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THE GUARDIANSHIP OF THE PUBLIC INTEREST: A BRITISH TALE
OF CONTESTABLE ADMINISTRATIVE LAW

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INTRODUCTION

In the United Kingdom and, indeed, across the common law world, the constitutional relation of parliamentary government to the courts is contested. In constitutional law the controversies are relatively well known: should courts have the power to strike down legislation they hold to be incompatible with basic rights? Should legislatures be able to insist on their rights-infringing legislation notwithstanding a judicial ruling that there is an incompatibility? Questions such as these have been at the fore of debates not only in the United Kingdom, but in Canada, Australia, and New Zealand. But similar controversies abound also in administrative law and, in particular, in the relationship of executive to judicial decision-making.

In common law parliamentary systems the executive is drawn from the legislature. In the United Kingdom all government ministers are members either of the House of Commons or of the House of Lords. To those more familiar with presidential than parliamentary democracy, this may appear at first sight to be a straightforward separation of powers problem. But the overlap of personnel between the legislative and executive branches in common law parliamentary systems is perfectly deliberate. It occurs in order to help with—and not to hinder—the core constitutional function of holding the powerful to account. Ministers can do only what they can politically get away with. Parliamentary systems seek to find ways of allowing ministers politically to get away with less. Weak ministers in a robust legislature will find that the parliamentary processes of debate, question-and-answer, and committee inquiry operate so as to limit their room for maneuver. For sure, strong ministers who can command the confidence of the legislature in which they sit will enjoy significant authority. But even here, such authority lasts for only as long as the minister in question continues to enjoy the confidence of his or her fellow lawmakers. In this way, counter-intuitive though it may be from a strict separation of powers perspective, the intertwining of legislature and executive in a parliamentary system is actually designed to be a check on ministerial power.

In a parliamentary system, ministers—the key decision-makers in the administrative state—are accountable directly to the legislature of which they are members. Thus, as a British citizen, if a minister is doing something that I disagree with, I can contact my Member of Parliament and invite her to put

political pressure on the minister to change course. Indeed, in the British parliamentary system ministers are primarily accountable politically to Parliament. The courts, historically, have played only a secondary role.

This is true at least as far as central government is concerned. Central government is divided into several departments, each of which is headed by a minister who is a member of one of the two Houses of the United Kingdom Parliament. Of course, hundreds of thousands of executive decisions will be taken each year by officials—civil servants—working in departments. But, under English law, those decisions are regarded formally as those of the minister him- or herself: “Constitutionally, the decision of such an official is . . . the decision of the minister” said Lord Greene MR in the leading case.¹ Where executive or administrative decisions are taken in contexts where there is no minister, the courts have played a more prominent role in ensuring that the standards of reasonableness and fairness are upheld. Local government decisions, and the decisions and actions of police officers, have, for example, been prone to judicial review for longer and in a manner that is more intense in its scrutiny than has traditionally been the case as regards ministerial decision-making.²

In recent years, however, the courts in the United Kingdom—as elsewhere in the common law world—have become considerably more interventionist when it comes to the judicial review of ministerial decisions. Judges have shed their former deference to political and parliamentary forms of accountability, as if judicial review should supplant, rather than merely supplement, ministerial responsibility to Parliament.³ This shift—from politics to law, from Parliaments to courts—has been seen not only in the United Kingdom, but in countries as diverse as Canada and South Africa, Israel and New Zealand. Its effects in constitutional terms have been much documented.⁴ This article focuses on the effects of this shift in terms of administrative law, taking as a case-study two recent developments in the United Kingdom. The first concerns immigration and, in particular, ministerial decisions holding that it is necessary in the public interest to deport an individual from the UK.⁵ The second concerns freedom of information and decisions holding that it would be contrary to the public interest for certain information to be published.⁶ Each of these cases marks an attempt to shift the constitutional guardianship of the public interest from politically-accountable government to the

¹ *Carltona Ltd. v. Comm’rs of Works and Others* [1943] 2 All ER 560 (appeal taken from Eng.).

² *See, e.g., R (On the Application of the Comm’r of Police of the Metropolis) v. Police Appeals Tribunal* [2011] EWHC (Admin) 3241.

³ *See, e.g.,* MINISTRY OF JUSTICE, *JUDICIAL REVIEW: PROPOSALS FOR FURTHER REFORM*, 2013, Cm. 8703, at 19 (UK) [hereinafter *JUDICIAL REVIEW*].

⁴ *See* RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1–4 (2004); STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* 97, 129 (2013).

⁵ *See infra* Part II.A.

⁶ *See infra* Part III.

courts of law. What were formerly seen as political judgements for parliamentary oversight have come to be viewed—at least by certain judges—as questions of law for the courts to determine. Before coming to the two case-studies, however, we need to set the scene.

I. CONTESTING THE ROLE OF THE COURTS

In the United Kingdom, the constitutional relation of parliamentary government to the courts is contested. It is vital to understand that there is nothing new about this. For example, the campaign to incorporate the terms of the European Convention on Human Rights into domestic UK law lasted for a quarter of a century, from Lord Scarman's Hamlyn lectures of 1974⁷ to the enactment twenty-four years later of the Human Rights Act 1998.⁸ In the 1970s the most famous defense of the view that the courts should play only a limited role in administrative law was Professor J.A.G. Griffith's polemic, *The Political Constitution*.⁹ In large measure, Griffith was seeking to rebut the charges of liberal lawyers such as Lord Scarman and Professor Ronald Dworkin that the old Westminster model was no longer fit for purpose and needed to be replaced by a new model, based either on the European Convention on Human Rights ("ECHR") or on American-style judicial review, in which appeals courts would enforce basic or constitutional rights against ministerial incursion.¹⁰ Griffith, echoing Bentham, considered this to be "nonsense on stilts".¹¹ Rights, thought Griffith, were political claims dressed up as law.¹² When freedom of expression—to take just one example—may be limited where "necessary in a democratic society" in the interests of a legitimate end, as Article 10 of the European Convention provides,¹³ what you have, in Griffith's terms, is "the statement of a political conflict pretending to be a resolution of it."¹⁴ Deciding where the limits of free speech should lie is a matter of political judgement, Griffith thought, and in a democracy

⁷ See SIR LESLIE SCARMAN, ENGLISH LAW—THE NEW DIMENSION 12–14 (1974).

⁸ The Human Rights Act 1998 incorporates most of the substantive rights contained in the European Convention on Human Rights ("ECHR") into UK law. Before the Act came into force (in 2000) the United Kingdom was bound by the terms of the ECHR as a matter of international law, but the rights contained in the ECHR could not be relied upon in domestic litigation. See COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION 277–84 (7th ed. 2011).

⁹ See J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 14 (1979).

¹⁰ *Id.* at 13–14.

¹¹ *Id.* at 18. See also JEREMY WALDRON, NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 36–37 (1987).

¹² See Griffith, *supra* note 9, at 17.

¹³ Eur. Convention on H.R., art. 10, Nov. 4, 1950, Rome, 4.XI. 1950, www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁴ Griffith, *supra* note 9, at 14.

such as the United Kingdom, political decisions should be made by politicians: that is to say, by people who are politically removable.¹⁵ Political questions do not cease to be political simply because you hand them to a court to determine.

Griffith's essay remains a leading point of reference and has been re-examined by generations of scholars—the controversy about the proper constitutional role of the courts in the administrative state is not new.¹⁶ There was significant contestation in the 1970s and 1980s about whether the United Kingdom needed a Bill of Rights.¹⁷ Similarly, there has been a lively argument since 1998 about whether the Human Rights Act has inappropriately or unwisely augmented the role of the courts in the public life of the United Kingdom.¹⁸ If it was perfectly legitimate for Lord Scarman, Ronald Dworkin and many others to campaign from the 1970s to the 1990s for the powers of the courts to be increased, likewise in the early twenty-first century it is perfectly legitimate for those who worry that the courts have now become too powerful to advocate reforms designed to re-set the balance. It is not an affront to the rule of law to argue that policy should be made by politicians and not by judges. On the contrary, those who argue that the courts should confine themselves to matters of law—and should not seek to extend their reach to political questions—do so in order to safeguard and sharpen the rule of law.

In the 1970s and 1980s resistance to the idea that the United Kingdom needed a Bill of Rights could be found both on the Left and the Right of British politics. Griffith was a man of the Left.¹⁹ But the Conservative government that was elected to office in the year *The Political Constitution* was published never contemplated incorporating the ECHR into domestic law: no Human Rights Act or British Bill of Rights would be enacted during Mrs. Thatcher's period in Downing Street.²⁰ If we fast-forward to the present day,

¹⁵ *Id.* at 16.

¹⁶ See, e.g., ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 60–61 (2005); Graham Gee, *The Political Constitutionalism of JAG Griffith*, 28 LEG. STUD. 20, 22 (2008); Thomas Poole, *Tilting at Windmills? Truth and Illusion in the Political Constitution* 70 MOD. L. REV. 250, 251–53 (2007).

¹⁷ See Cristina E. Parau, *Constitutional Ferment in the United Kingdom: Towards a Republican Constitution* (forthcoming) (manuscript at 3), http://www.politics.ox.ac.uk/materials/The_British_Constitution_after_1989_v_1_SENT.pdf.

¹⁸ See Luke Gittos, *The Human Rights Act is No Friend of Freedom*, SPIKED (May 10, 2016), <http://www.spiked-online.com/newsite/article/the-human-rights-act-is-no-friend-of-freedom/18335#.WA5zs-ArLb0>.

¹⁹ See J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY 211–13 (1977); David Dyzenhaus, *The Left and the Question of Law*, 17 CAN. J. L. & JURIS. 7, 8 (2004).

²⁰ Margaret Thatcher was Prime Minister from 1979–90; upon her resignation John Major replaced her as leader of the Conservative Party and Prime Minister. *History of Britain: 1945 to Present*, BBC, http://www.bbc.co.uk/history/british/timeline/present_timeline_noflash.shtml (last visited Oct. 24, 2016). He lost office and resigned at the 1997 election, when Tony Blair led the Labour Party back to power. *Id.* The Human Rights Act was passed in Tony Blair's first year as Prime Minister. Mark Rathbone, *The Human Rights Act: A Magna Carta for the Twenty-First Century*, POL. STUD. ASS'N, at 2 (May 2014),

concern about the increased power of the courts is now found almost exclusively on the political Right.²¹ It is instructive, for example, that the center-right think tank, Policy Exchange (routinely described in the British press as Prime Minister David Cameron's favorite think tank), has established a Judicial Power Project, described on its website as follows:

The focus of this project is on the proper scope of the judicial power within the constitution. Judicial overreach increasingly threatens the rule of law and effective, democratic government. The project aims to address this problem—restoring balance to the Westminster constitution—by articulating the good sense of separating judicial and political authority. In other words, the project aims to understand and correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power within our tradition and the related scope of sound legislative and executive authority.²²

In opposition, the Conservatives did not support the Blair government's constitutional reforms of 1997-2001.²³ From 2010-15 the United Kingdom had a coalition government, led by the Conservatives but with Liberal Democrat support. Since May 2015 the UK has had a majority Conservative government once again (for the first time since 1997). In coalition, the Conservatives sought to make a number of reforms designed to reset aspects of the relationship between parliamentary government and the courts.²⁴ One of these—in the area of immigration and deportation—will be examined in depth in Part II.²⁵

In its manifesto for the 2015 general election, the Conservative party pledged to reform what it called “Labour's human rights laws” by scrapping the Human Rights Act 1998 and replacing it with a British Bill of Rights.²⁶ It

<http://magnacarta800th.com/wp-content/uploads/2014/05/Rathbone-Essay-Human-Rights-Act-and-Magna-Carta1.pdf>.

