>27</sup> P. Craig, *The Nature of Unreasonableness Review*, *Current Legal Problems* Vol. 66 (2013), 131-167, 135.

<sup>28</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591, [60] (Lord Carnwath), [94] (Lord Mance) and [109] (Lord Sumption). See also: *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] A.C. 455, [54] (Lord Mance).

under unreasonableness review.<sup>29</sup> He posits that in all these cases the court weighed these considerations and indeed that different judges weighed them differently.

Whilst the focus of this paper lies in the cases where anxious scrutiny was the applicable standard of review it will be worth exploring whether an alternative explanation can be advanced more generally for the cases referred to by Professor Craig. It is argued that the courts were not engaged in weighing up the considerations that were for the decision-maker in these cases.

Rather, the judicial approach in these cases can be categorised in three ways. The first involve those where the decision-maker was subject to a statutory duty. The second are those where the judges held that the considerations taken into account by the decision-maker were not legitimate. In the third category are those cases where the court considered that there was no 'rational connection' between the stated aim of the decision-maker and the course that they adopted. These three categories illustrate three kinds of reasoning which one finds most commonly in cases where *Wednesbury* review is applied.

The cases where anxious scrutiny was applied are analysed, in a separate category, to explore whether heightened *Wednesbury* review can operate like proportionality.

## I. Legal Duties

Where there is a specific statutory legal duty on the decision-maker it operates as a constraint on the ability of the decision-maker, to the extent that it is engaged on the facts, to weigh up the varying considerations. Legal duties are better thought of as constraints rather than considerations to be taken into account in the decision-making process.

In *Rafferty*, West Glamorgan County Council had a duty pursuant to (the now repealed) s 6 of the Caravan Sites Act 1968 to find adequate accommodation for 'gypsies' where they were being evicted as a result of the council's action.<sup>30</sup> Gibson LJ concluded that the council's decision to evict the appellants without finding them alternative and adequate accommodation was not a decision a reasonable council could reach. He found that the breach of the s 6 duty was not a defence to possession proceedings brought by the council.

This was because, the judge clarified, "the law does not permit complete freedom of choice or assessment because legal duty must be given proper weight."<sup>31</sup> Professor Craig has noted that this evidences the court's willingness to inquire into the weight attached to considerations by the decision-maker.

However, a legal duty is a constraint on the decision-maker's authority and a constraint which Parliament has enacted, i.e. a statutory duty, is one which the court has to enforce with a certain level of primacy. The county council could not consider its s 6 duty while making a decision about the appellants, it has no choice but to comply with that statutory duty. The judge may have used the language of 'weight' in this case but, in reality, he was merely enforcing the statutory duty placed on the county council.

Where there are several statutory duties, the court has accepted that the decision-maker may be afforded sufficient leeway to act in a manner that best satisfies these various duties. *Re L* was such a case, where the defendant school had a duty pursuant to s 67 of the School Standards and

<sup>29</sup> *West Glamorgan County Council v Rafferty* [1987] 1 W.L.R. 457, [1987] 1 All E.R. 1005; *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 A.C. 453; *R. v Secretary of State for Health, ex p Wagstaff* [2001] 1 W.L.R. 292, [2000] H.R.L.R. 646; *R. (O) v London Borough of Hammersmith and Fulham* [2011] EWCA Civ 925, [2012] 1 W.L.R. 1057; *R. v Lord Saville of Newdigate, ex p A* [2000] 1 W.L.R. 1855, 4 All ER 860; *R. v Chief Constable of Sussex, ex p International Trader's Ferry* [1998] 3 W.L.R. 1260, [1999] 2 A.C. 418; *R. (L (A Child)) v J School Governors* [2003] UKHL 9, [2003] 2 A.C. 633.

<sup>30</sup> *West Glamorgan County Council v Rafferty* [1987] 1 W.L.R. 457, [1987] 1 All E.R. 1005.

<sup>31</sup> *Ibid.*, at p 280.

Frameworks Act 1998, *inter alia*, to set up a panel by which a pupil could appeal decisions of permanent exclusion made against him. In that case, the court had to determine whether the conditions that L was subjected to after being included in school, following a successful appeal of the decision to exclude him, constituted “re-instatement” for the purposes of the statute. Professor Craig has noted that weight and balance were central to the decision of the House of Lords in this case.

Lord Scott explicitly considered the question of weight and inquired into other considerations which could reasonably have occupied the head-teacher such as obligations relating to good discipline and behaviour.<sup>32</sup> Notably, Lords Scott and Walker appeared to end their analysis on noting that these considerations pulled in different directions, doing so in the round.<sup>33</sup> In effect, the majority in the House of Lords held that where various statutory duties are incumbent upon the decision-maker, the weight to be accorded to those duties in a given set of circumstances is up to the body making the decision.

The minority, Lords Bingham and Hoffmann interpreted “re-instatement” in a literal manner and considered that any other duties that the head-teacher might have, by virtue of primary legislation or otherwise, could not be used to empty that notion of content.<sup>34</sup> The disagreement between the Lords was not directed at the weight that the head-teacher ought to have given to their s 67 duty, in light of the other duties they had, but whether they could take into account those other duties while seeking to comply with s 67. The majority in the House of Lords held the head-teacher and governors could take into account other duties imposed on them to determine how to comply with s 67. The dissenting judges considered that, as a matter of statutory interpretation, “re-instatement” had a clear meaning – to put the pupil back in the position s/he had been in before exclusion – and that no other duty could justify moving away from what s 67 sought to achieve.

This case, therefore, may be treated as having turned on statutory interpretation and *whether* a particular consideration could be taken into account rather than the weight that has been afforded to one which the decision-maker was entitled to take into account. Of particular note is the majority’s reluctance to pronounce a view on whether the head-teacher’s weighing up of their various duties was reasonable.

## II. Relevancy or Legitimacy of Consideration

In this category of cases are those where the courts have held that the decision-maker ought not to have taken a particular consideration into account. This may be cast in terms of irrelevant consideration in some cases.

*International Traders’ Ferry (ITF)* and the majority in *Bancoult* illustrate this kind of reasoning. In particular it is significant that, in these cases, the judgments only pertain to whether the decision-maker could take a certain consideration into account and express judgment only as to whether or not the considerations are legitimate. There are observations in these judgments that there is a balance to be struck between the various factors at play but they do not consider whether the weight given to each consideration by the decision-maker was appropriate.

