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PROPORTIONALITY

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THE STARTING POINT

- European Convention on Human Rights (“ECHR”)/Human Rights Act 1998 (“HRA”) proportionality is a useful starting point
- Described in Bank Mellat v HM Treasury (No. 2) (2013) UKSC 39, (2014) AC 700 (“Bank Mellat”) by Lord Sumption, at paragraph 20
- Proportionality depends upon “an exacting analysis” of the factual case advanced in defence of the measure
- Four requirements which, although logically separate, in practice overlap, because the same facts are likely to be relevant to more than one of them.

THE BANK MELLAT REQUIREMENTS

- (1) Whether the objective is sufficiently important to justify the limitation of a fundamental right;
- (2) Whether the measure is rationally connected to the objective;
- (3) Whether a less intrusive measure could have been used; and
- (4) Whether a fair balance has been struck between the rights of the individual and the interests of the community, having regard to the above matters and the severity of the consequences.

OTHER RECENT SUPREME COURT DECISIONS 2014

- Kennedy v Charity Commission [2014] UKSC 20, [2015] AC 455 concerned a challenge to the refusal of the Charity Commission to provide to a journalist information about its investigation into George Galloway's Mariam Appeal
- R (Lord Carlile of Berriew) v Secretary of State for the Home Department [2014] UKSC 60, [2015] AC 945 was a challenge to restrictions imposed on an Iranian dissident entering the United Kingdom in order to speak to Parliamentarians

OTHER RECENT SUPREME COURT DECISIONS 2015

- Recovery of Medical Costs for Asbestos (Wales) Bill (2015) UKSC 3, (2015) AC 1016, was a challenge to the legislative competence of the Welsh Assembly
- R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6, [2015] PTSR 322 concerned a challenge to the Secretary of State's decision as to how EU structural funds should be distributed
- Pham v Secretary of State for the Home Department (2015) UKSC 19, [2015] 1 WLR 1591 was a challenge to a decision by the Secretary of State to deprive a person of his British citizenship on the ground that he was suspected of involvement in terrorism
- R (Lumsdon) v Legal Services Board [2015] UKSC 41, [2016] AC 697 involved a challenge to the quality assurance scheme for advocates appearing in criminal trials on the ground that it was said to breach EU Regulations
- R (Tigere) v SoS for BIS (2015) 1 WLR 3820, (2015) UKSC 57 was a challenge to the blanket exclusion from student loans based on immigration status
- R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, (2016) AC 1355 was a challenge to a decision not to hold a public inquiry into the shooting by the British Army of 24 unarmed people in Malaya in 1948

OTHER RECENT SUPREME COURT DECISIONS 2016

- Mirga v SSWP, Samin v Westminster Council (2016) UKSC 1, (2016) 1 WLR 481: proportionality exercise not necessarily required in every case in which right is invoked
- Youssef v SSFCO (2016) UKSC 3, (2016) AC 1457: proportionality in relation to “fundamental”/”important individual” rights

OTHER RECENT SUPREME COURT DECISIONS 2017

- In the Matter of an Application by Denise Brewster for JR (NI) (2017) UKSC 8: eligibility for survivor's pension of unmarried partner of public service employee
- Tigere distinguished, on margin of appreciation
- No rational connection between objective (establishing the existence of a cohabiting relationship equivalent to marriage or civil partnership and identifying wishes of scheme member) and imposition of requirement (that unmarried cohabiting partners be nominated by their pension scheme member partner in order to be eligible for a survivor's pension)
- Failure to meet Bank Mellat 3rd and 4th standards: Brewster paragraphs 66/67

KENNEDY AND PHAM

- A move towards common law proportionality

2017 Continued

- R (Hicks) v Metropolitan Police Commissioner (2017)
UKSC 9
- Policing Royal Wedding: preventive arrest and detention for short time held to be lawful
- Balancing need to protect individual from arbitrary detention and not making it impracticable for police to perform their duty to maintain public order and protect the lives and property of others
- Keeping a “grasp of reality” and the practical implications is “central to the principle of proportionality” which is embedded not only in ECHR Article 5 but is also part of the common law relating to arrest for breach of the peace (para 30)

LUMSDON

- Flexibility inherent in EU approach to proportionality
- Two basic questions:
 - Whether measure is suitable to achieve objective pursued
 - Whether it could be obtained by less onerous method
- Proportionality need not prescribe any specific level of scrutiny

LUMSDON APPLIED

- Uber London Ltd v Transport for London, Mitting J, 3 March 2017
- Requirement upheld as proportionate that a private hire vehicle operator's drivers should pass an English language test
- But further requirement, to maintain round the clock telephone service, quashed: less intrusive alternative available

KEYU

- Judicial review of refusal to hold public inquiry into killings
- Refusal neither irrationality nor disproportionate
- Argument raised that irrationality should now be replaced by proportionality in domestic judicial review cases
- Not appropriate to rule on argument without 9 SCJ panel
- Proportionality is not substitution of judicial reviewer's opinion for that of primary decision maker

PROPORTIONALITY UNDER THE ECHR

- Now no doubt that domestic Courts will apply the Bank Mellat four-part test for proportionality under the ECHR/HRA
- The application of this test involves the Court in a value judgment
- In particular, the Court, at the 4th stage, is striking a balance between (1) the importance of the objective pursued and (2) the value of the right intruded upon
- Nonetheless primary decision-maker has an area within which its judgment will be respected, depending upon for example:
 - the nature of the decision
 - the decision-maker's expertise
 - the decision-maker's sources of information

PROPORTIONALITY UNDER EU LAW

- Not the same as under the ECHR!
- See Lumsdon

COMMON LAW

- Proportionate to what?
- If no (fundamental) right engaged, what is there to which proportionality principle can be applied/what balance with public interest is to be struck?

BRITISH AMERICAN TOBACCO (“BAT”) (1)

- R (BAT) v SoS for Health (2016) EWCA Civ 1182, Court of Appeal, 30 November 2016
- Appeals dismissed from dismissal of claims for judicial review of Standardised Packaging of Tobacco Products Regulations 2015
- Ability of tobacco companies to place branding on outer packaging or tobacco products themselves limited

BAT (2)

- Proportionality challenge
- Regulations would fail to meet their stated objective of improving public health and as such were not suitable and appropriate
- Regulations were not necessary, because less extreme measures of equal efficacy could have been adopted
- Regulations failed to strike fair balance between the public interest and the tobacco companies' private rights of property

BAT (3)

- Common ground that Regulations had to be justified by reference to EU principle of proportionality and in context of ECHR A1P1
- Relevant principles as per Bank Mellat, Lumsdon and CJEU in Scotch Whisky as regards public health justification
- Assessment of proportionality is an evaluative exercise on the part of the first instance Judge, the function on appeal is to review the Judge's decision, not to make an independent evaluation, and an appellate Court will be extremely slow to interfere with the conclusions of a first instance Judge in relation to an issue of this kind unless they are shown to be vitiated by error of law

POSTSCRIPT

- Proportionality may also be a statutory concept
- For example, Section 8(2) of Data Protection Act 1998 refers to “disproportionate” effort in the supply of copies of personal data pursuant to a Subject Access Request (which should be complied with if at all possible)
- No disproportionality in Dawson-Damer v Taylor Wessing LLP (2017) EWCA Civ 74

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