HOW CAN YOU JUDGE THE DIFFERENCE BETWEEN THE STANDARD OF REVIEW AND THE INTENSITY OF REVIEW WITH REFERENCE TO LORD SUMPTION'S FOUR QUESTIONS IN BANK MELLAT AND THE MARGIN YOU GIVE THE PRIMARY DECISION-MAKER?

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[PLEASE NOTE THAT THIS TALK IS UNFINISHED. IN PARTICULAR THERE ARE NO CASE REFERENCES. IT DOES NOT REPLICATE IN ITS ENTRETY MY TALK TO THE WHITE PAPER CONFERENCE ON 3rd MARCH ALTHOUGH THE TALK WAS CENTRALLY BASED AROUND THE ARGUMENT SET OUT HERE]

I take as my premise (and please remember it when I come to the end) that the proportionality doctrine does not involve merits review. Everyone says it. But if it does not involve merits review what is the intensity of judicial review in proportionality cases and how do they differ from other judicial review cases?

In responding to exam-type questions such as this (and the one which the title of my talk raises) I find myself resorting – as so often – to extracts from *Alice in Wonderland*. Looking at the verbosity that has characterised the myriad formulations of the concept of proportionality or the impenetrable distinctions sought to be drawn between *Wednesbury* review and proportionality review one is driven, to make sense of them all, like Humpty Dumpty to make words mean just what you choose them to mean or like the Queen of Hearts to believe in six impossible things before breakfast. Atomistic conceptual classification can often be counter-productive and I suggest that this is especially true of the proportionality doctrine as it is being fashioned through the courts.

As far as I know, no one yet has managed to define in clear terms that which characterises a practical difference between the standard of review and the intensity of review in an HRA proportionality case from that which characterises the standard and intensity of review in a domestic judicial review case governed by *Wednesbury*. This is so, I suggest, because the wrong questions are being asked.

I want to advance and, if possible, make good three propositions. First, the *standard* of review is the structure or framework by which a court asks itself the question whether a decision-maker has acted reasonably or proportionately. The standard of review will be different depending on whether or not the case is one sounding in domestic judicial review (where it will be the *Wednesbury* approach), whether it is a case under the Human Rights Act (where it will now be the *Bank Mellat* approach) or whether it is a case under EU law (where, as we now know from *Lumsdon*) different types of challenge may require different taxonomies even with an EU fundamental rights challenge).

Secondly, the *intensity* of review will also differ depending upon the context. However, the relevant level of intensity of review does not necessarily depend upon the taxonomy being deployed. Thus, the approach in *Bank Mellat* for cases involving fundamental rights without an EU element will often (though not always) overlap with the requirements of *Wednesbury*.

It is only where the question or questions being asked by the court necessarily engage a level of intensity of review as opposed to an abstract analytical tool that it becomes possible to separate out different classes of case in terms of which cases will be given a higher or a lower intensity of review.

Thirdly, where the framework being used by a court does not itself suggest the relevant intensity of review, this will be determined by the subject matter.

Much confusion has arisen, I suggest, because of the tendency of the human mind to seek clear answers to questions that ought not to have been asked in the first place. Thus, it is not I believe a sensible or productive use of time to ask what the differences are between the requirements of *Wednesbury* in an HRA fundamental rights case and the requirements of proportionality in such a case. This is because although the analytical framework is (largely for historical reasons) different in a Strasbourg case to a domestic judicial review, there will usually be little difference in the application of either framework. On the other hand, the framework for an EU judicial review case with the labyrinthine distinctions between different layers of challenge suggests that the approach in an EU case may very well be determinative of the intensity of review in such a case. Here, the relevant taxonomies themselves compel the relevant level of intensity of review.

Thus, *Bank Mellat* can, at best, offer only a partial answer to relevant differences between standard and intensity of review. Even then, it is as a standard rather than as a flagger of intensity that its relevance lies.

