

## PROPORTIONALITY AT COMMON LAW: ANOTHER FALSE DAWN

If it is a truism that hard cases make bad law, it can be equally true that easy cases are capable of creating, or perpetuating, questionable propositions of law. Academic engagement with the detailed reasoning of judges has a tendency to focus on only one aspect of how the common law develops. In an avowedly incrementalist system, the way in which the arguments are advanced and the facts upon which they are based significantly frame the outcome. If an ambitious or novel argument is run badly, or on facts which are not well-suited to it, the impact can go beyond the individual case: the court may express its conclusions in terms which preclude the same argument in future, better, cases. *Browne v Parole Board of England and Wales* [2018] EWCA Civ 2024 is such a case.

The long-running academic debate about whether or not proportionality should function as a free-standing ground of judicial review at common law, outside the application of the Human Rights Act 1998 or EU law, is precisely the sort of context in which the trend of the case law can easily be tilted by a particular case. The argument for proportionality at common law has been reinvigorated to some extent over the last few years with a succession of Supreme Court judgments which have appeared to indicate support for moving away from the rationality standard: see especially, *Kennedy v Charity Commission* [2014] UKSC 20, [2015] A.C. 455; *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591; and, to a lesser extent, *R. (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] A.C. 1457. *Kennedy* and *Pham* were cases in which the discussion of the common law standard of review took place in a context of arguments seeking to apply proportionality under Convention rights and EU law respectively, whereas *Youssef* was a common law challenge to inclusion in a UN sanctions list which sought to adopt the proportionality standard outright. Practitioners have not been shy in seeking to expand the breadth of judicial review on the basis of dicta from these cases, but the courts have been reluctant to engage with a wider role for proportionality at common law in detail. The Supreme Court declined to decide upon the wholesale replacement of rationality review with a structured proportionality analysis in *R. (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] A.C. 1355, both because the claim failed whatever standard applied and because a larger constitution of the Court was required for such a step. The door, accordingly, could have been left ajar for a case with the right facts.

Mr. Browne was serving a prison sentence for a particularly violent burglary and assault. He was released on licence, whereupon he repeatedly

breached the terms of a non-molestation order his ex-partner had obtained against him, and he was recalled to prison. The Parole Board had to consider whether the risk he posed was manageable in the community, or whether he should be detained for the remainder of his sentence. The Board set out detailed reasons why it concluded in favour of detention, having assessed Mr. Browne to pose a high risk of causing serious harm to his ex-partner, a medium risk of serious harm to children and members of the public, a medium risk of general re-offending and a low risk of violent re-offending. If these appear unpromising facts for an attempt to push the boundaries of judicial review outwards, they were not helped by a claim which sought to attack the Board's risk assessment of serious harm on rationality grounds alone. Nor, as Coulson L.J. pointed out for the Court of Appeal, was the application of proportionality even raised as a ground of appeal, but it appeared only obliquely in the skeleton argument seeking permission to appeal. Permission had, however, been granted, and the Court of Appeal addressed the application of proportionality in principle, and in the factual context.

Coulson L.J. held in no uncertain terms that rationality and not proportionality was the applicable standard of review as a matter of principle. A long list of previous challenges to the Parole Board was cited as authority for the proposition that rationality had been accepted and applied as the appropriate basis for a challenge to an assessment of risk. Coulson L.J. did, however, accept (at [52]) that the enhanced rationality standard of anxious scrutiny was likely to be applicable in the context of the liberty of the claimant. The Court then went on to consider judicial review case law more generally to address the argument that the common law had developed to adopt proportionality as the general test. Coulson L.J. cited authorities such as *R. v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 to establish that proportionality required the express sanction of the highest court to establish it as having a role at common law. He held that cases such as *Pham* and *Youssef* had deliberately declined to take the law further, and that the approach of the majority in *Keyu* was binding authority for the proposition that the common law test for judicial review was based on rationality, and that any more widespread change would require a major review of the authorities by the Supreme Court (at [58]).

Coulson L.J. is clearly right as a matter of pure authority. Singh L.J. agreed; oddly, Arden L.J. declined to express a view on proportionality as the relevant test. Yet *Browne* was a conspicuously unpromising case in which to persuade the Court of Appeal to accept a proper basis for suggesting an appellate move towards proportionality. In a case with more appealing facts, in which the point had been properly pleaded and advanced below, the nuances of the judgments in *Kennedy*, *Pham* and in *Youssef* (itself a common law context) might have provided a springboard for encouraging the Court of Appeal to recognise the attractions of moving

towards proportionality at common law. Instead, the possibility has been firmly dismissed, and there is one further appellate authority against a more attractive future case.

