Key developments in human rights in judicial review

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1. The key rights that arise in the context of commercial and regulatory judicial review are the right to property (Article 1 of Protocol No. 1), the right to fair proceedings (Article 6) and the right to non-discrimination; Article 14. There have been interesting developments in all of these over the past 18 months. In particular, there have been developments in how the Courts are approaching the proportionality test, which is so crucial in any case that raises Article 1 of Protocol No. 1, the approach to civil rights and the applicability of Article 6 and also on damages.

2. My intention this afternoon is to update you on some of the key cases, which bring out if not new points of law, then at least nuances on the earlier position.

The meaning of property rights

3. Before one can even begin to bring oneself within Article 1 of Protocol 1, one must establish the existence of a property right. It is well established that this can include "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see, inter alia, *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51, *Pressos Compañía Naviera S.A. v. Belgium* judgment of 20 November 1995, Series A no. 332, p. 21, § 31).

4. The concept of a legitimate expectation sufficient to found a property right under Article 1 of Protocol No. 1 is different from the domestic judicial review concept of legitimate expectation of that of EU law. It is the legitimate expectation that potentially gives rise to the right. Once the right is established, any interference with it will need to be justified on the normal Convention basis: prescribed by law, in pursuit of a legitimate aim and necessary and proportionate. For example, a 'legitimate expectation' that HMRC will behave towards a particular individual or company in a particular way may be sufficient to give rise to a property right under Article 1 of Protocol No. 1. However, whether it in fact does so, will depend on the facts: see for example see *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51.

5. Having a 'legitimate expectation' sufficient to found a 'property right' or 'possessions' under Article 1 of Protocol No.1 means only that the State must justify any interference with those possessions, as necessary in the public interest and proportionate, which is a relatively low threshold to meet.

6. It may be that the act of a public authority can found a legitimate expectation, sufficient to amount to a property right. For example, an individual may have a domestic law legitimate expectation that the Commissioners will behave towards him in a particular way, which may be sufficient to give rise to a property right under Article 1 of Protocol No. 1, that is not necessarily so and will depend on the facts. One example in domestic law of the same course of action by a public body giving rise to an (asserted) legitimate expectation both in domestic common law and under the Convention is *Rowland v Environment Agency* [2005] Ch 1. In the event, the Court of Appeal found that the conduct in question was capable of giving rise to both types of legitimate expectation, but that the common law case failed because the public authority would have been acting beyond its powers in giving the assurance asserted by the Claimant; and the Convention case failed because the interference was justified and proportionate.

(b) Some examples

7. In *Pine Valley Developments* (1991), the company had purchased a site acting in reliance on the outline planning permission which had been recorded in a public register, and which it was perfectly entitled to assume was valid. The Court concluded that the company therefore had at least a legitimate expectation of being able to carry out their proposed development, which expectation was a component part of the property in question. When the domestic courts annulled that outline planning permission, the State interfered with that right.

8. In *Stretch v United Kingdom* App. No. 44277/98 judgment 24 June 2003, the Court took the view that an option to renew in a contract, which the applicant had entered into with the local authority, constituted a 'property right' even though the Court of Appeal had held that the option was invalid, as having been entered into ultra-vires. The concept of a legitimate expectation under the Convention is distinguished in this important way from the concept of the same name in domestic law: a legitimate expectation under the Convention can extend even to unlawful acts by the State, whereas in domestic law the individual can have no legitimate expectation that the public authority will act unlawfully or beyond its powers.

9. In *Kopecky v Solvakia* App. 44912/98 judgment 28 September 2004 the Grand Chamber of the Court rejected the finding of the Chamber that a 'possession' for the purposes of Article 1 of Protocol 1 could be established if the individual could show an 'arguable claim' or 'genuine dispute' as to his rights. It noted that:

> "On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an 'asset' only where it has sufficient basis in national law, for example where there is settled case-law of the domestic courts concerning it."

10. In *Saghinadze and others v Georgia [ref]*, the Court confirmed that an "expectation" is "legitimate" if it is based on either a legislative provision or a legal act bearing on the property interest in question. The Court will look therefore at the legal provisions and any other 'legal acts' that bear on the property in question (such as the sum of money for which repayment is sought) and decide whether there is a sufficiently robust legal basis for the claim, for it to amount to a possession under Article 1 of Protocol No. 1.

