

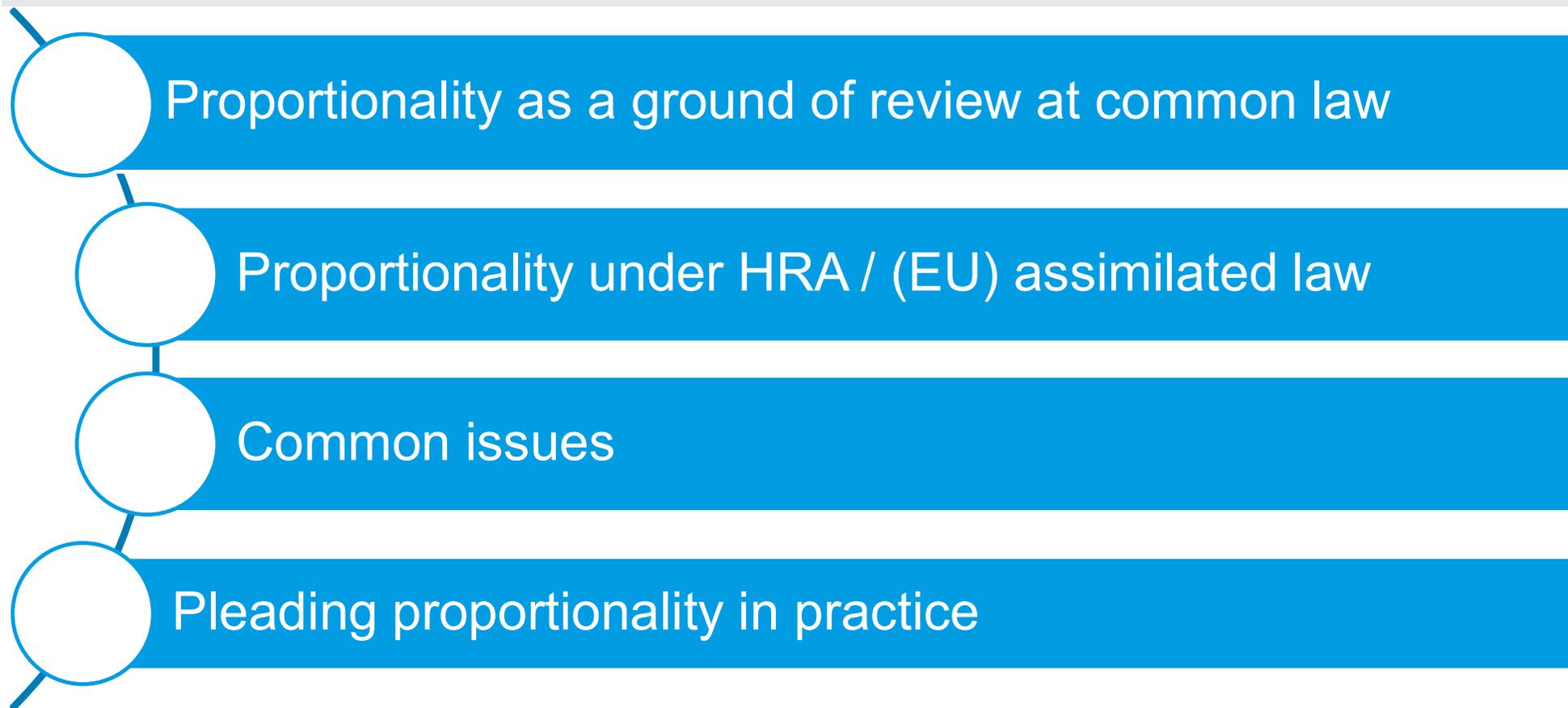
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## **Proportionality in Judicial Review Claims**

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- Proportionality as a ground of review at common law
  - Proportionality under HRA / (EU) assimilated law
  - Common issues
  - Pleading proportionality in practice

## 1. Proportionality at common law

**Not generally  
a ground of  
review**

- R v SSHD ex p Brind [1991] 1 AC 696
- Court have to substitute its decision for that of decision maker
- Possibility of development in future?

**Supreme  
Court says  
no**

- R (Keyu) v SS for FCO [2016] AC 1335
- Given “profound constitutional implications of taking such a step” could be done only by panel of nine SC Justices

## 1. Proportionality at common law

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- Will Supreme Court take that step?
- Sir Philip Sales (2013) 139 LQR 223: *Rationality, proportionality and the development of the law*
- Argued that a shift from rationality to proportionality review would be a substantive change in legal doctrine imposed by the judges without warrant from Parliament

### Do the courts apply proportionality in practice?



Penalties: administrative and disciplinary penalties are unlawful if they are disproportionate – *ex p Hook*; *Taylor v Honiton Town Council* [200

In reality, this is irrationality review – irrational to impose a penalty that is wholly disproportionate to the conduct in Q



Where stat provision authorises public body to interfere with CL constitutional right of access to justice, principle of stat interpretation that only authorises interference reasonably necessary to fulfil objective



Substantive legitimate expectations: if a public authority resiles from a substantive legitimate expectation, courts will often apply a proportionality test to judge lawfulness of public body's actions

## 2. Proportionality under the HRA

### Court to determine whether been breach of Convention rights

- Determine whether statutory provision, or act of public authority, is compatible with Convention rights
- For court to conduct objective assessment of the evidence for itself, subject to discretionary area of judgment

### Court itself applying proportionality test

- Whether interference with a qualified right is justified as necessary in a democratic society
- Right not to be discriminated against under Article 14
- A1/P1, A2/P1

## 2. Proportionality under the HRA

- 4 stage *Bank Mellat* test : structured consideration. Burden on D to establish justification/proportionality once interference made out
- Legitimate aim: is measure's objective sufficiently important to justify limitation of a Convention right?
- Rational connection: is measure rationally connected to the objective?
- Less intrusive measure: could a less intrusive measure have been used without unacceptably compromising the achievement of the objective?
- Fair balance: balance severity of measure's effects on the rights of persons to whom it applies against the importance of the objective / general interest of the community, including the rights of others?

