Has Judicial Review on Substantive Grounds Evolved from Wednesbury Towards Proportionality?

Alex Gewanter

INTRODUCTION

Academics have long argued that proportionality review is supplanting Wednesbury review, a doctrine that will allegedly soon be obsolete. The actual movement in the law is far more nuanced, with proportionality being modified by Wednesbury. The recent developments in proportionality are not just expansions in applicability, but also fundamental changes in the very nature of the review. Rather than simply growing and replacing Wednesbury, proportionality is adapting and changing. This essay will assess whether the two doctrines are fundamentally similar, then proceed to analyse these recent changes in the doctrines. It will conclude that they are dissimilar, though there is a definite convergence between the two methods. This convergence is not the common law Wednesbury review moving towards proportionality, but rather proportionality becoming more like Wednesbury. It is predicted that in the next few years substantive review will be conducted on ‘proportionality’ grounds, though it will not be the same proportionality doctrine understood today.

I. ARE THE DOCTRINES DISSIMILAR?

For many years it has become standard practice to teach public law students judicial review in a convenient, but simplified, way. Proportionality review, a doctrine engaged under certain human rights and all European Union (EU) law, is taught as a very separate method to Wednesbury review, which is engaged in “a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person … could have arrived at it.”\(^1\) Though this might once have been the case, an argument can be made that the two doctrines have greatly influenced each other. It could therefore be said that the current position is

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\(^{1}\) Council of Civil Service Unions and Others v Minister for the Civil Service [1984] UKHL 9, [1985] AC 374, 410 (Lord Diplock).
different to the orthodox view of them as antithetical in their application and methodology. This chapter will focus on outlining various arguments in favour and against the assertion that the doctrines are dissimilar. This section will focus on pre-2014 law, as the speculative nature as to the post-2014 position is to form the subject of the second chapter.

A. The Weights Argument

This argument stems from perhaps the most influential essay written on the subject, ‘The Nature of Reasonableness Review’ by Professor Paul Craig. In the essay, Craig answers the question in the title of the chapter in the negative by reference to ‘weights.’ Weights, here, is an approach taken by the courts under Wednesbury review in which competing interests are weighed against each other. This is very similar to proportionality review, which requires the court to assess whether an action by a public body that limits a fundamental right of a person strikes a fair balance. Craig cites four cases decided under Wednesbury grounds that have an implicit weights consideration to them. For the purposes of this essay, I will explore one of the cases, Bancoult (No 2). The facts, as outlined by Lord Hoffmann, were whether it was lawful for the Government to occupy the Chagos Archipelago for defence purposes, resulting in the removal of 1,000 Chagossians. The Divisional Court, with Laws LJ and Gibbs J presiding, found in favour of the appellant, Mr. Bancoult, in the first litigation. The secondary legislation was quashed, but due to various intervening political developments, the Government later found it “impossible … to promote or even permit resettlement to take place.” A second case was brought on this issue. Lord Hoffmann, delivering the lead judgment, outlined the two arguments proposed. Jonathan Crow, representing the appellant (the Secretary of State),

“said that because the Crown was acting in the interests of the defence of the realm, diplomatic relations with the United States and the use of public funds in supporting any settlement on the islands, the courts should be very reluctant to interfere. Judicial review should be undertaken with a light touch.”

By contrast, Sir Sidney Kentridge, representing the respondent, said that “because the Order deprived the Chagossians of the important human right to return to their homeland, the Order should be subjected to a much more exacting

3 R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2) [2008] UKHL 61, [2009] 1 AC 453.
5 Bancoult (No 2) (n 4) [32] Hoffmann.
test.” By this, Sir Sydney submitted that the intrusive effect of the action by the state should warrant a more intensive version of Wednesbury, known as ‘anxious’ or ‘heightened’ scrutiny. Lord Hoffmann and the wider court were weighing up the competing interests of the parties. The type of Wednesbury review adopted by the court depends on the weight accorded to each of these interests. As noted by Paul Craig, Lords Hoffmann, Rodger of Earlsferry and Carswell all gave more weight to the interests of the state. By contrast, Lords Bingham and Mance, both dissenting, reached their verdict giving more status to the right of the Chagossians to not be displaced from their home.

_Bancoult (No 2)_ is a very relevant case to cite here. In applying Wednesbury, of which there was no doubt it was the correct approach, the courts were forced to weigh the competing interests, as this would determine the level of scrutiny adopted. If they were to accept the Government’s argument, a low intensity level of scrutiny would be adopted. By contrast, if they placed more weight on the right not to be removed from one’s home, then a higher level of scrutiny would be chosen. By applying Wednesbury and the consequential need to choose which level of scrutiny is required, the courts are forced to weight the balancing interests. As noted earlier this is very similar to the core aim of proportionality review, whereby competing interests are weighed up against each other.

The two doctrines involve weighing competing considerations, though to different degrees. In one, it is implicit and in the other explicit. This is a persuasive argument towards suggesting that the two doctrines are similar.

**B. The Sliding Scale Argument**

This argument is espoused by academics such as James Goodwin and is also seen in case law. The foundation of ‘anxious scrutiny’ is perhaps the best illustration of the sliding scale consideration.

This doctrine finds roots in a judgment of Lord Bridge of Harwich, who posited that “the court must be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the court determines … the basis of the decision must surely call for the most anxious scrutiny (emphasis added).” This was cited by Sir Thomas Bingham MR, who developed the principle under the idea that “[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.”