11. In *Dangeville v France* (2004) 38 EHRR 32, the Court considered provisions of French law, whereby the Applicant had been charged VAT contrary to EC law. In considering whether the domestic Court's rejection of the Applicant's claim for repayment constituted an unlawful interference in his possessions it had to determine whether the Applicant's claim constituted a property right. It held that in the light of the law, as established, the applicant company had a valid claim against the State when it lodged its two appeals for the VAT paid in error for the period from 1 January to 30 June 1978 and that the claim therefore "constituted an asset". However, it also considered that the applicant company had at least a 'legitimate expectation' of being able to obtain the reimbursement of the disputed sum, such that for that reason too it had a possession.

12. In *Intersplav v Ukraine*, app. No. 803/02, judgment 9 January 2007, the Court concluded that the taxpayer had a substantive interest protected by A1P1, consisting of the reasonable expectation that of a refund of VAT paid in the course of business activities. The Court noted:

> "30. …. the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is independent from the formal classification in domestic law (see *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I). The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant an entitlement to a substantive interest protected by Article 1 of Protocol No. 1."

13. In *Bulves v Bulgaria* app No 3991/03, judgment 22nd January 2009, the applicant claimed repayment of input tax under Bulgarian law (Bulgaria not being a member of the European Community, so that Community law did not apply directly). The Court held:

> "57. … the applicant company's right to claim a deduction of the input VAT amounted to at least a "legitimate expectation" of obtaining effective enjoyment of a property right amounting to a "possession" within the meaning of the first sentence of Article 1 of Protocol No 1".

14. The concept of a "substantive interest protected by A1P1 is far from clear. However, it certainly encompasses claims or proprietary interests that are recognised by the relevant State's domestic law. It also encompasses rights that are <u>not</u> recognised in domestic law. Thus, while in domestic law it is not possible to have a legitimate expectation in respect of a promise to do something that would be

unlawful, such a promise could give rise to a "possession" under A1P1: see *Stretch,* and *Rowland v Environment Agency.*

(c) recent developments

15. In this context, there have been recent developments in the European Court, which have been considered and applied in the domestic courts. On 14 February this year, the Court gave judgment in the case of B v United Kingdom (App. No. 36571/06). In that case an applicant, who had a severe learning difficulty failed to declare that her children had been taken into care. She did not realise she was required to do so, nor did she realise the materiality of not doing so. Consequently, she continued to be paid income support at a level to which she was not entitled. The Secretary of State decided that she had to repay that money by way of deductions from future benefits. She appealed to the Commissioners against that decision and then to the Court of Appeal, arguing that the repayment requirement was a breach of her property rights and the right not to be discriminated against. A key argument was that it was disproportionate for repayment to be required in circumstances where she was not aware of the materiality of the information that her children had been taken into care.

16. The Court of Appeal held that there were no possessions at stake – the Secretary of State was claiming an entitlement to recover money which should not have been paid to the applicant in the first place. Accordingly, it held that no right under Article 1 of Protocol No. 1 was at issue. Whilst the Court in Strasbourg appears to have agreed with this decision, it nevertheless held that the reduction in benefit (as a result of the deductions) constituted an interference in property rights. Thus it held:

    a. The repayment decision did not interfere with existing possessions because it was not recovered as a debt by enforcement against existing possessions, as has been the case in *Tsironis v Greece* (Requête n° 44584/98) 6 March 2002 (where the State had sold the Applicant's assets to recover debts owing): §37;

    b. It was not right to say that the over-payment was a possession until it was reclaimed, in circumstances where the benefit system relies on the individual to report changes; to allow that would mean that fraudulent failure to report a change in circumstances that removed entitlement to a benefit could nonetheless allow an individual to establish a property right: §39.

17. Consequently, the Court agreed that the Applicant did not have a property right: §40.

18. The court nevertheless found that the reduction in the Applicant's award in order to recover the over-paid benefit could be said to have interfered with a possession, since she was entitled under the law to that higher level of award. This is of course, inconsistent with its finding at paragraph 37 that repayment through a reduced award did not interfere with her possessions. It is significant because it suggests that a deduction from any State payment, even to repay a debt, is likely to involve an interference with possessions. In the tax context, in particular, VAT, that could be very significant.