## 2. Proportionality under the HRA

- Deference – discretionary area of judgement for decision maker. Multi factorial:  
SC
- Nature of Convention right
- Nature of public authority (widest for Parliament, wider for elected members, less for unelected officials)
- Extent to which decision involves social, economic or political issues, or moral and ethical issues
- Extent to which court has particular expertise – fair trial versus public administration
- Whether public authority has considered balance
- Consensus in Contracting States?
- Article 14 claims – suspect ground

### 3. Proportionality derived from EU law

- Proportionality a general principle of EU law. Now dead and buried in UK.
- Assimilated law – domestic legislation enacted to comply with EU law, include EU proportionality test
- Example – Equality Act 2010
- Section 19(2)(d) – indirect discrimination. A cannot show the PCP to be a proportionate means of achieving a legitimate aim.
- Legitimate aim and proportionate in many of the exceptions – e.g. single sex, separate sex exemptions in Schedule 3 to the 2010 Act
- Again, court itself has to determine whether decision is proportionate – in claim in county court, ET etc. But what if it is by way of JR?
- *R (Independent Workers Union of Great Britain) v Mayor of London* [2020] 4 WLR 112 – same approach as under HRA

### 3. EU proportionality: same as *Bank Mellat*?

Historically described in different terms to ECHR – language of objective justification

Objectively justified by a legitimate aim and means of achieving that are appropriate and necessary

*Elias* followed *de Freitas* - objective sufficiently important to justify limiting fundamental right; is measure rationally connected to objective; are means chosen no more than necessary to achieve objective

Later added a fourth stage – *Hardy & Hanson; Homer*. Fair balance. Whether can be justified includes consideration of impact of rule upon affected group against importance of aim to society/employer

### 3. EU proportionality: same as *Bank Mellat*?

- Is EU derived proportionality test the same as *Bank Mellat*?
- Short answer: yes
- BUT see *R (Lumsdon) v Legal Services Board* [2016] AC 697, suggests *Bank Mellat* is not applicable to proportionality in EU law. EAT cases also suggest may be a difference
- May use different language to describe the tests, may derive from different source. But substance of the test is the same
- Should still have margin of discretion for decision maker (principles in *ex p ITF* and *Eastside Cheese Company* similar to those in *SC*)
- Under Equality Act, will depend on identity of decision maker. Less margin for employer, individual service provider etc. Wider margin for s29 exercise of public function claims. Consider same kind of matters as outlined under HRA.
- Very unlikely to have one conclusion on proportionality under HRA, different conclusion under assimilated law

## 4. Domestic legislation requires public authority to apply proportionality test

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- Domestic statute requires public body to take a proportionate decision.
- Decision is then JRd – no HRA claim, no EU derived proportionality test
- Distinction between proportionality as a legal standard of review of a decision, and proportionately as a component of the decision under review.
- *R (British Gas and others) v Secretary of State for Energy Security and Net Zero* [2025] EWCA Civ 209
- Subsidy control principles – essentially provide public authority can only award a subsidy if it is necessary/proportionate to the policy objective being pursued
- TCA regime, given effect in domestic law by section 29 of the EUFRA 2020

Div Court – apply proportionality as standard of review, albeit light touch given commercial context

▶ SoS RN: stat regime did not require court to apply grounds or standard of review different from conventional domestic approach – i.e. rationality standard

▶ Proportionality a component of the decision to be made by public authority

▶ Standard of review of decision to grant subsidy was subject to review on conventional domestic law principles of JR. That does not include proportionality.  
Legal Q open to different conclusions, on which different DM might rationally disagree.

## 4. Bright line rules

- Proportionality test – fact sensitive test
- Applied by reference to, individual facts and circumstances of a particular case, at its heart, it is a balancing exercise
- Examine whether a rule is proportionate by examining the impact on persons to whom it applies.
- Some cases – courts have recognised it is permissible to have a “bright line” or “blanket” rule.  
Fact insensitive – individual cases are determined by abstract rules, without considering particular factors of individual case.
- Q whether rule is proportionate generally, not tested by outcomes in hard cases.
- At fair balance stage, consider whether bright line rule has been drawn in such a way that it reflects a relevant difference between substantial majority of cases that fall on either side of it

## 4. Bright line rules

### When can you have them?

- Legislation – Parl can enact bright line/general rule – social welfare benefits, controversial social policy.
- Minimises costs of administration of social welfare scheme, consistency, reduce risk of abuse
- No bright line rule in policy (fetter?)
- *R (Z) v Hackney LBC* - charity

### When are they lawful?

- Prop test applied to bright line rule itself
- Hard cases falling on wrong side do not invalidate the rule.
- Can still be disproportionate: see *Tigere* (bright line drawn in wrong place)
- *Re Abortion Services (SAZ)* [2023] AC 505 at §35

## 5. Pleading proportionality

- Where proportionality review is permitted, how should claim be pleaded?
- Address each element of *Bank Mellat*. Relatively easy to establish legitimate aim, rational connection
- Less intrusive measure – practical reality, C needs to identify alternatives. No duty on DM to prove positively that no other measure could be as effective. Not required to consider all possible alternatives, including those never suggested by consultees
- Balance – putting all factors in the mix. C focus on impact on claimants and others in similar situation. D focus on objective pursued and impact on that if rule changed.
- Cases turn on intensity of review/breadth of discretionary area of judgment. Address that first. C wants it to be narrow, D wants it wide.
- D: are you relying on a bright line rule?