

# “The Developing Jurisprudence of the Supreme Court on Convention Rights”

## Scottish Public Law Group Conference, Keynote Speech

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1. The history of human rights in Scotland is a fascinating topic, especially when contrasted to the other jurisdictions within the UK.<sup>1</sup> Stair founded the whole of his *Institutions of the Law of Scotland* on the concept of rights.<sup>2</sup> Meanwhile, Dicey conceived of civil liberties under English law as defined by remedies,<sup>3</sup> and Jeremy Bentham famously described the idea of natural and inalienable rights as “nonsense upon stilts”.<sup>4</sup> The picture is, of course, rather different today. The Human Rights Act gives domestic effect to the rights set out in the European Convention on Human Rights throughout the UK, including in Scotland. Convention rights also have an important role to play for all the devolved legislatures, in terms of delimiting their legislative competence.
2. Today I want to focus on this shared experience of working with Convention rights as reflected in the jurisprudence of the Supreme Court. I will explore six key themes.

### A. No idiosyncrasies: consistency in rights interpretation

3. First, in the recent case of *Elan-Cane*,<sup>5</sup> the Court addressed the issue of consistency in rights interpretation between the Strasbourg and domestic courts.
4. The Convention is an international treaty which imposes obligations upon the contracting states of the Council of Europe under international law. The Human Rights Act is a domestic statute which imposes obligations on public authorities in the UK under domestic law. The question addressed in *Elan-Cane* was whether this translation, from the international plane to the domestic, alters the content of the relevant substantive obligations. Could an act which does not violate the international law obligations of the UK under the Convention nevertheless

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<sup>1</sup> A Boyle, “Human Rights and Scots Law: Introduction” in Boyle, Himsworth, Loux and MacQueen, *Human Rights and Scots Law* (2002), 1.

<sup>2</sup> Stair, *Institutions of the Law of Scotland* (6<sup>th</sup> Ed., 1981).

<sup>3</sup> AV Dicey, *An Introduction to the Study of the Constitution* (10<sup>th</sup> Ed., 1967).

<sup>4</sup> HLA Hart, *Essays on Bentham* (1982), 79.

<sup>5</sup> R (*on the application of Elan-Cane*) v Secretary of State for the Home Department [2021] UKSC 56.

be incompatible with a public authority's duty under the Human Rights Act?<sup>6</sup> There had been earlier cases which obscured this issue of principle and contained dicta which suggested that this might be possible.

5. In *Elan-Cane*, however, the Court held unanimously that the answer is no, concluding that:<sup>7</sup>

“The [Human Rights Act]... defines the Convention rights to which it gives effect in domestic law as the rights which are enforceable against the United Kingdom under international law. It follows that the rights given effect in domestic law have the same content as those which are given effect under international law, although they are enforceable before domestic courts rather than the European court, and against public authorities rather than the United Kingdom as a state. Since the rights have the same content at the domestic level as at the international level, it follows that the relevant articles of the Convention should in principle receive the same interpretation in both contexts.”

6. The uncertainty in this area arose from a previous decision of the House of Lords in *Re G*.<sup>8</sup> As part of their alternative reasoning, the majority indicated their view that, even if the European court would consider that the relevant legislation (which excluded unmarried couples from being eligible to adopt children) fell within the margin of appreciation, it was nevertheless open to domestic courts to hold that the legislation violated the rights guaranteed by the Human Rights Act.<sup>9</sup> As summarised in *Elan-Cane*:<sup>10</sup>

“It was said that where the European court declared a question to be within the national margin of appreciation, it was for the courts in the United Kingdom to interpret the relevant articles of the Convention and to apply the division between the decision-making powers of the courts and Parliament in the way which appeared appropriate for the United Kingdom. On that basis, even if the European court would have found the legislation to be compatible with the Convention, the domestic court could nevertheless hold that the legislation violated Convention rights.”

7. The Supreme Court regarded this statement as obiter.<sup>11</sup> We addressed the underlying principle, taking into account (a) the role of the European court; (b) the drafting and structure of the Human Rights Act; and (c) legal certainty and the rule of law.

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<sup>6</sup> Para 75.

<sup>7</sup> Para 87.

<sup>8</sup> *In re G (Adoption: Unmarried Couples)* [2008] UKHL 38; [2009] AC 173.

<sup>9</sup> See paras 30-31 and 36-37 (Lord Hoffmann), 50 (Lord Hope), 119-120 (Lady Hale), and 126-130 (Lord Mance).

<sup>10</sup> *Elan-Cane* (n 5), para 71.

<sup>11</sup> See paras 72 and 73.

