

## TACKLING HUMAN RIGHTS CLAIMS

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1. This paper has two inter-related objectives. First, to highlight some important differences between judicial review claims raising human rights points and those that do not. Secondly, to show how those differences affect the way in which a claim can be defended. Consistently with the theme of today's series of talks, I have concentrated on the procedural and tactical considerations that a human rights challenge can bring into play. Sometimes these work to the advantage of the defendant, sometimes to its disadvantage, but in any case it is important that those defending the claim understand the potential implications of the human rights ground being raised.
2. This paper refers to three important features of human rights judicial review, and seeks to set out some of the practical implications of each. The three features I have chosen to highlight (there are no doubt more) are as follows:
  - (1) The merits based approach to human rights judicial review, which has been re-affirmed recently by the House of Lords in *Nasseri v Secretary of State for the Home Department* [2009] UKHL 23.
  - (2) The need for the defendant to show that there exists a proper justification for an interference with Convention rights (and I have included in this part of my paper consideration of the margin of discretion given to decision-makers and the related question of the intensity of review of the decision undertaken by the courts)
  - (3) Largely following from the first two matters, the extent to which evidence may be treated differently in human rights judicial review.
3. All defendants faced with a claim raising a human rights ground need to undertake some preliminary sifting of the claim in order to ask and answer certain basic questions at the outset, such as, what is the right the claimant is relying upon? Is the claimant someone who can raise that right? Is that right prima facie engaged? These are important questions that must not be overlooked, and I therefore mention them at the outset. But assuming they are all answered against the defendant so that they present no immediate knock-out blow, what are the other tactical and procedural considerations that should then come into play?
  - (1) **The merits based approach and its implications**
4. The first and perhaps most fundamental difference between JR proceedings raising human rights claims and those that do not, is the extent to which the court is prepared to, or indeed must, assess the merits of the case and not merely the way in which the decision was reached.
5. Traditionally, judicial review is about process, not outcomes. Lord Keith reminded judges in *R v Secretary of State for Trade and Industry ex p Lonrho Plc* [1989] 1 WLR 525 at 535 that they should be mindful of

“the danger of . . . wrongly though unconsciously substituting their own views for the views of the decision-maker . . . The question is not whether the Secretary of State came to a correct solution or to a conclusion which meets with the approval of the . . . Court but whether the discretion was properly exercised.”

6. This is bread and butter administrative law, too trite to mention, or so you may think. But the distinction between merits and legality has been largely eroded by a series of recent House of Lords cases, so that in human rights cases judges are now criticized for falling into the error of believing that they were simply reviewing the legality of the decision rather than its merits. I should say at the outset that the case law, even at the House of Lords level, is not entirely consistent, and the implications of the merits based approach have not really been explained satisfactorily.
7. The extent to which the courts will examine the merits on a judicial review claim was put starkly by Lord Hoffman in the recent immigration case *Nasseri v Secretary of State for the Home Department* [2009] UKHL 23. The case concerned the compatibility of a provision in the Asylum and Immigration (Treatment of Claimants) Act 2004 which deemed that returning an asylum seeker to certain EU member states where his claim would be determined was not a breach of article 3 ECHR (which prohibits torture and inhuman and degrading treatment). In explaining why the first instance judge had erred, Lord Hoffman said at [12]:

“It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State’s decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach when the challenge is based upon an alleged infringement of a Convention right.”

8. He cited the House of Lords’ earlier decision in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 (a case on article 9 and the right to freedom of thought and religion), where he had said at [68]:

“In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result . . .”

9. In *Belfast City Council v Miss Behavin’ Ltd.* [2007] UK HL 40, Baroness Hale observed at [31]

“In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not whether the administrative decision maker properly took them into account.”

10. It would be inaccurate to suggest that the law is as clear cut as the above citations would suggest. There are many cases where the courts – including the House of Lords – have taken a more orthodox approach. Thus in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, the Asylum and Immigration Tribunal’s decision was quashed because it had relied upon an adjudicator’s decision which had not accurately or adequately addressed the issues that needed to be considered under article 8 of the Convention. This approach appears to be no different to the material/immaterial considerations ground of review. And none other than Lord Steyn said in his speech in the celebrated case of *R (Daly) v Secretary of State* [2001] 2 AC 532 at [28]:

“It is . . . important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, . . . the respective roles of judges and administrators are fundamentally distinct and will remain so.”

