Challenges to legislation under the Human Rights Act

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Abstract

This article critically analyses a line of case law in which the courts have held that for legislation to be incompatible with a Convention right on proportionality grounds, it must produce incompatible outcomes in "all or nearly all cases". The effect of the test is to immunise legislative measures from certain forms of challenge, which in some circumstances can render Convention rights nugatory. The test's spread from its emergence in challenges to the immigration rules to cases involving both primary and secondary legislation is traced, along with different formulations of the test employed by the judiciary. It is shown that whilst the test significantly undermines human rights protection, it is only in the immigration context that the courts have been consistently willing to employ the test. It is argued that the test should have no place in human rights law, with other much more appropriate tools available to the judiciary to give effect to any overreach concerns.

Introduction

A central doctrinal question in UK human rights law is when will the courts make a declaration of incompatibility in respect of primary legislation or quash or declare unlawful secondary legislation as incompatible with a Convention right. From a comparative public law perspective, Joseph Weiler has remarked that proportionality has been exhaustively debated, with discussion "long passed the limits of what is proportionate and reasonable" and on balance he would "rather not read another work" on the topic.[1] Yet the circumstances in which the domestic courts will issue a declaration or quash a legislative measure on the grounds of proportionality under the Human Rights Act (HRA) have attracted relatively little attention from domestic academic lawyers,[2] with no attention at all paid to the most significant doctrinal development in this area over the last decade.[3] Namely, the development of a test by the courts which holds that in order for a legislative

[1] J. Weiler, "Editorial" (2019) 17 ICON 1025, 1036.

[2] Alan Brady unusually gives separate treatment to proportionality-based challenges to administrate acts and legislation in his "institutionally sensitive approach": *Proportionality and Deference under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2012). Similarly, D. O'Brien, "Judicial review under the Human Rights Act 1998: legislative or applied review?" (2007) 5 E.H.R.L.R. 550.

[3] Conor Gearty has identified "the quashing of general rules" as one of the "most interesting and trickiest issues that the HRA has thrown up" ("The Human Rights Act comes of age" (2022) 2 E.H.R.L.R. 117, 123). For an approach

measure to be Convention incompatible, "it must be incapable of being operated in a proportionate way and so [is] inherently unjustified in all or nearly all cases."[4] Instead, proportionality related discussion in this period has focused on the possible extension of the well-understood four-fold test to the common law as either an independent ground of review,[5] the technique through which common law constitutional rights are protected,[6] or as an aspect of the ("augmented") principle of legality.[7]

Despite the neglect in the academic literature, this "all or nearly all cases" test has profound implications for human rights protection, since few, if any, legislative measures will meet this threshold. Prima facie, the test could immunise almost any measure from Convention challenge by the domestic courts, so long as it was passed in a legislative form, rendering Convention rights nugatory. The test appears to go significantly further than the extremely controversial, and now discarded, Bill of Rights proposal, which directed the courts to attach the "greatest possible weight" (cl.1(2)(c)) to how Parliament has struck the relevant balance when the proportionality of primary legislation is challenged: a likely less demanding standard than incompatible in "all or nearly all cases", which regardless would have only applied to Acts of Parliament, rather than legislation generally.

The radically restrictive implications of the line of cases employing the test can be instructively contrasted with Shona Wilson-Stark's argument that the courts should adopt an "expository justice approach" to s.4 HRA.[8] For Wilson-Stark, the courts should issue a declaration of incompatibility, even if it is not necessary in order to decide the case before it, when incompatibility can be envisaged in some other range of cases. The test in contrast holds that not only declarations of incompatibility in respect of primary legislation, but declarations and quashings generally under the Act, should not be made, even if there is incompatibility in the instant case, if there would not be incompatibility in "all or nearly all cases".

The lack of attention to the test is all the more surprising given that it has been employed in some of the most important human rights cases in recent years, particularly those involving immigration: the greatest source of consistent tension between the government and the judiciary since the HRA's introduction. The test was used by the Court of Appeal to overturn the

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focused on the "discretionary" aspect of s.4: C. Mallory & H. Tyrrell "Discretionary Space and Declarations of Incompatibility" (2021) 32(3) K.L.J. 466.

[4] *R (Bibi) v Secretary of State for the Home Department (SSHD)* [2015] UKSC 68 at [69].

[5] Amongst a huge literature generally focused on whether proportionality should replace reasonableness as a ground of review: T. Hickman, "Problems for Proportionality" [2010] N.Z.L.R. 303. P. Craig, "Proportionality, rationality and review" [2010] N.Z.L.R. 265.

[6] C. Lienen, "Common Law Constitutional Rights: Public Law at a Crossroads?" [2018] *P.L.* 649; A. Bogg, "The Common Law Constitution at Work" (2018) 81 M.L.R. 509.

[7] J. Varuhas, "The Principle of Legality" (2020) 79(3) C.L.J. 578; M. Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 C.L.P. 85.

[8] S. Wilson-Stark, "Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998" (2017) 133 L.Q.R. 631, 633. Also, A.L. Young, "Towards an Expository Justice Approach to Human Rights Adjudication?" *UKCLA Blog* (25th Oct 2016).

Administrative Court in the only direct challenge to a provision of the hostile environment policy central to the Windrush scandal—widely regarded as a source of "national shame"[9] —in the "right to rent" litigation.[10] It was adopted by the Supreme Court to reject challenges to the language rules[11] and the minimum income requirement for family reunification:[12] reforms that led one Brussels-based thinktank to judge the UK as possessing "the least 'family-friendly' immigration policies in the developed world."[13] It was used by the Court of Appeal to reject a challenge to a very significant tightening in the rules enabling the immigration of adult dependent relatives[14] and by the Administrative Court to uphold the rule which prevents practically all asylum seekers from engaging in paid employment.[15] Most recently, it has been employed in cases challenging the "no recourse to public funds" provision applied to migrants, including the parents of British citizen children.[16] Outside the immigration context, the test was used by some members of the Supreme Court in the very high-profile Northern Ireland abortion litigation,[17] whilst also occurring in other significant cases, including challenges to the Scottish government's flagship "named person service"[18] and, under EU law, to data protection rules.[19]

This article will subject this test to long overdue scrutiny, tracing its emergence in the litigation challenging the 2010-2015 Coalition Government's controversial immigration reforms, and then onto other policy areas. First, it will show how the test was initially rejected by the courts in direct challenges to the immigration rules, with a deferential but well-established manifestly without reasonable foundation proportionality test preferred. It will then identify the two versions of the test which emerged in this context: one, adopted by the Court of Appeal, which creates a very high, but in principle at least surmountable bar for the unlawfulness of an immigration rule and was arguably intended as a bespoke, albeit highly dubious, response to a certain form of immigration judicial review; the other test, significantly more radical doctrinally and adopted by the Supreme Court, effectively renders the rules non-justiciable and would seemingly apply to any human rights challenge to legislation. The article will also show how in some immigration cases, but only some, the at best very high threshold for Convention compatibility required by the test has been compensated for by the use of a much lower, "significant number of cases", threshold for the lawfulness of guidance on the interpretation and implementation of the rules issued by the

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[9] "The 'national shame' of Britain's treatment of Windrush migrants" (*The Economist*, 18 April 2018), available at: https://www.economist.com/britain/2018/04/18/the-national-shame-of-britains-treatment-of-windrush-migrants

[10] *JCWI v SSHD* [2020] EWCA Civ 542 at [119].

[11] *R (Bibi) v SSHD* [2015] UKSC 68 at [60], [69].

[12] *R (MM (Lebanon)) v SSHD* [2017] UKSC 10 at [56].

[13] T. Huddleston, *Migrant Integration Policy Index 2015* (Migration Policy Group, 2015), 213.

