What principles should be considered when assessing proportionality of interference with qualified rights on the basis of pressing social need?

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Public Law analysis: Tom Tabori, barrister at 39 Essex Chambers, discusses the principles that should be considered when assessing proportionality of interference with qualified rights on the basis of pressing social need.

What restrictions can legitimately be placed by a public authority on qualified rights granted by the European Convention on Human Rights by virtue of pressing social need?

There are no specified or exhaustive restrictions that may be placed on qualified rights by virtue of 'pressing social need'. Unlike the 'legitimate aims' specified in subparagraph (2) to Articles 8–11 of the European Convention on Human Rights (ECHR), the forms that 'pressing social need' may take are not specified.

'Pressing social need' is among the qualifying conditions by which Articles 8–11 ECHR make provision for their own limitation. By contrast, Articles 2, 4, 5, and 6 ECHR are qualified by defining certain conduct as outside the scope of the article, such that anything within is not susceptible to derogation.

'Pressing social need' is one of two concepts that the ECtHR has implied by the phrase 'necessary in a democratic society' (NDS) contained in subparagraph (2) to Articles 8-11 ECHR. The other is that the interference must be 'proportionate to the legitimate aim pursued'. In more recent case law, particularly in the UK, it is the proportionality test that has done more of the heavy lifting, mainly because its mechanism allows courts a firmer route through to determining for themselves (as they must) whether the impugned decision is NDS or not, owing to the disaggregation of the proportionality test following *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 and finally in *Bank Mellat v Her Majesty's Treasury (No 2)* [2011] EWCA Civ 1.

Nonetheless, 'pressing social need' does capture some of the ways in which the ECtHR interprets NDS and these are unpacked below:

- while 'the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"'—as per *Silver and others v United Kingdom* [1983] 5 EHRR 347 at [97]. Mere policy aims desirable to a given executive are thus insufficient per se, however 'reasonable' by traditional judicial review measures
- yet because it is a 'need', the court must determine for itself whether the restrictions on the right are compatible with the ECHR, albeit allowing 'a certain but not unlimited' margin of appreciation in assessing whether a pressing social need exists, as per *Delfi AS v Estonia* [2013] ECHR 64569/09, [2013] All ER (D) 131 (Nov) at [131] (holding internal news portal liable for defamation not a violation of Article 10 ECHR)
- that it is a 'pressing' social need ensures that the exceptions in Articles 8–11 ECHR are to be narrowly interpreted—*Silver* at [376]–[377]. In his dissenting judgment in *Bedat v Switzerland* [2016] ECHR 56925/08 (imposition of criminal penalty on journalist reporting on matter of public interest), at [OI–8], judge Lopez Guerra used 'pressing' interchangeably with 'compelling'. Contrary to the Grand Chamber, judge Guerra found a violation of Article 10 ECHR, so use of 'compelling' may have elevated the threshold of necessity and thus lack authority

- that it is a 'social' need allows the ECtHR to attach weight to the particular society in which the measure operates, eg *Sahin v Turkey* [2007] ECHR 44774/98 at [115]–[116] (secularism in Turkey)

Therefore, 'pressing social need' encompasses key meanings given to the ECHR by the ECtHR, but the domestic courts have found the four-stage proportionality test from *Bank Mellat* (No 2) gives a better on handle on a case when determining whether a restriction is NDS.

Indeed, unless 'pressing social needs' is merged with the concept of legitimate aims so as to become part of the proportionality exercise (as one sees in the domestic caselaw, eg *R (on the application of R) v Chief Constable of Greater Manchester* [2018] UKSC 47, [2019] 1 All ER 391 at [70] (requirement to disclose acquittals in enhanced criminal records check (ECRC) compatible with Article 8 ECHR), the Supreme Court affirming a first instance decision that the scheme was 'no more than necessary to meet the pressing social need for which the ECRC process was enacted'—it is difficult to envisage a case where an interference would be proportionate and yet not also pursuing a pressing social need.

What matters have the courts taken into consideration when determining whether such interference is proportionate to the outcome sought particularly in public interest cases?

In relation to the proportionality test, the courts have taken into consideration the following matters.

- in the UK, the four-stage test designed to establish whether an interference with a qualified ECHR right can be justified, as summarised by Lord Reed JSC at [75] of *Bank Mellat (No 2)*:
  - is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right
  - are the measures which have been designed to meet it rationally connected to it
  - are they no more than are necessary to accomplish it and
  - do they strike a fair balance between the rights of the individual and the interests of the community?