8. The role of the European court is to determine whether an applicant's rights under the Convention have been violated. That is, ultimately, a binary question: breach or no breach. In reaching that conclusion, the court may be influenced (perhaps decisively) by the application of the margin of appreciation. But a conclusion that the acts of the state are within the margin of appreciation is not an alternative determination to breach or no breach. It is a reason, or intermediary step, as to why the conclusion is no breach. As Lord Reed explained, "[t]he European court's treatment of the margin of appreciation cannot therefore be severed from its interpretation of the Convention rights: it is part and parcel of the exercise of interpretation."<sup>12</sup> The margin of appreciation doctrine is not an abdication of the task of interpretation, by which the European court has not made a determination, but rather an important aspect of that task.<sup>13</sup> It is by reference to it that the question of whether there has been a violation of the Convention is answered.<sup>14</sup>
9. As a necessary corollary, it is not open to the national authorities to decide on their own approach to the question whether the issue was determined as within the scope of the margin of appreciation or not.<sup>15</sup> That, of course, is a different question to whether domestic law can go further than the Convention. Plainly it can.<sup>16</sup> The Convention rights create a floor, not a ceiling. But where the relevant domestic law replicates the effect of the Convention rights themselves there is no basis for saying that it creates more extensive rights. As Lord Reed explained:<sup>17</sup>
- “When the European court finds that the contracting states should be permitted a margin of appreciation, it does not cede the function of interpreting the Convention to the contracting states, or enable their domestic courts to divide that function between their domestic institutions. Contracting states can of course create rights going beyond those protected by the Convention, but that power exists independently of the Convention and the Human Rights Act, is not dependent on the margin of appreciation doctrine, and is exercisable in accordance with long-established constitutional principles, under which law-making is generally the function of the legislature.”
10. The drafting and structure of the Human Rights Act is important here. Section 3 requires courts to change the ordinary meaning which would otherwise be given to statutory provisions,

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<sup>12</sup> Para 89.

<sup>13</sup> Para 83.

<sup>14</sup> Para 80.

<sup>15</sup> Paras 80 and 81.

<sup>16</sup> Para 82.

<sup>17</sup> Para 85.

so far as it is possible to do so, in order to produce a new interpretation which is compatible with Convention rights.<sup>18</sup> As I put it in a judgment at first instance, where section 3 applies, it “authorises what is in effect a re-drafting of statutory provisions by the courts in light of their interpretation of the Convention rights, in tension with the usual expectation that it is for the democratically elected legislature to lay down the law in statutory provisions formulated by itself, with a meaning directly given by its own (collective) intention.”<sup>19</sup>

11. This is a powerful interpretive tool which has to be used with meticulous care. If the approach in *Re G* were adopted, it would permit the use of the section 3 power in circumstances where the European court has determined that the UK, by a law enacted by Parliament, has complied with its obligations under international law. The effect would be that, despite this, judges would be authorised to override the intention of Parliament as understood according to the ordinary approach in domestic law on the basis of their individual assessments of the requirements of the Convention rights without any support in the Strasbourg jurisprudence. Such consequences were described by the court in *Elan-Cane* as “remarkable”.<sup>20</sup> They cannot be justified in constitutional terms. As Lord Reed explained, such an exercise “would represent a substantial expansion of the constitutional powers of the judiciary, at the expense of Parliament” and “would constitute a significant encroachment on the principle of Parliamentary sovereignty”.<sup>21</sup>
12. Section 4 requires the same analysis. Notwithstanding a finding by the European court as a matter of international law that the UK, through Parliament, had complied with its obligations, under the *Re G* approach the court could still issue a declaration of incompatibility with Convention rights. On the basis of their own idiosyncratic interpretation of Convention rights the domestic courts could also find<sup>22</sup> that public authorities were acting unlawfully, contrary to section 6(1), and grant remedies including injunctions and damages under section 8.<sup>23</sup>
13. The third point concerns issues of legal certainty and the rule of law. Section 3 necessarily creates a significant degree of uncertainty about the meaning of legislative provisions, since the particular words may not reflect their ordinary meaning.<sup>24</sup> That has a significant impact on the stability of the meaning of legislative provisions and can cause tension with rule of law values concerning the accessibility, ease of interpretation and predictability of application of such

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<sup>18</sup> *R (SF and K) v Secretary of State for Justice* [2012] EWHC 1810 (Admin), para 61.

<sup>19</sup> *Ibid.*, para 62.

<sup>20</sup> Para 90.

<sup>21</sup> *Ibid.*

<sup>22</sup> Subject to section 6(2) of the Human Rights Act.

<sup>23</sup> Para 91.

<sup>24</sup> *R (SF and K)* (n 18), para 61.

provisions. The *Re G* approach compounds this effect, by allowing the meaning of legislation to depend not on the ordinary meaning of the language used, nor on the guidance given by the European court, but rather on the unconstrained and idiosyncratic interpretation of Convention rights by domestic judges.<sup>25</sup> It is reasonable to infer that Parliament did not intend such destructive effects on legal certainty and stability to be produced by the operation of the Human Rights Act.