Let us start with the *standard* of review. *'Standard'* is a somewhat elusive concept because it often tends to conceal more than it reveals about the relevant intensity of review. It is, as foreshadowed earlier, simply the way in which the Administrative Court is required to approach its review function in different contexts. There may be, and I suggest that there are, difficulties about Lord Sumption's formulation in *Bank Mellat* (as there were about Lord Bingham's materially identical formulation in *Huang* at paragraph 19) but perhaps the most fundamental point is that even if we take his four questions at face value they do not in any way explain the underlying way in which, in a fundamental rights case, the court goes about its task. In particular, they do not reveal or point to the intensity of review.

The four questions are these (from paragraph 20 of *Bank Mellat*):

(1) Whether the objective of a measure is sufficiently important to justify the limitation of a fundamental right.

(2) Whether it is rationally connected to the objective.

(3) Whether a less intrusive measure could have been used. Finally:

(4) Whether having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the Community.

Now, the core point to note about these questions is that each of them engages a clear analytical question. But none of them explains how any of the questions are to be answered. Each of them involves a subjective judicial assessment but nowhere is there reference to the stringency or otherwise of that assessment.

Lord Sunption introduces his four questions by a disclaimer in paragraph 20 of his judgment. He observes that *'the requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap.'* He does not tell us how they overlap but even this opening short informs us that he is not referring to the intensity of review for, if he were, there would be no inevitability about it. That would be a question of the kind to which everyone wants to know the answer but to which none has so far been given.

This is not, then, an Hercule Poirot-like response to questions that have eluded us for so long. Lord Sumption is here plainly referring, without more, to the framework for approaching proportionality. Moreover, he is only addressing the framework, as he makes clear, in the context of decisions engaging the human rights of applicants; in other words he is solely considering a highly specific subject-matter and even then only where there is a non-EU element.

Put shortly, at least in ostensible intent, Lord Sumption is merely seeking to summarise or encapsulate the principles already articulated in the case-law. Paragraph 20 is replete with references to earlier case-law.

For anyone attempting to find references to the intensity of review in a proportionality case as opposed to a rationality case the analysis is opaque. True it is that at paragraph 20 Lord Sumption refers to the fact that *'the question'* (not specifically identified) *'depends on an exacting analysis of the factual case advanced in defence of the measure'.* Yet that he is not purporting to distinguish between the stringency of what the court does in a proportionality case from that undertaken in a rationality challenge may be inferred from paragraph 21 in which he states that *'... any assessment of the rationality and proportionality of a Schedule 7 direction'* (the subject of the challenge in *Bank Mellat*) *'must recognise that the nature of the issue requires the Treasury to be allowed a large measure of judgment'.*

So he is for intensity of review purposes treating the requirements of rationality and proportionality interchangeably in the context of fundamental rights.

Although Lord Sumption's taxonomy for a fundamental rights case under the ECHR does not (and cannot as formulated) explain or purport to explain what the court is really doing (i.e. the relevant intensity of review) it does raise one specific problem. This is his fourth question – whether a fair balance has been struck between the rights of the individual and the interests of the community.

What we do know is that it is not being suggested that the insertion of the 'fair balance' test involves any greater degree of intensity of review than the first three of Lord Sumption's questions. We discern this from the first sentence of paragraph 21 of his judgment: *'None of*

this [referring to each of the four questions] *means that the court is to take over the function of the decision-maker, least of all in a case like this one.'* So, whatever the intensity of review that this fourth question might possibly imply, I suggest that Lord Sumption obviously intends each of the questions to be treated similarly in terms of the stringency with which the court goes about its task.

