

**CONSTITUTIONAL AND ADMINISTRATIVE LAW BAR ASSOCIATION SEMINAR**

**SPY ROOM, GRAY'S INN, 3 DECEMBER 2008, 17.45 – 19.15**

**EU PUBLIC LAW – INSPIRATION OR ANACHRONISM?**

**DAVID ANDERSON Q.C.**

**THE PROPORTIONALITY TEST**

<p><i>R (Derwin) v Attorney General</i> [2006] EWCA Civ 817, paras 158-9.</p> <p>(Proportionality review may be in some respects stronger in EC law than under HRA, in that (i) deference to the legislator is less significant: all organs of the member state, including its legislature, are equally bound by Community law; (ii) permitted grounds of justification are less flexible and (by comparison with A1P1) less extensive; (iii) the requirement to choose the least onerous alternative is applied more frequently and more strictly.)</p> <p>Doubted by Lord Brown on appeal [2008] 1 AC 719, paras 162-164.</p> <p><i>Commission v Denmark</i> (Case C-192/01 [2003] ECR I-9693: strict</p> <p><i>Commission v Germany</i> (Case C-141/07, 11.09.08): relaxed</p>	<p><i>CCSU v Minister for the Civil Service</i> [1985] AC 374, Lord Diplock at 410E: “the possible adoption in the future of the principle of proportionality”</p> <p><i>R v C/C Sussex ex p International Trader's Ferry Ltd.</i> [1999] AC 418, Lord Slynn at 439E-F: “.. the distinction between the two tests is in any event much less than is sometimes suggested.”</p> <p><i>Somerville v Scottish Ministers</i> [2007] UKHL 44: Lord Hope at para 56 “not the occasion to embark on an examination of this issue, which is plainly one of considerable importance and difficulty”</p>
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**THE DUTY TO GIVE REASONS**

<p>Art 253 EC “Regulations, directives and decisions [adopted by the Parliament, Council or Commission] shall state the reasons on which they are based ..”.</p> <p><i>OMPI v Council (1)</i> (Case T-228/02, [2006] ECR II-4665, para 141:</p> <p>“The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the</p>	<p>JUSTICE Report, <i>Administration under Law</i> (1971) at p. 23</p> <p><i>Stefan v GMC</i> [1999] 1 WLR 1293, 1300G:</p> <p>“The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis. .. [T]here are also dangers and disadvantages in a universal requirement for reasons. It may impose an undesirable legalism into areas where a high</p>
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<p>statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a decision are sufficient if it was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure concerning him .... Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision.”</p>	<p>degree of informality is appropriate and add to delay and expense.”</p> <p><i>R (Hasan) v S/S BERR</i> CA 25.11.2008: no general duty on administrative decision-makers to give reasons.</p>
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### SUBSTANTIVE LEGITIMATE EXPECTATION

<p><i>Spagl</i> (Case C-189/89; [1990] ECR I-4539)</p> <p>Restriction of returning milk producers to quotas based on 60% of their previous production infringed their legitimate expectation to resume full production (Court); engaged (but did not infringe) an expectation of equal treatment with other producers (Jacobs A-G).</p> <p>“Overall, the cases on milk quotas indicate that the principle of protection of legitimate expectations imposes more severe restraints on the discretion of Community institutions than the principle of equal treatment”</p> <p>BUT</p> <p>The principle has been applied “particularly in agriculture and staff cases .. the overwhelming majority of claims based on breach of the principle have been rejected.”</p> <p>- Tridimas, <i>The General Principles of EC Law</i> (2<sup>nd</sup> edn., 2006) p. 279, 251.</p>	<p><i>R (BAPIO Action Ltd.) v S/S Home Department</i> 2008 UKHL 27, para 60 (Lord Mance).</p> <p><i>R (Bancoult) v S/S Foreign Affairs</i> [2008] UKHL 61, para 135 (Lord Carswell).</p> <p>“The principles governing what is now known as substantive legitimate expectation were outlined by the Court of Appeal in <i>R v North and East Devon Health Authority, Ex p Coughlan</i> [2001] QB 213 in a judgment which has now become very familiar. They have not yet been considered in depth by the House, although in <i>R (Reprotech (Pebsham) Ltd) v East Sussex County Council</i> [2003] 1 WLR 348, 354, para 34 Lord Hoffmann accepted <i>Coughlan</i> as correct...”</p> <p>The basis of the jurisdiction is abuse of power and unfairness to the citizen on the part of a public authority: see <i>Coughlan</i>, para 82. On this basis it has been held that two factors, both present in the case before the House, tend to show that there has not been an abuse of power. The first is when the authority changes its policy on sufficient public grounds. If there is an overriding public interest behind its change of policy, it will not be an abuse of power .. The second factor is whether the claimant has relied on the promise or representation, in particular whether he has thereby suffered any detriment. The Court of Appeal has affirmed the necessity for this.”</p> <p>Contrast para 73 (Lord Bingham, dissenting):</p>
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	<p>“Mr Bancoult and his fellows were clearly intended to think, and did, that for the foreseeable future their right to return was assured. The Government could not lawfully resile from its representation without compelling reason, which was not shown. It is not in such circumstances necessary for the representee to show that he has relied on or suffered detriment in reliance on the representation. In any event, by analogy with the law of estoppel, it is enough if the representee would suffer detriment if the representor were to resile from his representation.”</p>
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### EQUAL TREATMENT