[14] *R (BritCits) v SSHD* [2017] EWCA Civ 368 at [87].

[15] *IJ (Kosovo) v SSHD* [2020] EWHC 3487 (Admin) at [102].

[16] *R (W) v SSHD* [2020] EWHC 1299 (Admin), [52-3]. *ST v SSHD* [2021] EWHC 1085 (Admin) at [39], [175].

[17] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27 at [34], [355].

[18] *Christian Institute & Ors v The Lord Advocate* (Scotland) [2016] UKSC 51 at [88].

[19] *R (Open Rights Group) v SSHD* [2019] EWHC 2562 (Admin) at [60]-[67].

Secretary of State (SoS) to immigration case officers. A constitutionally highly curious position, with non-legally binding, soft law, instruments seemingly more controlled by the judiciary through the HRA than legislation.

Second, the article analyses the deployment of the test to challenges to legislation more generally, identifying the confusion which has arisen in this area. The main difficulty has been a lack of clarity over the circumstances in which the test will be employed, including in contexts where the use of the test renders Convention rights nugatory; most clearly, when the interference is either mandated by legislation or when it is incentivised by the state but committed by private parties. The test has been specified as the general standard for challenges to legislation, but also at times only when the challenge is "abstract" (ie brought by a third party not directly affected by the measure) or "ab ante" (ie brought by an individual to whom the measure has not yet been applied). In these contexts, it is unclear why the courts did not simply dismiss the challenge as "premature" or as not satisfying the s.7 HRA "victim" requirement, rather than adopting a de novo proportionality test. The test has been most often employed when the legislation challenged is non-mandatory or in some sense "discretionary", with the public authority able to disapply the measure whilst also under a s.6 HRA obligation to act compatibly with Convention rights. In the latter context, the test amounts to a discretionary power principle: if legislation does not mandate interference with Convention rights, then it is Convention compatible—at least on proportionality grounds.

Nonetheless, whilst the potential for the test to significantly undermine human rights protection in the UK is clear, the article shows that it is only in the immigration context where the courts have been consistently willing to employ the test. In other areas—abortion, data protection, bereavement benefits—workarounds have been constructed to avoid its unpalatable consequences. It is argued that the test is not appropriate in any context, with much more suitable tools—the manifestly without reasonable foundation test, dismissing "premature" challenges, robustly enforcing the s.7 "victim requirement" —available to the courts to give effect to any overreach or comity concerns.

Emergence

The test first emerged in *R (Bibi) v SSHD*,[20] a judicial review challenging the lawfulness, primarily on Article 8 grounds, of an immigration rule requiring a foreign partner of a British citizen to pass an English test prior to entry. The claimants were resident in the UK, with husbands based in Pakistan and Yemen, where it was claimed they did not have access at an affordable cost to tuition and/or a test-centre. Government counsel, James Eadie QC, submitted that a challenge of this type to an immigration rule can "only succeed if it is established that the rule is incapable of applying consistently with the Convention to the circumstances of any case".[21] As this test was not satisfied, it followed that whether the rule's application was disproportionate in the individual case had "to

[20] *R (Bibi) v SSHD* [2011] EWHC 3370 (Admin).
[21] *Bibi* [2011] EWHC 3370 at [5].

be resolved by a fact-sensitive consideration of the individual decision".[22] In the case of the claimants, therefore, the challenge was premature: they needed to apply for leave and then, if refused, make a human rights appeal to a tribunal.

However, Beatson J held that this put the matter "too broadly": a rule may be ultra vires at common law or under the Convention "even where not every application of the rule to a particular case will breach the rights of the person to whom it is applied".[23] In support of his position, Beatson J cited *R (Quila) v SSHD*,[24] a successful challenge to the restriction of spousal visas to those aged over 21, then very recently decided by the Supreme Court.[25] Although *Quila* arose from the appeals of two individual claimants, both had been granted leave to enter by the time the appeal reached the court, where the focus was on the proportionality of the rule itself, with the court employing a conventional four-stage test.[26] Lord Brown's dissent was also noted, which Beatson J claimed "by implication suggested" that there was "a particular need to accord government an area of discretionary judgment" when a rule itself was challenged, given the way in which his lordship had attempted to "distinguish *Huang* as a case involving two particular individuals and not a rule" from the circumstances in *Quila,* "where what was at issue is the striking down of an Immigration Rule as opposed to a particular decision".[27]

In *Bibi* itself whilst Beatson J applied a conventional four-stage proportionality test considerably more demanding than Eadie QC's submission—balancing the "extent of the benefit to be derived from [the rule] and the extent of the detriment to individuals from it"[28]—he still held that the rule was proportionate, with the possibility in an individual case that "the operation of the [rule] is a disproportionate infringement of that individual's Article 8 rights" not enough to "render the rule itself disproportionate".[29] He also, in accordance with Lord Brown's approach, stressed the importance of giving the Home Secretary's views "appropriate respect" in this area—a phrase repeated three times in the judgment.[30]

A similar approach was taken when *Bibi* reached the Court of Appeal.[31] Kay LJ, in the majority judgment, drew what might have been expected to be an important analogy with the emerging social security case law—another area of high-profile and controversial public policy reform at the time.[32] In *Humphreys v HMRC*, a challenge to tax credit eligibility criteria, Lady Hale had endorsed the manifestly without reasonable foundation (MWRF) test as the general standard

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[22] *Bibi* [2011] EWHC 3370 at [6].
[23] *Bibi* [2011] EWHC 3370 at [57]-[58].
[24] *R (Quila) v SSHD* [2011] UKSC 4.
[25] *Bibi* [2011] EWHC 3370 at [60].
[26] *Quila* [2011] UKSC 45 at [45].
[27] *Bibi* [2011] EWHC 3370 at [61]. Beatson J is summarising *Huang v SSHD* [2007] UKHL 11 and *Quila* [2011] UKSC 45 at [91].
[28] *Bibi* [2011] EWHC 3370 at [90].
[29] *Bibi* [2011] EWHC 3370 at [148].
[30] *Bibi* [2011] EWHC 3370 at [61],[77],[121].
[31] *R (Bibi) v SSHD* [2013] EWCA Civ 322.
[32] *Bibi* [2013] EWCA Civ 322 at [30].

of justification for Convention challenges in the social security context.[33] Also approving of this standard in respect of the immigration rules,[34] the majority found the language rule proportionate, although Sir David Keene dissented holding that it was neither no more than necessary in pursuit of its legitimate aim nor struck a fair balance.[35] Although the government was once again represented by James Eadie, there was no mention in either judgment of his "incapable" test, or Beatson J's discussion thereof. Both majority and dissenting judgments employed a conventional four-stage test, considering "the cases as matters of principle", with "the assumed facts simply provid[ing] a framework in which to test the lawfulness or otherwise of the amendment."[36] The primary difference between the judges concerned how much deference should be accorded to the SoS when deciding whether the rule was necessary and struck a fair balance, with the majority employing the MWRF standard to answer these questions.[37]

The following year in *MM*, a judicial review challenging the minimum income requirement (MIR) for the grant of a spousal visa,[38] government counsel (now Lisa Giovannetti QC) followed Kay LJ's approach, submitting that MWRF was the correct standard in the context of social and economic strategy, which included the immigration rules.[39] Part of Aikens LJ's unanimous judgment can be read consistently with such a conventional deferential approach, with it being claimed that "[e]ssentially the debate is about figures" and to "what extent should the court substitute its own view of what… is the appropriate level of income".[40] However, Aikens LJ also returned to the issue that had arisen in *Bibi* at the Administrative Court, with it held that the key issue in the case was that the claimants were attempting to mount a "pre-emptive strike" upon the income rule, although there was no engagement with Beatson J's position.[41] For Aikens LJ, this raised the question as to "[w]hat are the legal principles by which the court should consider the question of the compatibility of the [rule] with… Article 8 rights".[42] The answer was the "all or nearly all cases" test:

