WHITE PAPER: JUDICIAL REVIEW CONFERENCE 2019

What grey areas remain over deference in claims under the Human Rights Act 1998?

What do recent cases show about the current approach of the Courts?

I. Introduction[1]

1. The proportionality of an act or impugned measure under the European Convention of Human Rights (**"the ECHR"**) is a question for the court, to be judged objectively: see *R (SB) v. Governors of Denbigh High School* [2007] 1 AC 100 per Lord Bingham at [30].

2. A court conducts a proportionality assessment according to the principles set out in (amongst other authorities), *Bank Mellat v. HM Treasury (No 2)* [2014] AC 700. That requires the court to conduct an exacting analysis of the factual case advanced in defence of the act or measure to determine whether: (i) its objective is sufficiently important to justify the limitation of a fundamental right; (ii) it is rationally connected to the objective; (iii) a less intrusive measure could have been used; and (iv) having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the rights of the community.

3. The intensity of review—i.e. the degree of weight or respect given to the assessment of the primary decision maker—will vary depending on the context. As Lord Reed observed in *Bank Mellat* the relevant context is both legal (the nature of the right asserted) and factual (the subject matter of the decision impugned) [69].

4. This paper considers some (but not all) recent developments in "*deference*", or the margin of discretion a court will give to the primary decision maker when conducting the proportionality analysis.[2] The paper address the following issues: (i) the relationship between the margin of appreciation and the margin of discretion; (ii) the current case law on the manifestly without reasonable foundation standard of review; and (iii) proportionality on appeal.

[1] Parts of this paper are based on talks given by Zoë Leventhal at the ALBA conference (July 2018) and the PLP conference (October 2018).

[2] There has been academic and judicial criticism of the word "*deference*": see *R (Lord Carlile) v. Home Secretary* [2015] AC 945 per Lord Sumption [22] who noted the word's "*overtones of cringing abstention in the face of superior status*". For this reason, this paper uses the term "*margin of discretion*".

II. The Relationship Between the Margin of Appreciation and the Margin of Discretion

(a) Definitions

5. The margin of appreciation is a transnational concept. It describes the latitude the European Court of Human Rights (**"the ECtHR"**) will allow to member states, which is wider in some contexts and narrower in others. In *Hämäläinen v. Finland* (2014) EHRR 55 the Grand Chamber of the ECtHR held that the court would apply a narrow margin of appreciation where a particularly important facet of an individual's existence or identity is at stake, but a wide margin of appreciation where no consensus between member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it (particularly where a case raises sensitive moral and/or ethical issues) [67].

6. The margin of appreciation reflects the principle articulated by the ECtHR that because of their direct knowledge of society and its needs, a national court is in principle better placed than an international judge to appreciate what is in a nation's public interest on social or economic grounds: see, for example, *James v. UK* (1986) 8 EHRR 123 at [46].

7. The margin of discretion is, by contrast, a domestic law concept. In *R v. DPP, ex p. Kebilene* [2000] 2 AC 326, 381 Lord Hope referred to "*an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention*". The reasons why a court applies a margin of discretion are: (i) institutional competence, and (ii) the democratic accountability of decision makers: see, for example, *R (Lord Carlile) v. Home Secretary* [2015] AC 945 per Lord Sumption, Lord Neuberger and Lady Hale at [32]-[34], [66]-[68], [152]-[153].

(b) The status of the margin of appreciation doctrine in domestic law

8. The following principles can be derived from the case-law.

9. First, the margin of appreciation does not apply in domestic law—it is not the same concept as the margin of discretion: see *In Re G (Adoption: Unmarried Couples)* [2009] 1 AC 173 (HL) per Lady Hale at [118]; and *R (Steinfeld and Keidan) v. Secretary of State for International Development* [2018] 3 WLR 415 per Lord Kerr at [28].