²¹ My former colleague, Professor Keith Ewing at King's College London is now perhaps the sole commentator on the Left who remains staunchly critical of Britain's human rights laws. *See generally* K. D. EWING, *BONFIRE OF THE LIBERTIES: NEW LABOUR, HUMAN RIGHTS, AND THE RULE OF LAW* (2010).

²² Judicial Power Project, *About the Judicial Power Project*, <http://judicialpowerproject.org.uk/about/> (last visited Oct. 24, 2016).

²³ *See Tony Blair: Prime Minister of United Kingdom*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/biography/Tony-Blair> (last visited Nov. 8, 2016). As well as the Human Rights Act 1998 this period saw also the devolution of power to Scotland, Wales and Northern Ireland, reforms to the membership of the House of Lords, the creation of regional government (and a Mayor) in Greater London, and the enactment of the Freedom of Information Act 2000. Lesley Dingle & Bradley Miller, *A Summary of Recent Constitutional Reform in the United Kingdom*, 33 INT'L J. LEGAL INFO. 71, 79–81, 83–89, 92 (2005).

²⁴ *See* Oliver Wright, *Unshackled from Coalition Partners, Tories Get Ready to Push Radical Agenda*, INDEPENDENT (May 9, 2015), <http://www.independent.co.uk/news/uk/politics/generalelection/unshackled-from-coalition-partners-tories-get-ready-to-push-radical-agenda-10237611.html>.

²⁵ *See infra* Part II.B.

²⁶ THE CONSERVATIVE PARTY MANIFESTO 60 (2015), <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>.

is understood that the new British Bill of Rights will, like the outgoing Human Rights Act, be based on the rights enshrined in the European Convention on Human Rights but that their incorporation into UK law will be undertaken in a way that invests less discretion in the courts and leaves more decision-making power in the hands of ministers.²⁷ In this way, the Conservatives hope that European human rights norms and Britain's traditional prioritization of political decision-making might be more happily reconciled than has been the case under the Human Rights Act.²⁸ However, the whole matter remains controversial, and at the time of writing we still have yet to see any detail from the government.²⁹

It will be apparent from the numerous references above to instruments of human rights law that much of the argument concerning the proper role of the courts focuses on fundamental rights. It is important, however, to understand that not all of it does. The matter is broader than that. It may well be that one of the most important influences behind the growing power of the courts in the United Kingdom is the Human Rights Act 1998, but the growth of judicial power is not confined to cases about basic rights. The analysis in Part III of this essay, on freedom of information, is a case in point (freedom of information is not a human right protected by the European Convention on Human Rights).³⁰

From 2010-2015, the Conservative-led coalition government pursued a series of reforms to the law and practice of judicial review.³¹ The common law of judicial review allows the courts to review the lawfulness of the exercise of administrative power on grounds such as rationality and procedural fairness (it is not concerned with the review of legislation against constitutional standards). The law of judicial review is the core of administrative law in the United Kingdom. Since the 1970s, judicial review has grown to an astonishing degree, both in volume and in importance. In England and Wales there were 4,500 judicial review cases in 1998 but 12,400 in 2012.³² The vast bulk of the expansion over this period was in cases concerned with decision-making in immigration.³³

²⁷ See Luke Gittos, *The Liberal Case for Scrapping the Human Rights Act*, SPIKED (Aug. 24, 2016), <http://www.spiked-online.com/newsite/article/the-liberal-case-for-scrapping-the-human-rights-act/18689#.WA6C6-ArLb0>.

²⁸ See *id.*

²⁹ A useful summary of the position down to 2013 is given by Mark Elliott. See Mark Elliott, *A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights* 10–13 (Univ. of Cambridge Faculty of Law, Working Paper No. 8/2013, 2013).

³⁰ See *infra* Part III.

³¹ See MINISTRY OF JUSTICE, GOVERNMENT RESPONSE TO THE JOINT COMMITTEE ON HUMAN RIGHTS: THE IMPLICATION FOR ACCESS TO JUSTICE OF THE GOVERNMENT'S PROPOSALS TO REFORM JUDICIAL REVIEW, 2014, Cm. 8896, at 3–4 (UK).

³² JUDICIAL REVIEW, *supra* note 3, at 8. The figures for Northern Ireland and for Scotland are different from those of England and Wales.

³³ *Id.*

As well as the increase in volume, judicial review also plays a more prominent role in public life than ever before. The law requires that for a claimant to be able to bring a judicial review case, he or she must have a “sufficient interest” in the matter.³⁴ Over the course of recent years the courts have relaxed this requirement, so that interested parties, pressure groups, and campaigners have been able to use judicial review more and more freely as a means of challenging government policy.³⁵ Formerly understood as a means for an aggrieved litigant to seek a remedy for an injustice suffered, judicial review has become a campaign tool, in which the generality of government policy, rather than a specific instance of alleged injustice, is challenged in court.³⁶ The changing nature of judicial review is compounded by the growing acceptance of third-party interventions, in which campaign groups join proceedings as additional parties to the litigation. This can be useful where it brings to the attention of the court matters relevant to the legal dispute but overlooked by the parties; however, overused, it can have the effect of turning adjudication into something more resembling a seminar. It risks blurring the line between the legal resolution of disputes (a judicial function) and inquiring more broadly into where the public interest lies (a political function).³⁷

Introducing its proposals for reform of judicial review, the government explained as follows:

Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. The Government will ensure that judicial review continues to retain its crucial role. The Government is though concerned about the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision making. This is bad for the economy and bad for the taxpayer.³⁸

³⁴ See JUSTICE & FRESHFIELDS BRUCKHAUS DERINGER LLP, TO ASSIST THE COURT: THIRD PARTY INTERVENTIONS IN THE PUBLIC INTEREST 64 (2016) [hereinafter JUSTICE & FRESHFIELDS].

³⁵ For example, a pressure group was permitted to seek judicial review of the decision by the Director of the Serious Fraud Office to abandon a criminal investigation into British Aerospace over an arms contract agreed between the United Kingdom and Saudi Arabia and a peace activist was permitted to seek judicial review of the Ministry of Defence’s transfer of prisoners in custody in Afghanistan. See *R (Evans) v Sec’y of State for Def.* [2010] EWHC (Admin) 1445, [2011] A.C.D. 11, 11 (appeal taken from Eng.); *R (Corner House Research) v. Dir. of the Serious Fraud Office* [2008] UKHL 60, (2009) 1 AC 756, 756 (appeal taken from Eng.). Both claims were unsuccessful, but each illustrates the extent to which rules of standing have become relaxed.

³⁶ See JUSTICE & FRESHFIELDS, *supra* note 34, at 7; *Cadder v. HM Advocate* [2010] UKSC 43, [1] (appeal taken from Scot.).

³⁷ See ERIC METCALFE, A JUSTICE REPORT: TO ASSIST THE COURT: THIRD PARTY INTERVENTIONS IN THE UK 4-5, 11 (2009); JUSTICE & FRESHFIELDS, *supra* note 34, at 1, 3-4.

³⁸ JUDICIAL REVIEW, *supra* note 3, at 5.

A particular concern for the government was the use of judicial review to disrupt and delay major infrastructure and other large-scale planning decisions—on projects that (in challenging economic circumstances) were intended to stimulate growth and promote economic recovery.³⁹

The government consulted on its proposals and was subject to a barrage of criticism from lawyers and legal interest groups. The human rights pressure group, Liberty, led the charge, declaiming that the proposals would “all but shut down the availability of judicial review,” that this would have “grave consequences for . . . the Rule of Law,” and that the proposals were “wrong-headed,” “incoherent and unsubstantiated,” and that Lord Chancellor was “badly confused.”⁴⁰ A newspaper article introducing the government’s proposals was condemned as “bizarre, divisive and misleading.”⁴¹ Shrill hyperbole has become a favorite rhetorical style in Liberty briefings, its response to the government’s judicial review proposals being no exception.⁴² Justice, the legal pressure group, was more moderate in its language, while sharing a number of Liberty’s concerns.⁴³ Of the Bill that followed on from the proposals, Justice wrote that they were “concerned that the proposals . . . are . . . unnecessary and potentially damaging” in that they “could inhibit access to justice.”⁴⁴ Aspects of the changes proposed by the government were “inappropriate and unjustifiable,” Justice said.⁴⁵

Eventually, the government brought forward legislative proposals to make only two core changes to the law and practice of judicial review.⁴⁶ After lengthy parliamentary wrangling, even these were further diluted. They were eventually enacted in the Criminal Justice and Courts Act 2015.⁴⁷ Section 84 of the Act provides that courts “must refuse” a claim for judicial review “if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”⁴⁸ At a late stage in the legislation’s passage through Parliament a proviso was added: that a court may allow such a claim to continue “for reasons of exceptional public interest.”⁴⁹ Previously, the courts had discretion

³⁹ *Id.*

⁴⁰ LIBERTY, LIBERTY’S RESPONSE TO THE MINISTRY OF JUSTICE’S CONSULTATION ‘JUDICIAL REVIEW: PROPOSALS FOR FURTHER REFORM’ 3–4 (2013).

⁴¹ *Id.* at 4.

⁴² *See id.* at 3–4.

⁴³ *See* Justice, CRIMINAL JUSTICE AND COURTS BILL: JUDICIAL REVIEW (HOUSE OF LORDS SECOND READING) 2 (June 2014).

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 7.

⁴⁶ *See* Justice, *Criminal Justice and Courts Bill*, <https://justice.org.uk/criminal-justice-courts-bill/> (last visited Oct. 28, 2016).

⁴⁷ Criminal Justice and Courts Act 2015, c. 2 (UK). The Act also includes specific provisions on planning appeals, in addition to the changes made to judicial review.

⁴⁸ *Id.* c. 2, § 84(1)(2A).

⁴⁹ *Id.* c. 2, § 84(1)(2B).

to refuse a claim for judicial review when it was “inevitabl[e]” that, even if the claimant won the case, it would make “no difference.”⁵⁰ The government sought to tighten this rule in two respects: to make the test one of high likelihood rather than inevitability, and to turn the rule from a discretionary to a mandatory one.⁵¹ The House of Lords sought to resist both changes and was prevailed upon to accept them only with the addition of the “exceptional public interest” proviso—a late government concession.⁵²

Section 87 of the Act concerns interveners. It provides that they should normally be required to bear their own costs (and that the parties to the litigation should not ordinarily be obliged to pay the intervener’s costs).⁵³ It further provides that if an intervener has unreasonably required a party to incur additional costs, that party may seek to recover those costs from the intervener.⁵⁴ This is a relatively modest change in the law and would appear on its face to be wholly reasonable, yet even here the government faced opposition. Parliament’s Joint Committee on Human Rights, in its report on the legislation, for example, opined that the provision be omitted and that the matter of interveners’ costs should be one for the court to determine in its discretion, rather than for Parliament to legislate on.⁵⁵

The struggle in 2010-2015 over such modest reforms to the law of judicial review illustrates both the contested nature of contemporary administrative law in the United Kingdom and the opposition any Government is liable to face from legal lobby groups (such as Liberty and Justice) if it seeks to address and remedy problems of judicial overreach.

II. IMMIGRATION AND DEPORTATION

A. *Rationality review and proportionality*

Under the common law of judicial review the courts may declare an administrative decision to be unlawful on three basic grounds: illegality, irrationality and procedural unfairness.⁵⁶ An illegal decision is one that the decision-maker had no authority to make.⁵⁷ An irrational decision is one that is

⁵⁰ JUSTICE, *supra* note 43, at 6.