In *ITF* the House of Lords upheld the Chief Constable’s decision to scale back police protection at Shoreham where animal rights’ protesters were demonstrating against the claimant’s transport of livestock.<sup>35</sup> *ITF* advanced that the decision was both *Wednesbury* unreasonable and a disproportionate interference of their rights under Articles 34 and 36 of the EC Treaty.

Considering the claim under *Wednesbury* unreasonableness, Lord Slynn noted that the police had to balance a number of factors in discharging their duty to uphold the law and that the balancing

<sup>32</sup> *R. (L (A Child)) v J School Governors* [2003] UKHL 9, [2003] 2 A.C. 633, [58].

<sup>33</sup> *Ibid.*, at para [63].

<sup>34</sup> *Ibid.*, at para [31] (Lord Hoffmann).

<sup>35</sup> *R. v Chief Constable of Sussex, ex p International Trader’s Ferry* [1998] 3 W.L.R. 1260, [1999] 2 A.C. 418.



required exercise of judgment and discretion. The judge focussed on the considerations that the Chief Constable took into account and held that he was entitled to take into account the resources available to him, in manpower and funding, the rights of others in his area and the competing rights of ITF. It was then up to the decision-maker to decide how to balance these considerations.<sup>36</sup> In addressing ITF's argument that the Chief Constable did not "sufficiently take into account" the impact on businesses, Lord Slynn only went so far as to say that the Chief Constable had treated that consideration as being relevant.<sup>37</sup> He did not engage with how much weight the decision-maker had given to these considerations despite being urged by ITF to do so.

Proportionality review was discussed in the context of the EU law in this law. Nonetheless, his reasoning is of interest here. Turning to the claim based on proportionality Lord Slynn – despite noting that the difference in practice of applying these standards of review on the outcome of the case would be minimal – engaged in a different kind of review.<sup>38</sup> Finding in favour of the Chief Constable again, he considered not whether the considerations he took into account were legitimate but whether those measures were suitable and necessary. In other words, he was assessing the impact of the decision on the rights of ITF and concluded that there was no disproportionality in the decision taken by the Chief Constable. There were other ports available to the claimants and they had only been required to turn back on a handful of occasions.<sup>39</sup>

In doing so, he was considering the weight that the decision-maker could afford to the interference on the claimants' rights in light of the financial resources available to him. That lies in contrast with the analysis he undertook over the unreasonableness of the decision, which turned on the relevance and legitimacy of the considerations that occupied the decision-maker. In their determination of the unreasonableness of the decision, the House of Lords did not assess the weight of any other considerations that the Chief Constable took, or was entitled to take, into account. The court merely highlighted that there were legitimate reasons for acting in the manner that he did, and that the law required him to take into account the considerations that he had, and ultimately, there was a balance to be struck which was up to the decision-maker.

This approach can be seen in *Bancoult* too, in which the Chagossian Islanders challenged s 9 of the Constitution Order, which subjected them to immigration control upon return to the island. The order was upheld in the House of Lords by a 3-2 majority.<sup>40</sup> Professor Craig argues that the division as between the Lords arose from the weight that they attached to the considerations in question.<sup>41</sup> He considers that the majority placed less weight on the rights of the islanders and more on the governmental interest in security whereas the minority were sceptical about the latter and placed much more weight on the islanders' right to return.

However, an alternative analysis based on the legitimacy of the considerations emerges from the judgments. The language used by their Lordships in relation to the considerations that the government could take into account is noteworthy. Lord Hoffmann, in the majority, noted that "government is entitled to take the concerns of its ally into account" and held that "policy as to the expenditure of public resources and the security and diplomatic interests of the Crown are peculiarly within the competence of the executive."<sup>42</sup> Lord Rodger, similarly, held that the government was entitled to give appropriate weight to the wider economic, foreign affairs and defence interests of the UK.

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<sup>36</sup> *Ibid.*, at pp 430-1.

<sup>37</sup> *Ibid.*, at p 433.

<sup>38</sup> *Ibid.*, at p 439.

<sup>39</sup> *Ibid.*, at pp 439-40.

<sup>40</sup> *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 A.C. 453.

<sup>41</sup> P. Craig, *The Nature of Unreasonableness Review*, *Current Legal Problems* Vol. 66 (2013), 131-167, 142.

<sup>42</sup> *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 A.C. 453, [57]-[58] (Lord Hoffmann).

Their Lordships were also divided on the appropriate standard of review, and whether the anxious scrutiny variant of *Wednesbury* applied. The majority considered that it did not. Lord Hoffmann considered that the right to abode, asserted over 40 years after the alleged interference in this case, to be “purely symbolic”.<sup>43</sup> Lord Mance dissented and considered that anxious scrutiny review was applicable. He was concerned that the government did not take into consideration the “legal freedom to return and all that it represents for the human spirit on the basis that return is impractical or uneconomic”.<sup>44</sup>

Lord Bingham, also in the minority, argued that s 9 was irrational because there was “no good reason” for it. He remained unpersuaded by the evidence put forward by the government in support of its security concerns and did not treat it as being a legitimate consideration in this case.<sup>45</sup> His reasoning is considered more fully below, on the analysis based on ‘rational connection’, but for present purposes his approach illustrates an important distinction.

There lies a fundamental difference in approach between a judgment of the relevancy of a consideration to the decision-maker based on the evidence put forward, and one that considers the weight afforded to that consideration by the decision-maker. Lord Bingham did not dissent because he held that the decision-maker failed to have sufficient regard to the rights of islanders, but because he did not find, on the evidence put before the court, that there was any real concern over security in the island. Lord Bingham considered that the interests of the Chagossian Islanders were a relevant consideration to the enactment of s 9 of the Constitution Order and that the Secretary’s failure to consider it was unreasonable. He did not consider that it was not open to the decision-maker to justify the measure on the basis that the right being deprived was of “little practical value”.<sup>46</sup> In other words, the reason for the measure could not be that the right was of little consequence. There must have been some other real consideration that occupied the decision-maker. There was none, for Lord Bingham, in this case and therefore he considered that there was no good reason for the government to have enacted s 9 of the Constitution Order.