19. The Court then went on to consider whether it was fair (under Article 14) that the Applicant should be treated less favourably than an individual unaware of a fact that he/she was required to report (who would not have to repay), in circumstances where the Applicant was not able to understand the significance or 'materiality' of not informing the authorities. The Court accepted the Government's submission that these two categories of person: those that did not know a fact and those that did realise the significant of a fact were different and could therefore be treated differently: §57. However, it was more sympathetic to the argument that since she did not have cognitive capacity to understand the importance of reporting the fact, she should have been treated differently to people who did understand. However, in the end the Court accepted that the requirement for decision makers to take into account cognitive capacity in cases like his could hinder the recovery of social security and thus, the welfare system itself.

20. The case was considered by Mr. Justice Cranston in the case of *Sharon McGrath v Secretary of State for Work and Pensions* [2012] EWHC] 1042, a near identical case to B. However, because of the rules of precedence, he found that he was obliged to follow the judgment of the Court of Appeal in B, namely that there was no right to a possession.

Proportionality

21. One of the most important issues in the context of A1/P1 is proportionality. There have been two particularly important cases concerning proportionality this year. First, *Bank Mellat v her Majesty's Treasury (No. 1)* [2012] QB 101 (pending before Supreme Court) and secondly, *R (Sinclair Collins Ltd) v Secretary of State for Health* [2011] EWCA Civ 437. I deal with the latter first because the opinion of Arden LJ on how proportionality should be applied in this context – a 'manifestly inappropriate' test – in effect appears to have been applied by the Court of Appeal in *Mellat.*

R (Sinclair Collis Ltd) v The Secretary of State for Health [2011] EWCA Civ 437

22. In this case the Court of Appeal carried out a very extensive review of the proportionality test in EU and Convention jurisprudence. The context was public health; the ban on the sale of cigarettes in vending machines. As such, it raised not only the right to property under A1/P1 but also the right to free trade under the EU Treaty. In summary, Laws LJ and Neuberger LJ both considered that the proportionality test involving the least restrictive measures necessary to meet the legitimate objective applied but took the view that a wide margin of appreciation or discretionary area of judgment should be afforded to the decision maker in deciding both the appropriateness of the measures adopted and whether or not they were the least onerous necessary to achieve the objective. Arden LJ applied a different test, holding that in the public health context the question was whether the measures could be said to be manifestly inappropriate to the objective pursued – in effect a Wednesbury test. If they could not, then the proportionality test was met.

23. Lord Justice Laws considered the principle of proportionality in detail from paragraph 19 of the judgment onwards. The classic exposition of the proportionality test as a matter of EU law, referred to at paragraph 20 of Laws LJ's judgment is that set out *R v Minister of Agriculture, Fisheries and Food, Ex parte Federation Européenne de la Santé Animale (FEDESA) and Others* [1990] ECR I- 4023. It is unnecessary to set out the facts. At paragraph 13 the Court of Justice said:

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."....

24. Laws LJ then considered East *R v Secretary of State for Health ex p Eastside Cheese* [1999] 3 CMLR 123, in which Lord Bingham CJ, delivering the judgment of the Court of Appeal stated:

> "41 ...Because the principle [of proportionality] is so general (and may affect a range of issues from the validity of primary legislation such as the Shops Act 1950 to much narrower points such as the quantum of penalties for customs infringements) it must be related to the particular situation in which it is invoked…
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> 43 However the test is formulated, it is clear that in the application of Article 36 the maintenance of public health must be regarded as a very important objective and must carry great weight in the balancing exercise. In *De Peijper* [1976] ECR 613, 635 (paragraph 15) the Court of Justice said that health and the life of humans rank first among the interests protected by Article 36, and it is for member states to decide (within the limits imposed by the Treaty) what degree of protection to provide…

> ...in the case of a legislative measure the national court must not simply accept the view of the national legislature or confine itself to deciding whether what the legislature has enacted is reasonable.
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> 46 Nevertheless it is clear that the national legislature has a considerable margin of appreciation, especially in legislating on matters which raise complex economic issues connected with the Community's fundamental policies."

25. Laws LJ noted that whilst Paragraph 13 of *FEDESA* provides a classic formulation of the proportionality doctrine, as *Eastside Cheese* shows, that doctrine applies differentially between cases; and the engine of the differences is the scope of the margin of discretion or appreciation accorded to the decision-maker. He considered that two factors in particular affected the margin's scope:

    a. the identity of the decision-maker. Acts of the primary legislator attract a broader margin; acts of the secondary legislator, a narrower; and

    b. the subject-matter of the decision. Where it is the promotion of a benefit of great general importance such as public health, or a general policy of the European Union, again the margin will be broader.