Properly analysed, Lord Sumption's fourth question raises a different issue; it is the relevant scope of review as opposed to the intensity of review that this question could imply. In *Miranda* [2014] 1 WLR 3140 Laws L.J. had this to say about the *'fourth question'*:

> *'[it] appears to require the court, in a case where the impugned measure passes muster on points (i)-(iii), to decide whether the measure, though it has a justified purpose and is no more intrusive than necessary, is nevertheless offensive because it fails to strike the right balance between private right and public interest; and the court is the judge of where the balance should lie. I think there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government. If it is properly within the judicial sphere, it must be on the footing that there is a plain case.'*

Of course, questions about the proper scope of review are linked to intensity of review. But they are not the same. They are linked in the sense that if a court applies high-intensity review in a particular context it is in danger of trespassing into areas of executive judgment and usurping the power that Parliament has conferred upon the primary decision-maker. So, too, if a court embarks upon questions that are for the primary decision-maker it risks usurping the specific power conferred by Parliament. However, in the latter case it may apply low-intensity review but still trespass upon the relevant statutory power. This is because the court is going beyond the proper scope of judicial review; it is failing to abide by the Biblical injunction to *'render unto Caesar the things that are Caesar's and unto God the things that are God's'*.

Nonetheless, even to attempt to address the potential minefield exposed by Lord Sumption's fourth question is I suggest to grapple with monsters that do not exist. I say this because Lord Sumption has himself disabused us of the notion that he intends anything radical by his last question.

In his ALBA lecture in November 2014, Lord Sumption said this:

> *'I think that Laws L.J.'s concern [in Miranda] is entirely justified. I have myself more than once drawn attention to the propensity of judicial review of human rights to elide the boundaries of politics and law. But Laws L.J. is shooting the messenger...'*

But Lord Sumption went on to observe as follows:

> *'But I also think that Laws L.J. was right to say that a plain case is required before this can be regarded as a proper judicial function.'*

Close readers of judicial syntax will realise, at once, that Laws L.J. had prefaced his remarks with the contingent *'[if] it* ['it' being Lord Sumption's fourth question) *is properly within the judicial sphere'* and not (as Lord Sumption has hurriedly translated) that a plain case of lack of fair balance *was* to be regarded as a proper judicial function.

For myself, I do not believe that Lord Sumption's last question adds anything to the proportionality analysis. It is neither novel nor dangerous (and was, as I have mentioned, articulated in material terms by Lord Bingham in *Huang*). The notion of 'fair balance' is intrinsic to all balancing rights in the ECHR although expressly deployed in cases under Article 1 Protocol 1. If (as seems to be common ground) only a plain case of lack of fair balance is justiciable this simply collapses back into the earlier three questions. It will evince a lack of legitimate objective and/or a lack of rational connection and/or a more intrusive measure than is necessary.

However, the wider point is whether the answer to <u>any</u> of Lord Sumption's questions would produce a different result to *Wednesbury* in a fundamental rights challenge brought under the HRA. There is nothing in Lord Sumption's taxonomy that gives us the answer. In *Daly* Lord Steyn had suggested that the structure of a proportionality analysis might in some cases produce a different result to *Wednesbury* but without offering any indicia as to why or how this might occur.

In structure there is an obvious contrast between *Wednesbury* and proportionality, in that the former is couched simply in the language of unreasonableness while proportionality constitutes various more structured questions (however they are formulated). But this is, I suggest, a distinction without a difference. As Sir John Laws wrote many years ago, the *Wednesbury* doctrine is not monolithic. What he meant by this was that if taken literally *Wednesbury* claims to permit intervention only where no reasonable decision-maker could have come to the same decision. But, in fact, the court's assessment of what a reasonable decision-maker could decide is applied with varying intensity according to the subject-matter of the particular case. So, too, Lord Sumption's questions (and the other cases from which they are derived) will be applied with varying intensity depending on the subject-matter of that which the court is considering.

It is, for example, well accepted that there are fundamental rights and fundamental rights even within the same basic 'right'. In *Carson* Lord Walker referred to *'suspect grounds of discrimination'* implicit in the Strasbourg jurisprudence but more clearly spelled out in the jurisprudence of the United States Supreme Court in applying the equal protection clause of the 14th amendment; such *suspect grounds* are grounds of discrimination which *'the court will subject to particularly severe scrutiny'* such as the personal characteristics of sex, race and sexual orientation. So, as Lord Walker went on to observe *'[w]here there is an allegation that Article 14 [ECHR] has been infringed by discrimination, on one of the most sensitive grounds, severe scrutiny is called for.'*

Lord Walker is here referring to the intensity of review within a single provision of the ECHR. The self-evident point to make is that no general proportionality or *Wednesbury* taxonomy will tell us anything other than the standard of review; it says nothing about the intensity of review.