In *O*, the Court of Appeal held that the local authority had acted unreasonably in dismissing the parents’ request to not accommodate the child in question who suffered from severe autism and attention deficit hyperactivity disorder at a specialist residential school. Professor Craig argues that the court remitted the decision to be reviewed by the local authority because it considered that it had attached too much weight to the decision of the First-tier Tribunal made when the child was younger, and because it considered that the local authority had not afforded sufficient weight to the detrimental impact on the child of the transition between home and school that the decision led to.<sup>47</sup>

It is certainly the case that in the High Court, Blair J had considered that the weight that the local authority attached to the Tribunal’s decision (made when *O* had been younger) appeared to make it a “determinative factor”.<sup>48</sup> In other words, the concern was that the decision had not been made independently on the facts before the local authority which were different to the ones that had been put before the Tribunal. Given that *O* was older when the local authority was making its own determination and, consequently have very different needs, compared to when the Tribunal considered the issue, the local authority had to consider the issue afresh.<sup>49</sup> Blair J did not go so far as to hold that the local authority could not have any consideration of the tribunal’s determination but, in effect, he determined that the local authority’s duty to properly consider the issue before it would be evaded if it were permitted to follow the Tribunal’s outdated determination.

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<sup>43</sup> *Ibid.*, at para [53] (Lord Hoffmann).

<sup>44</sup> *Ibid.*, at para [172] (Lord Mance).

<sup>45</sup> *Ibid.*, at para [72] (Lord Bingham).

<sup>46</sup> *Ibid.*, at para [72] (Lord Bingham).

<sup>47</sup> P. Craig, *The Nature of Unreasonableness Review*, *Current Legal Problems* Vol. 66 (2013), 131-167, 143.

<sup>48</sup> *R. (O) v Hammersmith and Fulham London Borough Council* [2011] EWHC 679 (Admin), [2012] 1 W.L.R. 1057, [70] (Blair J).

<sup>49</sup> *Ibid.*, at para [71].

Both in the High Court and the Court of Appeal, the claimant was refused mandatory relief precisely because the court felt unable to determine the proper weight to be attached to the considerations in question. The Court of Appeal noted that the claimant's parents and the local authority put forward different proposals to meet the educational needs of O. Black LJ considered that these proposals were a result of "different weighting of the various factors that must be considered" and that, in substance, both courses were open to the local authority.<sup>50</sup> She concluded that the "choice between the two proposals depends on how one weights the various factors" and that was up to the local authority.<sup>51</sup>

An important conceptual difference between Wednesbury unreasonableness and proportionality is illustrated by these cases. The former, even in its most intensive form, can only go so far as grappling with the legitimacy of a consideration. Once a consideration is accepted to be legitimate, and indeed in many cases it will be difficult not to, the courts have tended not to engage in further enquiry. Proportionality review, on the other hand, goes further by mandating the court to form a view of the relative weight given to these legitimate considerations by the decision-maker.

### III. Rational Connection

In this category of cases, the reasoning of the court grapples with the stated aim of the decision-maker. Given the stated reasons, or the aim of a particular measure, the court asks whether the measure pursued satisfies that aim. The court does not have to engage with the weight accorded to the considerations before the decision-maker to perform this exercise. It merely considers whether the reasoning of the decision-maker is sustainable, i.e. rationally connected, given the aims it was seeking to realise.

This type of reasoning does bear some resemblance to that which has been adopted under proportionality review by the English courts. Indeed, in *Belmarsh detainees*, the majority were unpersuaded by the rationale advanced for s 23 of the Anti-Terrorism, Crime and Security Act 2001 by the Home Secretary, and considered the measure to be flawed in its reasoning. Section 23 of the Anti-Terrorism, Crime and Security Act 2001, which permitted the indefinite detention of foreign nationals, suspected of being international terrorists. The House of Lords held that this was incompatible with Article 5 (right to liberty) and Article 14 (prohibition on discrimination) ECHR and issued a declaration of incompatibility under s 4 of the Human Rights Act. *Inter alia*, the majority was not persuaded that a provision authorising indefinite detention of foreign nationals, but not British nationals, was a proportionate response to the public emergency that existed in the UK.

They reasoned that prisoners were able to leave Belmarsh if they could find countries willing to accept them and the government had given undertakings and assurances that it would continue to search for countries that were safe for the prisoners to return to. In other words, the detainees were in a prison with three walls.<sup>52</sup> The majority did not consider that releasing prisoners detained for the purpose of combating international terrorism, so long as they left the country, was rationally related to that aim. This may be an example of a case that would lead to the same outcome both under unreasonableness and proportionality reviews. This aspect of the reasoning in the *A* case is similar to that deployed under unreasonableness approach in some of the cases that Professor Craig discusses.

In *Belmarsh detainees*, the government failed to cross the hurdle of rational connection which applies both to proportionality and unreasonableness review. However, even if it had crossed that hurdle, a court applying proportionality review to the decision will have considered the relative weight attached to the considerations and balance that was struck as between them.

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<sup>50</sup> *Ibid.*, at para [39] (Black J).

<sup>51</sup> *Ibid.*, at para [40].

<sup>52</sup> *A v Secretary of State for Home Affairs* [2004] UKHL 56, [2005] 2 A.C. 68, [81] (Lord Nicholls), [123] (Lord Hope), [173]-[174] (Lord Rodger), [212] (Lord Walker) and [230] (Baroness Hale).

Before turning to an alternative analysis of the cases referred to by Professor Craig, it must be borne in mind that rational connection is not concerned with the weight afforded to the considerations by the decision-maker nor the balance struck as between them. It merely asks, whether the reasoning put forward can hold good as a matter of *internal* logic.

This was the case in *ex p Wagstaff*.<sup>53</sup> In that case, the Health Secretary had decided that the inquiry into the murders committed by Dr Harold Shipman, a General Practitioner, would be held in private with a report being published at the end, which would be made available to the public. The Court of Appeal held that that decision was unreasonable. It did so not because it found, as Professor Craig has suggested, that the considerations in favour of a public inquiry (such as public confidence in the NHS and the wishes of the friends and relatives of the deceased) outweighed those in favour of a private one (such as speed and candour). The court did consider the “widespread loss of confidence” and the wishes of those related to the deceased, but it did not do so in order to hold that these were more important than those put forward in defence of the decision.

The court was strongly influenced to find in favour of a public inquiry because of the wishes of the family and friends of the deceased.<sup>54</sup> The Secretary had initially justified his decision to hold the inquiry in private in order to protect the privacy of the families and friends of the deceased. It emerged, however, that even when he had made that statement several such friends and relatives had written to the Secretary making clear that what they sought was a public inquiry.