11. It would be tempting to discuss the implications of this merits based approach for the development of administrative and indeed constitutional law, but that is not what today’s series of talks is about. My focus is a practical one: from a defendant’s perspective, what are the implications of the merits based approach when defending a claim?
12. The first point to make is that the merits based approach provides a basis upon which a defendant can credibly argue that although there may have been glitches in its decision making process and its reasoning, its decision should nevertheless stand because the outcome was not an infringement of the claimant’s Convention rights. Lord Rodger put the matter in this way in *DS v Her Majesty’s Advocate* [2007] UKPC D1 at [82]

“ . . . the House of Lords has made it clear that the decision on the compatibility with the Convention rights of any legislative provision or of any act of a public authority does not depend on the anterior reasoning of the body concerned. If the Court examines the matter objectively and comes to the conclusion that a provision or action is indeed compatible with the Convention, the fact that the reasoning of the decision-maker may have been flawed is irrelevant for Convention purposes.”

13. Logically it must follow that even if the defendant’s reasoning failed to identify relevant Convention rights, or even if the defendant did not realize that the claimant’s Convention rights were engaged,<sup>1</sup> it may nevertheless be argued that the outcome was compatible with the Convention and therefore the decision ought not to be quashed. The merits of the defence in such a case would then turn upon the particular circumstances of the case: in particular the nature of the alleged interference, and any

<sup>1</sup> I appreciate that this sounds odd, but the relationship between the merits based approach and the common law grounds of judicial review is not clear. Is there an obligation to take into account a claimant’s human rights, even if the outcome of the decision is judged to have been compatible with them?

justification which can be advanced for it. For the same reason, if a challenge alleging a breach of Convention rights focuses on the form of the decision (such as a criticism of the reasoning and its structure), it should be examined closely to see if this can be exploited as a weakness in the claim.

14. Secondly, it follows that a defendant can legitimately marshal its case around the substance of the decision under challenge.
15. The *Denbigh* case provides a good illustration of this. This was a case where a school had a clothing policy which forbade the wearing of a kind of Muslim dress called a Jilbab, which is a long, loose fitting, black coat like garment that covers the body. The challenge was brought by a Muslim girl who wished to wear the Jilbab at the school. She alleged that the school policy infringed her rights under article 9 ECHR (freedom of thought and religion).
16. The challenge succeeded in the Court of Appeal. The Court accepted that it was open to the school to ban this particular form of dress, but held that the claimant's rights had been violated because the school, in considering their uniform policy, had not approached its decision in the right way. The Court of Appeal's decision was overturned in the House of Lords. Of its approach, Lord Hoffman had this to say at [66] to [68]:

“In the end, however, the Court of Appeal did not decide that the school could not justify its uniform policy. Brooke LJ . . . thought that the school had infringed Shabina's rights under article 9 because it had not reached its decision by an appropriate process of reasoning. It should have set itself an examination paper with the following questions:

1. Has the claimant established that she has a relevant Convention right which qualifies for protection under article 9(1)?
2. Subject to any justification that is established under article 9.2, has the Convention right been violated?
3. Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
4. Did the interference have a legitimate aim?
5. What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
6. Was the interference justified under article 9.2?

67. The school's method of working out the problem, as disclosed in the witness statements filed on its behalf, did not suggest that it had adopted this procedure at all. It had decided that a uniform policy was in the general interests of the school and then tried to devise a uniform which satisfied as many people as possible and took into account their different religions. When Shabina refused to wear the uniform, they did not "explore the reasons why [she] sincerely believed that she must wear [the jilbab]". They simply said that the policy was in place and that if she wanted to come to school she must wear the uniform.

68. Quite apart from the fact that in my opinion the Court of Appeal would have failed the examination for giving the wrong answer to question 2, the whole approach seems to me a mistaken construction of article 9.

.....

The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law." (underlining added)

17. Thirdly, as the above passage acknowledges, the merits based approach does not mean that the form of reasoning adopted is irrelevant. The way in which the decision was approached may assist in persuading the court that it was lawful. This is obviously right, because the fact that a decision maker has approached his decision in demonstrably the right way increases the likelihood that he got the answer right. Context will be important here: more may be required of a judicial or quasi judicial decision maker than is required of a lay committee.