I believe that once the different concepts of <u>standard</u> and <u>intensity</u> of review are isolated one from the other and treated as separate animals it should be uncontroversial that it is a

semantic confusion to treat the proportionality framework for review in an HRA case as if it said anything about the intensity of the review being undertaken or, indeed, anything different about the intensity of review under a *Wednesbury* template.

Some reassurance is afforded by the judgment of Lord Mance in *Kennedy* where, at paragraph 54, he said this:

> *'... both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law.'*

I accept that it is still unclear whether proportionality is, *eo nomine*, a principle of domestic judicial review but what I derive from Lord Mance's judgment in *Kennedy* is that it is the context (i.e. the subject-matter of the case before the court) that will determine the intensity of review rather than the standard of review in an HRA challenge.

In his Melbourne lecture in August 2014 Lord Neuberger (and see even more recently in *Keyu*) went one policy stage further observing that:

> *'The HRA has also spurred the UK judiciary into fresh thinking about the law because we now have new ideas to grapple with and to apply to our domestic law, such as the concept of proportionality. But we are also wondering whether, for instance, it makes sense to have such different approaches between a traditional JR challenge to an executive decision on the merits, and a Convention challenge to an administrative decision. On that issue, the judgments in Kennedy have something to offer as well.'*

However, whatever logic and policy may have to say about the axiom that context rather than taxonomy should dictate the intensity of review, we now have to contend with the Supreme Court's ruling in *Lumsdon*.

In *Lumsdon* the Supreme Court has provided a detailed discussion of the differences between the principle and tests of proportionality in ECHR and EU law.

The case concerned an EU law challenge brought by barristers to the UK's Quality Assurance Scheme for Advocates (QASA), which required criminal barristers to be judicially assessed before they may accept certain categories of cases. The appellants sought judicial review of the bringing into effect of QASA, alleging that it was contrary to the Provision of Services Regulations 2009. This SI (and the Directive it implemented, 2006/123/EC) stated that authorisations schemes had to satisfy two conditions: the need was justified by an overriding reason relating to the public interest, and the objective pursued could not be attained by a less restrictive measure.

In summary, the Supreme Court held as follows:

(i) EU proportionality was different from ECHR proportionality. The latter involved a four-stage analysis explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 (in

brief, importance of the objective, rationality, availability of a less intrusive alternative and proportionality). This analysis was not applicable to proportionality in EU law.

(ii) By contrast, EU proportionality was now enshrined in Article 5(4) of the Treaty on European Union: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

(iii) In EU law proportionality may arise in a number of circumstances, principally:

- as a ground of review of EU measures themselves (i.e. in cases before the CJEU). Here, a court would only intervene if it considered the measure manifestly inappropriate having regard to the objective pursued.

- in reviews of national measures relying on derogations from general EU rights (mainly fundamental freedoms), where proportionality functioned as a means of preventing disguised discrimination and unnecessary barriers to market integration, and was therefore applied more strictly. Here, the measures should be applied in a non-discriminatory manner, be justified by imperative requirements in the general interest, be suitable for the objective pursued, and not go beyond what was necessary to attain it.

- in reviews of national measures which did not threaten the integration of the internal market, e.g. because the subject-matter was within an area of national rather than EU competence, a less strict approach was generally adopted. Here, the test was the 'manifestly inappropriate' one.

It is beyond my remit to undertake a detailed analysis of these different forms of review. But I suggest that Lord Reed (who delivered the main judgment) has, in an EU context, obscured the distinction I seek to draw between the standard and intensity of review. At paragraph 34 he makes clear that the question of intensity of review should not be approached schematically and that *'[t]he court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle will be applied in another*

context; it is necessary to examine how in practice the court has applied the principle in the particular context in question.'