10. Second, in cases falling within the margin of appreciation that the ECtHR would allow to a member state, "*the question is one for the national authorities to decide for themselves and it follows that different member states may give different answers*": see *In Re G* per Lord Hoffmann at [31]. Which branch of government within the member state should reach that decision is also a matter for the member state: see *In Re G*, per Lord Hoffmann at [32], Baroness Hale at [118]-[119]. There is no principle in domestic law that the issue was automatically one for the legislature: see *In Re G* at [37]. Further, in cases concerning discrimination, even in an area of social policy, the issue will always be appropriate for judicial scrutiny as the constitutional responsibility in this area rests with the courts: *In Re G*, per Lord Hope, at [48].

11. Similarly, in *R (Nicklinson) v. Ministry of Justice* [2015] AC 657 (SC) a majority of 5 to 4 considered, in respect of the primary legislation that bans assisted suicide, that it was open to the court to find an incompatibility even if the ECtHR would regard the matter as within the margin of appreciation (although 3 of the 5 thought it premature to make a declaration of incapacity whilst the matter was under active consideration by Parliament).

12. But third, the margin of appreciation remains relevant in this way: where the case concerns a matter that the ECtHR would regard as within the margin of appreciation, and the approach taken by Government is rational, and where the case concerns a scheme devised to accommodate competing issues "*a court in the United Kingdom would normally be very cautious before deciding that it infringes a Convention right*", *Nicklinson* per Lord Neuberger at [75].

(c) Adjudicating consensus into the margin of discretion

13. Despite the Supreme Court saying on a number of occasions that the margin of appreciation doctrine does not apply in domestic law, courts on occasion have relied on the margin of appreciation in determining proportionality. In particular, courts have relied upon a consensus (or a lack of consensus) amongst Council of Europe member states.

14. But what relevance does consensus amongst Council of Europe member states (a factor highly material to the width of the margin of appreciation in the ECtHR) have to the domestic law question of the margin of discretion?

15. The case-law does not (yet) grapple with this issue expressly, but suggests three possible answers: (i) to signpost the width of the margin of discretion; (ii) to cast light on what decision

the ECtHR might reach on the issue; and (iii) to act as a cross-check on *Bank Mellat* question four (the fair balance test). These are addressed in turn below.

To signpost the width of the margin of discretion

16. An example of this may be seen in *R (Elan-Cane) v. Secretary of State for the Home Department* [2018] 1 WLR 5119,[3] in which the non-binary claimant contended that the defendant's to permit the use of "X" markers in passports, rather than "M" or "F" sex markers, breached their rights under articles 8 and 14 ECHR. Jeremy Baker J noted the lack of consensus in the recognition of non-binary status in Council of Europe member states, and concluded that in consequence defendant had a wide margin of discretion [128]-[129].

To cast light on what decision the ECtHR might reach on an issue

17. *In Re G* concerned the Northern Irish prohibition on couples being considered as adoptive parents on the ground only that they were not married. The claimants contended that this discriminated against them contrary to article 14 read with article 8 on the ground of their marital status. Lady Hale noted the lack of consensus amongst Council of Europe member states on opposite sex unmarried adoption [113]. Given this, and other factors, she concluded that it was unclear whether the ECtHR would regard this issue as falling within the UK's margin of appreciation.

To act as a cross-check on the fair balance test

18. On occasion, the court appears to look to consensus as a cross-check on the fair balance test by indicating when the decision maker is acting as an outlier. For example, *In Re McLaughlin* [2018] 1 WLR 4250 concerned the question of whether the restriction of widowed parent's allowance to the spouse or civil partner of the deceased breached article 14 of the ECHR, when read with article 8 or article 1 of Protocol 1 (**"A1P1"**). Having noted that the provision was not justified [37]-[39], Lady Hale went on to note that "*the great majority of member states of the Council of Europe*" provided survivor's pensions to children or their surviving parent regardless of whether or not the parents were married. This was, she noted "*evidence of a European consensus which is always relevant to the width of the margin of appreciation which Strasbourg will allow*" [41].