> In a particular case, an IR [immigration rule] may result in a person's Convention rights being interfered with in a manner which is not proportionate or justifiable on the facts of that case. That will not make the IR unlawful. But if the particular IR is one which, being an interference with the relevant Convention right, is also incapable of being applied in a manner which is

[33] *Humphreys v HMRC* [2012] UKSC 18 at [19].
[34] *Bibi* [2013] EWCA Civ 322 at [31].
[35] *Bibi* [2013] EWCA Civ 322 at [55].
[36] *Bibi* [2013] EWCA Civ 322 at [7].
[37] In both *Humphreys* and *Bibi* the MWRF was treated as the standard to assess each stage of the four-fold test, whilst in some later cases it was treated as an alternative proportionality test, with it simply asked whether a measure is MWRF. For discussion, see *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271 at [43]-[54].
[38] Set at the level of £18,600 since adoption in 2012: Immigration Rules, Appendix FM.
[39] *R (MM (Lebanon)) v SSHD* [2014] EWCA Civ 985 at [74].
[40] *MM* [2014] EWCA Civ 985 at [148].
[41] *MM* [2014] EWCA Civ 985 at [94].
[42] *MM* [2014] EWCA Civ 985 at [93].

proportionate or justifiable or is disproportionate in all (or nearly all cases), then it is unlawful.[43]

Justification

Aikens LJ's argument for adopting this test was that it provided a "reconciliation" between two strands of case law.[44] First, some cases including *Baiai v SSHD*,[45] *Bibi* and *Quila*, which supported the use of a conventional four-stage proportionality test if a rule is directly challenged.[46] Second, a strand of cases including *Pankina v SSHD*,[47] *R (Nagre) v SSHD*,[48] and especially *AM (Ethiopia) v SSHD*,[49] which attached significance to whether an individual's Convention rights are ultimately protected and not to whether the rules themselves are proportionate. In the latter case, Laws LJ rejected a submission that the rules must "systematically protect" Article 8 rights, since, following *Huang*, it was "a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8".[50] Accordingly, on Laws LJ's view, the SoS's duty under the Convention was to protect a migrant's Convention rights, regardless of "whether or not this was done through the medium of the immigration rules". As a result, "it follow[ed] that the Rules are not of themselves required to guarantee compliance with the Article".[51]

However, whilst it seems obvious that it would be practically impossible for the immigration rules to "guarantee compliance" with Convention rights, unless so lax that almost anyone with an Article 8 claim would qualify (eg anyone with a family member in the UK), it is far from obvious why Aikens LJ's test, with its extremely high threshold of incompatibility, would follow. If a court decides to hear a judicial review challenge to a rule in principle, then it seems counter-intuitive and wasteful of judicial resources to decide that the rule is lawful merely because it will not be incompatible in "all or nearly all cases", with such a seemingly obvious and inevitable finding also likely communicating no useful information to future claimants, the SoS, practitioners and tribunal judges when decisions applying the rule are then later challenged in individual cases. There is also a clear risk of misunderstanding: when a rule is found to be Convention compatible, the court's decision might be understood to mean that individual decisions made in accordance with the rule are (at least, generally or absent "exceptional circumstances") in compliance with the Convention, when, given the test, all the case will actually stand for is that the rule will not lead to a Convention incompatible outcome in nearly all cases: it might still do so in most.

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[43] *MM* [2014] EWCA Civ 985 at [134].
[44] *MM* [2014] EWCA Civ 985 at [134].
[45] *Baiai v SSHD* [2008] UKHL 53.
[46] *MM* [2014] EWCA Civ 985 at [122]-[127].
[47] *Pankina v SSHD* [2010] EWCA Civ 719.
[48] *R (Nagre) v SSHD* [2013] EWHC 720 (Admin).
[49] *AM (Ethiopia) v SSHD* [2008] EWCA Civ 108.
[50] *AM (Ethiopia) v SSHD* [2008] EWCA Civ 1082 at [39].
[51] *AM* [2008] EWCA Civ 1082 at [39].

More fundamentally, it is unclear normatively why so much significance should be attached to the spread of cases of disproportionate interference within the affected population to the exclusion of the severity of the interference for those affected and the nature of the public interest claiming to justify the rule. A rule that has profoundly negative consequences only for some, with minimal public interest in the measure, is lawful, unlike potentially a rule addressing a rare social problem which leads to disproportionate outcomes in practically every case, but where the severity of the impact is also limited. In effect, Aikens LJ is proposing a distorted proportionality test, with overwhelming significance attached to only one factor usually considered germane. In contrast, the MWRF test, as employed by the Court of Appeal in *Bibi*, imposes a lower standard of justification than a conventional test ("manifestly disproportionate"[52]) and provides a means by which the courts can give effect to overreach concerns, without biasing the test to only one relevant factor. The test also requires statistical evidence regarding the distribution of the interference and the make-up of the affected population, data that may be both unavailable and the courts unsuited to interpret, followed by an impressionistic judgment (95%, 99% etc) about whether the "nearly all cases" threshold has been passed.

In response, it could be argued that the comparison with the MWRF is unfair, since the two tests are directed at different questions. Even if a rule will be disproportionate when applied in some cases, this does not determine whether the rule itself should be quashed or declared unlawful. Aikens LJ's test answers this latter question. However, whilst it is true that the fact that a rule would be Convention incompatible in an individual case is not enough to render the rule itself incompatible, this does not explain why the test for the latter is to attach sole significance to the percentage of disproportionate cases in the affected population. The conventional four-stage test as applied to a rule, employing the MWRF standard or not, allows the courts to attach importance to other relevant normative properties, such as the feasibility and consequences of adopting a different rule for the public interest. The court can weigh up all these relevant properties—the benefits and detriments, as Beatson put it—whilst also showing, if appropriate, pronounced deference when conducting the balancing exercise to the rules adopted by the executive and endorsed by Parliament.

Laws LJ's remarks in *AM* were also made in a context where the issue was whether the immigration rules should be interpreted in order to systematically protect Convention rights, but there are very good reasons related to legal certainty, in an area of law already notorious for its "byzantine complexity",[53] why the use of s.3 style interpretation of the rules, with the courts stretching their ordinary meaning, is undesirable. Yet, likewise, legal certainty, and rule of law considerations generally, would seem to favour the quashing (or declarations in respect) of rules which systematically fail to protect Convention rights, absent a good reason to potentially allow very large gaps to emerge between the requirements of the Convention and the rules. That is, the test could introduce considerable uncertainty into the immigration system considered as a whole,

[52] *R (SC) v SSWP* [2019] EWCA Civ 615 at [145] (Leggatt LJ).
[53] *Pokhriyal v SSHD* [2013] EWCA Civ 1568 at [4].

with potentially the rules providing minimal guidance as to the actual rights of users of the system, since even if a rule conflicts with Convention rights in a large majority of cases it will still be Convention compatible. It should also be noted that Aikens LJ was not holding that the test merely applied to when a quashing or a formal declaration would be issued, rather than issuing statements as to when the court judged a rule was (very) likely to lead to disproportionate outcomes if followed. The Administrative Court in *MM* had adopted the *Quila* approach, stating that the MIR was very likely to be disproportionate for British citizens earning the minimum wage, rather than making a formal declaration or quashing, and it was this decision that the Court of Appeal overturned.[54] Rather if a rule was challenged, then the test would be employed, with the rule then found Convention compatible or not, simpliciter.