<p>Charter of Fundamental Rights, Article 21(1)</p> <p>“Any discrimination based on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”</p> <p><i>R (Partridge Farms Ltd.) v S/S EFRA</i> [2008] EWHC 1645, 67 (cattle) (“any justification must..satisfy the requirement of proportionality”)</p>	<p><i>Kruse v Johnson</i> (1889) 2 QB 291: byelaw would be unlawful if “partial or unequal in its operation”.</p> <p><i>R (Kelsall) v S/S EFRA</i> [203] EWHC 459 (Admin) (mink): unjustified discrimination and arbitrary effects = irrational.</p> <p><i>R (British Civilian Internees – Far Eastern Region) v S/S Defence</i> [2003] EWCA Civ 473: left open “whether there is a free-standing principle of equality in English domestic law” or whether part of <i>Wednesbury</i>.</p>
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### DAMAGES AGAINST PUBLIC AUTHORITIES

Damages against public authorities which show manifest and grave disregard for legal obligations

<p><i>R (Synthon) v Licensing Authority</i> (Case C-452/06; ECJ 16.10.2008), para 46:</p> <p>“.. the failure on the part of a Member State to recognise .. a marketing authorisation of a medicinal product for human use granted by another Member State on the ground that the relevant medicinal product .. is not essentially similar to the reference product.. constitutes a sufficiently serious breach of Community law, capable of rendering that Member State liable in damages.”</p>	<p><i>Three Rivers DC v Bank of England</i> (“<i>BCCI</i>”) [2003] 2 AC1</p>
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## DAMAGES IN RESPECT OF JUDICIAL DECISIONS

<p><i>Köbler</i> (Case C-224/01) [2003] ECR I-10239  <i>Traghetti del Mediterraneo</i> (Case C-173/03) [2006] ECR I-5177</p>	<p><i>Sirros v Moore</i> [1975] QB 118  <i>Arenson v Arenson</i> [1977] AC 405                      Crown Proceedings Act 1947, s 2(5)</p>
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## FREEDOM OF INFORMATION / DISCLOSURE: LEGAL ADVICE / SUBMISSIONS

<p><i>Sweden and Turco v Council</i> (Joined Cases C-39/05P and C-52/05P), ECJ 1.10.2008, paras 59, 64</p> <p>“As regards, first, the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.</p> <p>...</p> <p>As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council’s legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution’s interest in receiving frank, objective and comprehensive advice, and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it.”</p> <p>Joined Cases C-528/07P, C-532/07P (pending: disclosure of pleadings)</p> <p>Case C-550/07P <i>Akzo Nobel</i> (pending appeal against refusal of privilege to in-house legal advice)</p>	<p><i>R v Derby Magistrates Court ex p B</i> [1995] 4 All ER 526, per Lord Taylor (HL)</p> <p>FOIA ss 42(1), 2(2)(b)</p> <p><i>Pugh v Information Commissioner</i> (EA/2007/0055) 17.12.2007</p>
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## STANDING REQUIREMENTS