[3] This case is subject to an appeal to the Court of Appeal, which will be heard in December 2019.

(d) Interesting/unresolved questions

19. First, might the margin of appreciation play a greater role in domestic law? Certainly Lord Sales has given a judgment in which he held that the margin of appreciation is integral to the content of the Convention rights so that a judge must give Parliament or the Executive the full benefit of any margin of appreciation applicable.[4]

20. In *R (S) v. Secretary of State for Justice* [2012] EWHC 1810 (Admin) Sales J (as he then was) considered the lawfulness of a levy imposed on prisoners' earnings undertaken outside of the prison, where the earnings exceeded a prescribed amount. The money raised was given to Victim Support. It was argued that the levy breached A1P1.

21. Sales J held that "*the imposition of a special tax upon prisoners in receipt of enhanced earnings for the purposes of securing hypothecated funding to support the victims of crime in the present case falls well within the national authorities' margin of appreciation*" [45], and that the measure was proportionate [47]. The claimants contended that pursuant to *In Re G* the court was not entitled to rely on the margin of appreciation that the ECtHR would afford to domestic authorities, but must rather reach its own judgment [48]. Sales J rejected this argument. He stated that the "*Convention rights*" to which the Human Rights Act 1998 gives effect in domestic law are (pursuant to section 1(1)) the rights contained in the Convention "*as it has effect for the time being in the United Kingdom*", which effects are "*determined, in part, by the operation of the margin of appreciation applied by the ECtHR in determining whether there has been any violation of Convention rights*" [56]. As such [56]:

> "*The ambit of the Convention rights is directly governed by the concept of the margin of appreciation as it falls to be applied under the ECtHR's case law. Where the ECtHR applies the margin of appreciation so as to conclude that a state has not violated a Convention right when it acts in a particular way, the necessary corollary is that the Convention rights of the individual applicant did not extend to a right to require the state to refrain from acting in that way. Contrary to the submission of the Claimants, I do not think it is easy to separate out the content of the rights from the application of the margin of appreciation*."

22. The point has not been picked up since, but given the judge's elevation to the Supreme Court, is there a possibility of the argument being given another outing?

[4] This point is made by Professor Mark Elliott in his blog, *Public Law for Everyone*, in an article entitled "Is the margin of appreciation something that domestic courts should be applying?" (25 February 2013).

23. Second, what deference is appropriate in article 14 cases where the discrimination is on the basis of a "*suspect class*",[5] but it is an issue on which there is a lack of consensus amongst Council of Europe member states?

24. Where discrimination is on the grounds of a suspect class, the court must apply "*strict scrutiny*" to the assessment of any asserted justification and particularly convincing and weighty reasons to justify it are required: see *Steinfeld* at [32]. The definition of the margin of appreciation in *Hämäläinen* appears to suggest that a lack of consensus "*trumps*" discrimination on the grounds of a suspect class. In contrast, in *Steinfeld* the Supreme Court found discrimination despite a lack of consensus in Council of Europe countries.

25. Arguably the issue arises most acutely at the moment in cases concerning trans status. For example, in a current case pending before MacFarlane P (sitting as both a Judge of the Family Division and the High Court), *R (TT) v. Registrar General*, the claimant (a trans man with a gender recognition certificate who gave birth to a child) contends it is a breach of his rights under article 14 to be registered as the mother (and not the father) of the child. There is no consensus amongst Council of Europe member states that the parental status of trans men giving birth to children should be treated in accordance with their acquired gender. What then is the standard of scrutiny under article 14 ECHR?[6]

III. The Manifestly Without Reasonable Foundation Test

(a) The test

26. In cases concerning the compliance with the ECHR of a general economic or social policy, as an application of the margin of appreciation, the ECtHR has applied the "*manifestly without reasonable foundation*" (**"MWRF"**) test. Thus in *Stec v. United Kingdom* (2006) 43 EHRR 47 the ECtHR stated: "*[b]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'*" [52].