Guidance and the test

Despite these problems, when *Bibi* reached the Supreme Court Aikens LJ's formulation of the test was endorsed, with no discussion of the MWRF test as used by Kay LJ.[55] Unsurprisingly, given the test, the court held that the language rule was lawful. However, unlike the courts below, importance was attached to the nature of the "exceptional circumstances" guidance produced by the SoS as to when she would disapply the rule. Given how restrictive this guidance was at the time, Lord Neuberger held that it was "virtually certain that there will be a significant number of cases where application of the Guidance will lead to infringement of article 8 rights".[56] However, since no argument had been provided on the guidance, no declaration was made.[57] Perhaps surprisingly, what appeared clear was that the court considered that the tests for Convention compatibility were not the same: all or nearly all cases for the rules, but "a significant number of cases" standard when it came to the guidance.

In *Bibi*, the use of the nearly all cases test is very unlikely to have made any difference to the outcome of the case: it seems clear that even if the test had been a conventional balancing exercise undertaken with some intensity, all the Supreme Court justices considered that requiring a pre-entry language test was a justified interference with Article 8, except where there were major impediments to a partner either receiving tuition or undertaking a test. Since this issue could be appropriately dealt with through the guidance on "exceptional circumstances", there was no real prospect that the rule would be quashed regardless of the stringency of the test employed.

However, the test took on more importance when *MM* reached the Supreme Court. The claim appeared particularly strong: the government had adopted an income threshold for family reunification considerably in excess of the minimum wage, in contrast to almost all other European countries. The effect of the rule seemed clear: it would prevent low-income British citizens, like Mr MM (a full-time security guard in Wolverhampton), from living with their spouses in the UK,

[54] *(R (MM) Lebanon) v SSHD* [2013] EWHC 1900 (Admin) at [142]-[144].
[55] *R (Bibi) v SSHD* [2015] UKSC 68 at [60].
[56] *Bibi* [2015] UKSC 68 at [101].
[57] *Bibi* [2015] UKSC 68 at [104].

permanently unless they could find a higher-paid job—compared with, say, the claimants in *Quila* who only had to wait until they reached 21. It was far from obvious that the highly questionable benefits identified by the government (to social integration and social security expenditure) could outweigh such interference. What the test allowed the court to do in this case was to avoid making such a judgment. Lady Hale and Lord Carnwath in a joint unanimous judgment reasoned that since the SoS "retains a discretion to grant entry clearance outside the rules… which must be exercised in accordance with section 6 [HRA]", then the MIR is "only one part of the decision-making process"; a position "reinforced by the nature of the right of appeal against any adverse decision" to a tribunal on Article 8 grounds.[58] As a result, the MIR was Convention compatible, since when the system is considered as a whole—a "two-stage process, the second involving consideration of the human rights issues outside the rules"—it is capable of leading to Article 8 compatible outcomes.[59] As the Court pointed out, the test provides a very "simple answer to the central issue in the case… remov[ing] any substantial basis for challenging the new rules as such under the HRA."[60]

Two distinct tests

The Supreme Court's reasoning in *MM* was significantly different from Aikens LJ's. Given the emphasis on incompatibility in every case, Aikens' central idea appeared to be whether an immigration rule, when viewed in isolation from the SoS's power to disapply a rule and the s.6 obligation (ie considering only the first-stage of the two-stage process), would lead to a Convention incompatible outcome in practically every case, with this test providing a reconciliation between in his view the two conflicting strands of case law. But this quantitative threshold is irrelevant on the reasoning of the Supreme Court, since an immigration rule will not be bound or "inevitably"[61] lead to a disproportionate outcome in a single case, let alone all cases, given the SoS's power to disapply a rule. The test, as formulated by the Supreme Court in *MM*, therefore appears empty, since what the position of the Court amounts to is the one that Aikens LJ attributed (correctly or not) to Laws LJ: that an immigration rule can never be quashed or a declaration issued on, at least, proportionality grounds. In effect, for the Supreme Court, the rules are non-justiciable in this respect, even if they can be disapplied in individual cases. However, unlike the position assigned to Laws LJ, the Supreme Court's test lacks transparency, since it purports to impose a test of Convention compatibility—incompatible in practically every case—on the rules, when by their very nature the rules cannot reach this threshold if, unlike with Aikens LJ's reasoning, reliance is placed on s.6 and the SoS's power to disapply a rule in individual cases.

Also in *MM*, unlike *Bibi*, the Supreme Court did not consider whether the position of the claimants was likely to lead to an Article 8 infringement in "a significant number of cases" unless

[58] *R (MM (Lebanon)) v SSHD* [2017] UKSC 10 at [58], [60].
[59] *MM* [2017] UKSC 10 at [59].
[60] *MM* [2017] UKSC 10 at [60].
[61] *MM* [2017] UKSC 10 at [55], [58]. *Bibi* [2015] UKSC 68 at [2].

the guidance was changed. On the one hand, this might seem inconsistent: if the court can consider whether a citizen with a partner in Pakistan, with limited resources and far from a test centre, is likely to have their Convention rights interfered with if the existing guidance is followed, why could they not consider the same question for someone working full-time on the minimum wage in Wolverhampton? On the other hand, asking this question would seem to render the test redundant, leading to bizarre results. That is, an immigration rule could lawfully state that a spousal visa sponsor is required to earn above X (indeed, on the Supreme Court's approach any figure would be Convention compatible), since it would not inevitably lead to a Convention incompatible outcome in "all or nearly all cases". But the guidance must state that the rule is likely to contravene the Convention rights of people earning less than X and so it should be disapplied in these cases, since otherwise Convention rights would be interfered with in a significant number of cases. However, in *MM* the court did not attempt to resolve this problem: they just did not address whether denying leave to a partner of a minimum wage worker etc was likely to be Convention incompatible in a significant number of cases.

The tension resulting from *Bibi* and *MM* between the rules and guidance would arise in *R (W) v SSHD*.[62] The case involved a challenge to the rule that grants of leave to remain will normally be subject to No Recourse to Public Funds (NRPF) unless the "applicant is destitute" or "there are particularly compelling reasons relating to the welfare of a child".[63] Clearly, if the test was employed then the challenge would fail, since the rule is not incompatible in "all or nearly all cases". However, the move made by Chamberlain J and Bean LJ was to decide that since the challenge was effectively to the wider regime—the rules plus guidance—then the test was whether "the regime, read as a whole, g[ave] rise to a real risk of unlawful outcomes in a 'significant' or 'more than minimal number' of cases?".[64] The judgment in *W* also highlights a further strange consequence of *Bibi*: if there was no guidance and only rules, then, presumably, the NRPF regime would have been Convention compatible.

However, there were likely more straightforward ways to distinguish *W* from the prior cases than the questionable, given existing authorities, "regime as a whole" approach. The challenge was made under Article 3 and not Article 8; unlike in *Bibi/MM* the measure had actually been applied to the claimants; and unlike in claims for leave to enter or remain no tribunal appeal is available to challenge a NRPF imposition, with claimants required to bring a far more expensive judicial review.[65] However, as discussed in the next section, four years prior to *W*, the test began to be used in challenges to legislation generally, with the test being presented, at times, as the standard for when legislation can be quashed or a declaration of unlawfulness or incompatibility issued, including in contexts very different from *Bibi* and *MM*.

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[62] *R (W) v SSHD* [2020] EWHC 1299 (Admin).

[63] Immigration Rules, para GEN.1.11A.

[64] *W* [2020] EWHC 1299 (Admin) at [59].

[65] Nationality, Immigration and Asylum Act 2002 s.113: a "human rights claim" attracting an appeal to a tribunal means a claim that to remove or require to leave or refuse a person entry into the UK would be unlawful under s.6 HRA.