⁵¹ JUSTICE, CRIMINAL JUSTICE AND COURTS BILL: JUDICIAL REVIEW (HOUSE OF LORDS REPORT STAGE BRIEFING ON AMENDMENTS) 7 (Oct. 2014).

⁵² Criminal Justice and Courts Act 2015, c. 2, § 84(1)(2B) (UK).

⁵³ *Id.* § 87(3).

⁵⁴ *Id.* § 87(5).

⁵⁵ JOINT COMMITTEE ON HUMAN RIGHTS, THE IMPLICATIONS FOR ACCESS TO JUSTICE OF THE GOVERNMENT’S PROPOSALS TO REFORM JUDICIAL REVIEW, 2013-14, HL 174, HC 868, at 4 (UK).

⁵⁶ The Right Honourable Lord Justice Woolf, *The Role of the English Judiciary in Developing Public Law*, 27 WM. & MARY L. REV. 669, 672 (1986).

⁵⁷ *See id.* at 672–74.

so unreasonable no reasonable decision-maker would have made it.⁵⁸ An unfair decision is one in which the decision-maker has failed to act fairly—that is, has failed to act in accordance with the common law principles of natural justice.⁵⁹ Of these three established grounds of judicial review, it is irrationality that concerns us here.

Until the 1980s, this ground of judicial review was known as “*Wednesbury* unreasonableness.”⁶⁰ The purpose of common law judicial review is not to allow litigants to appeal government decisions they dislike; it is narrower than that. Constitutionally, the purpose of common law judicial review is to enable the courts to ensure that government decisions are lawful. In the *Wednesbury*⁶¹ case, Lord Greene MR stated that while the courts could not intervene to quash a decision merely because they considered it to be unreasonable, they could intervene if the decision was “so unreasonable that no reasonable authority could ever have come to it.”⁶² In a leading House of Lords case in 1984, Lord Diplock recast this formulation in terms of irrationality.⁶³ An irrational decision, he said, is one that is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”⁶⁴

In another leading case from the same era, the courts were invited to introduce into English administrative law an additional ground of review, derived from European law: proportionality. Both the Court of Appeal and the House of Lords declined the invitation. Lord Donaldson MR ruled that:

[I]t must never be forgotten that [judicial review] is a *supervisory* and not an *appellate* jurisdiction . . . [A]cceptance of ‘proportionality’ as a separate ground for seeking judicial review . . . could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision.⁶⁵

In the House of Lords, Lord Ackner agreed, stating that a proportionality test would inevitably require the court to make “an inquiry into and a

⁵⁸ See *id.* at 674–75.

⁵⁹ See *id.* at 675–77.

⁶⁰ Named after the leading case, *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

⁶¹ [1948] 1 KB 223.

⁶² *Id.* at 230.

⁶³ *Council of Civil Serv. Unions v. Minister for the Civil Serv.* [1985] AC 374 (HL) 410 (appeal taken from Eng.). Until 2009 the Appellate Committee of the House of Lords was the highest court of appeal in the United Kingdom. In 2009 it was replaced by the United Kingdom Supreme Court.

⁶⁴ *Id.*

⁶⁵ *R v. Sec’y of State for the Home Dep’t, ex parte Brind* (1991) 1 AC 696, 722 (appeal taken from Eng.).

decision upon the merits” of the matter and would as such amount to a “wrongful usurpation of power”.⁶⁶

By contrast with the English common law, proportionality has been central to European law for decades—since at least the 1970s.⁶⁷ This is true for both the European Court of Justice and for the European Court of Human Rights. For our purposes it is the latter that matters more. The European Court of Human Rights in Strasbourg enforces the ECHR, an international human rights treaty promulgated under the auspices of the Council of Europe.⁶⁸ Most of the rights protected under the ECHR are qualified rights. Only a few are absolute rights (a well-known example is the right to freedom from torture).⁶⁹ The rights to privacy, to freedom of religion, to freedom of expression and to freedom of assembly are examples of qualified rights under the Convention.⁷⁰ In each case, interference with the exercise of the right will be lawful if the interference is: (1) prescribed by law; (2) necessary in a democratic society; and (3) in pursuit of a legitimate aim. This is all set out in the Convention itself.⁷¹ Since the 1970s, the European Court of Human Rights has used a proportionality test to determine whether or not an interference with a qualified right is “necessary in a democratic society.”⁷² A proportional interference will be lawful (as long as it is also prescribed by law and in pursuit of a legitimate aim), whereas a disproportionate interference will be unlawful (even if it is prescribed by law and in pursuit of a legitimate aim).⁷³

There is no doubt that proportionality is a more intrusive test than common law irrationality. Unlike common law irrationality, proportionality may require courts to inquire not only into the lawfulness of decisions, but into their merits. Despite the fact that, as Lord Ackner put it in the *Brind*⁷⁴ case,

⁶⁶ *Id.* at 762.

⁶⁷ See Alec Stone Sweet & Giacinto della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez*, 46 N.Y.U. J. INT’L L. & POL. 911, 919–20 (2014).

⁶⁸ The European Court of Justice in Luxembourg is the principal court of the European Union (“EU”). The EU and the Council of Europe are separate international entities. See *The Court in Brief*, EUR. CT. HUM. RTS., http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Oct. 17, 2016).

⁶⁹ See Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 2889 [hereinafter Human Rights Convention]; Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 MOD. L. REV. 671, 671 (1999).

⁷⁰ See Human Rights Convention, *supra* note 69, arts. 8–11 (dealing with privacy, religion, expression, and assembly).

⁷¹ *Id.*

⁷² See *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45, 76 (providing an example of the court’s use of this doctrine).

⁷³ See *id.* at 75, 81.

⁷⁴ (1991) 1 AC 696 (appeal taken from Eng.).

to cross this line would mark a “wrongful usurpation” of judicial power,⁷⁵ once the Human Rights Act 1998 was enacted, the House of Lords ruled that courts in the United Kingdom should adopt a test of proportionality, at least in cases concerning Convention rights.⁷⁶ This test, their Lordships ruled, requires the court to ask itself the following questions: (1) whether the objective pursued by the decision-maker is sufficiently important to justify the limitation of a fundamental right; (2) whether the measure adopted by the decision-maker is rationally connected to that purpose; and (3) whether a less intrusive measure could have been used.⁷⁷ In ruling in these terms, the House of Lords was bringing the United Kingdom into line not only with European law, but with the jurisprudence of constitutional and supreme courts across the Commonwealth. Indeed, the formulation of the proportionality test preferred by the House of Lords in the *Daly*⁷⁸ case was taken directly from the case law of the Canadian Supreme Court.⁷⁹

Their Lordships in *Daly* were candid about the “intensity of review” being “somewhat greater under the proportionality approach” than it is under common law irrationality, such that it “may therefore sometimes yield different results.”⁸⁰ Lord Steyn specified as follows: “proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.”⁸¹ Further, he added, proportionality “may go further than the traditional grounds of judicial review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.”⁸²

In the years since, *Daly* proportionality has become firmly established in United Kingdom law as the core doctrine of judicial review in cases concerning Convention rights or points of European Union law. The old common law test of irrationality remains for judicial review cases not concerned with

⁷⁵ *Id.* at 757.

⁷⁶ *See* R (Daly) v. Sec’y of State for the Home Dep’t [2001] UKHL 26, (2001) 2 AC 532, 547–48 (appeal taken from Eng.).

⁷⁷ *Id.* at 547.

⁷⁸ [2001] UKHL 26, (2001) 2 AC 532 (appeal taken from Eng.).

⁷⁹ *See* R. v. Oakes [1986] 1 R.C.S. 103, 139 (Can.). The *Oakes* test is one of the greatest contemporary examples of the migration of constitutional ideas. Emerging from German law, proportionality was adopted both by the European Court of Human Rights and the European Court of Justice before being adopted in *Oakes* by the Supreme Court of Canada and thereafter by supreme or constitutional courts in Israel, South Africa and the United Kingdom. The story is a well-known one in the literature on comparative constitutional law. *See, e.g.*, Aharon Barak, *Proportionality (2)*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 738, 742–43 (Michel Rosenfeld & András Sajó eds., Joel Linsider, trans., 2012); Bernhard Schlink, *Proportionality (1)*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718, 728–29, 731–32 (Michel Rosenfeld & András Sajó eds., 2012); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3101–02 (2015) (discussing proportionality in U.S. constitutional law).

⁸⁰ R (Daly) v. Sec’y of State for the Home Dep’t [2001] UKHL 26, (2001) 2 AC 532, 547–48.

⁸¹ *Id.* at 547.

⁸² *Id.*

Convention rights or EU law, but, even here, pressure now appears to be building for *Wednesbury* unreasonableness to give way to proportionality.⁸³ Moreover, the doctrine of proportionality has come to be seen as stretching across an even larger canvas than was identified by the House of Lords in *Daly*. In addition to the three questions set out in that case, a fourth has now been added: “whether, having regard to . . . the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.”⁸⁴ This fourth element of proportionality is its most contentious aspect. One of the English Court of Appeal’s most senior and respected public lawyers said in a judgment in 2014 that, “there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government.”⁸⁵ Be that as it may, the law as it stands was recently stated as follows by the President of the United Kingdom Supreme Court, in a case called *Carlile*⁸⁶: “once a Convention right is affected by a decision of the executive, the court has a duty to decide for itself whether the decision strikes a fair balance between the rights of an individual . . . and the interests of the community as a whole.”⁸⁷ To return to the terms used by Lord Donaldson MR in *Brind*, this is no longer a merely supervisory jurisdiction (in which the courts ensure that the administration has acted lawfully) but a fully appellate one (in which the courts decide for themselves where the balance of the public interest lies).⁸⁸

When the Human Rights Act 1998 first came into force, the judges in the House of Lords were alive to concerns that it risked upsetting the United Kingdom’s established constitutional order by giving to the courts new powers so significant that they would diminish and perhaps even render obsolete the system of giving priority to political forms of accountability. In *Alconbury*,⁸⁹ the first case under the Human Rights Act to reach the House of Lords, their Lordships were at pains to ensure that this should not happen.⁹⁰ It is

⁸³ Supreme Court Justices have recently made suggestions to this effect. *See* *R (Keyu) v. Sec’y of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, (2015) 3 WLR 1665, 1735, 1738 (appeal taken from Eng.); *Pham v. Sec’y of State for the Home Dep’t* [2015] UKSC 19, (2015) 1 WLR 1591, 1621–22 (appeal taken from Eng.); *Kennedy v. Charity Comm’n* [2014] UKSC 20, [2015] AC 455, 506 (appeal taken from Eng.). *But see* Michael Taggart, *Proportionality, Deference, Wednesbury*, 2008 N.Z. L. REV. 423, 425 (2008) (arguing that proportionality should not replace common law irrationality in cases not concerned with rights).

⁸⁴ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, 771 (appeal taken from Eng.).

⁸⁵ *R (Miranda) v Sec’y of State for the Home Dep’t* [2014] EWHC (Admin) 255, (2014) 1 WLR 3140, 3156.

⁸⁶ [2014] UKSC 60, [2015] AC 945 (appeal taken from Eng.).

⁸⁷ *Id.* at 982.

⁸⁸ *See* *R v. Sec’y of State for the Home Dep’t, ex parte Brind*, (1991) 1 AC 696, 757–58 (appeal taken from Eng.).

⁸⁹ [2001] UKHL 23, (2003) 2 AC 295 (appeal taken from Eng.).