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[5] In *R (Carson) v. Secretary of State for Work and Pensions* [2006] 1 AC 173 Lord Hoffmann identified the suspect classes of discrimination as being race, gender, illegitimacy, religion, nationality and sexual orientation.

[6] It is not clear whether strict scrutiny review applies to trans status: neither the ECtHR nor the domestic case law considering trans status and article 14 addresses the point: see *PV v. Spain* (2011) ECHR 35159/09 and *Re A (Children) (Contact: Ultra-Orthodox Judaism; Transgender Parent)* [2018] 4 WLR 60 (CA).

27. The MWRF test has been applied in cases concerning social welfare benefits. For example:

(i) In *RJM v. Secretary of State for Work and Pensions* [2009] 1 AC 311 per Lord Neuberger [57]: "*[t]he fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected… Of course, there will come a point where the justification for the policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable*".

(ii) In *MA v. Secretary of State for Work and Pensions* [2016] 1 WLR 4550 Lord Toulson stated [32]: "*[t]he fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems… [is] Choices about welfare systems involve policy decisions in economic and social matters which are pre-eminently matters for national authorities*".

(b) Inroads into the MWRF test?

28. There are some circumstances in which the MWRF has been applied in an amended form, or with less rigour, namely: (i) the restriction of the MWRF test to the first (or possibly also the second and third) *Bank Mellat* questions; (ii) the non-application of the MWRF to certain subjects; (iii) cases in which the decision-maker has not properly considered the justification advanced; and (iv) cases in which a breach of an international convention is found.

<u>The restriction of the MWRF test to the first (and possibly the second and third) *Bank Mellat* questions</u>

29. In *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by General Counsel for Wales* [2015] AC 1016 the Supreme Court held that the MWRF applied to the first *Bank Mellat* question but not to the fourth (fair balance): see Lord Mance at [46].

30. After the *Asbestos Diseases* case was decided, the Supreme Court considered the issue again in *MA*. The case concerned the bedroom tax: i.e. the removal of the "*spare room subsidy*" from disabled people who needed an extra room because of their disability. The Supreme Court reiterated that the MWRF test was the correct test, but did not distinguish between the different elements of the *Bank Mellat* test. Although the *Asbestos Diseases* case was cited in argument, the Supreme Court did not consider the observations of Lord Mance as to the inapplicability of the MWRF test to the fair balance question.

31. Subsequently, in *R (A & B) v. Secretary of State for Health* [2017] 1 WLR 2492, a case concerning a challenge under article 14 ECHR to the non-availability of free abortions in England to those resident in Northern Ireland, the Supreme Court endorsed the comments of Lord Mance in *Asbestos Diseases*. Lord Wilson stated that it was "*now clear that, while this criterion [i.e. MWRF] may sometimes be apt to the process of answering the first question, and perhaps also the second and third questions [from Bank Mellat], it is irrelevant to the question of fair balance, which, while free to attach weight to the fact that the measure is the product of legislative choice, the court must answer for itself*" [33].

32. Whether the MWRF test applies to discrimination in the provision of welfare benefits (as per its original application in *Stec* and *Humphreys*) is an issue in the forthcoming decision of the Supreme Court in *R (DS & DA) v. Secretary of State for Work and Pensions* (a 7 judge panel, heard in July 2018).[7] The appellants contend that the approach in the *Asbestos Diseases* case and in *A&B* applies equally to social welfare provision (and that there is no good reason for carving it out for particular treatment). The Government contend: (i) there is no ECtHR authority in the context of social welfare provision which endorses the approach in the *Asbestos Diseases* case, (ii) there is no principled reason why the MWRF should not apply at all stages of *the Bank Mellat* test, and (iii) that the concerns that underpin the MWRF test are equally applicable throughout all four questions.