26. He then went on to consider the application of those two factors to the facts of the specific case rejecting the Government's contention that the relevant standard of review was Wednesbury in the public health sphere: §48. Rather, the standard as set out in *FEDESA*, §13 applied and the decision maker had to show that that standard was satisfied. However, whilst taking the view that the notion of necessity exemplified by the "'less restrictive alternative' means test" had to be met, in his view the need for different standards of 'proportionality' in different spheres could be met by affording the decision maker a wider margin in deciding 'necessity': §50. He stated:

> "Given that there can be no abrogation of the standards of proportionality – the criteria set out in FEDESA paragraph 13 or, in Professor Tridimas' words, "the notion of 'necessity' exemplified by the 'less restrictive alternative' test" – how is the decision-maker's broad margin of appreciation actually to be made good? The answer is that the court leaves a wider space for the decision-maker's own judgment as to the application of the standards. The questions the standards represent must still be asked and answered, first by the decision-maker himself; but the broader the margin of appreciation, the less inclined the court will be to strike an autonomous balance of the material factors. The flaw at the root of Mr Paines' case is that by seeking to articulate the generous margin of appreciation enjoyed by the Secretary of State in the language of "manifestly inappropriate", he has undercut the standards themselves; and that is illegitimate."

27. Accordingly, in his view, rather than applying different standards of proportionality, the same standards apply but the Court will apply a wider margin in assessing compliance with those standards by the decision maker in certain contexts than in others.

28. The same view, put slightly differently was taken by the Master of the Rolls, Lord Neuberger. He noted that where there is a choice between several appropriate measures, the obligation on the decision maker to adopt the least onerous should be interpreted in such a way as to afford some deference to the decision maker. Thus, as he noted, there might be a difference in view as to which measure will be less onerous. He considered that "unless the view of the Member State's government that its measures is more appropriate is manifestly wrong, the Court should not substitute its view for that of the government.": §§203 (see also 200-202). As he concluded:

> "So, too, when there is said to be a less onerous measure than that proposed, it seems to me that, before rejecting the proposed measure, the court would have to bear in mind, in the context of the overall margin of appreciation afforded to the Government, that there may reasonably be different opinions on questions such as the relative disadvantages of the allegedly less onerous alternative, and the degree of difference in onerousness.
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> 205. Accordingly, when considering a challenge to any measure which engages article 34 and which a Member State government seeks to justify on the basis of policy and evidence, the court should avoid being too exacting when it comes to an attack on the evidence on which the measure is based. On the other hand, it would be wrong not to address and evaluate the supporting evidence. As stated in paras 6.1.2 and 6.3 of the Guidance, any measure must be "well-founded – providing relevant evidence, data (technical, scientific, statistical, nutritional) and all other relevant information" and the "justification provided by the Member State must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the [measure], and precise evidence enabling its arguments to be substantiated" – see e.g. Case C-270/02 *Commission v Italy* [2004] ECR I-1559 and Case C-124/97 *Laara and others* [1997] ECR I-6067, para 36. This obligation would ring entirely hollow if the courts did not have a duty to consider and assess the evidence in question."

29. Lady Justice Arden took a different approach. In her view, the case law of the ECJ made clear that where the context was truly one of public health protection (and not a disguised restriction on trade), the measure would only fail the proportionality test if it was shown to be manifestly inappropriate to meet the legitimate objective: see in particular 117-133. She also noted that in certain cases, a precautionary principle will be being adopted by the decision maker; the facts will not all be known. In those cases, the application of the manifestly inappropriate test enables a decision to be taken in the interests of a wider group causing loss to one group, even where the future facts are unknown. But EU law expects private commercial interests to give way to wider public good. She concluded that the standard of review in a case like this would closely resemble the *Wednesbury* test: §155.

30. The approach of Lady Justice Arden in *Sinclair Collis*, whilst not specifically referred to, in practice appears to have been persuasive. The case concerned an Order in Council that prohibited all persons operating in the financial sector in the UK from entering into or continuing to participate in any transaction or business relationship with the Claimant, a major Iranian commercial bank. The Order in Council was adopted pursuant to section 62 and Schedule 7 of the Counter-Terrorism Act on the grounds that the Treasury reasonably believed that the development or production of nuclear weapons in Iran posed a significant risk to national interests of the UK.