## **B. Mind the gap: keeping pace and going too far in relation to Strasbourg’s jurisprudence**

14. The second lecture theme is related to the first. What should be the approach of domestic courts when faced with a gap in the European court’s jurisprudence? When are domestic courts entitled to fill that gap? In considering this, my focus will be on the decisions in *AB*<sup>26</sup> and *Elan-Cane*.
15. The legislative starting point in answering this question is section 2 of the Human Rights Act, which requires judges to “take into account” the relevant jurisprudence of the Strasbourg court when considering domestic human rights claims. The proper approach was authoritatively stated by Lord Bingham in *Ullah*,<sup>27</sup> where he noted that “courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court”; domestic courts must, therefore, “keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less”. I will explore this requirement by reference to different types of “gap”.
16. The first type of gap between domestic and European jurisprudence may result from Strasbourg having *spoken* on the issue. In a given situation, Strasbourg may say either there is a violation or not a violation of a Convention right. Where the finding is one of no violation, the approach in *Elan-Cane* means that there is no room for the domestic courts to find differently. What about where the finding is that there has been a violation? Ordinarily, it will be obvious that the domestic court will also find a breach, in accordance with its obligation under section 2. However, *AB*<sup>28</sup> and *Elan-Cane*<sup>29</sup> have reaffirmed that Parliament’s intention to implement domestically the rights which are available under the Convention as a matter of international law does not mean that domestic courts are bound to follow and apply the jurisprudence of the European court slavishly or unquestioningly. There remains a gap in which the domestic courts can, and do, exercise independent judgment. They may decline to

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<sup>25</sup> *Elan Cane* (n 5), para 92.

<sup>26</sup> *R (on the application) of AB v Secretary of State for Justice* [2021] UKSC 28.

<sup>27</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 at para 20.

<sup>28</sup> Paras 54-59.

<sup>29</sup> Para 101.

following Strasbourg judgments where there is a good reason to do so, as was explained in the *Pinnock* case,<sup>30</sup> in particular if the finding of violation was only made by a chamber of the court, the domestic courts consider it has misunderstood how domestic law works and they wish to engage in a form of dialogue about this with Strasbourg.

17. The second type of gap may result from Strasbourg *not* having spoken on the issue. In such circumstances, one might ask: “keep pace” with what? In *Elan-Cane*<sup>31</sup> (and *AB*<sup>32</sup>), the Supreme Court reaffirmed that “it is open to domestic courts to develop the law in relation to Convention rights beyond the limits of the Strasbourg caselaw, on the basis of the principles established in that law.” In the *Rabone* case,<sup>33</sup> Lord Brown affirmed that it is open to the domestic courts, consistently with *Ullab*, to reach a conclusion which flows “naturally from existing Strasbourg” caselaw, even if the existing caselaw does not deal with the precise issue at hand. This approach was endorsed in *Elan-Cane* and *AB*. The reference to “beyond” therefore refers to the principled development of the Convention case-law, through traditional analogical reasoning, as applied to new factual circumstances. This is the routine exercise of the common law judge.<sup>34</sup>
18. Development according to this kind of reasoning, as the law has to take account of new cases and new sets of circumstances, is available to both the Strasbourg court and the domestic courts. But since the Strasbourg court, not the domestic courts, has the jurisdiction to interpret the Convention authoritatively on the international plane, and under the Human Rights Act the domestic courts track the content of the Convention rights on that plane, the domestic courts engage in a more limited form of development. Major advances in the principled development of the application of the Convention rights are for Strasbourg. But if there is a new fact situation which is not yet the subject of a ruling in Strasbourg, but according to Strasbourg’s already established jurisprudence the domestic courts can be confident it would be determined in a particular way in Strasbourg, the domestic courts can join the dots and fill the gap without having to wait for an explicit ruling on that very point from Strasbourg.
19. As Lord Reed stated in *AB*, domestic courts “[i]n situations which have not yet become before the European court... can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case

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<sup>30</sup> *Manchester City Council v Pinnock* [2010] UKSC 45.

<sup>31</sup> Para 63.

<sup>32</sup> Para 59.

<sup>33</sup> *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, referred to in *Elan-Cane* (n 5) at para 103.

<sup>34</sup> See generally: P Sales, “The Common Law: Context and Method” (2019) 135 LQR 2047.

law.”<sup>35</sup> However, they must cross a high threshold of confidence to do so. Without such confidence, as Lord Reed noted, “it is not the function of [the domestic courts] to undertake a development of the Convention law of ... a substantial nature”.<sup>36</sup>

20. The asymmetry in the ability to bring a claim in the Strasbourg court is also central to this reasoning. Whilst the individual may bring a claim, the state cannot. This asymmetry creates greater potential for divergence and the idiosyncrasies I have mentioned. As Lord Reed explained in *AB*:<sup>37</sup>

“If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected.”

### C. Proportionality, rationality and the role of appellate courts

21. I now turn to my third theme, which is the standard of review to be applied by appellate courts when reviewing a lower court’s proportionality exercise. Here, three recent decisions are significant: *R(Z) v Hackney*,<sup>38</sup> *Ziegler*<sup>39</sup> and the *Northern Ireland Abortion Safe Access Zones* case.<sup>40</sup>

22. In a 2021 article in the journal *Judicial Review*,<sup>41</sup> I expressed concern about the risk of appellate courts taking a wrong turn in their approach to reviewing proportionality assessments by lower courts. I referred to two streams of caselaw. In the first, the appellate court will not make its own proportionality assessment unless the first instance court has stepped outside generous parameters allowed to it in making its own decision, akin to a rationality review by the appellate court. My view was that, whilst this approach may be appropriate in many cases, there are strong reasons to do with the rule of law and the proper role of appellate courts, why the approach is wrong in some cases. In the second stream, the appellate courts will not defer to the judgment of the lower court and will give their own judgment on the proportionality of

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<sup>35</sup> Para 59.