Legislation

In *Christian Institute & Ors v The Lord Advocate* (*CI*),[66] the Supreme Court deployed the test in an Article 8 challenge to the Scottish government's "named person service", which aimed to promote children's well-being by facilitating information sharing amongst public services. The court held that:

> an ab ante challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights: *R (Bibi)*[67]

Accordingly, the court reasoned that whilst the Act "may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents", the proportionality-based challenge inevitably failed, since "it cannot be said that its operation will necessarily give rise to disproportionate interference in all cases".[68]

The strikingly high threshold for disproportionality set out in *CI* is likely to be very rarely, if ever, satisfied, although the test's use appears limited to "ab ante" challenges. However, the court did not define what it meant by this term. In *Bibi* and *MM*, the challenged rules were in force and had been applied to many families but not to the claimants. The measure in *CI* was "ab ante" in a different sense since the legislation itself had not been brought into effect and so had not impacted on anyone. The case was not brought purely by a third-party or campaigning organisation, with individual parents amongst the claimants, along with the Institute, although it was not obvious that the provisions, after commencement, would have directly affected them and their personal characteristics did not feature in the litigation. The challenge in *CI* therefore can be considered a form of abstract review, with the legislation challenged independently of the facts of any particular case.

An abstract review was the context for the next time the test was discussed by the Supreme Court, outside the immigration rules, in the challenge to the criminalisation of abortion in Northern Ireland: *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* (*NIHRC*).[69] Four of the seven-member panel found that prohibiting abortion in cases of foetal abnormality and where pregnancy resulted from rape or incest was incompatible with Article 8. However, a declaration of incompatibility was not issued since the majority held that the Commission did not have standing to bring the claim. There was also disagreement over

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[66] *Christian Institute & Ors v The Lord Advocate* (Scotland) [2016] UKSC 51

[67] *Christian Institute* [2016] UKSC 51 at [88].

[68] *Christian Institute* [2016] UKSC 51 at [106], [94].

[69] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27.

the nature of the proportionality test to be employed, at least, in these circumstances: an abstract review brought by a third-party or non-victim.

The claim raised an important conceptual problem about the nature of the test, which has not been considered so far in this article. Although the challenge was to legislation that criminalised abortion,[70] the claim was based on Convention incompatibility only insofar as it prohibited abortion in cases of foetal abnormality and where pregnancy resulted from rape or incest. How then could the legislation be incompatible in nearly all cases? In a judicial review of an immigration rule concerning when an adult dependent relative can receive leave to enter, Sales LJ gave the following succinct definition of the test:

> if there are cases in which the immigration rule can be applied without violation of Article 8 either because Article 8 is not engaged in the first place (so there is in those cases no interference with Article 8 rights which requires justification) or because, even if Article 8 is engaged, the interference will be justified and proportionate, the court would not be entitled to strike the rule down.[71]

What the test appears to mean in practice, therefore, is that for a measure to be Convention incompatible, then virtually every time it will be negatively applied to an individual (refusing a visa because the income requirement is not satisfied etc) this must be Convention incompatible. Hence, presumably, in the *NIHRC* context, the challenged legislation must be incompatible almost every time a pregnant woman would seek and be denied an abortion. However, if the answer is that it only needs to be incompatible in every case in a sub-group of those affected (eg in cases of foetal abnormality), then either the test is virtually meaningless, since almost any claim will be based on incompatibility for people with certain general characteristics (eg minimum wage earner), or a key question in any such review will be a metaphysical one about whether some group-ness threshold is met, such that the measure will then be incompatible in every case, rather than only in a subset of cases. Nonetheless, the intuitive formulation of the test, as provided by Sales LJ, is open to manipulation: the more coarse-grained or all-encompassing a measure is, the more likely there will be cases in which it can be applied compatibly with the Convention.

However, this issue was not engaged with by any of the panel. Lord Reed expressly endorsed the test, quoting the key part of para 88 of *CI* extracted above.[72] In his view, the threshold for Convention incompatibility was clearly not met in many cases in each of the three groups. First, women seeking an abortion could travel to the rest of the UK, which was likely to mean that the Article 3 threshold, at least, generally would not be infringed, and this option was also relevant to the proportionality assessment under Article 8.[73] Second, abortion is a highly controversial

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[70] Offences Against the Person Act 1861, ss.58–59; Criminal Justice (Northern Ireland) Act 1945, s.25(1).
[71] *R (BritCits) v SSHD* [2017] EWCA Civ 368 at [87].
[72] *NIHRC* [2018] UKSC 27 at [355].
[73] *NIHRC* [2018] UKSC 27 at [356]-[357].

issue, with the separation of powers requiring deference to the balance struck by elected institutions.[74] Third, in an individual case where a Convention right has been infringed, the remedy would depend on the specific facts, since the incompatibility may result from "shortcomings in the provision of advice and support by health care professionals", rather than from the legislation itself.[75]

Lady Hale also employed the test, but reached a different conclusion, holding that the challenged legislation was "bound to produce incompatible results in every case" with Article 8, but declined to issue a declaration in respect of Article 3 since it was only "a situation in which the law is bound to operate incompatibly in some cases."[76] Given the significance of the interests protected by Article 3 and in particular its unqualified nature, it may seem surprising, and is likely testament to the test's impact on judicial thinking, that a liberal feminist judge like Lady Hale in the area of abortion would not view a measure bound to infringe this article in some cases as sufficient to warrant a declaration of incompatibility. For Lord Kerr, in contrast, at least in the Article 3 context, it was sufficient that there is a "likelihood" of infringement for "at least some members of the vulnerable group".[77] In the fullest discussion, Lord Mance rejected the "all or nearly all cases" quantitative threshold:

> The relevant question is whether the legislation itself is capable of being operated in a manner which is compatible with that right, or, putting the same point the other way around, whether it is bound in a legally significant number of cases to lead to unjustified infringement of the right… It cannot be necessary to establish incompatibility to show that a law or rule will operate incompatibly in all or most cases. It must be sufficient that it will inevitably operate incompatibility in a legally significant number of cases.[78]

A few months after the decision in *NIHRC*, the *CI* test was, confusingly, ostensibly employed in *McLaughlin*, concerning the exclusion of cohabiting couples from Widowed Parent's Allowance.[79] Unlike both *CI* and *NIHRC*, this was not an ab ante or abstract review: Ms McLaughlin's partner had died and she had been refused the benefit. Like *NIHRC*, the challenge concerned primary legislation containing mandatory provisions, but in these circumstances there was no question that the interference derived from the particular way in which the legislation had been applied or understood, or that the interference could have been avoided, or more easily justified, through changes to other aspects of the overall system (eg the availability of advice for travelling abroad). Rather, as is standard in respect of contributory social security benefits, the cause of the interference was straightforwardly the qualifying rules governing entitlement to the Allowance,

[74] *NIHRC* [2018] UKSC 27 at [341].
[75] *NIHRC* [2018] UKSC 27 at [359].
[76] *NIHRC* [2018] UKSC 27 at [34].
[77] *NIHRC* [2018] UKSC 27 at [257].
[78] *NIHRC* [2018] UKSC 27 at [82].
[79] *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48.

which Ms McLaughlin failed to satisfy, with no discretion of any kind for administrators to adapt or ameliorate these provisions. This means that the only "remedy" available to those who claim that their Convention rights have been infringed by a measure of this type is a judicial review pursuant of a declaration of incompatibility of the primary legislation.

Hence, if the test is employed in this type of case, then the Convention would appear empty, since there are likely to be extremely few situations when a mandatory rule would lead to a Convention incompatible outcome in "all or nearly all cases". Indeed, the government could immunise virtually any rule from a Convention challenge, including a declaration of incompatibility, by passing it into primary legislation in the form of mandatory provisions. This would provide full immunity, rather than, as with the immigration rules, from a certain form of challenge, since no other challenge is available on Convention grounds to unambiguous mandatory rules contained in primary legislation. Fortunately for Ms McLaughlin, in the majority judgment Lady Hale appeared to employ a version of Lord Mance's test in *NIHRC*, with a declaration of incompatibility issued, but confusingly claimed that this was what was endorsed in *CI*:

> the test is not that the legislation must operate incompatibly in all or even nearly all cases. It is enough that it will inevitably operate incompatibly in a legally significant number of cases: see [*CI*], para 88.[80]

As the discussion of *CI* above shows, this is not what the relevant extract states.