⁹⁰ *See id.* at 322–23.

instructive to compare this case with what has happened subsequently. *Alconbury* arose out of three conjoined disputes about planning, highway improvement and compulsory purchase.⁹¹ Under the United Kingdom's planning legislation, the final decision-maker in certain planning schemes is the Secretary of State for the Environment, a minister in central government.⁹² This is because determining whether such schemes should proceed may involve broad social and economic issues (including as regards the local economy, the preservation of the environment, public safety, the development of the road network, etc.).⁹³ In a parliamentary democracy it is important that such decisions are made by an office-holder who is democratically accountable—that is to say, by a minister. *Alconbury* and other property developers argued, however, that this was contrary to Article 6 of the ECHR.⁹⁴ Article 6 provides that “[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal.”⁹⁵ *Alconbury* argued that the determination of planning appeals affected its property rights, and that such a determination should therefore be made by a judicial tribunal, not by the Secretary of State.⁹⁶

The House of Lords unanimously rejected this argument and upheld the statutory planning schemes, ruling that the legislation was compatible with Article 6.⁹⁷ Principally, this was because, even though the Secretary of State was the statutory decision-maker, his (or her) decision-making was subject to judicial review.⁹⁸ Applying the case law of the European Court of Human Rights, the House of Lords ruled that this fact brought the overall decision-making scheme within the requirements of Article 6.⁹⁹

In the course of their opinions in *Alconbury*, a number of the law lords expressed strong views about the implications of the arguments made in the case. Lord Nolan emphasized that:

Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament which he must account for his exercise of it. To substitute for

⁹¹ See *id.* at 307.

⁹² See *id.*; see also Transport and Works Act 1992, c. 42, §§ 1, 3, 23(4); Town and Country Planning Act 1990, c. 8, §§ 77–79, sch. 6; Acquisition of Land Act 1981, c. 67, § 2(3), sch. 1; Highways Act 1980, c. 66, §§ 14(3)(a), 16(5)(a), 18(3)(a), 125, sch. 1.

⁹³ See *R (Alconbury Devs. Ltd.) v. Sec’y of State for the Env’t, Transp. and the Regions*, [2001] UKHL 23, (2003) 2 AC 295, 324 (appeal taken from Eng.).

⁹⁴ See *id.* at 307–08.

⁹⁵ Human Rights Convention, *supra* note 69, at 228.

⁹⁶ See *R (Alconbury Devs. Ltd.) v. Sec’y of State for the Env’t, Transp. and the Regions*, [2001] UKHL 23, (2003) 2 AC 295, 312 (appeal taken from Eng.).

⁹⁷ *Id.* at 321–22, 342, 355–56, 365.

⁹⁸ See *id.* at 320.

⁹⁹ See *id.* at 315–16, 320–22, 352–53, 362 (relying most particularly upon *Bryan v. United Kingdom*, App. No. 19178/61, (1996) 21 Eur. H.R. Rep. (ser. A) 342, 352–53 (1995)).

the Secretary of State an independent and impartial body with no central electoral accountability would . . . be profoundly undemocratic.¹⁰⁰

Lord Hoffmann said that “[i]n a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them.”¹⁰¹ His Lordship cited the right to property in the European Convention on Human Rights, and noted that it provides that “no one shall be deprived of his possessions except in the public interest . . .” and that this provision is expressly stated “not . . . in any way to impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.”¹⁰² Lord Hoffmann stated that the question of what the public or general interest requires for the purposes of the right to property “can, and in my opinion should, be determined according to the democratic principle—by elected local or central bodies or by ministers accountable to them.”¹⁰³ Indeed, he suggested that if the case law of the European Court of Human Rights provided otherwise, he would doubt whether it should be followed.¹⁰⁴ A European human rights law that required the result sought by the claimants in *Alconbury*, he said, would be one that “compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution.”¹⁰⁵ The Human Rights Act, in Lord Hoffmann’s view, was designed to give greater effect to Convention rights in a manner compatible with the core fundamentals of the United Kingdom constitution: the Act was “no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers,” he concluded.¹⁰⁶

Whether this remains the case, given the President of the Supreme Court’s recent dictum in *Carlile*, is an open question.¹⁰⁷ Indeed, in *Carlile*, another Supreme Court Justice seemed to directly contradict what Lord Hoffmann had said in *Alconbury*, when he was observed that “traditional notions

¹⁰⁰ R (Alconbury Devs. Ltd.) v. Sec’y of State for the Env’t, Transp. and the Regions [2001] UKHL 23, (2003) 2 AC 295, 323 (appeal taken from Eng.).

¹⁰¹ *Id.* at 325.

¹⁰² *Id.*

¹⁰³ *Id.* at 325–26.

¹⁰⁴ *Id.* at 327. Under the Human Rights Act 1998, s. 2, courts in the United Kingdom must take into account the relevant case law of the European Court of Human Rights, but they are under no statutory or constitutional obligation to follow it. See Elliott, *supra* note 29, at 9. Thus far, the courts in the UK have tended to follow any clear and constant line of Strasbourg authority. See Sir Philip Sales, *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine*, 2 PUB. L. 253, 253, 255–57 (2012). Whether the UK’s courts have followed Strasbourg authority too slavishly and uncritically is a live argument in the United Kingdom at the moment. See Elliott, *supra* note 29, at 9–10.

¹⁰⁵ R (Alconbury Devs. Ltd.) v. Sec’y of State for the Env’t, Transp. and the Regions [2001] UKHL 23, (2003) 2 AC 295, 327 (appeal taken from Eng.).

¹⁰⁶ *Id.* at 341.

¹⁰⁷ See R (Lord Carlile of Berriew) v. Sec’y of State for the Home Dep’t [2014] UKSC 60, [2015] AC 945, 984–85 (appeal taken from Eng.).

of the constitutional distribution of powers have unquestionably been modified by the Human Rights Act 1998.”¹⁰⁸

B. *Deportation, family life, and proportionality*

“For several years Home Office ministers have been concerned about court and tribunal rulings which have prevented them from deporting people” from the United Kingdom.¹⁰⁹ “There is a presumption [in UK immigration law], for example, that migrants who are convicted of serious criminal offenses” and sentenced to a term of imprisonment “will be deported upon release” from prison.¹¹⁰ “In a series of cases it has been ruled that [such a deportation] . . . disproportionately interfere[s] with the right to family life under Article 8 of the European Convention on Human Rights and [is] therefore unlawful.”¹¹¹ Article 8 provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹¹² Like most of the articles in the European Convention, it is a qualified right. It may be lawfully restricted if the interference is: (1) “in accordance with the law;” (2) “necessary in a democratic society;” and (3) in furtherance of a certain, listed legitimate end: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health and morals, or the protection of the rights and freedoms of others.¹¹³ As with other rights, the key test of “necessity in a democratic society” has been interpreted as amounting to a test of proportionality.

We saw above how the courts in the United Kingdom have developed the doctrine of proportionality. We noted that the fourth element of the courts’ definition—that a fair balance must be struck between the rights of the individual and the interests of the community—has proved to be its most

¹⁰⁸ *Id.* at 968. In *Carlile* a member of the House of Lords challenged the decision by the Secretary of State not to allow a certain Iranian dissident politician to enter the United Kingdom, where she had been invited to address a number of British politicians. *Id.* at 956. The Secretary of State’s decision was made for reasons connected with the United Kingdom’s diplomatic relations with Iran. *Id.* This would formerly have been a sufficient reason for the courts not to intervene but the Supreme Court held that, under the Human Rights Act, the facts of the case raised a justiciable matter concerning the scope of freedom of expression. *Id.* at 949. Lord Sumption ruled that traditional understandings of non-justiciability “cannot apply in cases where a scrutiny of [executive] decisions is necessary in order to adjudicate on a complaint that Convention rights have been infringed” *Id.* at 969. By a 4-1 majority the Court upheld the Secretary of State’s decision to exclude the dissident Iranian from the UK on the basis that her exclusion was not a disproportionate interference with the right to free speech. *Id.* at 981, 988, 995, 997, 1015.

¹⁰⁹ Immigration Bill 2013-14, HL Bill [148] cl. 14 (UK). The Home Office is the department of central government with responsibility (among other matters) for immigration, policing and border controls.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Human Rights Convention, *supra* note 69, at 230.

¹¹³ *Id.*

controversial aspect. The House of Lords ruled in a unanimous opinion in a leading immigration law case in 2007, however, that this aspect of the proportionality doctrine “should never be overlooked or discounted.”¹¹⁴

In October 2011, the Home Secretary complained in her speech at the annual Conservative party conference that the courts were “misinterpreting” their powers under the Human Rights Act to prevent her from deporting foreign criminals from the UK on the basis that such deportations were a disproportionate interference with the right to respect for family life under Article 8.¹¹⁵ Notoriously, the Secretary of State illustrated her argument by referencing a case in which a claimant had sought to establish that he had a family life in the United Kingdom by relying on the fact that he and his partner owned a pet cat together.¹¹⁶ She was pilloried for this, but academic research has shown that there was indeed such a case (albeit that it did not concern the deportation of foreign criminals) and that the Asylum and Immigration Tribunal did indeed accept that the ownership of a pet cat reinforced the “strength and quality” of the individual’s family life in the UK.¹¹⁷ The case was in fact about a Bolivian immigrant who had entered the United Kingdom on a student visa and who had unlawfully remained in the UK for four years beyond the expiry of his visa.¹¹⁸ He came to the attention of the immigration authorities when he was caught attempting to steal a figurine cat from a department store.¹¹⁹

Immigration law in the United Kingdom clearly contemplates that people may be deported even where they have a family life in the United Kingdom. In particular, a person subject to immigration control is liable to be removed if, “having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave.”¹²⁰ The mere fact that an offender has a settled family life in the UK gives him or her no right to remain. Yet, successive appeal court decisions on the relationship between the UK’s immigration law and the Article 8 right to family life have made it easier and easier for claimants to show that their deportation or removal from the United Kingdom would be in violation of Article 8 when they have no right to remain and, indeed—as in the case of the Bolivian cat—even when the claimant is in clear breach of immigration

¹¹⁴ *Huang v. Sec’y of State for the Home Dep’t* [2007] UKHL 11, (2007) 2 AC 167, 187 (appeal taken from Eng.).

¹¹⁵ See Theresa May, Home Sec’y, Speech to the Conservative Party Conference (Oct. 2011).

¹¹⁶ *Id.*

¹¹⁷ See David Campbell, “*Catgate*” and the Challenge to Parliamentary Sovereignty in Immigration Law, 2015 PUB. L. 426, 434 (2015).

¹¹⁸ *Id.* at 430.