The Health Secretary then advanced that in order to avoid delay, and in the interest of a more candid inquiry he had decided to hold the inquiry in private. Furthermore, he had assured the court that a private inquiry would not be any less exacting than a public one. The court was unpersuaded that any risk of delay was insurmountable. It considered that delay could be mitigated by changing the format of the inquiry rather than insisting that it be held in private. The court questioned whether there was a need for speed in these circumstances where Dr Shipman had been convicted and imprisoned, and it was unlikely that other general practitioners would behave in the way that he did in the immediate future.<sup>55</sup> Kennedy LJ accepted that while a full adversarial inquiry might cause delay which would not be desirable in any event, the Health Secretary had not explained why an inquiry with a modified format would not be sufficient to surmount the risk of delay. On the need for candour, he considered that since there were no vulnerable witnesses involved, there was no need for candour.<sup>56</sup>

The court did not give less weight to speed and candour as compared to the confidence in the NHS and the wishes of the family; it considered that the former factors were not at play in this case and, therefore, there was no reason to not hold the inquiry in public. Furthermore, as the court observed, when the inquiry had purported to be public in the first instance it was not acceptable for it to be held in private.

The difference may appear to be fine but it runs deep. It forms the crux of the difference in reasoning that one finds in cases where *Wednesbury* unreasonableness is the applicable standard of review as compared to the proportionality. In the former, the court will very rarely find a decision to be unreasonable once it finds that there are legitimate countervailing considerations. Where proportionality applies, the court may well find that there were legitimate reasons for the decision, but even so, the decision went too far in its infringement of a right.

In *O*, discussed above, the court was similarly concerned that the local authority had not properly considered its own views as expressed in the Core Assessment, which described the need for minimal transitions in *O*'s routine.<sup>57</sup> As in *Wagstaff*, the court considered that having purported in

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<sup>53</sup> *R. (Wagstaff) v Secretary of State for Health and another* [2001] 1 W.L.R. 292, [2000] H.R.L.R. 646.

<sup>54</sup> *Ibid.*, at pp 302-3, 304, 321.

<sup>55</sup> *Ibid.*, at p 305 (Kennedy LJ).

<sup>56</sup> *Ibid.*, at pp 320-1.

<sup>57</sup> *R. (O) v Hammersmith and Fulham London Borough Council* [2011] EWHC 679 (Admin), [2012] 1 W.L.R. 1057, [72] (Kennedy LJ).

the Core Assessment to pursue a course of action which would be minimally disruptive for O, the local authority reached a decision which had the opposite impact on the child. This is why the court remitted the decision, finding it to be unreasonable, for failure to take into account considerations that the local authority itself had deemed to be relevant, indeed, important. Therefore, even though mandatory relief was denied, the court recognised that the decision was illogical because its practical impact cuts against the stated aim of the local authority in its Core Assessment.

In Lord Bingham's dissent in *Bancoult* too there is criticism of the rational connection between the stated aims of the Foreign Secretary and s 9 of the Constitution Order.<sup>58</sup> The judge questioned the evidence upon which the Secretary of State alleged that the re-settlement of the Chagos Islands posed a threat to the security of the US military base on Diego Garcia. The fact that the Secretary had undertaken a feasibility study of re-settlement in November 2000 evidenced that there was no such threat perceived at that time. No evidence had been adduced to suggest that the situation had changed at the time of the litigation, some eight years later.<sup>59</sup> The failure by the British authorities to question Mr Bancoult and others of their intentions to stage protest landings on the island suggested to him that there was little concern over what these individuals might do unless s 9 was put in place. Given the stated aim of the measure, i.e. the security of the US's military base on Diego Garcia, the evidence put before the court did not appear consistent with establishing that aim. In other words, the measure was not rationally connected to its stated aim.

#### IV. Anxious Scrutiny

Of the many cases that Professor Craig has reviewed in his article, four are pertinent to discuss here. These are the cases where anxious scrutiny was applied as a fundamental human right was engaged. These are *Brind*, *Smith*, *Lord Saville of Newdigate* and *AA (Afghanistan)*.

In *Brind*, the applicant journalists unsuccessfully sought to set aside the directives issued by the Home Secretary under his statutory discretion in s 29(3) of the Broadcasting Act 1981 and clause 13(4) of the licence and agreement made with the British Broadcasting Corporation.<sup>60</sup> The claimants argued that the Home Secretary's decision was unreasonable under *Wednesbury* grounds, that he had failed to take into account their rights under Article 10 of European Convention on Human Rights, and that the decision was disproportionate.<sup>61</sup> Professor Craig argues that the court weighed the relevant considerations in deciding against the applicants.

Lords Bridge and Ackner, in particular, were influenced by the limited restrictions imposed on the right to freedom of speech of the claimants. Lord Ackner held that "close scrutiny" must be given to the justification put forward by the government where there is an interference with a fundamental human right. He explained that this is only relevant to the extent that the primary decision-maker has to "identify the factors which motivated his decision so as to ensure that he had overlooked none which a reasonable Secretary of State should have considered."<sup>62</sup>

Even under this 'close scrutiny' variant of *Wednesbury*, the court does not engage with the substance or the merit of the decision in that it does not *weigh* the considerations that the decision-maker did or had to take into account in asking how much significance, properly considered, the Secretary of State should have attached to the public interest and the right in question. It is notable that Lord Ackner did not consider himself to be asking about the necessity of the direction that the

<sup>58</sup> *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 A.C. 453; [2009] 1 A.C. 453, [72] (Lord Bingham).

<sup>59</sup> *Ibid.*, at para [72]. Lord Bingham did not consider the evidence put forward by American officials in support of the Foreign Secretary that there was a threat to security on the base to be credible, dismissing them as "highly imaginative".

<sup>60</sup> *R. v Secretary of State for the Home Department, ex p Brind*, [1991] 2 W.L.R. 588, [1991] 1 A.C. 696.

<sup>61</sup> *Ibid.*, at p 793 (Lord Ackner). The claimants advanced that proportionality was the appropriate standard of review where Convention rights were engaged regardless of the fact that it had not been incorporated into domestic law. The Lords rejected this argument.

<sup>62</sup> *Ibid.*, at p 757.