<sup>36</sup> Para 54.

<sup>37</sup> Para 57, after referring to the comments of Lord Brown in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] AC 153, para 106.

<sup>38</sup> *R (on the application of Z and another) (AP) v Hackney London Borough Council and another* [2020] UKSC 40.

<sup>39</sup> *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23.

<sup>40</sup> *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32.

<sup>41</sup> P Sales, “Proportionality Review in Appellate Courts” (2021) *Judicial Review* 26(1), 40.

the measures in question, without deferring much or at all to the view of the lower court. I argued that no single test was applicable in all cases, and we should not be trying to grasp a “one size fits all” approach.

23. In several Supreme Court decisions, the court held that the obligation of an appellate court under section 6 of the Human Rights Act did not require it to conduct the proportionality exercise afresh for itself as a departure from its normal appellate function<sup>42</sup> of secondary review of the trial judge’s decision.<sup>43</sup> The role of the appellate court remained relatively limited, to determine whether the lower court had been “wrong”, according it a margin of appreciation in making its decision. It was not enough that the appellate judge might reach a different decision; if the question of proportionality had been approached correctly and the decision reached was reasonably open to the judge, then the appellate court would not interfere.
24. The decision in *R(Z) v Hackney* clarified one point.<sup>44</sup> Although the caselaw to then had relied upon the English Civil Procedure Rules, I noted in my judgment that this was slightly odd at the Supreme Court level: the CPR do not apply to the Supreme Court, nor do they apply outside of England and Wales. The approach to be adopted, as to whether the appellate court exercises a review function or makes a fresh decision, should be a matter of general legal doctrine. The test for whether a decision of a court at first instance is “wrong” under CPR Part 52 should reflect the application of that doctrine, not the other way around.
25. The debate about the proper approach has continued in the decisions of *Ziegler* and *Safe Access Zones*. The latter considers and clarifies the former, so I will take them together. In *Ziegler*, Lord Hamblen and Lord Stephens articulated the standard of appellate intervention in terms involving reasonableness review, that is “if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found.”<sup>45</sup>
26. Absent an error of this kind by the lower court, this test does not allow scope for the appellate court to make its own proportionality assessment. In *Safe Access Zones*, however, the unanimous judgment of the court clarified that the approach to identify when the lower court is “wrong” is capable of being applied flexibly, and the test or standard applied in deciding this can be adapted to the context.<sup>46</sup> That must be right, given the many examples in which appellate courts have not accorded any deference to the assessment of proportionality by the courts below, nor

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<sup>42</sup> Under CPR 52.11.

<sup>43</sup> Most significantly *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, followed by *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7; *R (R) v Chief Constable of Greater Manchester* [2018] UKSC 47.

<sup>44</sup> Para 74.

<sup>45</sup> Para 54.

<sup>46</sup> Para 33.

limited their intervention to an assessment of the reasonableness of their conclusion, but rather carried out their own assessment.<sup>47</sup>

27. Take, for example, the Supreme Court’s judgment in *Nicklinson*,<sup>48</sup> a case concerning the question whether the criminalisation by statute of giving assistance for suicide by persons with locked-in syndrome, trapped in their bodies in severe distress and unable to terminate their own lives, involved a breach of the right to respect for private life under Article 8. None of the nine Justices on the panel thought they should defer to the view of the first instance court. As I argued in my article in 2021,<sup>49</sup> the public had a right to expect the Justices to exercise their own judgment, as the apex court, regarding the legal outcome. It would have been an abrogation of their duty if they had deferred, not to Parliament, but to the views of a court of first instance.

28. It is worth exploring the factors that can influence this flexible approach. As I argued in *Judicial Review*.<sup>50</sup>

“[t]he debate regarding the role of an appellate court is... about the respective degree of decision-making authority which should be allocated between a first instance court and an appellate court. ... the justification for limiting an appellate court to a reviewing role should reflect argument regarding the allocation of decision-making authority between courts within a national system. The force of these arguments is not uniform across all cases.”

29. One such factor is the extent to which the proportionality assessment is bound up with factual findings. Usually, fact-finding is a matter for the lower court, and for good reason.<sup>51</sup> As I set out in my dissenting judgment in *Ziegler*, respect for the factual findings of a lower court reflects the distribution of roles between first instance and appellate courts, and (potentially) the advantage of assessing facts relevant to the assessment by means of oral evidence.<sup>52</sup> Even when the evidence is in written form, a first instance court will often have had a better opportunity to understand it in depth.<sup>53</sup> However, that is not necessarily the case. In the *Belmarsh*<sup>54</sup> case, Lord Bingham explained:

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<sup>47</sup> *Safe Access Zones* (n 40), para 31, citing *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 and *Elan-Cane* (n 5).

<sup>48</sup> *R (Nicklinson) v Secretary of State for Justice* [2014] UKSC 38.

<sup>49</sup> P Sales, “Proportionality Review in Appellate Courts” (n 41), 41.

<sup>50</sup> *Ibid.*, 44-5.

<sup>51</sup> *Ibid.*, 45, referring to *United Policy Holders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17; [2016] 1 WLR 3383.

<sup>52</sup> *Ziegler* (n 39), para 132 per Lord Sales.