31. The dispute on proportionality related to whether the three stage test laid down in de *Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69. Lord Clyde's now familiar three stage test requires first that the legislative objective is sufficiently important to justify limiting the right. Secondly that the measures designed the meet the legislative objective are rationally connected to it and thirdly, that the means used to impair the right or freedom are no more than is necessary to accomplish the objective. This was prior to the HRA. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 para. 19, the House of Lords added the requirement "to balance the interests of society with those individual and groups...which should never be overlooked of discounted."

32. Mitting J in the High Court rejected the third stage of the *de Freitas* test as irrelevant in the context. He stated at paragraph 15 that:

> "On the contrary, when very important public interests are in play, interference in private rights well beyond the minimum necessary to safeguard those interests may be proportionate."

33. The Secretary of State sought to uphold that proposition, relying in particular, on the opinion of the Advocate General in *Bosphorous Hava Yollari Turizm ve Ticaret AS v Minister of Transport* (Case C-84/95) [1996] ECR I 3953, in which a Yugoslav plane leased by a wholly innocent Turkish Airline was impounded on the basis of economic sanctions provisions relating to Yugoslavia. The AG considered that losses to innocent parties were an inevitable aspect of a sanctions regime but suggested that for such a regime to breach fundamental property rights, it would be necessary to show that the measures were wholly unreasonable in the light of the aims that the competent authority sought to achieve.

34. The Court of Appeal did not accept this. In its view, the *Bosphorous* case was not authority for the proposition that the minimum interference test has no relevance to proportionality in this context. Kay LJ stated that:

> 27. The question is not always approached on the basis of doctrinal purity. Moreover, a test of "wholly unreasonable in the light of the aims" does not exclude the possibility that, notwithstanding the enormity of the aims, it may be unreasonable not to pursue them by the selection of a self-evidently less intrusive measure which is no less likely to achieve them.
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> 30. In my judgment, the answer lies not in the wholesale rejection of the minimum interference test but in its cautious deployment. It does not amount to insistence that the least intrusive measure is selected. It is that consideration be given to whether the legitimate aim can be achieved by a less intrusive measure without significantly compromising it. Where, as in the present case, the legitimate aim is one of very high value and the context is one in which the decision-maker is to be accorded a wide margin of appreciation, sensitivity to the risk of compromise and a dose of common sense should provide the decision-maker with ample protection against undue judicial interference."

35. On the facts, he held that the measures, excluding the bank from the financial sector in the UK, was rationally connected with the objective – inhibiting the development of nuclear weapons in Iran because there was evidence that it had traded with a company designated by the UN as a company that provided a financial conduit to the Iranian Atomic Energy Agency. On that basis alone, the Bank had the capacity to assist entities that had been designated by the UN, such that was rational to control or prevent transactions with that bank in order to reduce the likelihood of funding for the atomic energy programme in Iran.

36. The Bank rightly submitted that the interference was extreme. Kay LJ considered that whilst great weight had to be given in this field to the views of the Treasury, since national security was at issue, it was nevertheless necessary for the Court to determine whether the measures were proportionate. He concluded that the most effective measures was the most intrusive one but that that was justified by the very high value of the legitimate aim, namely minimising the risk of very great harm to national interests.

Proportionality after Mellat and Sinclair

37. It is now clear that the strict test of 'least restrictive' necessary, expounded by Lord Clyde as stage three of his test in de Freitas will no longer be applied, at least in the context of public health and national security but likely in other areas too: see *R (Gallastagui) v Westminster Council and others* [2012] EWHC 1123 (Admin) – ban on protests and rights of others to enjoy Parliament square.

38. The Courts are either willing to ignore the third stage of the test (Mitting J in *Mellat*), or to say a wide margin of appreciation exists for the decision maker (Laws LJ and Lord Neuberger in *Sinclair*) or to say that it should be applied 'cautiously' (Lord Kay in Mellat) or to say that the test does not apply and that the correct test is manifestly inappropriate: Arden LJ in Sinclair. Whichever semantic approach is adopted, it is now established that in the context of the 'appropriateness of the measures' and in particular, whether a less restrictive measures could have been used', in effect, a 'Wednesbury type' review has in effect been applied where the aim is the protection of national security or public health. The Supreme Court is likely to give a final view on this in *Mellat*.