<p>Case C-50/00P <i>Unión de Pequeños Agricultores</i> [2002] ECR I-6677, paras 38-42: standing to challenge a normative measure restricted to those concerned in a manner unique to themselves: but national courts required to do what they can to fill the gap in judicial protection.</p>	<p>Case C-74/99 <i>R v S/S Health ex parte Imperial Tobacco</i> [1999] EuLR 582</p> <p><i>R (Telefonica O2 Europe plc and others) v S/S BRR</i> [2007] EWHC 3018 Admin</p>
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## SPEED OF DETERMINATION

	2003	2007
References	25.5 mths	19.3 mths
Direct CFI	21.6 mths	29.5 mths
Appeals	28.7 mths	17.8 mths

*Melli Bank* (Case T-390/08) Appl 18.9.08; int rel refused 15.10.08, final hearing 22.01.09

Art 55 RP ECJ “priority” procedure

Art 104a RP “accelerated procedure”

Art 104b RP (references on asylum / police and judicial co-operation): “urgent procedure”, which may be oral only

*Rinau* (Case C-195/08 PPU; 11.07.08): child abduction case decided within 3 months of reference for preliminary ruling

*Goicoechea* (Case C-296/08 PPU, 12.08.08): extradition request, applicant detained for the purpose of extradition only, decided within 40 days of reference for preliminary ruling.

## PROCEDURAL FORMALISM?

<p><i>OMPI v Council 2</i> (Case T-256/07, 23.10.08), para 46:</p> <p>“When a decision or a regulation is replaced, during the proceedings, by another measure with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its claims and pleas in law. It would be contrary to the principle of due administration of justice and to the</p>	<p><i>R (Federation of Tour Operators) v HM Treasury</i> [2007] EWHC 206</p> <p>Challenge brought to pre-budget report; amended to challenge Bill, then Finance Act; argued before Finance Act had received royal assent.</p>
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requirements of procedural economy [and inequitable] to oblige the applicant to make a fresh application.”	
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### DELAYING THE CONSEQUENCES OF JUDGMENT

<p><i>OMPI I</i> (Case T-228/02, [2006] ECR II-4665, para 35:</p> <p>“If the contested acts are annulled, [Council] will be obliged to take the measures necessary to comply with that judgment, pursuant to Article 233 EC, which may involve its amending or withdrawing, as the case may be, any acts which have repealed and replaced the acts contested subsequent to the close of the oral procedure.”</p> <p><i>OMPI II</i> (Case T-256/07, 23.10.08), paras 65-66:</p> <p>But:</p> <p>Council may adopt a procedurally compliant replacement measure, with retroactive effect if need be.</p> <p>Council may retain in force a procedurally <i>non-compliant</i> replacement measure “for as long as is absolutely necessary for it to adopt a new measure satisfying the formal and procedural rules concerned.</p> <p><i>Kadi v Council</i> (Case C-402/05P, 03.09.08, [2008] 3 CMLR 41)</p> <p>Regulation annulled <i>ex futuro</i>: its effects maintained for up to 3 months to enable replacement.</p>	<p><i>R v Governor of Brockhill Prison ex p Evans (No. 2)</i> [2001] 2 AC 19, 26H (may be desirable that the effect of rulings should be “prospective or limited to certain claimants”)</p> <p><i>In re Spectrum Plus Ltd.</i> [2005] 2 AC 680</p> <p><i>R (Carson) v S/S Work and Pensions</i> [2006] 1 AC 173, per Lord Carswell at 104 (would have “ma[de] the invalidity prospective only”).</p>
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### FUNDAMENTAL RIGHTS v INTERNATIONAL LAW

<p><i>Kadi v Council</i> (Joined Cases C-402/05P and C-415/0P) [2008] 3 CMLR 1207, 03.09.08, para 326:</p> <p>“[T]he Community judicature must .. ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community</p>	<p><i>R (Al-Jedda) v S/S Defence</i> [2007] UKHL 58, para 39 (Lord Bingham):</p> <p>“Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its</p>
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<p>law, <i>including review of Community measures which .. are designed to give effect to [UN Security Council Resolutions].</i>"</p> <p>Poiaras Maduro AG at 45:</p> <p>"This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow."</p> <p>[and citing Aharon Barak, Israeli SCt:]</p> <p>"It is when the cannons roar that we especially need the laws .. Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no 'black holes' .."</p>	<p>jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention."</p>
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