<sup>53</sup> P Sales, “Proportionality Review in Appellate Courts” (n 41), 56.

<sup>54</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, para 44. This passage is referred to at para 131 of my judgment in *Ziegler* (n 39). Lord Reed refers to the same passage in *Safe Access Zones* (n 40), para 30.

“The European Court does not approach questions of proportionality as questions of pure fact... Nor should domestic courts do so”

This point was forcefully reiterated by the Supreme Court in the *Safe Access Zones* case.

30. A judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted reasonably or reached a conclusion which no reasonable court or tribunal could reach.<sup>55</sup> An appellate court may have to interrogate the extent to which the facts of the case are bound up in the proportionality analysis and, in light of institutional and expertise factors, as well as the wider context, determine the value it is able to add to the normative exercise and therefore the level of scrutiny to apply. That is unlikely to apply in relation to reviewing facts found by the first instance court, but the appellate court has a constitutional function to articulate and police general legal norms the validity of which may depend upon a proportionality assessment.<sup>56</sup>
31. It is not possible within the confines of this lecture to explore these factors in detail. However, in summary, I suggest that, in applying the flexible approach, “[r]elevant factors are the nature of the measure[;]... the range of cases affected by it[;]... the extent to which the first instance court had a superior opportunity to assess the evidence; the extent to which the fine detail of the evidence is of significance for the judgment which falls to be made[;]... and the degree to which the appellate court can feel confidence that the relevant issues (or some sub-set of them) have already been sufficiently considered by the first instance court.”<sup>57</sup>

#### **D. Form of law, bright-line rules and the fluidity of Convention rights**

32. My fourth theme today is the impact of Convention rights on the form of law itself. In particular, I am interested in the intersection between bright-line rules and the proportionality exercise.
33. There is a significant tension between proportionality and rule of law values. Many Convention rights require any interference to be proportionate to a legitimate public interest which the interfering measure pursued.<sup>58</sup> That requirement has the tendency to encourage states towards adopting flexible laws often involving a high degree of discretion on the part of decision-

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<sup>55</sup> *Ziegler* (n 39), para 131 per Lord Sales.

<sup>56</sup> P Sales, “Proportionality Review in Appellate Courts” (n 41), 57.

<sup>57</sup> P Sales, “Proportionality Review in Appellate Courts” (n 41), 59.

<sup>58</sup> A requirement of proportionality is inherent in the “necessary in a democratic society” rubric in Articles 8(2), 9(2), 10(2), and 11(2). It is also implied into aspects of the rights in other Articles, such as Articles 6 and 14, and Articles 1 and 3 of the First Protocol.

makers at the point of application of the law.<sup>59</sup> This approach allows greater fact sensitivity in the application of a rule, considering the proportionality of any interference in the particular case, rather than at a higher level of generality.

34. However, this approach may conflict with rule of law values. These include the idea that individual cases should be determined by abstract and general laws, without excessive recourse to the individual discretion of the decision-maker; the idea that laws should be declared as precisely as possible in advance so that citizens can plan their affairs in the knowledge of how they will be applied; and the idea that cases should be determined directly by rules promulgated by the body with authority to lay down the law for all (ie the legislature).<sup>60</sup> Related to a reduction of legal certainty, the move towards greater fact sensitivity in the form of law can also promote a transfer of control over outcomes from Parliament to other agents.<sup>61</sup> Such a transfer can have clear constitutional implications.
35. The proportionality doctrine applied by the Strasbourg court might suggest that Convention rights always favour norms framed to be fact sensitive rather than bright-line laws. But this is not always the case. The “in accordance with law” test<sup>62</sup> within various of the Convention rights, rather than promoting fact sensitivity, requires a level of legal certainty and foreseeability which may only be achieved by a rule which is more bright-line in nature and hence more fact insensitive. In *Sunday Times v United Kingdom*,<sup>63</sup> the European court explained:

“... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.”

36. In the 2021 decision *A v Secretary of State for Justice*,<sup>64</sup> the Supreme Court considered the role of policies in meeting the “in accordance with law” requirement. The requirement “does not

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<sup>59</sup> P Sales and B Hooper, “Proportionality and the form of law” (2003) 119 LQR 439.

<sup>60</sup> P Sales, “The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights” in M Andenas and D Fairgrieve, *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (2009), 170; Frederic Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (1991), esp chs 5–8; C Sunstein, *Legal Reasoning and Political Conflict*, esp chs 4–7; Kathleen M Sullivan, ‘Foreword: The Justices of Rules and Standards’ (1992) 106 Harv LR 24; R Posner, *How Judges Think*, pp 176 ff.

<sup>61</sup> P Sales and B Hooper, “Proportionality and the form of law” (n 59), 453.

<sup>62</sup> See Articles 5(1), 8(2), 9(2), 10(2), 11(2), all of which include an “in accordance with law” or “as prescribed by law” requirement.

<sup>63</sup> (1979-80) 2 EHRR 245, para 49.

<sup>64</sup> [2021] UKSC 37, paras 50-53.

require the elimination of uncertainty, but is concerned with ensuring that law attains a reasonable degree of predictability and provides safeguards against arbitrary or capricious decision-making by public officials”. The establishment of a policy may contribute to meeting this standard, in providing a degree of predictability in the application of general discretionary provisions in statute, but it does not follow that public bodies are obliged to have a policy in every case where a statute creates a discretionary power.

