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CASE AND COMMENT

THE PROTEAN PRINCIPLE OF PROPORTIONALITY: HOW DIFFERENT IS PROPORTIONALITY  
IN EU CONTEXTS?

THE Legal Services Board, tasked with the supervision of approved regulators of persons carrying on legal activities, granted an application (by the Bar Standards Board, Solicitors Regulation Authority, and ILEX Professional Standards Board) for approval of alterations to their regulatory arrangements to give effect to the so-called Quality Assurance Scheme for Advocates (“the decision”). The Scheme provides for judicial assessment of criminal advocates in England and Wales: only those deemed “competent” would gain full accreditation for upper levels of criminal work. Judicial review had been sought, unsuccessfully in the courts below, by barristers practising criminal law. The question in *R. (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41; [2015] 3 W.L.R. 121 was whether the decision was contrary to Regulation 14 of the Provision of Service Regulations 2009 (SI 2999/2009), which implemented Directive 2006/123/EC (O.J. No. L 376, p. 36). Regulation 14 requires that any authorisation scheme cannot be set unless, inter alia, the need for such a scheme is “justified by an overriding reason relating to the public interest” and the scheme’s objective “cannot be attained by means of a less restrictive measure” (see Regulation 14(2)).

The appellants submitted that Regulation 14(2) required the Court to assess the proportionality of the Scheme itself, and that the Court of Appeal had been wrong to assess only whether the decision to approve the scheme was “manifestly inappropriate”.

In a judgment given jointly by Lord Reed and Lord Toulson, the Supreme Court dismissed the appeal. In the Court’s view, the issue was whether the legitimate and important objectives of protecting recipients of legal services – and the sound administration of justice – could justify the Scheme in the way it had been approved. Simply put, could the

objectives be attained through reliance on a less restrictive measure? In this connection, the Court reviewed, in hitherto unseen detail, the jurisprudence of the Court of Justice of the European Union on the principle of proportionality.

The Court found that the courts below had erred in taking the view that the correct test was whether the Board's judgment had been "manifestly wrong" and that it was not for the courts themselves to decide; instead, the Court held, it was for the court itself to decide whether the scheme was proportionate. Whilst, on the one hand, the Scheme placed a burden on all those affected by it, on the other, the potential consequences of poor advocacy were serious and the scheme was to be reviewed after two years. Whether such a high level of protection could acceptably be provided was exactly the sort of question in respect of which national authorities are, under EU law, allowed a margin of appreciation. Thus, the Court held, the Board had not gone beyond its margin of discretion by determining that the level of risk presented by possible less restrictive measures made them unacceptable. The only way of providing the desired level of protection was to have a comprehensive assessment scheme; it followed, therefore, that such a scheme was proportionate to the aims sought achieved.

*Lumsdon* is the most important judgment to date regarding the meaning and application of the principle of proportionality by the domestic courts in EU law contexts. Its impact is, moreover, likely to be felt beyond the EU context. Three observations are particularly pertinent.

First, Lord Reed and Lord Toulson stated that the principle of proportionality in EU law contexts differs from the principle of proportionality under the European Convention on Human Rights. As regards the EU law test, proportionality involves two, possibly three, questions (at [33]): (1) whether the measure in question is suitable or appropriate to achieve the objective pursued; (2) whether it could be attained by a less onerous method; and, possibly, (3) whether the burden imposed by the measure is disproportionate to the benefits secured. Although there is evident overlap between proportionality in fundamental rights cases and in EU law cases, it was held that the four-stage analysis of proportionality in a fundamental rights context outlined in *Bank Mellat v H.M. Treasury (No. 2)* [2013] UKSC 39; [2014] A.C. 700 (at [74]) is not applicable to proportionality in EU law. The exact extent of the differences, however, was left unexplained (textually only the first stage of the human rights test, relating to the measure's objective, is missing). It is worth remembering that there will, as is the case with EU proportionality (witness how sometimes the EU law test will involve three stages when it is addressed by the parties; at other times, only two), be instances even in the context of fundamental rights where not all four questions of the test in *Bank Mellat (No. 2)* will be posed, or a less intense version (manifestly without reasonable foundation) will apply. Much of what the Court says about EU proportionality thus applies *mutatis mutandis* to proportionality in other contexts too.