18. Fourthly, and importantly, while the flexibility inherent in the merits based approach may give greater lee-way to decision makers, there is a downside which is that technically immaculate reasoning will not assist the defendant if it gets the answer wrong. As Lord Hoffman said in *Nasser* at [14]:

“The other side of the coin is that, when breach of a Convention right is in issue, an impeccable decision-making process by the Secretary of State will be of no avail if she actually gets the answer wrong.”

19. This means that in Convention rights cases, the customary ‘bullet proofing’ of reasoning by a legal audit so that, for example, the decision shows that all and only relevant considerations were taken into account, may not succeed in protecting the decision from a successful challenge.

20. The merits based approach will inevitably involve scrutiny of the defendant’s justification for the decision. That is the next matter I wish to comment upon.

## **(2) Justifying an interference with Convention rights**

21. In non-human rights judicial review claims, the burden of proving that there are grounds for quashing the decision rests on the claimant. Often the practical effect of this is that the defendant is given the benefit any doubt: it is not enough for the claimant to show there might have been an error of law; he must establish that there has in fact been one (see for example *R v the Governors of the Bishop Challoner*

Roman Catholic Comprehensive Girls School ex p Choudhury [1992] 2 AC 182 at 197E).

22. Human rights cases are different. Once the claimant has established a prima facie case that his rights under the Convention have been interfered with, it is for the defendant to show that there is a justification for the interference. Justification will usually be done in one, or both, of two ways. First, through evidence. Secondly, by argument whether in written submissions (such as the summary grounds of resistance) or orally before the court.
23. This means that the burden effectively shifts to the defendant to show that it made a lawful decision, rather than it resting with the claimant to show that the defendant acted unlawfully. In practice of course, and since the court system is adversarial, both sides tend to do what they can to prove their respective cases whether the claim raises human rights grounds or not. But there are particular considerations that come into play when showing justification for an interference with Convention rights and it is to these that I now turn.
24. First, the defendant's evidence will often be more important in a Convention rights claim than in a non-Convention rights claim. I deal with evidence below in the last part of this paper, but there are some general observations worth making at this stage. At the pre-permission stage there is no express procedure for filing witness statements, although the acknowledgement of service form has a statement of truth on it and therefore facts given in the acknowledgement of service can be relied upon as evidence. Advisors need to consider carefully whether the balance of advantage in trying to defeat a claim at the permission stage lies in putting in additional evidence at that time, or whether they should hold back until the permission decision is taken. The considerations here are the same as in any case. Often additional evidence can make the lack of merit in a claim clear. On the other hand, a defendant who looks as though he is trying too hard by putting in substantial additional material at the pre-permission stage can create the impression that the case is clearly arguable, particularly in the eyes of a busy judge faced with a number of paper applications to determine. Whatever view is taken, it is sensible for advisors to gather together relevant evidence at the outset of the claim, so that a clear view of the merits of the case can be gained at the outset.
25. Secondly, traditional Wednesbury reasonableness really has no part to play when justifying an interference with Convention rights. Defendants must show that an interference was proportionate to the legitimate aim being pursued by their action, and not merely that it was not unreasonable (see Daly v Secretary of State [2001] 2 AC 532 at [26], and Huang v Secretary of State [2007] UKHL 11 at [13]). The familiar defendant's refrain that it took into account all material considerations and reached a judgment that was not perverse will not suffice. In practice this means that defendants must bring to bear substantive justification for its decision rather than relying on mere judgment.
26. Thirdly, while decision-makers may not need to approach decisions involving human rights in a structured way, judges almost invariably do (and see the extract from Denbigh quoted above). Written and oral submissions will be more persuasive if they

set out clearly a structured approach to proportionality, drawing upon the decision maker's reasoning and relevant material and spelling out why the decision was proportionate.