Subject matter

33. In *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820, a case concerning a challenge to the eligibility rules for student loans which required indefinite leave to remain in the UK, the Supreme Court refused to apply the MWRF test as "*education is rather different*" to access to cash welfare benefits [28]-[32]. The Court cited *Ponomaryov v. Bulgaria* (2011) 59 EHRR 799 in which the ECtHR declined to treat education as being analogous to welfare payments, and did not apply the MWRF test [32].

Consideration by the decision-maker

34. A court will consider whether or to what extent the values and interests relevant to the assessment of proportionality were actually considered when the policy choice or decision was made.

[7] Lady Hale recently indicated that *DS & DA* would be handed down in May.

35. Thus, it is clear that, where a public authority has addressed the particular issue before the court and has taken account of the relevant human rights considerations in making its decision, a court will be slower to upset the balance which was struck. Conversely, where there is no indication that this has been done, *"[t]he court's scrutiny is bound to be closer and the court may… have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider*": *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 per Lord Mance at [47].

36. Similarly, *In Re Brewster* [2017] 1 WLR 519 Lord Kerr noted that "[*t]he margin of discretion may… take on a rather different hue when… it becomes clear that a particular measure is sought to be defended (at least in part) on ground that were not present in the mind of the decision-maker at the time the decision was taken*" [50]. Post hoc reasons will "*call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised*", but "*[e]ven retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide*" [52].

37. In some recent cases in which the court applied the MWRF test, the court nevertheless found the Convention breach not to be justified because of no or no adequate justification by the decision maker:

    (i) *Mathieson v. Secretary of State for Work and Pensions* [2015] 1 WLR 3250 concerned the lawfulness of a 84 day limit on children receiving disability living allowance (**"DLA"**) when in hospital (a policy dating from 1991). The justification was that after this period, the child received care from the NHS and not from the parent. The Supreme Court applied the MWRF test [24]-[27], but concluded that the measure was not justified. There was a failure by the SSWP to undertake any contemporaneous review as to whether the justification remained accurate (and that was in the face of strong evidence from charities that parents' costs increased when children were in hospital and their presence was required—things had moved on since 1991). The Supreme Court found a breach of article 14 ECHR.

    (ii) *TP & AR v. Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin) concerned the roll out of Universal Credit (**"UC"**): the claimants were severely disabled people who lost £180 per month of their ESA (severe disability premium) when moving to UC. The backdrop was commitments by the SSWP that there would be no "*cash losses*"

at the point of transfer to UC where circumstances remained the same, and that the SDP cohort would need transitional protection. The SSWP had designed regulations so that moving a local authority boundary triggered a mandatory move to UC regardless of disability or SDP entitlement. There was no evidence that the effect of this rule on the severely disabled recipients of UC had been considered, despite the importance apparently placed on transitional protection. The court found a breach of article 14 despite MWRF being applied.[8]

(iii) *C&C v. Governing Body of a School* [2018] ELR 554 (UT) considered whether the carve out of the definition of discrimination under the Equality Act 2010 for an impairment which gives rise to a "*tendency to physical abuse*" was discriminatory against children with autism or ADHD contrary to article 14 ECHR. The Secretary of State for Education had undertaken to review or consult on the 2010 measure after a Select Committee report in 2016 which recommended it be changed, but this had not been done by the time of proceedings. The Upper Tribunal applied the MWRF standard [44] but held that there was "*absolutely nothing*" before it "*to suggest that there was any attempt actively to consider whether the regulation struck a fair balance between respective interests*" [73] and as such, the measure breached article 14 ECHR.

(iv) Compare *R (Buxton) v. Secretary of State for Work and Pensions* [2018] EWHC 2196 (Admin) which concerned whether the cap on the level of discretionary award under the access to work scheme was indirectly discriminatory against deaf users of the scheme (as BSL users had generally very high awards). The SSWP had raised the level of the cap in the course of proceedings, so that deaf BSL would get on average 90% of their needs met. The Court dismissed the claim: the SSWP had given the matter detailed, recent consideration both in public sector equality duty terms and in respect of the justification for the indirect discrimination.