¹¹⁹ *Id.*

¹²⁰ Immigration and Asylum Act 1999, c. 33, § 10(1)(a) (UK). See also Immigration Act 2014, c. 22 § 1 (UK).

law.¹²¹ As Professor Campbell rightly points out in his analysis of “catgate,” Parliament “obviously did not intend” that a family life so ordinary would render those in breach of the terms of their entry “immune to removal” from the UK.¹²² The case law that has so extended the reach of Article 8 that it has effectively created new rights to remain in the UK is, in Professor Campbell’s judgement, “characterised by a want of appropriate [judicial] deference to as perfectly clear a legislative intention as it is possible to conceive.”¹²³ As Professor Campbell notes, the case law flies in the face of the “constitutional compromise which was the basis on which the Human Rights Act was passed.”¹²⁴

In her October 2011 conference speech, the Secretary of State undertook to amend the Immigration Rules to address the matter.¹²⁵ The Immigration Rules are “rules laid down by the Secretary of State as to the practice to be followed in the administration” of immigration law; they regulate “the entry into and stay in the United Kingdom of persons not having the right of abode.”¹²⁶ Formally, the constitutional “status of the immigration rules is rather unusual,” in that “[t]hey are not subordinate legislation but detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration.”¹²⁷ They are more than mere statements of practice or policy, however, for they have the force of law and create legal rights; if an immigration decision is taken in breach of the Rules it is unlawful.¹²⁸

The Rules were duly amended in June 2012.¹²⁹ A Home Office publication, *Statement of Intent: Family Migration*, published alongside the revised

¹²¹ See, e.g., *Beoku-Betts v. Sec’y of State for the Home Dep’t* [2008] UKHL 39, (2009) 1 AC 115, 115 (appeal taken from Eng.); *Chikwamba v. Sec’y of State for the Home Dep’t* [2008] UKHL 40, (2008) 1 WLR 1420, 1423 (appeal taken from Eng.). The former case is reported in the official law reports as authority for the following proposition: “where a breach of a claimant’s right to respect for his family life [is] alleged the appellate authorities [are] to consider the complaint with reference to the family unit as a whole and if his proposed removal would be disproportionate in that context each affected family member [is] to be regarded as a victim.” *Beoku-Betts v. Sec’y of State for the Home Dep’t* [2008] UKHL 39, (2009) 1 AC 115, 115 (appeal taken from Eng.).

¹²² See Campbell, *supra* note 117, at 437.

¹²³ *Id.*

¹²⁴ *Id.* at 438. The “constitutional compromise” is perhaps most pithily expressed in the dictum of Lord Hoffmann’s from the *Alconbury* case that the Human Rights Act was intended to strengthen the rule of law “but not to inaugurate the rule of lawyers.” *R (Alconbury Devs. Ltd.) v. Sec’y of State for the Env’t, Transp. and the Regions* [2001] UKHL 23, (2003) 2 AC 295, 341 (appeal taken from Eng.).

¹²⁵ See Speech from Theresa May, *supra* note 115.

¹²⁶ Immigration Act 1971, c. 77, § 1(4) (UK).

¹²⁷ *Odelola v Sec’y of State for the Home Dep’t* [2009] UKHL 25, [2009] 1 WLR (HL) 1230, 1233 (appeal taken from Eng.).

¹²⁸ See *id.*

¹²⁹ The Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012/1547 (UK).

Rules, set out the Government's position.¹³⁰ The *Statement of Intent* explained how the revised Immigration Rules would "set [out] proportionate requirements that reflect, as a matter of public policy, the Government's and Parliament's view of how individual rights to respect for private or family life should be qualified in the public interest."¹³¹ The Government hoped that this would mean that "failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim."¹³² In particular, the revised Rules provided that "only in exceptional circumstances will family life . . . outweigh criminality and the public interest in seeing the foreign national criminal deported where they have received a custodial sentence of at least four years."¹³³ They further provided that "[d]eportation will normally be proportionate where the foreign national criminal has received a custodial sentence of at least 12 months and less than four years . . . and, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender."¹³⁴ The Rules also provided for a number of circumstances in which deportation would not be proportionate.¹³⁵

The *Statement of Intent* emphasized that "[t]he Courts will continue to determine individual cases according to the law but, in doing so, they will be reviewing decisions taken under Immigration Rules which expressly reflect Article 8" and, moreover, which "for the first time reflect the views of the Government and Parliament" as to how Article 8(1) should, as matter of public policy, be qualified in the public interest under the terms of Article 8(2).¹³⁶ The *Statement of Intent* recognized that "[t]his does not mean that the Secretary of State and Parliament have the only say on what is proportionate," but—clearly—the plain intention was to reclaim from the courts the power to decide how the balance should be struck between the public interest and individual rights.¹³⁷ The assumption was that if an immigration decision was within the revised Rules it would, absent wholly exceptional circumstances, be compatible with Article 8.

Unfortunately, however, this intention was not reflected in the ensuing case law. In *MF (Nigeria) v. Secretary of State for the Home Department*,¹³⁸ the Upper Tribunal held that MF's deportation (he had been convicted of handling stolen goods) would be a disproportionate interference with his

¹³⁰ HOME OFFICE, STATEMENT OF INTENT: FAMILY MIGRATION, 2012, at 4–5 (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf.

¹³¹ *Id.*

¹³² *Id.* at 4.

¹³³ *Id.*

¹³⁴ *Id.* at 5.

¹³⁵ *Id.*

¹³⁶ HOME OFFICE, *supra* note 130, at 5.

¹³⁷ *Id.* at 11.

¹³⁸ [2012] UKUT (IAC) 393, *aff'd*, *MF (Nigeria) v. Sec'y of State for the Home Dep't* [2013] EWCA (Civ) 1192, (2014) 1 WLR 544.

stepdaughter's Article 8 right to family life, despite the fact that his deportation fell within the revised Immigration Rules.¹³⁹ The Upper Tribunal ruled that the new Rules could not be construed as providing a complete code for Article 8 claims.¹⁴⁰ The Tribunal stated that, under the Human Rights Act 1998, it (i.e. the Tribunal itself) was bound to act compatibly with Convention rights, and that this meant that the Tribunal, as well as the immigration officer, had to be satisfied that the decision to deport was compatible with Article 8.¹⁴¹ On this view, it would be impossible for the executive lawfully to claim anything approaching exclusive competence to determine the question of where the balance lies between the public interest and individual rights. While the Secretary of State's appeal to the Court of Appeal was unsuccessful, that court distanced itself from the Upper Tribunal's reasoning.¹⁴² Because the revised Immigration Rules provided for an "exceptional circumstances" exception to the general proposition that a decision within the Rules could not be incompatible with Article 8, the Rules "are a complete code."¹⁴³ The Court of Appeal ruled that "[i]n approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favor of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal."¹⁴⁴ On the facts of MF's particular case, the Court of Appeal upheld the Upper Tribunal's finding that the position of the claimant's stepdaughter constituted such a compelling or exceptional factor.¹⁴⁵

Despite the fact that the Court of Appeal's reasoning in *MF (Nigeria)* was not as hostile to the Government's intention in revising the Immigration Rules as the Upper Tribunal's had been, the fact that MF nonetheless won his case suggests that the Government's attempt to use the Immigration Rules to settle how the courts should determine the proportionality of decisions to deport foreign criminals was unsuccessful. Notwithstanding that MF's deportation fell within the revised Immigration Rules, it was held to be an unlawful interference with his stepdaughter's Article 8 right to family life. The Government needed a "Plan B." One quickly emerged: instead of seeking to use the Immigration Rules to lay down what proportionality means in the context of deportation decisions and the right to family life, primary legislation—an Act of Parliament—would be used. The Human Rights Act 1998, Section 3, provides that "[s]o far as it is possible to do so, primary legislation . . . must be read and given effect in a way which is compatible with the Convention rights."¹⁴⁶ Any provision of a new Immigration Act seeking to

¹³⁹ *Id.* [80]. 30.

¹⁴⁰ *Id.* [25]. 13.

¹⁴¹ *Id.* [32]. 15.

¹⁴² *MF (Nigeria) v. Sec'y of State for the Home Dep't* [2013] EWCA (Civ) 1192, (2014) 1 WLR 544, 562.

¹⁴³ *Id.* at 561.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 562.

¹⁴⁶ Human Rights Act 1998, c. 42, § 3(1).

place on a statutory footing what the revised Immigration Rules already sought to provide would itself have to be “read and given effect” by the courts compatibly with Article 8. However, if Parliament made clear during the passage of the legislation that, in its view, the new legislation was fully compatible with Article 8 and indeed was designed to eliminate doubt as to when a deportation will and will not be a proportionate interference with family life, the courts would be more respectful of that than they were about the executive’s Immigration Rules in *MF (Nigeria)*.

Case law in other contexts suggested that where Parliament, in enacting a statute, has considered carefully the rights-implications of its legislation, the courts will be slow to rule that the law is disproportionate.¹⁴⁷ For sure, the cases state that this will depend on the subject-matter, but in *R (Countryside Alliance) v. Attorney General*,¹⁴⁸ Lord Bingham stated that “[t]he democratic process is liable to be subverted if, *on a question of moral and political judgment*” those who oppose the legislation are able to have it quashed in the courts despite failing to persuade Parliament not to enact it.¹⁴⁹ Likewise, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*,¹⁵⁰ Lord Bingham stated that “it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the *measures necessary to safeguard the integrity of our democracy*.”¹⁵¹ None of this means that the courts will never declare primary legislation to be incompatible with Convention rights, but it is, generally speaking, more difficult to challenge statute in the courts than it is to challenge other rules or decisions made by the executive.

The result is Section 19 of the Immigration Act 2014. This provision is a constitutional innovation. It is the first time a statute has prescribed what proportionality means in a particular context and how it should be interpreted and applied. It provides that, in determining whether an immigration decision is in the public interest—that is to say, is compatible with the Article 8 right to family life—a court or tribunal “must . . . have regard” to the following considerations: (1) that “[t]he maintenance of effective immigration controls is in the public interest” (2) that “[i]t is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English” because they will be “less of a burden on taxpayers” and “are better able to integrate into society” (3) that it is likewise in the public interest “that

¹⁴⁷ See Case C-331/88, *The Queen v. Minister for Agric., Fisheries and Food and Sec’y of State for Health ex parte Fédération européenne de la santé animale*, 1990 E.C.R. I-4057, I-4063; *The Queen v. Sec’y of State for Health ex parte Eastside Cheese Co.*, 3 C.M.L.R. 123, 143–44 (1999).

¹⁴⁸ [2007] UKHL 52, (2008) 1 AC 719.

¹⁴⁹ *Id.* at 756 (emphasis added) (upholding the Hunting Act 2004, which banned most forms of fox-hunting in England and Wales).

¹⁵⁰ [2008] UKHL 15, (2008) 1 AC 1312.

¹⁵¹ *Id.* at 1347–48 (emphasis added) (upholding certain provisions of a statute that prohibited political advertising on broadcast media in the United Kingdom).

persons who seek to enter or remain in the United Kingdom are financially independent” (4) that “[l]ittle weight should be given to a private life, or a relationship . . . that is established by a person at a time when the person is in the United Kingdom unlawfully” and (5) that “[l]ittle weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.”¹⁵² These considerations, Section 19 provides, must apply in all immigration cases.¹⁵³

In addition, special provision is made by Section 19 for cases involving foreign criminals, as follows: (1) “the deportation of foreign criminals is in the public interest;” (2) further, “the more serious the offence committed by a foreign criminal, the greater is the public interest” in their deportation; (3) where a foreign criminal has been sentenced to a term of imprisonment of less than four years, the public interest “requires” their deportation unless either (a) the individual “has been lawfully resident in the United Kingdom for most of [his] life,” and the individual is “socially and culturally integrated in the United Kingdom,” and there would be “very significant obstacles” to his integration into the country to which it is proposed he be deported, or (b) the individual has a subsisting relationship with a partner or a child on whom the effect of his deportation would be “unduly harsh;” and (4) where a foreign criminal has been sentenced to a term of more than four years’ imprisonment, “the public interest requires deportation unless there are very compelling circumstances, over and above” those that apply to foreign criminals sentenced to less than four years’ imprisonment.¹⁵⁴

In steering these provisions through the legislative process in Parliament, government ministers explained as follows:

There is a clear public interest in these aims. These are also matters of public policy which we believe is the responsibility of government to determine, subject to the views of Parliament . . . It is for Parliament to determine what the public interest requires. It is then for the courts to have due regard to that when considering the proportionality of any interference in the exercise of an individual’s right under Article 8.¹⁵⁵

It was stated that “[t]he courts have a clear and proper constitutional role in reviewing the proportionality of measures passed by Parliament and of the executive decisions made under them.”¹⁵⁶ Section 19 does not seek to change this proper judicial function, ministers said, but “it is right that the Secretary of State should expect the courts to give proper weight to the view endorsed

¹⁵² Immigration and Asylum Act 2002, c. 22, § 19(117A)(2), (117B)(5).