Home Secretary made, as that would have been in the realm of proportionality. He did not consider that he was balancing the reasons for the decision.<sup>63</sup>

Lord Bridge, on the other hand, conceived the anxious scrutiny test in a different way. He emphasised that the court was entitled to require any restriction of fundamental human rights to be justified and, “nothing less than an important competing public interest will be sufficient to justify it.”<sup>64</sup> The court will exercise a supervisory and secondary judgment on whether a reasonable Secretary of State could hold the *particular competing public interest* justifies the *particular restriction* in question. For Lord Bridge, in effect, the court is raising the threshold for the legitimacy of a consideration (or aim) where fundamental human rights are at stake. The decision-maker must advance a sufficiently important countervailing consideration for a measure which interferes with fundamental human rights in order to be reasonable. The court then must consider not merely whether the aim of the measure was sufficiently important but also whether the restriction imposed was reasonably (or rationally) related to that aim. Applying this threshold, Lord Bridge concluded that “the defeat of a terrorist is a public interest of first importance”.<sup>65</sup> He accepted the reasoning of the Home Secretary that a terrorist must not be given a platform to gain support for his views and dismissed the claim.

None of the foregoing speaks to the weight that the Secretary attached to the public interest in not having the original broadcast of an interview with a proscribed organisation or individual (in requiring a voice-over) nor the interference with the right to freedom of expression of the journalists.

The European Commission on Human Rights, where the claimants took their case following the House of Lords decision, considered that the directive was proportionate to the aim.<sup>66</sup> The Commission did not consider that the inconvenience caused to the journalists a disproportionate interference with their rights under Article 10 freedom of expression. The Commission afforded the government a margin of appreciation, noting:

the difficulties involved in striking a fair balance between the requirements of protecting freedom of information—especially the free flow of information from the media—and the need to protect the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights.

How can the reasoning adopted by the House of Lords be distinguished from that of the European Commission, when the outcomes are the same? The House of Lords asked whether a particular competing interest could justify a particular competing restriction. But how does a judge determine whether there is sufficient justification? It might require asking a question like this: *Would a reasonable decision-maker have enacted this measure, given the importance of the right in question?* In practice, once a sufficiently important justification has been advanced, albeit in very abstract terms such as ‘the defeat of terrorism’, the enquiry ceases.

On the other hand, the European Commission appears to be asking this question: *Was the interference to the right of the applicants disproportionate, given the special problems that arise in combatting terrorism?* The crux of the distinction in approach lies in the focus on the interference that the European approach places. A *Wednesbury* reasonable decision may still have a disproportionate impact on the applicants’ Convention rights.

This proposition is clearly illustrated by the *Smith* litigation. In the domestic courts, the plaintiffs challenged the ‘blanket ban’ policy which prohibited homosexual individuals from serving in the military. The Court of Appeal upheld the policy. Two features of the judgment are salient.

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<sup>63</sup> *Ibid.*, at pp 762-3 (Lord Ackner).

<sup>64</sup> *Ibid.*, at p 749 (Lord Bridge).

<sup>65</sup> *Ibid.*, at p 749 (Lord Bridge).

<sup>66</sup> *Brind v United Kingdom* (1994) App No 18714/91, 18 E.H.R.R. CD76.

Firstly, the court deferred to the executive on matters of national security, holding that “judicial silence” on issues of Article 8 (right to respect for privacy) in this context, was appropriate. The decision concerned the exercise of prerogative power on a policy that required practical assessment of a situation which the courts did not have knowledge of. Furthermore, the policy had been approved by Parliament over the years.<sup>67</sup>

Secondly, it remarked that since Parliament had not given courts the power to exercise primary judgment over whether a governmental policy complied with the Convention, the relevance of a right guaranteed under it formed merely a background to the challenge on the ground of irrationality.<sup>68</sup> Indeed, Curtis J in the lower court, expressly held that once a court had determined that the decision was rational, it would not inquire into the “relative weight” that was struck between individual rights and the collective interest of the community (an exercise that it would have to be undertaken under proportionality review, at least at the “fair balance” stage).<sup>69</sup>

The applicants then took their case to Strasbourg. In a decision against the United Kingdom, the European Court of Human Rights held that there had been a violation of Article 8 (right to respect for private life), Article 14 (prohibition on discrimination) and Article 13 (right to effective remedy).<sup>70</sup> The government had conceded that there had been interference to the applicants’ Article 8 rights so the court had to consider whether the interferences had been justified under Article 8(2), and it held that there were no “convincing or weighty reasons” to justify the policy.<sup>71</sup> The government had advanced that the rationale for the policy was that the presence of open or suspected homosexuals in the forces would have a substantial and deleterious effect on morale. Since negative attitudes towards homosexuals existed within the military forces this would result in reduced morale and cooperation within the forces.<sup>72</sup>

Unlike the Court of Appeal, the Strasbourg court was unpersuaded by this argument. It highlighted that alternatives had been used effectively by the government to combat racial and sexual discrimination and held that, as such, the presence of negative attitudes alone were not enough to justify “rejection of a proposed alternative”.<sup>73</sup> The Strasbourg court thereby discredited the “anxious scrutiny” variant of the *Wednesbury* test in the context of fundamental rights.

Professor Craig has suggested that the differing outcomes in the Court of Appeal and Strasbourg have to do with the evidence advanced by the government and the weight that the courts attached to it.<sup>74</sup> In particular, he drew attention to the European Court’s scepticism over the policy assessment undertaken by the Ministry of Defence. The Strasbourg court expressed concern over the findings of the Homosexuality Policy Assessment Team (HPAT) whose report the UK government had relied on. However, any scepticism that the Strasbourg court did express towards the HPAT report cannot eclipse what it then went on to hold. Despite its reservations about the evidence, the court noted that even if the views expressed in the assessment were accurate, any threats to the morale and fighting power of the forces were based on the negative attitudes towards homosexual personnel held by their heterosexual counterparts. As discussed above, it went on to hold that these negative attitudes could not provide the justification required for the level of interference with the applicants’ Article 8 rights under the Convention.

The courts’ approaches and their outcomes differed not merely because the European Court was more intensively scrutinising the policy. The Strasbourg court required the government to

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<sup>67</sup> *R. v Secretary of State for Defence ex p Smith* [1996] 2 W.L.R. 305, [1996] QB 517, 564 (Henry LJ), citing with approval Brown LJ’s judgment in the lower court, 533 (Brown LJ).

<sup>68</sup> *Ibid.*, at p 558 (Henry LJ).

<sup>69</sup> *Ibid.*, at p 546 (Curtis J).

<sup>70</sup> *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493.

<sup>71</sup> *Ibid.*, at paras [70], [105].

<sup>72</sup> *Ibid.*, at para [95].