27. Fourthly, defendants need to be ever aware of the context of the decision, because the context colours the approach that the court will take to assessing whether the decision is compatible with Convention rights or not. By context, not only is the particular Convention right claimed an important factor, but the social and legal context in which the claim is raised will also be important. Two important and inter-related aspects of the courts' approach which are affected by context are, first, the area of discretion given by the courts to a decision-maker to make choices between the individual's rights and the needs of society. This will differ depending on the context. Secondly, the level of scrutiny applied by the court to the defendant's justification for its decision.
28. Thus in *Denbigh*, although the right involved was the important right to freedom of conscious and religious expression, Lord Hoffman noted that Parliament had left it to individual schools to decide their own uniform policy at a local level. Therefore an area of discretion had to be allowed to the school to make its own judgments about the relative priority to be accorded to the wishes of the individual pupil on the one hand, and the wider school community and the needs of education on the other. By contrast, where the right in issue is an unqualified right such as the right to life (art. 2), some, but only a limited amount of deference will be given to the decision-maker and the intensity of the court's examination of the justification advanced for the decision will be greater (see for example *R (Bloggs) v Secretary of State* [2007] EWCA Civ 686 at [64]). Where rights are qualified but the level of interference with them is severe, again the court can be expected to scrutinize the decision closely and seek particular justification from the defendant.
29. Finally, an interesting aspect of justification and the margin of discretion given to decision-makers is to be found in the so-called "bright line rule". This rule is most often seen in defences to legislation. In essence it recognizes that the legislature may sometimes need to enact law with a broad brush based upon general categories of case, even though as a consequence there may be individual cases that appear to be treated harshly by the rule in question. Where this happens, the effect of the rule on those individuals may not mean that the rule is disproportionate, provided that a proper assessment has been made of where the line should be drawn. In *Wychavon DC v Secretary of State* [2007] EWCA Civ 52, the claimants, who were Gypsies, argued that the provisions of planning enforcement legislation that exempted residential dwellings from the operation of stop notices but not residential caravans were discriminatory and in breach of the Convention. Richards LJ considered the bright line rule when assessing the choices which the legislature had made, holding at [56] to [61] as follows:

56. Another general point to consider arises out of the fact that, as Mr Sales submitted, Parliament in this case has adopted a "bright line rule". Prior to 1991, stop notices were available in any case except a dwellinghouse or residential caravan; and the change in 1991 involved an adjustment of the bright line by taking residential caravans out of the exemption and including them in the general category where stop notices were available. Thus at all material times there has been a clear-cut basis of distinction between the

exempt category and the generality of cases. Stop notices cannot be applied at all to cases within the exempt category, whereas their application to other cases depends on a fact-sensitive assessment in each individual case.

57. There is no objection in principle to the adoption of a bright line rule; and provided that the rule adopted falls within the margin of appreciation or discretionary of judgment allowed to the legislature, it cannot be impugned on the ground that a different balance might have been struck or that a less restrictive rule could have been devised. For example, in *James v United Kingdom* (1986) 8 EHRR 12, concerning the rights of acquisition conferred on tenants by the Leasehold Reform Act 1977, the Strasbourg court rejected a submission by the applicant landlords that the legislation should have provided for independent consideration of the justification for enfranchisement in each particular case. It held, at para 68, that such a system might have been possible, but “Parliament chose instead to lay down broad and general categories within which the right of enfranchisement was to arise” and that the system chosen could not be dismissed as irrational or inappropriate.

58. So too in *Blecic v Croatia* (cited above), at para 64, the Strasbourg court stated:

“The Court accepts that where state authorities reconcile the competing interests of different groups in society, they must inevitably draw a line marking where a particular interest prevails and another one yields, without knowing precisely its ideal location. Making a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves balancing conflicting interests and allocating scarce resources on this basis, falls within the State's margin of appreciation.”

59 A further strong statement to similar effect is to be found in *Evans v United Kingdom* (2006) 43 EHRR 21, in the context of IVF treatment where the State was held to have a wide margin of appreciation. The court stated, at para 68:

“The Court accepts that a different balance might have been struck by Parliament, by, for instance, making the consent of the male donor irrevocable or by drawing the ‘bright-line’ at the point of creation of the embryo. It notes in this regard that the latter solution has been adopted in a number of Member States of the Council of Europe. However, the central question in terms of Art.8 of the Convention is not whether a different solution might have been found by the legislature which would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article ....”