¹⁵³ *Id.*

¹⁵⁴ *Id.* § 19(117C)(1)–(6).

¹⁵⁵ 5 Mar. 2014, 752 Parl Deb HL (5th ser.) (2014) col. 1378 (UK).

¹⁵⁶ *Id.* cols. 1379–80.

by Parliament on how, broadly, public policy considerations are to be weighed against individual family and private life rights.”¹⁵⁷

Not everyone agreed. During the legislation’s passage through the House of Lords, Lord Avebury, for example, claimed that Section 19 “tries to coerce the courts into interpreting Article 8(2) more restrictively” and that this amounts to an “attempt to bend the decisions of the courts.”¹⁵⁸ Parliament’s Joint Committee on Human Rights took a more nuanced view. In its report on the legislation it noted that:

There is nothing inherently incompatible with the Convention in Parliament spelling out . . . its detailed understanding of the requirements of relevant Convention rights in particular contexts. Indeed, such an exercise could be considered to be Parliament’s fulfilment of the important obligation imposed upon it by the principle of subsidiarity¹⁵⁹

The JCHR was concerned, however, that legislation should not usurp the judicial function to determine individual cases.¹⁶⁰ It concluded that “[t]he provisions in the Bill which seek to guide courts and tribunals in their determination of Article 8 claims in immigration cases do not purport to go so far as to determine individual applications in advance or to oust the courts’ jurisdiction.”¹⁶¹

However, the JCHR then went on to record its unease about the provisions purporting to tell courts and tribunals that “little weight” should be given to certain considerations “[t]hat appears to us to be a significant legislative trespass into the judicial function.”¹⁶² However, there are no grounds for holding that assessment of proportionality in UK constitutional law is uniquely or exclusively a matter for the courts. Properly understood, it is a joint or shared enterprise between parliamentary government, on the one hand, and the courts of law, on the other.

When the matter was debated in the House of Lords, Lord Pannick supported the JCHR’s line, and the former Supreme Court justice Lord Brown argued against him. Lord Pannick said that Parliament should confine itself to identifying which “public interest considerations” the courts should “take into account;” it should not seek to instruct the courts as to “how much weight to give to relevant factors.”¹⁶³ Lord Brown welcomed Section 19, saying:

¹⁵⁷ *Id.* col. 1380.

¹⁵⁸ 10 Feb. 2014, 752 Parl Deb HL (5th ser.) (2014) cols. 452–53 (UK).

¹⁵⁹ JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: IMMIGRATION BILL, 2013–14, HL 102, HC 935, at 21 (UK).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 22.

¹⁶³ 5 Mar. 2014, 752 Parl Deb HL (5th ser.) (2014) col. 1393 (UK).

In the past, courts have rather too often tended to thwart the attempts of the Government to control immigration and deport foreign criminals on the basis on Article 8 interests. On occasion, they have carried the reach of this article beyond even the lengths to which the Strasbourg court itself has gone, and that court is no mean exponent of the art of dynamic and creative interpretation of the convention. . . . I am strongly in favour of the United Kingdom remaining fully committed to the European Convention on Human Rights—and the Human Rights Act . . . However, I can think of nothing more calculated to induce Government to conclude that the nation's better interests may in fact be served by abandoning our convention commitments that the continual frustration of government policy by an overenthusiastic interpretation and application of the convention, not least Article 8.¹⁶⁴

For the Government, Lord Wallace of Tankerness said “I do not believe that this is a trespass into the judicial function . . . It is appropriate and proper that Parliament determines what the public interest is.”¹⁶⁵ This is surely correct. Contrary to the views of Lord Pannick and the JCHR, Section 19 should be seen as a welcome innovation and as underscoring the constitutional fundamental that the articulation and protection of human rights is, in the British constitutional order, a matter that falls within the responsibility of Parliament and Government as much as it falls within that of the courts.

Section 19 has been cited in several cases since it came into force in July 2014.¹⁶⁶ In none of these cases have the courts repeated the criticisms of the legislation made during its enactment by the likes of Lord Pannick, Lord Avebury and the JCHR.¹⁶⁷ The first Court of Appeal case to consider Section 19 was *YM (Uganda) v Secretary of State for the Home Department*,¹⁶⁸ in which Sir Stanley Burnton went out of his way to reinforce a principle Section 19 provides for: namely, that where a foreign criminal has committed a serious offence “the public interest in his deportation is so strong” that it is “difficult to see” how his deportation would lead to a breach of his Article 8 rights.¹⁶⁹ In the High Court case of *R (Amin) v Secretary of State for the Home Department*¹⁷⁰ it was said that the principle was already “well established” that where a relationship is formed at a time when one of the parties does not have a lawful right to remain in the UK it will only exceptionally be that removal would be incompatible with Article 8 and that citation to Section 19

¹⁶⁴ *Id.* col. 1396.

¹⁶⁵ 1 Apr. 2014, 753 Parl Deb HL (5th ser.) (2014) col. 945 (UK).

¹⁶⁶ See *AM (Anonymity Direction) v. Sec’y of State for the Home Dep’t*, [2015] UKUT (IAC) 260, AM (S. 117B: Malawi) (appeal taken from Eng.), [6], [14]–[15]; *AK (Pakistan) v. Sec’y of State for the Home Dep’t* [2014] EWCA (Civ) 1642, [15]; *YM (Uganda) v. Sec’y of State for the Home Dep’t* [2014] EWCA (Civ) 1292, [12].

¹⁶⁷ See cases cited *supra* note 166.

¹⁶⁸ [2014] EWCA (Civ) 1292 (appeal taken from Eng.).

¹⁶⁹ *Id.* ¶ 66.

¹⁷⁰ [2014] EWHC (Admin) 4071 (appeal taken from Eng.).

to support this principle “is superfluous.”¹⁷¹ The Upper Tribunal appeared to be happy to give full effect to Section 19 in *AM v Secretary of State for the Home Department*,¹⁷² a decision about the removal of a Malawian individual who had unlawfully remained in the UK beyond the expiry of his visa.¹⁷³ The individual sought leave to remain in the United Kingdom on the basis of his family life in the UK, but this was refused.¹⁷⁴ He appealed to the Tribunal but was unsuccessful, the Tribunal relying *inter alia* upon what section 19 says about precarious immigration status.¹⁷⁵ *AM* is clearly a decision in which the Tribunal was endeavoring to give full effect to Parliament’s intentions and not, to quote Lord Brown to allow Convention rights to be a basis for the “continual frustration of government policy.”¹⁷⁶

Professor Campbell, in his expert analysis of “catgate,” portrays Section 19 as a “remarkable and troubling” provision—as a “most worrying constitutional innovation” in which Parliament, led by the government of the day, has committed a “trespass on the judicial function.”¹⁷⁷ He lays the blame squarely at the courts’ door, arguing that the government acted in this way only because it could see no alternative to addressing its “legitimate” concern that, in case law on Article 6 and deportation, the courts had themselves repeatedly trespassed on the executive and legislative functions in respect of immigration policy.¹⁷⁸ I agree with Professor Campbell that the government had little choice but to seek legislation along the lines of Section 19, but I disagree with him that the provision is either troubling or worrying or any kind of trespass.

On the contrary, the provision is a welcome reminder that in the United Kingdom’s constitution, while the courts have a considerable role to play in ruling upon what is, and what is not, a proportionate interference with Convention rights, theirs is not and should not be the only authoritative voice in this regard. There is nothing in any of the domestic jurisprudence to suggest that proportionality is exclusively a matter for the courts. While it enhances the role of the courts, it would be quite wrong to suppose that the emergence of proportionality as a ground of judicial review in Convention rights cases means that government and Parliament have no meaningful contribution to make.

This is reflected both in the Human Rights Act itself and in the courts’ case law. The Act provides that it is ministers and Parliament (not courts) who are responsible for policing the compatibility of Bills with Convention

¹⁷¹ *Id.* ¶ 30. There is a similar dictum in *R (Agyeman) v. Sec’y of State for the Home Dep’t* [2015] EWHC (Admin) 633, [19]–[20].

¹⁷² [2015] UKUT (IAC) 260, AM (S. 117B: Malawi) (appeal taken from Eng.).

¹⁷³ *Id.* ¶ 2.

¹⁷⁴ *Id.* ¶ 3.

¹⁷⁵ *Id.* ¶ 14.

¹⁷⁶ 5 Mar. 2014, 752 Parl Deb HL (5th ser.) (2014) col. 1396 (UK).

¹⁷⁷ See Campbell, *supra* note 117, at 427, 438.

¹⁷⁸ *Id.* at 437.

rights; the judicial role comes into play only after the Bill is enacted and has come into force.¹⁷⁹ Section 19 of the Human Rights Act 1998 provides that a minister promoting a Bill through Parliament must, before its parliamentary consideration gets underway, make a statement to Parliament either that in his view the Bill is compatible with Convention rights or, if he is unable to make such a statement, that the government wishes Parliament nonetheless to proceed with the Bill.¹⁸⁰ As part of the Section 19 certification process, it is axiomatic that ministers will have to make their own assessment of whether a Bill proportionately or disproportionately affects any Convention right engaged by the legislation.

Further, in numerous cases the United Kingdom Supreme Court has recognised that, even in the Human Rights Act era, there is a constitutionally important role for parliamentarians to play in deciding how individual rights and the public interest should be balanced. In *AXA General Insurance*,¹⁸¹ for example, Lord Hope noted that “elected members of a legislature . . . are best placed to judge what is in the country’s best interests as a whole” not least because of “the advantages that flow from the depth and width of the experience of [] elected members and the mandate that has been given to them by the electorate.”¹⁸²

All of the above shows that, properly understood, proportionality is a matter in the UK’s constitutional order for both courts and Parliament to assess. For sure, it is troubling and worrying that the courts have been so cavalier with their overzealous interpretation of Article 8 in immigration decisions that the Government felt it had no option but to legislate to correct this, but Section 19 of the Immigration Act 2014 should be heralded—not condemned.

III. FREEDOM OF INFORMATION

The Freedom of Information Act 2000 was, like the Human Rights Act 1998, another piece of ground-breaking constitutional reform legislation enacted in Tony Blair’s first term of office. Before the Freedom of Information Act 2000 (“FOIA”) the United Kingdom had no comprehensive law entitling individuals to seek access to information held by government and other public authorities. A series of internal directives and codes of practice had begun to partially liberalize access to government information from the 1970s through to the 1990s, but FOIA marked a step-change in the openness of British government.¹⁸³ Its scope is broad—more than 100,000 bodies fall

¹⁷⁹ See Human Rights Act 1998, c. 42, § 4 (Eng.).

¹⁸⁰ *Id.* § 19.

¹⁸¹ [2011] UKSC 46, [2012] S.C. (U.K.S.C.) 122 (appeal taken from Scot.).

¹⁸² *Id.* ¶ 49.