- the principles that the ECtHR considers the 'democratic society' to comprise, namely pluralism and tolerance—*Refah Partisi (the Welfare Party) v Turkey* (Applications 41340/98, 41342/98, 41343/98 and 41344/98) [2003] ECHR 41340/98, at [86] and [90] (dissolution of political party held not to violate Article 11 ECHR) and *R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin), [2018] All ER (D) 128 (Apr), per Singh LJ at [115] (refusal to prioritise burials on religious basis contrary to Article 9 with and without Article 14 ECHR)
- the importance of the relevant right—*O (A Child) v Rhodes and another (English PEN and others intervening)* [2015] UKSC 32 per Lord Neuberger at [110] (applying Article 10 ECHR, elements of tort of intentionally causing physical or psychological harm not made out by publication of book describing author's abuse), Lester and Pannick, 3.17
- the procedural safeguards available to the individual—*Buckley v UK* (Application 20348/92) [1996] ECHR 20348/92 at [76] (no Article 8 violation by refusal of planning permission because statutory appeal available and enabling representations to inspector) and *Air Canada v UK* (Application 18465/91) [1995] ECHR 18465/91 at [37]–[38] and [45]–[46] (seizure of aircraft no violation of Article 1, Protocol 1—judicial review available)
- in relation to immunities, 'the broader an immunity, the more compelling must be its justification in order that it can be said to be compatible with the Convention' (*A v UK* (Application 35373/97) [2002] ECHR 35373/97 at [78] (parliamentary privilege held within margin of

appreciation). However, an absolute immunity does not automatically render the interference disproportionate [ibid]

- in relation to freedom of expression, the test must be 'convincingly established' (*Observer and Guardian v United Kingdom* (Application 13585/88) [1991] 14 EHRR 153 at [59(a)] (Spycatcher memoirs)
- a lack of sufficient reasons and a failure to ensure participation of the individual has been relied on by the ECtHR in finding that an interference did not meet a pressing social need and was disproportionate to the legitimate aim invoked [*Mariya Alekhina and Others v Russia (*Application 38004/12) [2018] ECHR 38004/12 [268]–[269] (Article 10 violated by inter alia domestic court banning access to Pussy Riot's internet videos)
- the number of people benefitting from and calling for the measure *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (Application 931/13) at [111] (no violation of Article 10 where data protection regulator prohibited publishing of data—had received a number of complaints requesting intervention)
- whether there is any common European standard [*Dudgeon v UK* (Application 7525/76) [1983] ECHR 7525/76] at [60] (criminalisation of homosexuality in Northern Ireland breached Article 8) and contrast *X, Y and Z v UK* (Application 21830/93) [1997] ECHR 21830/93 (refusal to allow transsexual to be registered as father of child born by artificial insemination into his female partner—no violation of Article 8)

A factor that the ECtHR will not be exercised by is whether a right entails a negative or positive obligation, the line being difficult to draw, focusing instead on whether a fair balance has been struck (*Agyarko v SSHD* [2017] UKSC 11, [2017] 4 All ER 575 at [41] (overstayers married to British nationals—no Article 8 breach as no insurmountable obstacles to return).

What has recent case law clarified, or equally, left unclear?

Recent caselaw has clarified the following:

- whether the grounds relied on by the public authority are 'relevant and sufficient' functions as a threshold question in determining whether there is a pressing social need (*Delfi*, [25]). While threshold, 'relevant and sufficient' means 'more than simply reasonable' [ibid]
- the existence of a pressing social need may derive from a state's international law obligations as interpreted by the relevant treaty body (*Perinçek v Switzerland* (Application 27510/08) [2016] at [258]–[268] (but no such need found on the facts—no international law prohibiting genocide denial that state had ratified)
- legislation may fail both the legality and proportionality tests where the legislative scheme is insufficiently constrained, discriminating and granular, but the proportionality test is 'the only legal tool available' for resolving questions as to how much discretion a power affords—*In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland)* [2019] UKSC 3, [2019] All ER (D) 150 (Jan) at [13] (requirement to disclose convictions or reprimands when applying for jobs involving contact with children or vulnerable adults)
- the extent to which the Immigration Rule have given effect to ECHR rights. The government has sought to incorporate into the Rules the *Huang v SSHD* [2007] 2 AC 167 proportionality test for Article 8 immigration cases falling outside the Rules, such that the Rules are no longer merely where consideration of the Article 8 claim begins [*Agyarko v SSHD* at [8] and [59]. There is still a proportionality test for cases falling outside the Rules but to satisfy it the refusal of leave must result in 'unjustifiably harsh consequences' (*Agyarko* [60])

- in relation to Article 2, Protocol 4 (A2P4) (freedom of movement), the ECtHR has clarified the scope of the less strict form of NDS in paragraph 4 of A2P4. Instead of 'necessary', para 4 of A2P4 states 'justified by the public interest in a democratic society'. In *Garib v Netherlands* (Application 43494/09) [2017] ECHR 43494/09 at [29], the Grand Chamber clarified that paragraph 4 is not confined to times of warfare but also for reasons of economic welfare and found that legislation requiring households to be granted a housing permit in order to be allowed to live in a designated area was justified in a democratic society because it 'sought to address increasing social problems in inner-city areas of Rotterdam by favouring new residents whose income was related to gainful economic activity of their own' and 'to foster diversity and counter the stigmatisation of particular inner-city areas as fit only for the most deprived social groups' [142]–[144]

Less clear (for now) is the UKSC's recent affirmation of the first instance judgment that the ECRC regime was proportionate because it was no more than was necessary to meet the pressing social need for which the ECRC regime was set up (*R*, at [18] and [70]). This suggested a future role for 'pressing social need' which has otherwise become increasingly redundant alongside the proportionality test. If so, it will reflect a second, welcome, practical development by the domestic courts in their application of the NDS principles, to go with the four-stage proportionality test (supra).

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