<sup>73</sup> *Ibid.*, at para [102].

<sup>74</sup> P. Craig, *The Nature of Unreasonableness Review*, *Current Legal Problems* Vol 66 (2013), 131-167, 165-6.

demonstrate that the Article 8 rights of the officers had only been minimally infringed, which the Court of Appeal, applying the ‘anxious scrutiny’ standard, did not. The European Court, on the other hand, required more from the Home Secretary, who had to show evidence of thought processes behind the policy, not only in the sense of why it was adopted, but also in terms of why alternatives were rejected.<sup>75</sup> Ultimately, the court found that any impact on morale suffered by the unit would be a result of negative attitudes formed of pre-disposed bias and those negative attitudes could not, on their own, be sufficient justification for the interference with the claimants’ Convention rights.

Further, the Court of Appeal was unable to inquire into whether the decision struck a ‘fair balance’ between the rights of the homosexual personnel and the interest in national security.<sup>76</sup> This meant that it could not weigh the considerations before the decision-maker to find that the government had attached too much weight on these attitudes. Unlike the domestic courts, Strasbourg was willing to engage with how much weight had been afforded by the government to the considerations in question; an inquiry which is predominantly absent in *Wednesbury* unreasonableness and characteristic of proportionality review.<sup>77</sup>

In discussing another case where the anxious scrutiny standard was applied, *Lord Saville of Newdigate*, Professor Craig argues that the court weighed the relevant considerations, the duty the duty to carry out a public investigation and the soldiers’ fear for their personal safety, and concluded that the latter outweighed the former.<sup>78</sup>

In *Lord Saville of Newdigate*, a challenge to the tribunal’s decision in the Bloody Sunday inquiry to not grant the soldiers involved anonymity, it would appear that the Court of Appeal, by overturning that decision, weighed the soldiers’ fear for their personal safety and consequently their right to life as being more important than the tribunal’s duty to carry out a public investigation. Ultimately, this was a case where the court considered that there was no compelling justification for naming the soldiers.<sup>79</sup>

Lord Woolf MR observed that the Tribunal had been concerned with openness in evidence from soldiers who had been anonymised yet it had not considered that there was little to be lost by way of openness where the soldiers used letters instead of their real names. The public nature of the inquiry would not be compromised as the evidence would be given by these soldiers in public and, as such, the Tribunal would know their names and the names of those soldiers who were in charge and controlling events would be made available to the public. What, then, could be the reason for withholding anonymity from other soldiers?

Importantly, the court also found that the soldiers had a substantive legitimate expectation from the Widgery assurance which had guaranteed them anonymity for a period of 27 years.<sup>80</sup> As Lord Woolf MR went on to state in *Coughlan*, the leading authority on substantive legitimate expectations, in some cases the frustration of a legitimate expectation may be so unfair that to take a new course of action will be an abuse of power. This case is more akin to the legal duty category of cases discussed above where there is a constraint on the power of the decision-maker to weigh up the considerations before it.

Therefore, while Lord Woolf did consider that the court would attach more weight to the Widgery assurance than the Tribunal appeared to as it also represented a substantive legitimate expectation and hence a constraint on its power to weigh up the considerations before it.

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<sup>75</sup> *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493, [61], [102].

<sup>76</sup> *Ibid.*, at para [132].

<sup>77</sup> *Ibid.*, at para [97].

<sup>78</sup> P. Craig, *The Nature of Unreasonableness Review*, *Current Legal Problems* Vol 66 (2013), 131-167, 144.

<sup>79</sup> *R. v Lord Saville of Newdigate, ex p A* [2001] EWCA Civ 2048, [2001] EWCA Civ 2048, [2002] 1 W.L.R. 1249.

<sup>80</sup> *Ibid.*, at para [35] (Lord Woolf MR).

In *R (AA (Afghanistan))* the claimant was an Afghan national who entered the UK via Austria and was required to seek asylum in the latter country under the Dublin I Regulations. The Home Office failed to notify the claimant of the decision to remove him to Austria, leading to a delay of two years. In the High Court, Bean J considered that the delay made it unreasonable for the Home Secretary to deport AA, who now had a network of friends in the UK who, in turn, could support him through the process of his asylum application.<sup>81</sup> However, this was reversed in the Court of Appeal because it held that in the absence of an Article 8 (right to respect for family and private life) violation being made out, the delay could not, on its own, render the decision unreasonable.<sup>82</sup>

Professor Craig argues that this is a result of the difference in how the relevant considerations were framed by the High Court and the Court of Appeal.<sup>83</sup> However, the inquiry that both courts were engaged in did not concern the relative weight that the Secretary of State had attached to the countervailing considerations. It concerned, whether or not, delay was a consideration that could be taken into account independently of Article 8. Bean J considered that it could and the Court of Appeal held that it could not. Since infringement with Article 8 was not argued in the High Court by the claimant, it could not be raised on appeal.

Analysis of the foregoing cases shows that, even in its most heightened form, it is questionable whether *Wednesbury* unreasonableness can provide the level of scrutiny that proportionality affords. None of these cases has turned on the relative weight and balance struck by the primary decision-maker.

## Taking Stock

As can be seen from the analysis of the foregoing cases, it is questionable whether *Wednesbury* unreasonableness and proportionality both involve considerations of weight and balance. In the former, the court is typically determining whether a particular consideration is relevant, as a matter of statutory interpretation, or otherwise legitimate (as in the cases of *Wagstaff*, *Bancoult* and *O*). Once such a consideration is found, the court will very rarely overturn the decision. In other cases, the court might consider the internal logic of the decision by asking whether the measure is rationally connected to its stated aim (as in *Belmarsh detainees*). This represents an analytical overlap between *Wednesbury* unreasonableness and proportionality. However, the requirement in proportionality review that the courts must review the balance struck by the decision-maker is unique to that standard of review and one that will be lost if proportionality is subsumed under unreasonableness review.

It may be suggested, in the context of cases like *Pham* and *Keyu*, that under an approach which strictly distinguishes between Convention and non-Convention rights, the courts will not be able to adequately protect the rights of those whose rights are not within the ECHR. The right to citizenship, for instance, is a fundamental right and there is no principled reason to treat it as not being akin to a Convention right. It may be objected that formalistic distinctions about the source of the right should not drive the standard of review that should apply. To that, this author would respond that the appropriate solution ought to be to recognise that certain rights merit treatment as if they were Convention rights such that proportionality review applies. A desirable result should be achieved not by obfuscating the differences between the standards of review but through the transparent articulation of policy considerations underlying a course of action.