¹⁸³ See TURPIN & TOMKINS, *supra* note 8, at 556–65.

within its remit—and it enacts legally enforceable rights of access to information.¹⁸⁴ The Act is overseen by a powerful agency, the Information Commissioner, to whom complaints may be made in the event that a public body refuses access to information.¹⁸⁵ Onward appeals lie from decisions of the Information Commissioner to a Tribunal and, ultimately, to the United Kingdom Supreme Court.¹⁸⁶ Like all modern freedom of information laws, the UK’s FOIA exempts certain categories of information from disclosure. Some exemptions are automatic. Thus, for example, information relating to national security or to an ongoing criminal investigation may not be disclosed under the Act.¹⁸⁷ But most exemptions are not of this nature: most are subject to a “public interest” test. That is to say that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”¹⁸⁸ Two examples will suffice. Section 35 of FOIA provides that information relating to the formulation or development of government policy is exempt, and Section 37 provides that information relating to communications with senior members of the Royal Family is exempt.¹⁸⁹ At the time of FOIA’s enactment, neither of these exemptions was automatic; each would apply only if the public interest in maintaining the exemption outweighed the public interest in disclosure.¹⁹⁰

Where the Information Commissioner or a tribunal or court determines that the public interest requires information to be disclosed, Section 53 of the Act provides that a Cabinet Minister or the Attorney General may override such a decision.¹⁹¹ In this event, reasons must be given by the Cabinet Minister or Attorney General to Parliament.¹⁹² The executive override must be exercised within 21 days of the decision in question.¹⁹³ To date, this power has been used on only a handful of occasions; each instance has concerned either Section 35 or Section 37.¹⁹⁴ Its effect is that the last word on determining where the balance of public interests lies between disclosure and confidentiality rests with a senior minister who will be accountable to Parliament

¹⁸⁴ Freedom of Information Act 2000, c. 36, § 1 (Eng.).

¹⁸⁵ *See id.* § 50.

¹⁸⁶ *Id.* §§ 57, 59.

¹⁸⁷ *Id.* §§ 24, 30.

¹⁸⁸ *Id.* § 2(2)(b).

¹⁸⁹ *Id.* §§ 35(2)(a), 37(1)(a). The Royal Family includes HM the Queen, HRH the Prince of Wales (Prince Charles, the Heir to the Throne) and HRH the Duke of Cambridge (Prince William, second in line to the Throne).

¹⁹⁰ Freedom of Information Act 2000, c. 36, §§ 35(4), 37(2) (Eng.). In 2010 the section 37 exemption about communications with the Royal Family was amended such that it became an automatic exemption and was no longer subject to the public interest test.

¹⁹¹ *See id.* § 53.

¹⁹² *Id.* § 53(3)(a).

¹⁹³ *Id.* § 53(2).

¹⁹⁴ JUSTICE COMMITTEE, POST-LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION ACT 2000, 2012-13, HC 96-I, at 63 (UK). In July 2012 a committee of the House of Commons reported that it had been used four times; since then I am aware of only one further instance. *Id.*

for his decision. Ordinarily, it will be the Information Commissioner or, on appeal, a court or tribunal who will make the decision as to where the balance of public interests lies. But, in exceptional cases, those who framed FOIA considered that the matter would ultimately be one of political assessment, not legal judgment.

The similarity with the immigration and deportation decisions considered in Part II above is self-evident. As there, so too in the context of FOIA, there are competing claims as to who in the United Kingdom constitution is the guardian of the public interest—the courts of law or ministers accountable to Parliament.

The first uses of the Section 53 veto power each related to claims that minutes of certain Cabinet Committee meetings should be released.¹⁹⁵ These were meetings discussing such matters as the lawfulness of the 2003 invasion of Iraq.¹⁹⁶ Disclosure was resisted by the relevant government departments on Section 35 grounds: i.e. that the material in question related to the formulation and development of government policy and was therefore exempt.¹⁹⁷ The Government published a statement of policy on its use of the Section 53 veto in these circumstances. The statement of policy explained that ministers would not use the Section 53 veto simply where they considered that the public interest in withholding the information outweighed that in disclosure, but would do so only if “release of the information would damage Cabinet Government and/or the constitutional doctrine of collective responsibility.”¹⁹⁸ The constitutional convention of collective responsibility is central to the United Kingdom’s system of parliamentary government.¹⁹⁹ It provides that all ministers are responsible for Government policy. The rule is important because it facilitates the effective accountability of the Government to Parliament; ministers may not seek to evade or avoid responsibility by claiming that they do not agree with or approve of it. Whether they have argued for or against a particular matter in private, once adopted as Government policy, all ministers must defend the matter in public and in Parliament, or resign from the Government. For all of these reasons—and especially given the high constitutional status of collective responsibility—there is, in the Government’s view, a strong public interest that it not be undermined.

It is not the case, however, that the Section 53 veto may be used only for the purpose of safeguarding collective responsibility. In 2012 it was exercised for the rather different reason of protecting a “safe space” for the

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 64.

¹⁹⁸ *Id.*

¹⁹⁹ A constitutional convention is a non-legal but nonetheless binding rule of constitutional behaviour. *See generally* TURPIN & TOMKINS, *supra* note 8, at 182–99.

development of public policy.²⁰⁰ This instance concerned the Government's plans to reform the National Health Service ("NHS") in England.²⁰¹ These plans were hotly contested along party political lines.²⁰² An opposition Member of Parliament and a journalist at the *Evening Standard* newspaper made FOIA requests for the risk registers that officials in the Department of Health had prepared in the light of the Government's planned reforms.²⁰³ It became apparent that there were two such risk registers: a Transition Risk Register ("TRR") and a Strategic Risk Register ("SRR"). The Information Commissioner recognized that their disclosure fell within the Section 35 exemption but determined that the public interest in disclosure outweighed the public interest in confidentiality.²⁰⁴ The Secretary of State for Health appealed to the Tribunal.

The Tribunal heard evidence from a former head of the civil service, Lord O'Donnell, that "risk registers are the most important tool used across government to formulate and develop policy for risk management."²⁰⁵ In this case, the TRR was used mainly at official level to monitor implementation and operational risks associated with the Government's reforms.²⁰⁶ The SRR was used at both official and ministerial levels to monitor larger-scale risks that might require to be brought to ministers' attention.²⁰⁷ The Tribunal found that "[t]his is a difficult case" because "[t]he public interest factors for and against disclosure are particularly strong."²⁰⁸ It ruled that the TRR should be disclosed and that the SRR should not be disclosed.²⁰⁹ It justified this conclusion by holding that the SRR "was deserving of a protected safe space so that the Government could consider how to best deal with the unprecedented level of public debate" surrounding its proposed NHS reforms.²¹⁰ The TRR, by contrast, was concerned not with "direct policy consideration" but with operational risks.²¹¹ As such, its disclosure "would have informed the public debate at a time of considerable public concern" and "could have gone a long way to alleviating these concerns and reassuring the public."²¹²

²⁰⁰ Dep't of Health v. Info. Comm'r, Case EA/2011/0286 & 0287, at 7 (2012) (appeal from Information Commissioner's Decision Notices FS5032064 and FS 50390786) (UK) (unreported).

²⁰¹ *Id.* at 4. Responsibility for the NHS in Scotland, Wales and Northern Ireland is a devolved responsibility; the United Kingdom government remains responsible for the NHS in England.

²⁰² *See id.*

²⁰³ *Id.* at 5.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 12.

²⁰⁶ Dep't of Health v. Info. Comm'r, Case EA/2011/0286 & 0287, at 12–13 (2012) (appeal from Information Commissioner's Decision Notices FS5032064 and FS 50390786) (UK) (unreported).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 19.

²⁰⁹ *Id.* at 20.

²¹⁰ *Id.* at 19.

²¹¹ *Id.*

²¹² Dep't of Health v. Info. Comm'r, Case EA/2011/0286 & 0287, at 19 (2011) (appeal from Information Commissioner's Decision Notices FS5032064 and FS50390786) (UK) (unreported).

The Secretary of State for Health exercised his Section 53 power to veto the disclosure of the TRR.²¹³ The Information Commissioner reported the matter to the House of Commons, noting that the use of the veto in this case did not satisfy the Government's own tests as to when it could be exercised.²¹⁴ Production of the TRR would not have damaged Cabinet Government; nor would it have undermined collective responsibility.²¹⁵ Furthermore, the Information Commissioner noted, the Government had disclosed risk registers in other contexts (such as the proposed expansion of Heathrow Airport) without any apparent damage to the public interest.²¹⁶ Whereas the Government had claimed that it would use the veto power in the context of the Section 35 exemption only exceptionally, no exceptional circumstance pertained to the TRR and, in the Information Commissioner's opinion, the Secretary of State was wrong to veto the Tribunal's decision.²¹⁷

This episode occurred towards the end of a parliamentary inquiry into the effectiveness of the Freedom of Information Act. The committee undertaking that inquiry heard evidence that the Section 53 veto power was an essential component of the Act and that, without it, the Blair Government "would have dropped" the legislation.²¹⁸ The minister responsible for steering the Freedom of Information Bill through Parliament told the committee that "[w]e had to have some backstop to protect Government."²¹⁹ The committee accepted this, concluding that "the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material."²²⁰ Given that the Act, in the committee's view, "has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the veto is an appropriate mechanism, where necessary, to protect policy development."²²¹

Despite this all-party view, however, further controversy about the use of the Section 53 veto power was to erupt in 2015 and, on this occasion, the cause was an extraordinary judgment of the United Kingdom Supreme

²¹³ INFORMATION COMMISSIONER'S OFFICE, MINISTERIAL VETO ON DISCLOSURE OF THE DEPARTMENT OF HEALTH'S TRANSITION RISK REGISTER, 2012, HC 77, ¶ 1.4 (UK).

²¹⁴ *Id.* ¶ 7.2.

²¹⁵ *Id.* ¶¶ 7.12, 7.15.

²¹⁶ *Id.* ¶ 7.7.

²¹⁷ *Id.* ¶¶ 7.11, 7.15.

²¹⁸ JUSTICE COMMITTEE, POST-LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION ACT 2000, 2012-13, HC 96-I, at 63 (UK).

²¹⁹ *Id.*

²²⁰ *Id.* at 68.

²²¹ *Id.*

Court.²²² The case is *R (Evans) v Attorney General*²²³ and it concerns the Heir to the Throne, HRH The Prince of Wales.²²⁴

The United Kingdom monarchy, while historically powerful, has over the centuries seen its powers much diminished, as government has passed from the Royal Household to ministers and Parliament. The Sovereign remains Head of State and, as such, She has the constitutional “right to be consulted, the right to encourage, [and] the right to warn” as Walter Bagehot put it in his great work on *The English Constitution*.²²⁵ In practice, this means principally the right to be consulted by, the right to encourage, and the right to warn the Prime Minister. Her Majesty the Queen meets the Prime Minister weekly for these purposes. There is no one else present at these meetings, and no official record is kept of what is discussed at them. The monarchy may remain influential, but it now possesses few formal powers. Those which it retains may be exercised only on ministerial advice. Any such encouragement or warning as Her Majesty the Queen wishes to convey to the Prime Minister is very strictly confidential. The twentieth century’s leading authority on the monarchy and the United Kingdom constitution, Professor Bogdanor, has stated that “any private comments are made discreetly and cautiously so that relations with ministers are not compromised.”²²⁶ Professor Bogdanor adds that the Sovereign “is not entitled to make it known that he or she holds different views on some matter of public policy from those of the government. It is a fundamental condition of royal influence that it remains private. It follows, therefore, that the sovereign must observe a strict neutrality in public.”²²⁷

The current monarch, Queen Elizabeth II, has observed these strictures dutifully throughout her reign. The Heir to the Throne, by contrast, has used his unrivalled position in British public life to air concerns about a wide range of public policy matters, from medicine to genetically modified crops, from cuts to the armed services to modern architecture and from agriculture to urban planning.²²⁸ In 2005, journalists at the *Guardian* newspaper made a series of FOIA requests seeking access to correspondence between the Prince of Wales and a number of Government departments.²²⁹ They were concerned to

²²² The House of Commons Justice Committee comprises twelve MPs. JUSTICE COMMITTEE, POST-LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION ACT 2000, 2012-13, HC 96-I (UK). At the time of its report on FOIA, it was chaired by a Liberal Democrat MP. *Id.* In addition, there were five Conservative MPs, five Labour MPs and one Plaid Cymru MP on the Committee. *Id.* Its report on FOIA was unanimous. *Id.* at 97.