37. Convention rights may therefore have an impact on the form of law in a range of ways. In any given context, the choice of a form of law reflects a deeper choice as to the relative importance in that context of the competing aims of flexibility and certainty.<sup>65</sup> This tension is not novel. The legal philosopher HLA Hart saw all legal systems as the product of a compromise between these two social needs; the tension is endemic throughout the law.<sup>66</sup>
38. The nature of rules helps us explore this tension. A rule can be under- or over-inclusive by reference to the rule’s underlying justification.<sup>67</sup> To take an example from another legal philosopher, Fredrick Schauer,<sup>68</sup> if the justification of the rule “no dogs allowed” in a restaurant is to prevent disruption to customers, then the rule might be under-inclusive in relation to animals other than dogs (including humans) who are disruptive. On the other hand, it might be over-inclusive in relation to quiet, well-behaved, or even stuffed toy dogs. The success of a rule might be defined by its relationship with its justification, as to how probable it is to get it right in the general run of situations, in the context of the costs of getting it wrong (whether under- or over-inclusive), the benefits of getting it right and the benefits of having a rule at all, as opposed to leaving it to the discretion of the restaurant manager.
39. It is inherent in a rule, in determining legal outcomes prior to the crystallisation of factual circumstances, that they are sub-optimal. They will always risk under- or over- inclusiveness. Since following a rule may produce a sub-optimal decision in some particular case, judged in terms of the rationale for the rule, the question of the comparative value of relying on rules is the question of the extent to which a decision-making environment is willing to tolerate sub-optimal results in order that those affected by the decisions in that environment will be able to plan certain aspects of their lives.<sup>69</sup> Put simply, we may tolerate rules, including bright-line rules, making mistakes in exchange for the rule of law values they promote. The law is willing to make such a compromise, accepting bright-line rules, in certain contexts.

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<sup>65</sup> P Sales and B Hooper, “Proportionality and the form of law” (n 62), 441.

<sup>66</sup> H.L.A. Hart, *The Concept of Law* (1961), 127. See also Lord Reid, “The Judge as Law-Maker” (1972) 12 J.S.P.T.L. 22.

<sup>67</sup> Frederic Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (n 60), ch 2.

<sup>68</sup> *Ibid.*, esp Ch 2.

<sup>69</sup> Frederic Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (n 60), 140.

40. This threshold for toleration is alluded to by Lord Bingham in *Animal Defenders International*,<sup>70</sup> where he said:

“... legislation cannot be framed so as to address particular cases. It must lay down general rules ... A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.”

41. In some circumstances, the risk of sub-optimality may be too great for the law to tolerate. Aristotle said that “there are some things about which it is not possible to pronounce rightly in general terms”.<sup>71</sup> The realities of the real world are too varied, and the stakes in some contexts too high, to pronounce legal outcomes on the basis of generalised rules unable, or able only to a limited extent, to take into account the particular factual scenario to be adjudicated upon. This tension led Lord Reid to compare the common law to a fine hand-crafted pair of shoes, perfectly fitted for the individual case, while rules laid down in legislation were like mass-produced goods, cheap to produce but not always fitting very well.<sup>72</sup>

42. Whilst for the right occasion the fine hand-crafted pair of shoes might be required, the point I wish to make is that it is not necessarily so. In some areas, it will be especially important that citizens are able to know clearly where they stand by reference to the rule itself, without having to seek the court’s guidance in advance or being required to submit subsequently to unpredictable official rulings in the exercise of a flexible discretion.<sup>73</sup> Examples are the law of property or the rules of limitation.

43. The margin of appreciation afforded to states, and the corresponding intensity of proportionality review, will be of central (and perhaps determinative) importance to the demands of Convention rights on the form of law. As the Strasbourg court itself said in *Mellacher v Austria*:<sup>74</sup>

“Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way”

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<sup>70</sup> R (*Animal Defenders International*) v *Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] UKHL 15, para 33.

<sup>71</sup> Aristotle, *Nicomachean Ethics*, tr. JAK Thomson (Penguin, rev. ed., 1976), 199.

<sup>72</sup> Lord Reid, “The Judge as Lawmaker” (n 66) at 22.

<sup>73</sup> P Sales and B Hooper, “Proportionality and the form of law” (n 59), 440.

<sup>74</sup> *Mellacher v Austria* (1990) 12 E.H.R.R. 391, para 53.