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<sup>81</sup> *R. (AA (Afghanistan)) v Secretary of State for the Home Department* [2006] EWHC 318 (Admin); [2006] A.C.D. 44.

<sup>82</sup> *R. (AA (Afghanistan)) v Secretary of State for the Home Department* [2006] EWCA Civ 1550; [2007] A.C.D. 32.

<sup>83</sup> P. Craig, *The Nature of Unreasonableness Review*, *Current Legal Problems* Vol 66 (2013), 131-167, 145.

### Part III – Fair Balance

Thus far, much has been made of the requirement that the court must inquire into whether the decision struck a “fair balance between the rights of the individual and the interests of the community”.<sup>84</sup> This section address what the requirement entails and how it has been undertaken by the courts thus far.

The court must form an independent view of the fairness of the balance struck by the decision-maker by assessing the weight afforded as between the various considerations at play. This is different from unreasonableness review because it asks about the fairness of the balance, not its rationality, requiring the decision-maker to undertake a different sort of inquiry.<sup>85</sup> Fair balance requires assessment of whether the interests of societal welfare justify the infringement of the individual’s right. This limb of proportionality envisages that even where a decision pursued a legitimate objective, was suitable and necessary, it may not be proportionate because the balance is not fair.

It has been suggested that the courts do not undertake the “fair balance” analysis even under proportionality review with sufficient precision. In the *A* case, in particular, Rivers criticised that:

... in no judgment [in *A*] is the question squarely faced: even granted that the risk of catastrophic Al-Qaeda terrorism could not be reduced without detaining foreign suspects without trial, is this a price worth paying, taking account both of the size of the risk (*i.e.* probability of realisation and magnitude) and the cost to rights (*i.e.* intrinsic importance and extent of denial).<sup>86</sup>

It may be that in *A*, their Lordships did not get to the fourth stage of balancing because they concluded that either there was no rational relation between the aim pursued and the interference to the right of liberty, or that this level of interference was not necessary.

Lord Sumption’s reasoning in *Bank Mellat (No 2)* is in a similar vein. The case arose out of the financial sanctions imposed on the Iranian Bank Mellat, by HM Treasury under the Treasury’s Financial Restrictions (Iran) Order 2009, for its alleged connection with Iran’s nuclear weapons and missile programmes.<sup>87</sup> The sanctions were designed to prohibit British banks from dealing with Bank Mellat which alleged an interference with Article 1, Protocol 1 ECHR (the right to property). Lord Sumption, who delivered the majority judgment, drew on the *Belmarsh detainees* case to justify striking down the order on substantive grounds. He argued that, as in that case, this appeared to be a case of irrational discrimination since other Iranian banks, engaged in similar activity, were not subject to the same sanctions rendering the order disproportionate in singling out Bank Mellat.<sup>88</sup> In doing so, he did not consider the “fair balance” stage in detail and there was little need to do so. The measure had failed to meet the requirement of rational connection so there was no real need to go on to consider whether it minimally impaired the rights of the bank or indeed whether the measure struck a fair balance.

It may be suggested that ‘fair balance’ has little to offer as a separate limb such that once the court has concluded that the measure pursues a legitimate aim, is rationally related to that aim and minimally interferes with the claimant’s rights, there is little room that a fair balance was not struck as between the public interest and the individual’s rights. However, this limb allows the court to find that even if a measure meets the first three requirements of proportionality review and is defensible in

<sup>84</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167, [19] (citing *R. (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 A.C. 368; [20] (Lord Bingham)).

<sup>85</sup> D. Feldman, *Proportionality and the Human Rights Act 1998*, in E Ellis (ed), *The Principles of Proportionality in the Laws of Europe* (Hart Publishing, 1999), 117-44,128.

<sup>86</sup> J. Rivers, *The Variable Intensity of Review* [2005] C.L.J. 174, 189-90.

<sup>87</sup> *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39, [2014] A.C. 700, [1] (Lord Sumption).

<sup>88</sup> *Ibid.*, at paras [25]-[26].



general terms, as applied to a particular individual or a class of individuals, it was disproportionate. In this way, the fair balance limb focusses on the individual and their right.<sup>89</sup>

### Carlile – Ends and Means?

Yet Professor Rivers' concern remains pertinent as there have been notable cases where the final stage of proportionality was not considered. *R (Lord Carlile of Berriew)* is such a case.<sup>90</sup> The Supreme Court considered a challenge to the Home Secretary's decision to not allow Ms Rajavi, a former leader of the People's Mojahedin of Iran, to enter the United Kingdom on the ground that it would not be conducive to the public good. Lord Carlile was among the Parliamentarians who sought to invite Rajavi to speak in the Palace of Westminster on issues of democracy and human rights. The Home Secretary did not permit Rajavi to enter the UK since it would strain the country's political relationship with Iran, culminating in a threat to national security.

The Parliamentarians challenged the decision on the ground that there was an unlawful interference with Article 10 ECHR (the right of freedom of expression). The majority in the Supreme Court rejected that claim, holding that the Secretary's decision was proportionate and that she had given sufficient weight to the Convention rights. Lords Sumption, Neuberger, Clarke and Lady Hale delivered judgments finding for the Secretary and Lord Kerr dissented. The opinions of Lord Sumption and Lady Hale, notably, grappled with the issue of how to apply proportionality as a standard of review. Two noteworthy points from Lord Sumption's judgment emerge.

Primarily, Lord Sumption insisted that the court lacked institutional competence to evaluate the issue in question which involved questions of fact and included complex considerations about the international political impact of the decision. There appears to be some inconsistency with an earlier part in the judgment where, citing Lord Bingham's judgment in *Denbigh High School*, Lord Sumption recognised that the courts are required to make a "value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time."<sup>91</sup> The court is required to make such a value judgment at the "fair balance" or the proportionality *stricto sensu* stage and it is clear that this is not a factual question; it is necessarily a matter of judgment. In *A*, furthermore, Lord Bingham made clear that proportionality was not a matter of determining factual questions alone. He affirmed,

[t]he European Court does not approach questions of proportionality as questions of pure fact... Nor should domestic courts do so.<sup>92</sup>

Secondly and relatedly, while recognising that rationality was only a minimum condition of proportionality, Lord Sumption considered that the rationality limb may be the only controlling criterion available for judicial assessment in some cases, especially where the circumstances surrounding the case are posited in uncertainty.<sup>93</sup> While there will be cases where the rational relation of the measure to its stated objective will be controlling – *A* and *Bank Mellat (No 2)* illustrate this proposition – factual uncertainty should not on its own negate the requirement for fair balancing. There is no normative reason why the court cannot review the balance struck by the decision where the facts are uncertain when it is able to review the rational relation and the necessity of the measure.