At para 74 the court held that the reasons given for finding that there was no violation of article 8 also afforded a reasonable and objective justification under article 14. Mr George pointed to passages in the dissenting opinion of

two members of the court in which it was stated that exceptions to a bright line rule should be allowed where the rigid application of such a rule could lead to irreparable harm or to the destruction of the essence of one party's rights; bright line legislation is exceptional and must be strictly scrutinised by the court. It suffices to note, however, that that more limited approach towards bright line rules did not represent the reasoning of the majority of the court.

60. Examples of domestic cases in which bright line rules have been found acceptable are Hooper (cited above), where Lord Hoffmann observed at para 16 that “[n]o doubt means testing would have been more discriminating but the use of more complicated criteria increases the expense of administration and reduces take-up by those entitled”; and Carson, where Lord Walker concluded at para 91 that “[d]emarkation lines of this sort have to be reasonably bright lines, and the task of drawing them is ... ‘peculiarly a legislative task and an unavoidable one’”.

61. All of this means that the provision in the present case is not automatically open to challenge on the basis that a less restrictive solution would have been possible . . . .”

30. The bright line rule will not always be available to decision-makers. In particular, it is doubtful that it would rescue a challenge based on the application of policy, where a blanket approach to all cases is likely to infringe the Convention and common law principles. However, it may find an application in challenges based upon the effect of primary and secondary legislation and statutory orders.

31. Since assessing proportionality and therefore justification for an interference is fact sensitive, careful consideration needs to be given to questions relating to evidence. I turn to this now.

**(3) Approaches to evidence in human rights judicial review**

32. Traditionally, judicial review is carried out on the papers without live witness evidence. A power to order cross examination exists but it is rarely exercised. Similarly, the court has the power to order discovery but again this is rarely used. Furthermore, in many cases defendants choose not to exercise their entitlement to put in evidence because the core documents relevant to the decision taken are usually put in with the claim form. As a general rule, witness evidence will be accepted as truthful unless it is contradicted by “*undisputed objective evidence inconsistent with that of the witness which cannot sensibly be explained away (in other words, the witness’s testimony is manifestly wrong)*”: *R(S) v Airedale NHS Trust* [2002] EWHC 1780 Admin at [18].

33. Because the assessment of proportionality is fact sensitive, the burden of justifying the decision lies with the defendant, and the court may take a more merits based approach, judicial review claims involving Convention rights may require different approaches to the evidence than more normal forms of judicial review.

34. Where the claim involves an allegation that the application of a policy would lead or has led to an unjustified interference with Convention rights, the court may find it

necessary to investigate in close detail the background to the policy, in particular the evidence on which it was based. Thus in *R (P) and (Q) v Secretary of State* [2001] EWCA Civ 1151, the Court of Appeal considered a challenge to the application of a prison service policy requiring female prisoners to be separated from their children before the children were 18 months old. In holding that the prison service had to reconsider the application of its policy to one of the claimants, the Court of Appeal undertook a detailed and close examination of the background to the policy and the evidence supporting it, including the details of investigations undertaken by an expert working group, the concerns of the Prison Service that the policy was aimed at addressing, and the impact of its application on the claimant. In doing so, the court expressly recognized that it was following the approach to assessing proportionality required of it by the House of Lords decision in *R (Daly) v Secretary of State* [2001] UK HL 26.

35. Defendants therefore need to be alive to prospect of having to produce substantial evidence to justify their decision. Failure to do so may mean that the burden of justifying the interference is not discharged in a case where it could have been. Note that the courts may be more willing to order disclosure of documents in cases concerning Convention rights, since the court will need to decide whether proportionality can be fairly assessed in the absence of documents which the defendant has not disclosed: *Tweed v the Parades Commission* [2006] UKHL 53 at [38]. Defendants therefore need to tread carefully when embarking on the defence of a claim in circumstances where sensitive documents may be sought by the claimant, and an assessment of the merits of an application for disclosure and of the merits of the claim if disclosure is ordered may need to be undertaken.
36. The court's obligation to scrutinise the justification for an interference with Convention rights may also lead to a greater willingness to order cross-examination and live witness evidence, though it has been held that this will rarely be necessary: see *R (N) v M and others* [2002] EWCA Civ 1789 at [36] and [39].

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