44. The width of the margin of appreciation will vary by context. It will be wide, for example, in relation to general measures of economic or social strategy unless manifestly without reasonable foundation.<sup>75</sup> This was seen in *R(Z) v Hackney*. In my judgment, I noted<sup>76</sup> that it was well established that it is a generally legitimate approach and in accordance with the principle of proportionality for the state to use bright-line criteria to govern the availability of social welfare benefits. A similar point is acknowledged in the *SC* decision.<sup>77</sup> This is so even in circumstances where the rule is over- or under-inclusive, because “it minimises the costs of administration of a social welfare scheme; it may be the best way of ensuring that resources are efficiently directed to the group which, overall, needs them most; it can reduce delay in the provision of benefits; and it provides clear and transparent rules which can be applied accurately and consistently, thereby eliminating the need for invidious comparisons of individual cases in all their variety, with the risk of arbitrariness in outcomes which that may involve”.<sup>78</sup>
45. Lord Sumption and Lord Reed, in their judgment in *Tigere*,<sup>79</sup> noted that “[t]hose who criticise rules of general application commonly refer to them as ‘blanket rules’ as if that were self-evidently bad. However, all rules of general application to some prescribed category are ‘blanket rules’ as applied to that category”.<sup>80</sup> Lord Neuberger made a similar point in *Nicklinson*<sup>81</sup> in noting, as a general point, that the expression “blanket ban” is not helpful, “as everything depends on how one defines the width of the blanket”. The first question, therefore, is the applicability or scope of the rule. The second is its justification and, in the context of “blanket” rules of general application, which is to say “bright-line” rules in less pejorative language, whether the level of fact insensitivity can be justified. The Strasbourg caselaw has always recognised that the certainty associated with rules of general application is in many cases an advantage which may, depending on the context, be a decisive one.<sup>82</sup> That approach is also reflected in the jurisprudence of the Supreme Court.
46. Accordingly, in the *Safe Access Zones* decision, the court held that an offence prohibiting certain protest activities in the vicinity of abortion clinics was compatible with the Convention rights of protesters even though it was framed in a relatively bright-line way without a reasonable or

<sup>75</sup> *R(Z) v Hackney* (n 38), paras 107 to 110, referring in particular to *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18, para 19 (Baroness Hale); *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group and Another intervening)* [2015] UKSC 16, para 11 (Lord Reed); *Gilham v Ministry of Justice* [2019] UKSC 44, para 34 (Baroness Hale).

<sup>76</sup> Para 85.

<sup>77</sup> *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, para 204.

<sup>78</sup> Para 85.

<sup>79</sup> *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

<sup>80</sup> Para 88.

<sup>81</sup> *Nicklinson* (n 48), para 63.

<sup>82</sup> *Tigere* (n 79), para 89. See also P Sales and B Hooper, “Proportionality and the form of law” (n 59).

lawful excuse defence. The form of the law, judged in light of its objective, itself complied with the proportionality requirement across the range of cases in which it would be applied, without the need for a fact-specific reasonable excuse defence in addition.

## E. Dualism and Convention rights

47. My fifth theme for today is dualism and Convention rights. This requires discussion of the interaction between international and domestic law obligations in the context of the UK's dualist constitution, and, in particular, the impact of unincorporated treaty obligations on the interpretation of Convention rights. For this, my focus is on the unanimous judgment of the court in *SC*.<sup>83</sup>

48. It is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the UK.<sup>84</sup> The classic explanation of the principle was given by Lord Oliver in the *International Tin Council* case:<sup>85</sup>

“Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations.”

49. This dictum was cited with approval, and the principle reasserted, in *Miller No 1*.<sup>86</sup> Following the Supreme Court's reassertion of this principle, by a court of 11 Justices, it can fairly be described as settled law. However, one question which remained (it was said) was whether the Human Rights Act made a difference. Had it given domestic legal effect to unincorporated treaties by some indirect means? “Clearly”, held the court in *SC*,<sup>87</sup> “it has not”. Instead, “[t]he only treaty to which the Human Rights Act gives domestic legal effect is... the Convention”.<sup>88</sup>

50. The source of confusion came from a line of comments which suggested that human rights treaties might, in some way, be an exception to the rule in relation to unincorporated treaties. The first concrete<sup>89</sup> suggestion of this exception was made by Lord Steyn in the case of *Re McKerr*,<sup>90</sup> where he said:

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<sup>83</sup> (n 77). Similar points are made in *AB* (n 26).

<sup>84</sup> *Ibid.*, para 77.

<sup>85</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, p 500.

<sup>86</sup> [2017] UKSC 5, paras 56, 167 and 244.

<sup>87</sup> *SC* (n 77), para 79.

<sup>88</sup> *Ibid.*

<sup>89</sup> The possibility of such an exception was alluded to earlier by Lord Slynn in *Lewis v Jamaica* [2001] 2 AC 50 PC and the subject of comment in articles such as by Lord Collins, “Foreign Relations and the Judiciary” (2002), 51 ICLQ 485, 496 and Murray Hunt, *Using Human Rights Law in English Courts* (1997), 26-28.

<sup>90</sup> *In re McKerr* [2004] 1 WLR 807, paras 49-50.

“the rationale of the dualist theory, which underpins the *International Tin Council* case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future”

51. Lord Kerr, in his judgment in *SG*,<sup>91</sup> in 2015, relied on these comments to conclude that “the time has come for the exception to the dualist theory in human rights conventions... to be openly recognised.”<sup>92</sup> In doing so, he referred to an article of mine of 2008 in the *Law Quarterly Review* in order to disagree with it.<sup>93</sup> There, I argued that there was no basis in authority or principle for a distinction between “human rights” treaties and all other treaties in terms of their legal effect as a matter of English law. The true rationale for the dualist theory, I suggested, is that the Crown cannot change domestic law by the exercise of its powers under the prerogative, which is a rule reflecting and supporting the sovereignty of Parliament and its primacy as the domestic law-making institution in our constitution. That principle is unaffected by the relevant treaty being one concerned with human rights.