38. The case law shows that a court will give appropriate weight to the considered judgment of the primary decision maker. But only if there is one. The case law shows the courts looking to see whether the justification evidence: (i) shows any contemporaneous reasons, (ii) reveals up to date thinking (if the measure is historic), and/or (iii) shows whether the Secretary of State has done the work to evaluate the competing interests.

[8] This case is subject to an appeal to the Court of Appeal.

International conventions

39. There is a line of case law in which the courts have begun to consider (without yet any clear answer) the relevance of a breach of international law to proportionality. The case law suggests the courts, in the face of major welfare reform, showing some willingness to reach for international case law, perhaps in search of a more nuanced tool than the blunt MWRF test.

40. In *Burnip v. Birmingham CC* [2013] PTSR 117 (the first "*bedroom tax*" case) the issue was whether the statutory criteria for calculating housing benefit for private rented sector by reference to one bedroom per "occupier" were indirectly discriminatory against people with disabilities who needed an overnight carer (contrary to article 14 read with A1P1). The Court of Appeal held that it was, but applied the UN Convention on the Rights of Persons with Disabilities (**"UNCRPD"**) and noted that if the correct legal analysis of the meaning of article 14 had been "*elusive or uncertain*" (it was not), Maurice Kay LJ would have resorted to the UNCRPD which would have resolved the uncertainty in favour of the claimants. He stated that the UNCRPD "*has the potential to illuminate our approach both to discrimination and to justification*" [22] (emphasis added).

41. In *R (SG) v. Secretary of State for Work and Pensions* [2015] 1 WLR 1449 (the first "benefit cap" case) the beginnings of a tussle between children's rights under the United Nations Convention on the Rights of the Child (**"UNCRC"**) and the MWRF test can be seen (although without yet coming to a head given the findings of the majority). The Supreme Court held that:
    (i) International law rights are relevant in article 14 cases: see Lord Carnwath [113]-[119]; Lord Hughes [142]-[144]; Lady Hale [211]-[218] and Lord Kerr [258]-[262].
    (ii) But not always: there must be a sufficient link between the nature of the challenge before the court and the provision of international law in question (a "*factual or legal relationship*" per Lord Reed at [89]; a "*direct link*" per Lord Carnwath at [130]; or the "*necessary connection*" per Lord Hughes at [142]).
    (iii) A 3:2 majority held that there was not such a sufficient link between article 3 UNCRC (best interests of the children) and the alleged discrimination, i.e. against women in respect of their property rights.
    (iv) The impugned measure was justified.

42. In *Mathieson* Lord Wilson found a procedural breach of article 3 UNCRC and article 7 of the UNCRD as there had been no evaluation of the child's best interests. The effect of such a breach

on justification is not entirely clear from the judgment: Lord Wilson noted only that a "*conclusion, reached without reference to international Conventions, that the Secretary of State has failed to establish justification for the difference in treatment of those severely disabled children… would harmonise with a conclusion that his different treatment of them violates their rights under two international Conventions*" [44].

43. The issue is likely to be considered further by the Supreme Court in the forthcoming judgment in *R (DS & DA) v. Secretary of State for Work and Pensions*. In particular, the Court heard argument on what weight a breach of article 3 UNCRC should have in the proportionality balance. Does it determine the justification issue? Does it usurp MWRF? Or does it just weigh heavily against the proportionality of the measure?

IV. Proportionality on Appeal

44. The role of a judge at first instance is to make his or her own assessment of proportionality, see (amongst other authorities), *SB* at [30], [34]. On appeal, however, the test for the Court is whether "*the judge erred in principle or was wrong in reaching the conclusion which he did*", *R (R) v. Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 per Lord Carnwath at [61] (citing Lord Clarke in *Abela v. Baadarani* [2013] 1 WLR 2043 and adding the emphasis). Lord Carnwath added further that for a first instance decision to be "*wrong*", "*it is not enough that the appellant court might have arrived at a different conclusion*" [64].

Sarah Hannett

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