Source of the confusion

Overall, the disagreement and confusion at the Supreme Court in this area appears to have stemmed from the justices failing to carefully consider whether a test developed in the very specific context of direct challenges to the rules governing grants of leave to enter is applicable to challenges to legislation generally. Three distinctive features of the *Bibi* and *MM* judicial reviews can be identified. First, the "ab ante" element, since the rules in these two cases had not been applied to the individuals bringing the challenge, with the court in *CI* and *NIHRC* then further associating the test with "abstract" reviews. Second, the in principle element, since it was the lawfulness of the rule itself that was challenged, rather than how it had been understood or applied in practice. Third, a discretionary element, since, given s.6 HRA and the subordinate status of the immigration rules, the rules can and must be disapplied by the SoS (as well as by low-fee tribunals and the courts) in every individual case where not to do so would be incompatible with a Convention right. In the remainder of this section, it is considered whether the test is appropriate when any of these properties are present.

In principle challenges

[80] *McLaughlin* [2018] UKSC 48 at [43].

Most obviously, the test endorsed by the Supreme Court in *CI*, *Bibi* and *MM* is completely inappropriate if it is employed in a context where legislation is challenged in principle, simpliciter. As *McLaughlin* clearly shows, it renders human rights infringements which result directly from mandatory rules contained in primary legislation effectively immune from Convention challenge, since it is extremely unlikely that legislation would ever require a Convention incompatible outcome in nearly all cases. In this context, the reformulated test, put forward by Lord Mance, is correct, with it "sufficient that [legislation] will inevitably operate incompatibility in a legally significant number of cases", with no quantitative threshold: legislation which is disproportionate in a single case could be Convention incompatible if the interference is severe and the public interest in the measure weak; legislation that is bound to produce incompatible outcomes in a very large proportion of cases (considered individually) could still be compatible if the interference is outweighed by the overall public interest, with no way, subject to whatever deference the courts should show in answering this question, to produce a fairer overall balance through a redesigned scheme.

What is distinctive about this type of challenge is that considerations around the desirability of "bright line rules" and administrative workability will likely be of central importance, unlike in cases where, in essence, the claim is that a public authority should have exercised a "discretion" differently. As a result, it will not be enough for a claimant to show that a rule appears disproportionate when applied to their specific circumstances; they will need to also show that the line or boundary that a mandatory rule strikes should either be drawn in a different place (as per *McLaughlin*) or, alternatively, that the mandatory scheme should be supplemented or replaced with a discretionary or "exceptional circumstances" provision which enables administrators to disapply the rule when appropriate. But giving due regard to these considerations is still very different from adopting the "all or nearly all cases" test: it means that claims like *McLaughlin* will almost always fail regardless of the severity of the interference, the weakness of the public interest, and the ease with which Parliament or the executive could adopt a redesigned scheme.

Abstract reviews

The test may seem more suitable in abstract or ab ante challenges when a different test would be employed when a claim is brought by a directly affected individual alleging incompatibility on the facts of their case. A high threshold for unlawfulness in abstract reviews does not appear to be applied outside Convention rights, with *R (UNISON) v Lord Chancellor*[81] the most famous recent example. Surprisingly, given Lord Reed's alertness to the "practical difficulties involved in attempting to carry out an abstract assessment of compatibility, unanchored to the facts of any particular case" in *NIHRC*,[82] he felt able to undertake exactly this task in respect of employment tribunal fees. Lord Reed held that the fees interfered with the "constitutional right of access to the courts", since the level of fee, although means-tested, still required some claimants to forgo

[81] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[82] *NIHRC* [2018] UKSC 27 at [334].

"reasonable expenditure" based on the Joseph Rowntree Foundation's minimum income standards.[83] Since this interference could not be justified and was not expressly authorised by primary legislation, then the fees regime was ultra vires.[84] The fees were clearly not disproportionate in every case, since for the poorest, whose fees were waived, and the affluent it did not interfere with their reasonable expenditure, whilst the Lord Chancellor also possessed a discretion to waive the fee for any claimant.

Moreover, if there are good reasons why it might be difficult for directly affected individuals to bring a claim, then the insistence on imposing a very demanding standard of unlawfulness in abstract challenges could lead to injustice. As Lord Kerr observed in *NIHRC*, it cannot be presumed that women "who have had to endure the trauma of a fatal foetal abnormality pregnancy or a pregnancy which is the consequence of rape or incest… would be prepared, after the event, to assert a violation of their rights".[85] As a result, rather than imposing two tests with very different standards for Convention incompatibility: a virtually impossible to satisfy all or nearly all cases standard for abstract and ab ante reviews and then a conventional four-stage test for cases brought by directly affected individuals when the challenged measure has been applied, it would seem better to exclude abstract and ab ante reviews unless a convincing reason is made to the court for why, unusually, such a review, "unanchored to the facts of any particular case", or, in the immigration context at least, prior to a claimant applying for leave should be heard. In the "ab ante" immigration judicial reviews this requirement might have been easily satisfied, since whilst it was not inevitable that any of the claimants would have had their applications rejected, as the SoS may have accepted their Article 8 claim despite the restrictive nature of the "exceptional circumstances" guidance stating that grants of leave outside the rules would be "rare" (as indeed was the case),[86] the low-income claimants did not want to risk the (non-refundable) £1500 visa application fee when they did not satisfy the rules.

Indeed, it seems particularly curious that the courts have introduced a de novo proportionality test, when if the aim was to place some limits on human rights challenges to government policies, particularly what might appear as "political" claims brought by third parties, then the courts could have simply robustly enforced the s.7 "victim" requirement. Creating a bespoke test may have some intuitive appeal in the common law context where the laxer standing rules enable *UNISON* type challenges by NGOs and campaigning organisations, but s.7 would seem, if desired, a sufficient barrier to prevent such challenges under the Convention (even if there are academic arguments that s.7 should only apply in s.6 challenges and not to primary legislation[87]). However, s.7 is very unlikely to have been able to prevent the immigration challenges in *Bibi* or *MM* where the test emerged. Although the claims were "ab ante", the claimants would still almost certainly be regarded as "victims" given the Strasbourg jurisprudence

[83] *UNISON* [2017] UKSC 51 at [66], [93].
[84] *UNISON* [2017] UKSC 48 at [87].
[85] *NIHRC* [2018] UKSC 27 at [200].
[86] *MM* [2017] UKSC 10 at [23]-[25] (26 grants of leave from 30,000 refusals from 2012 to 2014).
[87] Wilson-Stark, "Facing Facts" (2017) 133 L.Q.R. 631.

on "potential victims", where it is sufficient for an applicant to "produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur".[88]

Private parties and the test

A recent example of a judicial review where the "victim" requirement is most unlikely to have been met and yet an abstract review appears highly desirable, whilst the test was also applied, is the "right to rent" litigation.[89] The challenged primary legislation (Immigration Act 2014 ss.20-37) sought to prohibit landlords from renting to "irregular migrants", although the challenge was on the basis of the alleged racially discriminatory consequences for certain groups with the "right to rent", especially individuals without British passports and "ethnically British attributes". The plausible hypothesis was that if a significant risk is attached to renting to irregular migrants—large fines and even, if knowingly, a prison sentence[90]—then landlords will prefer to rent to people thought to pose little risk of falling into this category. Evidence though from "mystery shopper" exercises of discrimination was weak, with the strongest evidence from surveys of landlords in which significant proportions reported that they would discriminate because of the scheme.[91] The measure appears particularly suitable to be challenged by a third-party in the abstract, since it seems highly unlikely, given the types of discrimination that the scheme was alleged to cause—a landlord fails to respond to an email when they see a "foreign" name etc—that a victim would respond by launching a judicial review; at most, when the discrimination is particularly egregious the very occasional claim might be brought against the landlord for discrimination in a county court.