Of greater analytical interest is the alternative analysis adopted earlier in *Browne* that proportionality, even if available, was inappropriate to the challenge brought. Coulson L.J. held, in stark terms, that proportionality was a “singularly inapt test” to apply to assessment of risk of harm posed by Mr. Browne to his ex-partner (at [38]). That proportionality is not easily applied in cases which do not involve the balance of competing interests involved in rights adjudication is an argument which has not infrequently been made – see especially M. Taggart [2008] N.Z.L.R. 423 – but positive examples of the problem in case law are not common at all. *Browne* is certainly the clearest example.

In the context of a Parole Board risk assessment, it was pointed out by Coulson L.J. that to ask the structured proportionality questions, and particularly whether the decision is no more than necessary and whether it strikes a fair balance, make no sense. The question of balance with which proportionality is ultimately concerned is an inherently relative issue: it is whether the ends are proportionate to the means. A risk assessment at a particular level is not an exercise in doing more or no more than is necessary. Asking whether the Board was or was not entitled to categorise Mr. Browne as posing a high risk of serious harm to his ex-partner is not seeking to examine the balance struck, but asking whether the evaluation was justified. Rationality enables that evaluation, but proportionality does not readily do so. Even in the context of individual liberty (a classic right), if the proportionality questions do not work, then they must be the wrong questions to ask. *Browne* is a good example of how even the flexible nature of proportionality does not make it sufficiently protean to apply in all circumstances.

Less persuasive is the Court’s reliance on *R. (Lord Carlile of Berriew Q.C.) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] A.C. 945. That case certainly recognises the difficulty in subjecting a predictive analysis to proportionality assessment, but Coulson L.J. failed to mention that it was nonetheless a Convention rights proportionality case. *Lord Carlile* addressed the problem of predictive analyses through an emphasis on judicial restraint rather than by concluding that proportionality was inapt. It could do so because the challenge there was to a refusal to permit a speaker entry into the UK: the decision actually under challenge was amenable to proportionality review, even if part of the justification for that decision was harder to assess. Restraint, or deference, would not easily operate as the answer in *Browne* because the challenge was to the assessment of risk itself.

*Browne* is both an unusual and an orthodox case. It is a rare example of the courts identifying a particular claim and context in which the structured

proportionality analysis – its principal virtue for its defenders – does not analytically work. The Court of Appeal did not reason from this, as they might have, that proportionality *ought* therefore not to be available at common law. Rather, they went on to hold in clear, orthodox, terms that it was not available as a matter of precedent. In doing so, *Browne* has become a bad case, badly advanced, which risks setting back the cause of public law and obscuring its more interesting contribution of how not every type of public law challenge is readily amenable to proportionality review at common law.

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#### REVIEWING A PAROLE BOARD DECISION TO RELEASE

IN November 2017, the Parole Board wrote to John Worboys (now known as John Radford) recommending his release on licence from a sentence of Imprisonment for Public Protection (IPP). There was a legal duty to hear his application as he had served the tariff period (eight years) specified by the sentencing judge, minus the time he had spent on remand. The question for the Board was whether Radford's continued confinement was necessary to protect the public (Criminal Justice Act 2003, s. 239(1)(b)). Having considered an extensive dossier, the evidence of psychologists, and interviewed custody staff and Radford, the Board took the decision that the risk posed by Radford could be safely managed in the community, assuming stringent licence conditions were imposed. The decision generated public alarm when it was reported in early 2018. Radford had been convicted of one count of rape, four counts of sexual assault, one count of attempted sexual assault, one count of assault by penetration and 12 counts of administering a substance with intent. All 12 attacks had been on lone female passengers in his taxi. However, the Metropolitan Police believed that his offending had been far more prolific; in 2014, the High Court held that Radford had committed "in excess of 105 rapes and sexual assaults" (at [6]) and found fundamental failings in the police investigation (*DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB), upheld by the Court of Appeal *The Commissioner of Police for the Metropolis v DSD and NBV, Alio Koraou v The Chief Constable of Greater Manchester Police* [2015] EWCA Civ 646, [2016] Q.B. 161, and by the Supreme Court *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11, [2018] 2 W.L.R. 895).

The legal significance of additional allegations was central to the judicial review of the decision to recommend the release of Radford on licence in