Proportionality, procedural fairness and Article 6

39. In *Mellat* there was a significant dispute as to the extent to which the Bank's inability to give its views prior to the Order in Council breached its procedural rights. That point was argued in two ways. First, the absence of the opportunity to make any submissions prior to the making of the Order was relevant to the assessment of the proportionality of the interference caused by the Order. It is well-established in that regard that where there are procedural protections, the measure is more likely to be found proportionate than when there are not. This is because the opportunity to make such submissions, and in particular the chance to know the allegations against one, means that it is less likely that the decision will be arbitrary. Here, the Order was made without the Bank having the least opportunity to know what was said about it and to correct any errors that might have existed in the decision makers mind.

40. The second way the point was put was that the making of an Order in Council in this way was determinative of the Bank's civil rights and obligations and as such, there was a breach of Article 6. These submissions relied on the House of Lords decision in *Wright* [2009] AC 739, where teachers were put on a register that precluded them from working, without them having been given the opportunity to make any prior submissions. Whilst interim, the House of Lords held that the effect on their civil rights was determinative such that Article 6 was breached by that procedure. Elias LJ in *Mellat* considered the position indistinguishable. He noted that the Order in Council caused irreparable harm to the bank; its immediate effect was that it was prohibited for those in the UK financial sector to transact with it or even to continue existing transactions. Furthermore, as he noted, the Court in Strasbourg has now held that interim as well as final proceedings are covered by Article 6: *Micallef v Malta*, App. No. 1705/06 judgment 15 October 2009 §81. Similarly, Elias LJ considered that the Treasury was in breach of the principles of common law fairness and the procedural obligations imposed by Article 1 of Protocol No. 1: §84. He noted that this was not a typical act of subordinate legislation laying down rules that affected a broad amorphous class of persons.

Here the Order was specifically directed at the bank, even if it did also impact on other parties. He made the important point that simply classifying the Act as legislative and on that basis holding that procedural safeguards did not need to be complied with would be a victory for form over substance. At paragraph 95 of his judgment he said:

> "In my judgment it would allow form to dictate substance if BM were to be denied the fundamental protection of natural justice simply on the grounds that the Order is classified as a legislative act. The history of judicial review shows the courts seeking to escape from the fetter of over rigid categories, such as limiting natural justice to judicial and not administrative acts, or judicial and quasi judicial acts; or depriving the courts of judicial review altogether where the source of the power was common law (prerogative) rather than statute. The focus must be on the particular character of the act in question."

41. As regards Article 6, he did not accept the argument that until the Order had been made there was no 'dispute' to which Article 6 could attach. Whilst for Article 6 to be applicable it was generally required that there should be some dispute as to civil rights and obligations, he considered that the purpose of that was to prevent article 6 claims where the applicant has an insufficient interest in the outcome of the case: §113. So, whilst conceding that until an Order had been made there was no dispute, his view was that this was because the Bank did not know about the pending order. Again, such an approach involved a victory of form over substance since had the bank been given notice of the impending order, a dispute as to the legitimacy of such an order would have arisen at that point. In *Wright* the House of Lords had held that the interference was caused by the initial placing of the individual on the register and could not be put right by the subsequent proceedings because of the seriousness of the consequences. In his view that was also the case with the Order in Council here. He stated that the important requirement under Article 6 was that:

> "it should apply to "all proceedings, the result of which is decisive for private rights and obligations"; see *Benthem*, para 32.
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> 118. It follows that the State must secure that there are proper judicial safeguards where private rights are affected. Whether or not the Treasury is directly subject to Article 6 at the time it makes the Order, the rights afforded by Article 6 must secure that BM at an appropriate stage has a proper and full opportunity to challenge both the factual and the legal conclusions on which the interference with its rights is based. If the procedures adopted by the State permit the possibility of irreparable damage to civil rights before any effective remedy can be granted, that will not comply with that obligation, as *Wright* demonstrates."

42. He did not accept that the subsequent statutory appeal proceedings, which were in substance equivalent to judicial review, could meet the requirements of Article 6 because of the delay involved and the irreparable harm done by the original order. At paragraph 128 he stated:

> "In my judgment, this Order did effectively determine civil rights, albeit it for a limited period of time. It prevented BM operating its business in the UK. Moreover, the appellant contends, with some evidential basis, that other institutions, including the EU, have now made copy cat Orders relying significantly on the evidence produced in this case. This is not one of those exceptional cases where the requirements of Article 6 could not be complied with because of the need for urgency or because to have given a hearing might have frustrated the purpose of making the Order. As I have said, that was the reason originally advanced by the Secretary of State, but the submission was rejected by the judge.
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> 129. Furthermore, if the effect of the listing procedure in *Wright*, removing someone from his or her livelihood for a short period, attracts Article 6, then it is difficult to see why this very significant impact on BM's business would not do so likewise. In many circumstances - and perhaps here too, although there is no evidence specifically about this -, an order bringing a business to a standstill - would be likely to result in a number of individuals losing their employment.

