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.

The claimants in *R. (Bibi) v Secretary of State for the Home Department (Liberty intervening)* and *R. (Ali) v Secretary of State for the Home Department (Liberty intervening)* [2015] UKSC 68; [2015] 1 W.L.R. 5055 were British citizens resident in Pakistan and Yemen, who had married nationals of Pakistan and Yemen, respectively. The claimants were entitled to reside in the UK, but wanted to be accompanied by their non-British husbands. Under para. 281 of the Immigration Rules, amended in 2010, the husbands would be given leave to remain in the UK only if they passed a pre-entry English-language test in their countries of origin, unless (among other exceptions) "there are exceptional circumstances which prevent the applicant from being able to meet the requirement" before entry. Guidance instructed entry clearance staff to apply the last exception "only in cases where there are the most exceptional, compelling and compassionate circumstances specifically relating to the ability of the applicant to meet the language requirement", and added that lack of English tuition and of any opportunity to take the test in the place of origin would not, without more, amount to "exceptional circumstances". The Government argued that guaranteeing a reasonable pre-entry standard of English would assist integration into British society, improve employment prospects, raise awareness of the importance of language, help to prepare people for a further test which they would need to pass in order to qualify for settlement at the end of a probationary period of residence in the UK, reduce the cost of providing translations, benefit children, and reduce immigrant spouses' vulnerability. Neither claimant's husband spoke English and it was not practically possible for them to access appropriate language courses. In Yemen, there was not a single test centre.

In these circumstances, it was pointless for the husbands to apply for leave to reside in the UK, so the claimants instead sought judicial review by way of an order to quash the decision to amend para. 281, on the ground (among others) that it violated the right to respect for family life under Article 8 of the ECHR and s. 6(1) of the Human Rights Act 1998, because it effectively prevented the claimants from living in the UK with their husbands. Beatson J. at first instance, a majority of the Court of Appeal, and a unanimous Supreme Court, while accepting that the application of the guidance might well lead to a violation of Convention rights in the application of the rule, considered that this did not make the rule itself unlawful. There were circumstances in which it could be applied without violating anyone's Convention right. The Supreme Court therefore refused to quash the rule, but it recognised a serious risk that the application of the rule to the claimants' husbands, in light of the guidance, would lead to the right of the claimants and their husbands to respect for family life under Article 8 being violated.

This unsatisfactory outcome led Lady Hale D.P.S.C. (with whom Lord Wilson and Lord Neuberger agreed) to suggest that the Court might declare

that the extra-statutory guidance and Instruction "will be incompatible with the Convention rights of a UK citizen or person settled here, in cases where it is impracticable without incurring unreasonable expense for his or her partner to gain access to the necessary tuition or undertake the test" (at [60], [103]). Lord Hodge and Lord Hughes (at [76]) were not persuaded that it would be right to make such a declaration, because circumstances could easily change (a consideration of little weight, since it applies to many situations in which declarations are routinely made), a declaration would be too general to give useful guidance, and it would be wrong to make such a declaration in circumstances where a declaration of incompatibility, under s. 4 of the Human Rights Act 1998, would be unavailable (because the guidance is not legislation). Counsel had not asked for such a declaration, so the Court invited written submissions as to whether such a declaration should be made to provide "formal record of this court's concern about the application of the guidance" (Lord Neuberger, at [103]). Having received those submissions, the Court decided to defer a decision on the point until after hearing and deciding *R. (MM (Lebanon)) v Secretary of State for the Home Department* and other cases, on appeal from [2014] EWCA Civ 985, which raised a similar issue in relation to the minimum income requirement where a non-EEA national wants to reside in the UK with his or her UK-national spouse. (These cases were heard on 22, 23, and 24 February 2016, and judgment is awaited.)

Five objections might be advanced against such declarations. The first three are: (1) that non-legal instruments do not sound in law, so are non-justiciable; (2) that the effects of norms should be decided in relation to an actual victim, so that the impact of the guidance can be properly assessed, rather than generally; and (3) that the court should not pre-empt the jurisdiction of another court or tribunal.

The answer to these objections is that officials typically follow guidance when making decisions which affect legal duties and rights. Where they do so, courts have attached legal consequences to publishing, following, or not following extra-statutory policies or guidance: see for example *R. (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2011] UKSC 11; [2012] 1 A.C. 245, and *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 W.L.R. 4546. When it is alleged that such guidance is unlawful, it is often more convenient to have their legal position authoritatively clarified by a single challenge to the guidance than to invite a plethora of challenges to individual implementations of the guidance. Examples include guidance on the role of nurses in abortions and on contraceptive advice and treatment for children: *Royal College of Nursing v Department of Health and Social Security* [1981] A.C. 800; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112; the policy of the Director of Public Prosecutions in relation to the offence of assisting suicide: *R. (Purdy) v Director of Public Prosecutions*

[2010] 1 A.C. 345; and see further C.F. Forsyth, *Wade and Forsyth's Administrative Law*, 11th ed. (Oxford 2014), 485–486. Sometimes civil courts refuse to pre-judge the outcome of a criminal trial, as in *Imperial Tobacco Ltd. v Attorney General* [1981] A.C. 718, but (as the cases mentioned above show) civil courts may sometimes make declarations as to matters which have implications for criminal law.

In short, using declarations to decide questions of general significance going beyond the circumstances of a particular case has been an established technique of public law for over a century. The question is not whether it can be done, but whether it is convenient to do it: *Dyson v Attorney General (No. 1)* [1911] 1 K.B. 410.

Objection (4) is that the only type of declaration as to the general effect of a norm which the Human Rights Act 1998 permits is a statutory declaration of incompatibility under s. 4. This misunderstands the role of a declaration under s. 4. It is available only when legislation is *not* unlawful (as a matter of domestic law) because it is saved by parliamentary sovereignty by virtue of s. 6(2) or 3(2). Where, as is usually the case, a violation of a Convention right is *unlawful* (s. 6(1)), the court should declare that unlawfulness in the ordinary way, as in *Anisminic v Foreign Compensation Commission* [1969] 2 A.C. 147 and countless other cases. If the unlawfulness is an inevitable result of applying guidance, that too can be declared, as in *Gillick*; unlawfulness under s. 6(1) of the 1998 Act is not special in this respect. Unlawfulness is unlawfulness, whether it results from violating a Convention right or acting in any other way contrary to law.

Objection (5) is that it would be difficult to formulate a declaration with sufficient specificity to be useful. This is no bar to making a declaration. It merely emphasises the importance of ensuring that any declaration is drawn sufficiently clearly and explicitly to be useful.

Both on authority and in principle, then, courts may declare that giving effect to guidance would violate Convention rights, when it is convenient to do so. It is to be hoped that the Supreme Court in *MM (Lebanon)* and on its resumed deliberation on *Bibi and Ali* will not restrict that useful function of public-law declarations.

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UNDERSTANDING THE "HOUSEHOLDER DEFENCE": PROPORTIONALITY AND REASONABLENESS IN DEFENSIVE FORCE

IN *Collins v Secretary of State* [2016] EWHC 33 (Admin), the High Court refused to declare that Criminal Justice and Immigration Act 2008, s. 76