52. The unanimous judgment of the court in *SC* marks a confirmation of and return to orthodoxy. However, it is important to set out the indirect ways in which unincorporated treaties can and do influence the interpretation of Convention rights, in a manner compatible with a dualist system. As Lord Reed explained in *SC*:<sup>94</sup>

“International law... has a broader significance, along with the contents of the domestic law of the contracting states, Council of Europe texts and other relevant materials, as evidence of a European consensus, or at least of relevant developments or evolving principles, which can inform the interpretation of the Convention, the width of the national margin of appreciation, and the court’s assessment of proportionality.”

53. As the Strasbourg court noted in *Neulinger v Switzerland*,<sup>95</sup> “[t]he Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law ... as indicated in article 31(3)(c) of the Vienna Convention on the Law of Treaties”. However, the relevance of obligations in international law must be limited. As Lord Reed explained,<sup>96</sup> the Strasbourg court has not treated the provisions of international treaties

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<sup>91</sup> R (*on the application of SG and others (previously JS and others)*) v Secretary of State for Work and Pensions [2015] UKSC 16.

<sup>92</sup> Para 254.

<sup>93</sup> P Sales and J Clement, “International law in domestic courts: the developing framework”, (2008) 124 LQR 388-421.

<sup>94</sup> Para 80. A similar point is made in *AB* (n 26), para 61.

<sup>95</sup> (2010) 54 EHRR 31.

<sup>96</sup> *SC* (n 77), para 83.

as if they are directly incorporated into the Convention itself, nor does it refer to international materials for the purpose of determining whether contracting states have complied with their obligations under unincorporated treaties. Even where rules of law are incorporated into domestic law, the court has said that its role “is confined to ascertaining whether those rules are applicable and whether their interpretation is compatible with the Convention”.<sup>97</sup> The percolation of these obligations into Convention rights jurisprudence is perhaps best framed by the decision of *Demir v Turkey*.<sup>98</sup> “the consensus emerging from specialised international instruments and from the practice of contracting states may constitute a relevant consideration for the court when it interprets the provisions of the Convention in specific cases.”

## **F. Importance of the margin of appreciation**

54. Given my rather disparate range of themes so far, by way of conclusion I would like to consider one more theme, which pervades the other topics I have discussed this evening. That is the margin of appreciation.

55. Whilst the margin of appreciation is specific to the European court, the Supreme Court in *SC* explained why domestic courts have generally endeavoured to apply an analogous approach.<sup>99</sup> The first reason was explained by Lady Hale in *Countryside Alliance*.<sup>100</sup>

“when we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states, it seems to me that this House should not attempt to second guess the conclusion which Parliament has reached. I do not think that this has to do with the subject matter of the issues, whether it be moral, social, economic or libertarian; it has to do with keeping pace with the Strasbourg jurisprudence as it develops over time, neither more nor less”.

56. Such reasoning can be seen throughout my first theme, that the domestic courts should not interpret Convention rights in idiosyncratic ways, and my second of keeping pace with Strasbourg jurisprudence. In each case, the margin of appreciation may be the determinative factor in the resolution of a dispute.

57. The second reason in *SC*<sup>101</sup> was that domestic courts must respect the separation of powers between the judiciary and the elected branches of government.<sup>102</sup> This reasoning again pervades the themes in my lecture, in particular the third theme (the intensity of review to be

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<sup>97</sup> *Neulinger* (n 95), para 100, referred to in *SC* (n 77), para 83.

<sup>98</sup> (2008) 48 EHRR 54.

<sup>99</sup> Para 143.

<sup>100</sup> *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] AC 719, para 126.

<sup>101</sup> Para 144.

<sup>102</sup> *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2008] UKHL 63.

applied by appellate courts) and the fourth (the form of law). Even within my fifth theme (dualism and Convention rights), unincorporated treaties have a role to play in informing the practice and consensus of contracting states which impacts upon the width of the margin of appreciation.

58. My concluding suggestion today, therefore, is that lawyers arguing cases involving Convention rights and courts deciding them would be well advised to give careful thought to how to frame the argument surrounding the width or narrowness of the margin of appreciation applicable in a given context. The margin of appreciation is often not merely one factor ranked alongside others in Convention rights adjudication. It can, and I would venture to suggest often will be, the determinative factor in whether a claimant is able to establish a breach of their Convention rights in a domestic court. For example, Lord Reed's careful analysis of the margin of appreciation in *SC* was an important part of the reasoning in support of the result in that case. If the margin of appreciation is wide, the scope for the legislature or the executive to take action without violating Convention rights is correspondingly wide. Despite the importance of this concept, however, submissions in relation to the width of the margin of appreciation can be treated as an uninteresting or rather subordinate bolt-on to a general discussion of whether there is a violation in the case at hand. They are often of a rather general nature, involving bald assertions on each side with little careful analysis. It would be desirable, however, if submissions in relation to the width of the margin of appreciation become drafted with a level of care and detail commensurate to its potential prominence in driving the practical outcome in the determination of disputes in a Convention rights context.