43. The other Judges disagreed, holding that until the Order was made there was no dispute, that in any event the composite procedure of appeal (equivalent to review) met the requirements of common law fairness, procedural fairness in Article 1 of Protocol No. 1 and Article 6. The Supreme Court is likely to have something important to say on these difficult but crucial procedural issues.

44. Interestingly, just before the Court of Appeal gave judgment in *Mellat* European Court of Justice held that In Case C 27/09 P *French Republic v. People's Mojahedin Organization of Iran* 21 December [2011] ECR I-nyr the Court of Justice upheld that fundamental right, as set out in Article 41(2)(a) of the Charter of Fundamental Rights, the entitlement to be given prior notification of incriminating evidence and of the right to make representations before the adoption of restrictive measures (in this case an asset freezing order). The purpose of the rule was both to ensure the authority concerned effectively took into account all relevant information and to allow the addressee to correct any errors or produce such information relating to his personal circumstances as would tell in favour of the decision's not being adopted.

45. It is difficult to reconcile the Court of Appeal's approach with that of the ECJ. Whilst no EU point was run in *Mellat*, EU rights may well be at issue, including for example, freedom of trade and capital, in particular for those EU companies that are no longer able to transact with the bank: cf however, *R (on the application of Minister For Economic Development Of The States Of Jersey) v Revenue & Customs Commissioners : R (On The Application Of States Of Guernsey) V (1) Hm Treasury (2) Revenue & Customs Commissioners* [2012] EWHC 718 (Admin) – where third countries were concerned, limited EU rights at issue.

Damages: human rights just satisfaction claims

46. There is nothing to preclude damages being awarded in judicial review proceedings and yet this has not generally been the pattern. This is because English law has not recognised a right to claim damages for losses caused by unlawful administrative action; a separate cause of action under tort or the Human Rights Act must exist: *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 at §96 per Baroness Hale. The Administrative Court will not permit a claim that is wholly about damages and in the case of *Cantor* [1999] 1 WLR 334, the Court held that a mandatory order to enforce a civil claim in restitution would be an unwarranted extension the administrative court's jurisdiction. Nevertheless, there have been pure judicial review cases, not involving any human rights or EU rights, where the Court has found that 'fairness' demanded the repayment of sums and that a failure to do so would be an abuse of power: see for example *Matrix Securities Ltd* [1994] 1 WLR 334.

47. Article 1 of Protocol No. 1 however, may well provide a clear basis for a damages claim under section 8 of the HRA: just satisfaction. An important case on this is the recent case of *R (on the application of (1) Infinis PLC and others v GEMA and the Non-fossil Fuel purchasing Agency* [2011] EWHC 1873.

48. The facts of the case are highly complex but put very simply it involved the refusal of GEMA to grant accreditation to an electricity generator, the effect of which was to preclude it from being granted renewable energy certificates (or ROCs) for electricity that it generated from renewable resources. Those ROCs had economic value. The reason for the refusal was the understanding of GEMA that the agreement relating to the supply of electricity between the generator and purchaser remained extant at the time of GEMA's decision. The relevant statutory provisions precluded accreditation in such circumstances. However, whilst parts of the agreement were extant, the clauses of the prior agreement that related to the supply and terms of supply of the electricity had lapsed. The terms that remained were terms concerning intention to commission the generating station and other terms that did not relate to supply or purchase. The Court held that applying a purposive construction to the relevant provisions, no 'extant' agreement should be considered to exist, such that accreditation should have been granted by GEMA. Accordingly, the claimants were entitled to ROCs for the past period and the failure to accredit was held to be a breach of A1/P1 and to have caused the Claimants loss. That loss was fully recoverable under s. 8 of the HRA.

49. This is an important case because it establishes that although just satisfaction under the Convention is a relatively flexible term, where pecuniary loss can be established accurately, the full amount will be payable.

18 June 2012.