Had Lord Reed stopped there he would, in substance, be echoing Lord Mance in *Kennedy*. But Lord Reed did not end there. He went on (as I have already outlined) to describe different taxonomies for different classes of decision sounding in EU law. The taxonomies he described are themselves designed to focus on both standard and intensity of review. The 'manifestly inappropriate' test is one of light review whereas the test for a violation of general EU rights is stricter.

Where (as here) the particular taxonomy is directed towards the intensity of review then the adoption of that taxonomy will, necessarily, dictate the relevant level of review. But such an approach means that classifying a case into a categoric class of challenge limits the availability of context to inform the intensity of review. However, I suggest that Lord Reed's classification in *Lumsdon* of cases distinguishing light-touch review from intensive review may legitimately (in view of his warning at pargraph 34) be treated merely as examples of how courts have approached the question of intensity of review in a particular type of case as opposed to rigid principles intended to govern the intensity of review in such cases.

I will end by attempting to link the standard of review, the intensity of review and the margin of appreciation in a series of short bullet points intended to suggest that whatever the different formulations of *Wednesbury*, ECHR proportionality, EU proportionality and their foot soldiers deference and margin of appreciation, it is context and context alone (by definition indefinable) that will dictate the result:

(1) The framework by which a court approaches a case (i.e. the standard of review) is rarely a helpful tool by which to assess the intensity of review. Such framework may differ according to whether the case involves a purely domestic challenge or an ECHR challenge or an EU challenge but it is usually a linguistic confusion to judge the intensity of review undertaken by the court by reference to that framework.

(2) A potential exception arises in cases where the framework itself implies a particular level of review. It has recently been held by Lord Reed in *Lumsdon* that a different framework for proportionality arises in EU law to that applicable in HRA fundamental rights challenges. At least one head of EU review challenge (the *'manifestly inappropriate'* test could be read as implying a light-touch intensity of review).

(3) Even here, however, there is a need for caution. Lord Reed intended his classification of cases to form illustrative examples of how courts have approached particular types of cases in the past. His judgment counselled against viewing intensity of review through a conceptual straitjacket.

(4) Deference and margin of appreciation are especially elusive notions and, like invocations of different standards of review, tend to occlude the overriding

importance of context. Thus, even where a court refers to the difference between domestic and international areas of discretionary judgment or the need for deference in an institutional context such as national security the court's view is invariably driven by context rather than principle.

(5) Nowhere is this truer than in the arena of fundamental rights and parts of EU law where the court rather than the decision-maker makes the ultimate judgment of whether there is a violation of such rights but where weight is accorded to the assessment of the primary decision-maker.

This is, and can only be in such a short space of time, but an outline of what is fast becoming an unnecessarily and over-complicated area of judicial review. In my view the only 'space' for a principled difference between proportionality in whatever context and other forms of review is if proportionality engages merits review. But that proposition has consistently been disavowed by the overwhelming majority of the senior judiciary. It has therefore, as I explained at the start, been the premise of this short talk.

Despite this, and because it is only fitting for the subject of my topic, I should give the floor and the last word to Lord Sumption who, as so often, is not shy of questioning premises. In his 2014 ALBA lecture he observed as follows:

> *'... In his speech in Denbigh ... Lord Bingham pointed out that the Strasbourg Court applied a standard of review which was not just formal and procedural but substantive. "The focus at Strasbourg", he wrote, "is not and never has been on whether a challenged decision is the product of a defective decision-making process, but on whether in the case under consideration, the applicant's Convention rights have been violated". This (if I may interject) is because the Convention asks whether the decision was actually proportionate and not whether the decision-maker could rationally have thought it was. Lord Bingham thought that the court would have to go beyond the traditional approach to judicial review in a domestic setting. But the modification of the traditional domestic approach which he proposed in order to deal with the problem was only more anxious scrutiny... For my part, I question whether you can address the questions posed by the doctrine of proportionality without accepting some shift to a merits review. And I question whether a more intensive standard of review can ever be a sufficient response to the question what departures from Convention rights are proportionate to a legitimate objective.'*