The case raised a distinctive legal issue since the focus of the challenge was legislation that it was alleged incentivised discriminatory conduct by private parties, with the case taking on a counter-intuitive character given the intervention of landlords through their representative bodies. Their argument, in effect, was that the legislation was Convention incompatible because of their own discriminatory conduct caused by the seemingly trivial task of checking and copying a prescribed form of ID, which would insulate them from any liability.[92] However, the distinctive nature of the challenge was not engaged with by the court. Hickinbottom LJ's judgment (with which the other members of the court agreed) was prepared to accept that the scheme fell within the ambit of Article 8 and that it did cause discrimination, due to the invocation of the test according to which the scheme was obviously lawful:

> the Scheme is clearly capable of being operated in a proportionate way in most individual cases—indeed, it seems to me that it is *capable* of being operated by landlords in such a

[88] *Senator Lines v Austria and others*, (62023/00) (E.C.H.R. 2004).
[89] *The Joint Council for the Welfare of Immigrants v SSHD* [2020] EWCA Civ 542 *(JCWI)*.
[90] S.39 Immigration Act 2016.
[91] *JCWI* [2020] EWCA Civ 542 [32-43].
[92] Immigration (Residential Accommodation) Order 2014 (SI 2014/2874).

> way in *all* individual cases—in my view, this is a complete answer to the claim on both article 8 grounds… and the article 14 claim.[93]

JCWI is also an example of the other area where the test may be appropriate, when legislation has at least a discretionary element, such that it does not mandate interference with anybody's Convention rights. It also highlights the considerable confusion created by the test, and perhaps the difficulties that some judges have experienced in making sense of what the extremely high threshold for Convention incompatibility means in practice. At the Administrative Court, where the judge was clearly sceptical of the scheme and very concerned about the racial discrimination that it was alleged to cause, the remarkable conclusion was reached that the scheme was Convention incompatible because it led to an incompatible outcome in every case, even though it is obvious, as Hickinbottom LJ points out, that it is capable of a compatible outcome in every case.[94]

The real issue, which eluded all the judges, is that the test is completely inappropriate in this context. This was not a case like *CI* where the legislation empowers, or modifies the duties on, a public authority, with a s.6 obligation to act compatibly with the Convention, but circumstances where the state imposes duties on private actors (to check ID), with no s.6 obligation. The impact of employing the test in any situation where it is alleged that the state is incentivising, but not mandating, Convention incompatible conduct by a private actor, therefore, would be to leave those affected without a remedy under the Convention. But this must be wrong: if the state can have an obligation to actively protect Convention rights from infringement by private parties,[95] then it must have an obligation not to create schemes which incentivise interference with (at least, some of) the interests protected by the Convention, unless the scheme is proportionate. Yet, the test means that such schemes will always be Convention compatible regardless of the severity and extent of the interference incentivised.

Section 6 obligation

Nonetheless, this still leaves open whether the test is appropriate when the interference that the challenged legislation leads to is non-mandatory or discretionary, with the decision to interfere with a Convention right made by a public authority with a s.6 obligation: the situation in *CI* and the immigration cases. As discussed above, the first point to emphasise is that the form of the test in this context is highly misleading, since it is not, as it was put in *CI*, a "high hurdle" for claimants to meet, but it is virtually impossible for a discretionary power not to be "capable of being operated in a manner which is compatible with Convention rights" in a single case, let alone in a way that will "give rise to an unjustified interference… in all or almost all cases". Given that the power is non-mandatory, then the public authority will be under a s.6 obligation not to exercise it in a way

[93] *JCWI* [2020] EWCA Civ 542 at [119].
[94] *JCWI v SSHD* [2019] EWHC 452 (Admin) at [127].
[95] *X and Y v Netherlands* (1985) 8 E.H.R.R. 235.

which interferes with Convention rights: the power will only be incapable of being operated compatibly when regardless of how the power is exercised (or not), it will give rise to an unjustified interference with a Convention right. Particularly with qualified rights, it is debatable whether such circumstances are not only very unlikely to occur in practice but are conceptually possible, since the use of the power which is least harmful is arguably not an unjustified interference with a Convention right. Regardless, what the test amounts to in this context is a discretionary power principle: if legislation does not mandate interference with Convention rights, then it is Convention compatible—at least on proportionality grounds.

In the early years of the HRA, there were several cases when the courts appeared to endorse a position that s.6 and the availability of a challenge to a Convention incompatible act through a judicial review meant that the authorising primary legislation could not be disproportionate and Convention incompatible. In *Shayler*, the House of Lords held that the Official Secrets Act 1989 was compatible with Article 10, since the Act did not ban absolutely any disclosure: it was restricted unless lawful authority had been gained, with any refusal challengeable through a Convention based judicial review.[96] A seemingly stark approach was taken in *Percy v Director of Public Prosecutions*, a challenge to the compatibility of s.5 of the Public Order Act 1986 with Article 10, where it was simply held that the court should "avoid making a declaration unless the clear and expressed wording of the statute under review makes it impossible [to do otherwise]."[97] Since the issue in the case—prosecution under s.5—was "one of discretion for the decisionmaker on the facts of a particular case" then it followed that s.6 provided sufficient remedy and there was no need to turn to s.3 or s.4.[98]

However, even in cases where statements can be found supporting something like a discretionary power principle, the courts generally attached some importance to other safeguards existing within the legislation or the wider administrative scheme.[99] More importantly, a significant line of cases, makes clear that a s.6 obligation and the possibility of judicial review are insufficient to render a discretionary power compatible with the Convention. This is particularly evident in the well-known ECtHR cases of *Gillan*[100] and *Beghal*,[101] where Strasbourg went further than the domestic courts,[102] requiring substantial safeguards.

In response, it could be argued that the courts, both Strasbourg and domestically, in these cases were addressing whether legislation was "in accordance with law", rather than its

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[96] *R v Shayler* [2002] UKHL 11 at [31]-[36].

[97] *Percy v Director of Public Prosecutions* [2001] EWHC 1125 (Admin) at [12]: albeit the claimant's counsel, Keir Starmer QC, conceded this point, with the case turning on the decision to prosecute.

[98] *Percy* [2001] EWHC 1125 at [13].

[99] For instance, *R (MH) v Secretary of State for the Department of Health* [2005] UKHL 60 at [32]: since "the means exist of operating [s.20(4) Mental Health Act] in a way which is compatible with the patient's rights. It follows that the section itself cannot be incompatible, although the action or inaction of the authorities under it may be so." But most of the judgment is a discussion of the various safeguards which exist to protect against unjustified detention.

[100] *Gillan v UK* (2010) 51 E.H.R.R. 1105 at [80]-[87].

[101] *Beghal v UK* (4755/16) 28 February 2019 at [109]-[110].