A better approach to the doctrine can be found in Baroness Hale's judgment, which grapples with how the proportionality test applies under the Human Rights Act, and emphasises the relationship between democratic values and proportionality. In highlighting that the real question under the test is one of balancing ("do the ends justify the means?"), she acknowledged that this was

<sup>89</sup> Such reasoning appears to underlie the judgements Barak J. in *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04; *Adalah v. Minister of Interior* HCJ 7052/03 (Supreme Court of Israel).

<sup>90</sup> *R. (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] A.C. 945.

<sup>91</sup> *Ibid.*, at [29], citing *R. (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 A.C. 100, [29] (Lord Bingham).

<sup>92</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68, [44].

<sup>93</sup> *R. (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] A.C. 945, [32].

the “nub” of the test.<sup>94</sup> Rather than situating her judgment in reliance on the Home Secretary’s assessment of the risks involved in allowing Rajavi to have a face-to-face discussion with the Parliamentarians, Baroness Hale framed the question in terms of the balance to be struck, focussing on how much stood to be gained from the exchange of views and how much to be lost by Rajavi’s admittance into the country.

there was relatively small beer compared to what is at stake in sanctions aimed at combating nuclear proliferation... There is little to be gained from exchanging views with her, and something to be lost.<sup>95</sup>

### Do the Ends justify the Means

From the foregoing, two points are salient. Firstly, the balancing exercise necessarily engages the value judgment of the court. Secondly, the balancing exercise will in most cases boil down to the question: *Do the ends justify the means?*

In response to the first point, it may be objected that the institutional structure of the British government is such that the courts ought to defer to the special expertise of the administration who must be allowed to decide how to weigh competing interests, which might include maximisation of, or interfere with, certain individual rights. Since these choices invariably result from policy decisions, they are for the executive.<sup>96</sup> The making of these choices might require the ability to evaluate complex and vast information which judges may not have access to. Further, choosing between policies may require and/or express certain moral and political convictions, which may be regarded as being for those representing the electorate. As the Conservative party paper described it, proportionality review may be criticised for requiring the court to answer essentially political questions.

A response to the expertise-based strand of the objection is that are they are controlling only where there is a very specialised area in question, or when the issues concerned are particularly “polycentric” such that the democratically elected government ought to decide how to best address them.<sup>97</sup> The contention that courts lack the technical expertise required to assess the relative weight given to considerations by the decision-maker is a narrower claim than might first appear. Deference may be given to the primary decision-maker where there is some special expertise that the judge simply does not possess. Therefore, as Professor Feldman has observed, “technical expertise may be desirable where technical issues are under consideration”.<sup>98</sup> Issues surrounding the restriction of such rights tend not to be technical. They are typically political and moral judgments, and while the executive may have the competence to resolve such issues, their expertise is not exclusive. Thus, moral and political convictions are not merely for the executive especially where fundamental rights are engaged. As Lord Hope stressed in *A*,

We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society...<sup>99</sup>

Further, the concern that democratically unaccountable judges are able to direct policy choices of the government is not defensible if it is to be all-encompassing. In the context of the Human Rights Act, and perhaps a new British Bill of Rights, the courts do not lack the “mantle of

<sup>94</sup> *Ibid.*, at paras [98], [104].

<sup>95</sup> *Ibid.*, at para [85].

<sup>96</sup> J. Goodwin, *The Last Defence of Wednesbury* (2012) P.L. 445, 452. See also: Lord Irvine, *Judges and decision-makers* (1996) P.L. 56.

<sup>97</sup> *R. (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 A.C. 756, [30] (Lord Bingham).

<sup>98</sup> D. Feldman, *Proportionality and the Human Rights Act 1998*, in E. Ellis (ed), *The Principles of Proportionality in the Laws of Europe* (Hart Publishing, 1999), 117-44, 136-7.

<sup>99</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68, [108].

legitimacy that democracy bestows”. Indeed, they are mandated by Parliament to protect individual rights.<sup>100</sup> As Goodwin rightly contends, courts are “looking at the legality, not the correctness” of executive decisions.<sup>101</sup> However, governing and adjudicating within the framework of a Bill of Rights means that certain policy choices are no longer legally available to the executive.

As Lord Kerr observed in *R (Carlile)*, constitutional principle does not point only towards deference:

By enacting the Human Rights Act, the government has chosen to subject decisions which any public authority, including the executive or an individual minister, takes, involving interference with citizens’ Convention rights, to the courts’ independent review. In submitting to that review, the government is entitled to say to the courts, “respect our reasons for deciding why such interference is required”. It is not entitled to say, however, “you must accept our view as to the importance of the right that has been interfered with”.<sup>102</sup>

## Conclusion

This paper began by asking what standard of review should apply in a new human rights regime for England and Wales. If one follows the recent trend of treating proportionality review under the Human Rights Act 1998 and *Wednesbury* unreasonableness alike, the answer would be that it does not matter which one is chosen, because the context of a case will decide how intensive the review should be.

That proposition has been tested in the foregoing and it has been argued that there is a difference in kind between *Wednesbury* unreasonableness and proportionality review. The former cannot meaningfully review the relative weight given to competing considerations nor can it mandate the kind of assessment of the fairness of the balance struck by the decision-maker that proportionality requires. As a matter of doctrine, *Wednesbury* unreasonableness has not led the courts to engage in that kind of inquiry. Proportionality review requires the judge to undertake a value judgment independent of the decision-maker. This is the crux of the standard of review and the reason why it is capable of affording better protection to human rights. Making less of fair balance and proportionality *stricto sensu* results in the erosion of the kind of scrutiny that proportionality review requires.

### Veena Srirangam

(BA Law (Hons) (Cantab), LLM (Harvard).  
Supervisor in Law, Downing College, University of  
Cambridge)

<sup>100</sup> J Goodwin, *The Last Defence of Wednesbury* (2012) P.L. 445, 452.

<sup>101</sup> *Ibid.*, at p 451.

<sup>102</sup> *R. (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] A.C. 945, [173].