²²³ [2015] UKSC 21, [2015] AC 1787.

²²⁴ *Id.* at 1787.

²²⁵ WALTER BAGEHOT, THE ENGLISH CONSTITUTION 103 (London: Chapman & Hall, 1867).

²²⁶ VERNON BOGDANOR, THE MONARCHY AND THE CONSTITUTION 67 (1995).

²²⁷ *Id.* at 71.

²²⁸ For a recent biography of the Prince of Wales, which documents many of his interventions in public and political life, see generally CATHERINE MAYER, CHARLES: THE HEART OF A KING (2015).

²²⁹ *Id.* at 211–12.

know whether the Heir to the Throne had lobbied ministers or had sought to affect Government policy in any way, given the range of issues on which he had spoken out in public.²³⁰ Access to all such correspondence was refused on the ground that it fell within the section 37 exemption outlined above.²³¹ Evans, a *Guardian* journalist, appealed to the Tribunal, which upheld aspects of his appeal and ordered that certain parts of the correspondence should be disclosed.²³² The Attorney General exercised the Section 53 power to veto this decision. He reasoned that “[t]he potential damage that disclosure would do to the principle of The Prince of Wales’ political neutrality, which could seriously undermine the Prince’s ability to fulfil his duties when he becomes King.”²³³ One might consider this to be a reason to disclose the correspondence in question, not to withhold it; if it shows that the Prince has so undermined his political neutrality that he would not be able to fulfil the obligations of the monarch, is there not a compelling public interest in knowing that?

Be that as it may, the Freedom of Information Act clearly provides that in a case such as this the final decision on where the public interest lies is for a minister responsible to Parliament.²³⁴ The *Guardian*, however, did not see it like that. The newspaper went to court, seeking a judicial review of the Attorney General’s exercise of the veto.²³⁵ Section 53(2) provides that a responsible minister may certify that information should not be released if “on reasonable grounds” he is satisfied that the public interest so requires.²³⁶ The *Guardian* argued that, in this instance, the Attorney General had no such reasonable grounds.²³⁷ The newspaper contended that all the Attorney General had done was to restate arguments that had not found favour with the Tribunal.²³⁸ This, it claimed, could not constitute reasonable grounds for a Government minister seeking to overturn the ruling of a judicial body.²³⁹ The High

²³⁰ *Id.* at 212.

²³¹ *Evans v. Info. Comm’r* [2012] UKUT 313, [31]–[34] (appeal taken from decision notices issued by Info. Comm’r.), *vetoed by* ATTORNEY GENERAL, EXERCISE OF THE EXECUTIVE OVERRIDE UNDER SECTION 53 OF THE FREEDOM OF INFORMATION ACT 2000, 2012, at 9 (UK).

²³² *Id.* at ¶¶ 14, 251. I declare an interest: I was called on behalf of the *Guardian* newspaper to give expert evidence to the Tribunal on the constitutional conventions governing the United Kingdom monarchy and on their application to Mr Evans’ FOIA requests.

²³³ ATTORNEY GENERAL, EXERCISE OF THE EXECUTIVE OVERRIDE UNDER SECTION 53 OF THE FREEDOM OF INFORMATION ACT 2000, 2012, at 9 (UK).

²³⁴ Oonagh Gay & Ed Potton, *Fol and Ministerial Vetoes*, HOUSE OF COMMONS LIBRARY STANDARD NOTE, 3–4 (last updated Mar. 19, 2014).

²³⁵ *R (Evans) v. AG* [2013] EWHC (Admin) 1960, [18], *overruled by* *R (Evans) v. AG* [2014] EWCA (Civ) 254, [2014] QB 855 (appeal taken from Eng.).

²³⁶ Freedom of Information Act 2000, c. 36, § 53(2) (UK).

²³⁷ *R (Evans) v. AG* [2013] EWHC (Admin) 1960, [92] (Eng.), *overruled by* *R (Evans) v. AG* [2014] EWCA (Civ) 254, [2014] QB 855 (appeal taken from Eng.).

²³⁸ *See id.*

²³⁹ *Id.* ¶ 93.

Court disagreed, and upheld the Attorney General's decision.²⁴⁰ The court noted, however, the extremely unusual nature of Section 53.²⁴¹ Plainly the court was disturbed by the rule of law implications of a statutory power enabling the executive branch to override a judicial determination.²⁴²

The *Guardian* appealed to the Court of Appeal, and won. The appeal court shared the High Court's concerns about the nature of Section 53, which was described by Mr. Evans' counsel as allowing someone who is "neither independent nor impartial, but a part of the executive arm of government" to make an intervention that "subverts the final, binding character" of a judicial ruling.²⁴³ The Court of Appeal quashed the Attorney General's certificate, holding that he did not have reasonable grounds for forming the opinion upon which it was based:

The mere fact that he reached a different conclusion from the [Tribunal] in weighing the competing public interests involved was not enough. He had no good reason for overturning the meticulous decision of the [Tribunal] reached after six days of hearing and argument. He could point to no error of law or fact in the [Tribunal's] decision²⁴⁴

The Attorney General appealed to the Supreme Court, but was unsuccessful. Whereas the Court of Appeal had been unanimous, the matter split the Supreme Court five to two.²⁴⁵ The majority ruled that the Court of Appeal had been correct to quash the Attorney's certificate, and ordered that the correspondence be disclosed in accordance with the determination of the Tribunal.²⁴⁶ Lord Neuberger, the President of the Supreme Court, gave the lead judgment, in which he ruled as follows:

A statutory provision which entitles a member of the executive . . . to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law. First . . . it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are . . . reviewable by the court. . . .²⁴⁷

For Lord Neuberger, this did not mean that Section 53 could have no effect, but it did mean that its effect had to be limited, at least when the veto was being exercised to overturn a judicial decision.²⁴⁸ As the Information

²⁴⁰ *Id.* ¶¶ 142–43.

²⁴¹ *Id.* ¶ 2 (Lord Judge CJ, concurring).

²⁴² *Id.* ¶¶ 9–10.

²⁴³ *R (Evans) v. AG* [2014] EWCA (Civ) 254, [2014] QB 855, 860 (appeal taken from Eng.).

²⁴⁴ *Id.* at 929.

²⁴⁵ *See R (Evans) v. AG* [2015] UKSC 21, [2015] AC 1787, 1788 (appeal taken from Eng.).

²⁴⁶ *Id.* at 1833.

²⁴⁷ *Id.* at 1818.

²⁴⁸ *Id.* at 1820.

Commissioner is not a judicial organ—he is an independent executive agency—Lord Neuberger’s constitutional concerns about Section 53 would not apply with the same force where a minister is seeking to veto a determination made by the Information Commissioner.²⁴⁹ Lord Neuberger was of the view that a judicial decision could be lawfully vetoed under Section 53 only where there was a “material change of circumstances” since the tribunal or court decision, or where the judicial ruling was “demonstrably flawed in fact or in law.”²⁵⁰ He accepted that “this conclusion results in [S]ection 53 having a very narrow range of potential application.”²⁵¹

Two Justices dissented. Lord Hughes took issue directly with what Lord Neuberger had said about the rule of law. It “is of the first importance,” Lord Hughes said, “[b]ut it is an integral part of the rule of law that courts give effect to Parliamentary intention. The rule of law is not the same as a rule that courts must always prevail.”²⁵² This, with respect, is precisely correct. Had Parliament wanted Section 53 to be as constrained a power as Lord Neuberger interpreted it to be, Parliament could (and, no doubt, would) have said so in legislation. “The reality,” Lord Hughes pointed out, is that the Section 53 “exceptional executive override was the Parliamentary price of moving from an advisory power for the [Information] Commissioner . . . to an enforceable decision.”²⁵³ Lord Wilson was even more forthright. He said that the Court of Appeal did not interpret the section, “[i]t re-wrote it. It invoked precious constitutional principles but among the most precious is that of parliamentary sovereignty, emblematic of our democracy.”²⁵⁴ At paragraph 171 of his judgment, Lord Wilson identified exactly the issue at stake in this case—the issue with which the whole of this paper has been concerned with—namely, the public interest. He noted that that a power of executive override of judicial determinations about “issues of *law* would have been an unlawful encroachment on the principle of separation of powers But issues relating to the *evaluation of public interests* are entirely different.”²⁵⁵

²⁴⁹ *Id.* at 1826.

²⁵⁰ *Id.* at 1823 (quoting *R (Evans) v. AG* [2014] EWCA (Civ) 254, [2014] QB 855, 918 (appeal taken from Eng.)).

²⁵¹ *R (Evans) v. AG* [2015] UKSC 21, [2015] AC 1787, 1827 (appeal taken from Eng.).

²⁵² *Id.* at 1850 (Lord Hughes, SJC, dissenting). *See also* RICHARD EKINS & CHRISTOPHER FORSYTH, JUDGING THE PUBLIC INTEREST: THE RULE OF LAW VS. THE RULE OF COURTS 22–23 (2015). This pamphlet, published as part of Policy Exchange’s Judicial Power Project, is available online at <http://www.policyexchange.org.uk/images/publications/judging%20the%20public%20interest.pdf> (last visited Oct. 27, 2016).

²⁵³ *R (Evans) v. AG* [2015] UKSC 21, [2015] AC 1787, 1850 (appeal taken from Eng.) (Lord Hughes, SJC, dissenting).

²⁵⁴ *Id.* at 1853 (Lord Wilson, SJC, dissenting).

²⁵⁵ *Id.* at 1853–54 (Lord Wilson, SJC, dissenting).

Lord Wilson cited the words of Lord Hoffmann in *Alconbury* that “in a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them.”²⁵⁶

CONCLUSION

We have come full circle. *Alconbury* was the very first Human Rights Act case to reach the United Kingdom’s top court, but what Lord Hoffmann correctly stated the law to be in that case is now only cited in the dissenting judgments of UK Supreme Court justices. Administrative law in the United Kingdom is not yet in crisis, but if the Government’s perfectly legitimate and, on the whole, remarkably modest attempts to constrain the ever-growing reach of judicial review meet resistance in the case law, it soon will be. For the time being a solution appears to have been found in the immigration context in Section 19 of the 2014 Act. The Freedom of Information Act 2000 is currently under review and may well face amendment in the coming months to restate the force of the view that, in the final analysis, delicate judgments about what is necessary in the public interest are constitutionally and appropriately for responsible ministers, not courts of law, as the dissenting justices in *Evans* explained.²⁵⁷ Crisis, for the time being, has been averted—but only just. Securing a less contested administrative law for the United Kingdom will be possible in the medium term only if the courts accept that, whilst they are the rightful guardians of the rule of law, judging what the public interest requires is ultimately a political question for government and Parliament, not a legal one for the judges.

²⁵⁶ *Id.* at 1854 (Lord Wilson, SJC, dissenting) (quoting *R Alconbury Devs. Ltd v. Sec’y of State for the Env’t, Trans. and the Regions* [2001] UKHL 23, (2003) 2 AC 295, 325 (appeal taken from Eng.)).

²⁵⁷ See *Freedom of Information: New Commission*, GOV.UK (July 17, 2015), <https://www.gov.uk/government/speeches/freedom-of-information-new-commission>.