[102] *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12; *Beghal v DPP* [2015] UKSC 49.

proportionality or necessity. However, it does not matter whether a discretionary or non-mandatory power is Convention incompatible because its exercise lacks sufficient safeguards such that it will risk arbitrariness (and so is not in accordance with law), or because it will lead to disproportionate interferences with Convention rights to an extent that cannot be justified (and so is not necessary). The important point is that s.6 and the possibility of judicial review of a specific act by the public authority are insufficient to guarantee the Convention compatibility of a discretionary power: limits or safeguards will often, if not invariably, be required restricting the use of a discretion, with their stringency depending on the context and the significance of the Convention rights at stake.[103]

Nonetheless, the distinctive issue raised by the test for human rights law in the context of this article is not that, for instance, the immigration rules risk arbitrariness, since the law appears reasonably precise: that a person earning less than £18,600 will be unable to live in the UK with their foreign spouse etc unless this will infringe Article 8. Rather, the issue is that the test means that the rules are Convention compatible, since they are non-mandatory, regardless of the extent to which the requirements contained in the rules, if followed, will lead to Convention incompatible outcomes.

The problem, as such, is whether a rule or legislation might be considered to lack the quality of law, not because a power is uncertain or uncontrolled as per *Beghal* et al, but because it does not accurately state the law. If, for instance, an income requirement above the minimum wage will generally be disproportionate—like Blake J held in the Administrative court—because it will strike an unfair balance to deny a minimum wage worker family reunification, then for an immigration rule to state that an income higher than the minimum wage is required will not, literally given the immigration rules' subordinate status, be in accordance with the law. If the immigration rules inform citizens that they must meet a certain requirement in order to enjoy family reunification, but in fact decision-making in accordance with that provision will generally not be lawful, as it will be incompatible with Convention rights, then the rules are not "adequately accessible and ascertainable, so that people can know what [the law] is".[104] Likewise, in this context the test strikes at the core of the rule of law by enabling large gaps to emerge between what subordinate legislation and the rules state and what the law actually requires. It means that when a citizen consults publicly promulgated laws such as the immigration rules, then potentially it provides little guidance as to their actual legal rights or entitlements.

If this is right, then all the test achieves in the context of non-mandatory measures is the reintroduction of a conventional proportionality test via the backdoor. According to the test (post Lord Mance's modification in *NIHRC*), any non-mandatory legislative measure is necessarily proportionate since it will not inevitably lead to the infringement of Convention rights. Yet, because either the common law principle of the rule of law or the in accordance with law test

[103] In *Bright v Secretary of State for Justice* [2014] EWCA Civ 1628 at [29] Lord Dyson MR noted that the Strasbourg jurisprudence adopts "a realistic and pragmatic approach" to the in accordance with law test and that in some contexts it will be "impracticable to define with precision how a discretionary power will or may be exercised".

[104] *In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland)* [2019] UKSC 3 at [73] (Lady Hale).

requires legislative measures to reasonably accurately state or represent the law, then it is necessary to assess whether the measure will be proportionate if applied in individual cases. If, for instance, it is not proportionate to deny family reunification to a minimum wage worker, then a rule or subordinate legislation that requires an income requirement higher than the minimum wage is not Convention compatible simply because it is not mandatory and can be disapplied.

Conclusion

The case law discussed in this article does not reflect well upon the senior judiciary. In response to a very significant tightening of the family reunification rules, unsurprisingly several judicial reviews were launched challenging aspects of the new system. In *Bibi* and *MM* the claimants clearly satisfied the standing rules, since although the rules challenged had not been applied to them, they were "potential victims" and had brought a review because they did not want to waste the expensive visa application fees. The Administrative Court in both cases, along with the Court of Appeal in *Bibi*, experienced no difficulty in assessing the proportionality of the new rules, like in the recently successful claim in *Quila* which led to the relowering of the age requirement.

Yet, the Court of Appeal in *MM* and the Supreme Court in both cases chose to depart from this well-established approach by introducing a de novo proportionality test, with, particularly in the Supreme Court's version, profound implications for human rights protection. For the Supreme Court, any legislative measure which would not inevitably lead to a Convention incompatible outcome in all or nearly all cases would be Convention compatible. This approach not only meant that the immigration rules, which are not bound to lead to a Convention incompatible outcome in a single case, would always be Convention compatible, but so would virtually any legislative measure, including in circumstances where no alternative s.6 claim is available to claimants: when the interference is contained in mandatory rules or carried out by a private party. Indeed, the Supreme Court appears to have been unaware in *Bibi* and *MM* that it was significantly changing Aiken LJ's test by employing a version which required that a rule would *inevitably* produce a Convention incompatible outcome, rather than merely in respect of the first-stage of a two-stage process. The Supreme Court's test is far more restrictive than that later proposed in the government's Bill of Rights, rendering Convention rights nugatory in some contexts. For human rights protection in the UK, arguably no cases have matched *Bibi* and *MM* for potential significance since the HRA's introduction.

Unsurprisingly, the courts have recoiled from some of these implications. In *McLaughlin*, the Supreme Court avoided an unjust outcome by simply misquoting its own test, whilst in *NIHRC* Lord Mance did appear to recognise the absurdity of the test in the context of mandatory rules, with the test lowered from a threshold of inevitable in "all or nearly all cases" to inevitable in a significant number. In the Administrative Court, one judge simply claimed that a measure would lead to an incompatible outcome in all cases when it patently would not. In another case, a workaround was constructed by adopting a "regime as whole" approach, leveraging the laxer test for the legality of guidance to the immigration rules. In the Court of Appeal, the use of the test by

the lower court in respect of EU law was rejected as wrong.[105] Yet, this gradual unwinding does not mean that the test has not had a substantial impact and arguably led to significant injustice. In the right to rent, the minimum income and the adult dependent relative cases the test was applied and so the proportionality of these rules was not assessed: rules affecting, given the size of the rental sector, millions of people, whilst potentially hundreds of thousands of low-income families were separated due to the MIR.

This article has focused on doctrine, tracking and evaluating the emergence and mutations of a significant legal test, rather than attempting to explain why the test was adopted. It is of course striking that this radically restrictive test emerged in immigration cases: the greatest source of consistent tension between the government and the courts since the HRA's introduction. Employing the test meant that politically controversial challenges to the government's immigration policies could be dealt with swiftly and straightforwardly, as the Supreme Court put it in *MM*, the test provided a very "simple answer to the central issue in the case… remov[ing] any substantial basis for challenging the new rules as such under the HRA."[106] Yet, when challenges emerged which raised the test in other areas—abortion, data protection, bereavement benefits—the courts have been much more reluctant to employ the test, constructing workarounds or even simply misstating the test.

Nonetheless, regardless of what underlay the test's development, the courts should complete the journey started by Lord Mance in *NIHRC* and take the next available opportunity to fully reject the use of the test in any context when a challenge is brought to a legislative measure, including the immigration rules. Whether a direct challenge on proportionality grounds to legislation should be heard will depend on the circumstances: it will always be appropriate if brought by a "victim" or "potential victim" and no alternative s.6 challenge to a specific administrative act is available. If these requirements are not met, then it will be reasonable for the courts to insist on a good reason why a challenge to the underlying legislation, rather than the exercise of a discretion, should be heard (or if the victim requirement is not met arguably, given s.7, to simply reject the claim regardless). In the immigration cases, the impact of high visa fees and the importance for the rule of law that the immigration rules do not state requirements that, due to the HRA, applicants are not in fact required to meet are two such good reasons. Equally, the courts can adopt the manifestly without reasonable foundation proportionality test, as is now standard in social security human rights challenges, if appropriate to the issues or policy area under challenge. A cautious approach will also often be particularly suitable when mandatory rules are in question, where difficult judgements about where to draw lines between different groups are likely inevitable. The point is not that the courts must adopt a demanding or intense standard of review, but that they should attend to the nature of the claims brought before them, rather than construct absurd tests, regardless of how easy it makes their job by enabling them to avoid assessing the proportionality of highly contentious immigration or other matters.

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[105] *R (Open Rights Group) v SSHD* [2021] EWCA Civ 800 at [53].
[106] *MM* [2017] UKSC 10 at [60].