Secondly, the effect of the judgment is to confirm that the principle of proportionality is not a monolithic standard: its application “depends to a significant extent on the context” (at [23]). In the EU field, the Court explained, whilst it is “important to avoid an excessively schematic approach” (at [34]), there are at least three different contexts and versions of the test:

- (1) the review of EU measures (at [40]–[49]) – here the reviewing court (the CJEU, as a national court cannot declare such measures invalid: C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452) should usually intervene only if it considers that the measure adopted by the legislature is “manifestly inappropriate”, thus effectively dropping the “least onerous” limb (at [42]);
- (2) the review of national measures relying on derogations from general EU rights (at [50]–[72]) – if a fundamental freedom is at issue, the test will normally be an exigent one, whereas, if no such right is involved, the courts will afford a greater margin of discretion to the decision maker;
- (3) the review of national measures implementing EU law (at [73]–[74]) – if political, economic, or social discretion is involved, the court will normally apply a test of “manifest disproportionality”, whereas, if a fundamental freedom is involved, the test will normally be an exigent one.

One is left with the impression that the principle of proportionality has taken on a distinctly protean nature. There is a multitude of different versions of “the” proportionality test which the domestic courts are now expected to apply. To give but a few examples: “normal” two-stage EU proportionality, “normal” three-stage EU proportionality, EU manifest disproportionality, “normal” four-stage ECHR proportionality, ECHR manifestly without reasonable foundation, and, arguably, “proportionality at common law” in connection with common law rights.

There are undoubted advantages of the courts adopting a (less intense) version of proportionality review outside the fundamental rights context (A.C.L. Davies and J.R. Williams, “Proportionality in English Law” in *The Judge and the Proportionate Use of Discretion* (Ranchordas and de Waard 2015), 89–95). Nevertheless, a number of cautions should be noted. First, the sheer multitude of different versions of proportionality from which a court must choose leads potentially to doctrinal confusion rather than the hoped-for simplicity of having proportionality as the general standard of review: reasonableness review was itself criticised for having many guises, which is a recipe for inconsistency. It is important that the danger against which Lord Slynn warned in *R. (Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295, at [51], that retention of rationality review alongside proportionality could be “unnecessary and

confusing”, should be avoided in relation to the diverse proportionality tests too. Secondly, in choosing between the versions, any court necessarily has to front-load much of its analysis. On the one hand, this could lead to overly simplistic compartmentalisation of categories of case with overtones of the issues related to “spatial” conceptions of deference (by creating zones of decision-making within which review does not, in practice, lie). On the other hand, it could produce a risk of double counting deference factors (e.g. constitutional, institutional, and democratic): the court will have to consider the context to decide on a “lower” initial standard, and then may duplicate the same concepts in exercising discretion when applying that test. Thirdly, it is equally important not to mask those conceptually distinct deference factors by “sweeping them up” in the initial analysis, thus jeopardising the structural clarity of proportionality.

Finally, Lord Kerr has recently questioned whether proportionality at common law can apply outside of a rights context (*Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2015] 3 W.L.R. 1665, at [281]). The application by the Supreme Court of a proportionality inquiry into the non-traditional rights issues in *Lumsdon* provides an example of how the principle of proportionality can apply to non-rights situations. Why could not the same be the case at common law? Kant said of the French Revolution that more important than the Revolution itself was the fact of its having happened; its importance lay in what it potentially pointed towards (*Political Writings*, 2nd ed. (Cambridge 1991), 182). It might, at some peril of portentousness, be thought that *Lumsdon* should be read in the same light. The nice distinction the Court makes as between EU and ECHR proportionality may succeed or it may fail. The real importance of *Lumsdon* is the simple fact that it – a proportionality case on a non-rights issue – was analysed in so much detail and the future direction in which it points: the replacement of rationality review by *one* variable, context-dependent *principle* of proportionality. This is a positive development.

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#### DECLARING THAT EXTRA-STATUTORY GUIDANCE VIOLATES CONVENTION RIGHTS

SECTION 3(2) of the Immigration Act 1971 requires the Home Secretary to lay down Immigration Rules regulating “entry into and stay in the United Kingdom” by “persons required by this Act to have leave to enter”. The rules are glossed by voluminous, extra-statutory, internal guidance and Immigration Directorate Instructions (hereafter referred to as “guidance”) drawn up in the Home Office.