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1 ibid.
2 Craig (n 2).
3 _Bancoult (No 2) _ (n 4) [132] (Lord Carswell).
5 _R v Secretary of State or the Home Department, Ex parte Bugdaycay _ [1987] AC 514, 531.
6 _R v Secretary of State for Defence, ex parte Smith and Grady _ [1996] QB 517, 547 (Sir Thomas Bingham MR).
defining characteristics of Wednesbury review is that it is flexible. In certain cases, 
there would be a very deferential and low intensity Wednesbury review, and in 
others, heightened scrutiny. In *ex parte Nottinghamshire County Council*,¹ the Secretary 
of State had the power to limit funding to local authorities who had demonstrated 
financial mismanagement. To do so, a Rate Support Grant Report had to be laid 
before, and approved by, the House of Commons. The relevant Report covering 
1985-86 passed with 343 votes in favour and 211 against.² The court had to 
determine whether it was irrational under Wednesbury unreasonableness to 
remove funding from struggling local authorities, which would potentially 
compound the issue. Lord Scarman, giving the lead judgment, called for a low 
intensity level review due to the support given in the House of Commons.³ His 
Lordship allowed the appeal of the Secretary of State on the ground that it was 
not a justiciable matter and should be left to Parliament—unless it could be proved 
that the Secretary acted in bad faith and, in doing so, abused the mandate granted 
by Parliament.

This creates an interesting scale: matters which have Parliamentary approval 
have a lower level of scrutiny compared to interferences with fundamental rights, 
which have a higher scrutiny. The doctrine is flexible and can adapt to the 
circumstances it is being applied to. But is this dissimilar to proportionality?

Applying the test adopted by Lord Sumption for proportionality, there does 
appear to be a degree of flexibility in its application. The relevant step of the test 
is the fourth: “whether, having regard to the matters and to the severity of the 
consequences, a fair balance has been struck between the rights of the individual 
and the interests of the community.”⁴ This implies that when the potential 
consequences are severe, the public body may be justified in adopting more 
invasive violations of rights.

There is a notable difference between the two doctrines here, however, based 
on which party receives the focus of the protection. Wednesbury adopts a public 
body focused approach. This is seen in the idea of deference, allowing them to 
reasonably do what they must in order to achieve the aim. It is only when they do 
so unreasonably that the court will intervene. Proportionality, by contrast, is more 
claimant-friendly. The requirement to assess “whether a less intrusive measure 
could have been used”⁵ is different from the Wednesbury standard that merely 
suggests that the decision must be reasonable. A visualisation of all the actions a 
Secretary of State could take in respect of a problem would find many that were 
reasonable and many that were not. Under Wednesbury, the Secretary could 
choose any of the reasonable actions. Under proportionality, the least intrusive 
measure would have to be taken. The sliding scale effect in Wednesbury will be

³ *Ex parte Nottinghamshire County Council* (n 13), 247 (Lord Scarman).
⁴ *Bank Mellat* (n 3) [20] (Lord Sumption).
⁵ *Bank Mellat* (n 3) [20] (Lord Sumption).
therefore greater than that in proportionality by virtue of who has the benefit of protection.

C. Divergence in Verdict Argument

For the purpose of the essay, I have named this the “divergence in verdict” argument, as it features most prominently amongst senior judges asserting that the verdict of most cases will not change based on the standard of review adopted.

There is a wealth of case law in which senior members of the judiciary have stated that in the majority of cases, applying proportionality and Wednesbury will not lead to different outcomes. This argument has some academic support, with Bjorge, to name one, asserting that most leading cases argued under the Human Rights Act 1998 (HRA 1998) on proportionality grounds would have reached the same outcome under Wednesbury review. This argument has its flaws, lying in application and past case law.

Alec Samuels, a practitioner, raises a very fair practical consideration to show that the doctrines are dissimilar. Summarising the debate succinctly, he says that:

“Proportionality has undoubtedly come to be accepted into English law. It may be the same as irrationality, simply expressed in different terminology, or at any rate rather similar. It may be different, but overlap to a considerable degree. It may even be quite different, opposed, mutually exclusive.”

His argument is that, though the extent to which the integration has happened is unclear, it is ultimately irrelevant. “What is clear is that the advocate will normally plead and argue both irrationality and proportionality. It is not a question of choice: go for both.” This perhaps provides an explanation for the stagnation in the case law as to whether proportionality has supplanted Wednesbury—practitioners arguing the cases are not forced to choose which method they prefer to argue under. While practitioners plead under both, the doctrines appear antithetical and distinct. It then falls to look at cases that highlight the differences between the doctrines.

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2 Eirik Bjorge, ‘Common law rights: balancing domestic and international exigencies’ CIJ. 2016, 75(2), 220.
3 ibid [223].
5 ibid.
The argument that the two doctrines are linked falters in light of *Smith and Grady v United Kingdom*.1 In this case, both applicants were discharged from the Royal Air Force on the grounds that they were homosexual. The Court of Appeal upheld the dismissal as lawful.2 As this case was before the introduction of the HRA 1998, the Court was limited to applying Wednesbury review. Even when using the heightened version of scrutiny warranted when there is a breach by the Executive of fundamental rights, the decision was held not to be unreasonable. When appealed to the European Court of Human Rights (ECtHR), the decision to exclude servicemen and servicewomen on the grounds of their sexuality was held to be disproportionate.3 This presents a gap between the two doctrines, where proportionality is able to protect against an injustice that Wednesbury fails to. How can the two doctrines be similar if such an outcome is possible? Even if in the majority of cases the doctrines may lead to the same outcome, outlying cases like this prove that there is a very real difference between the two approaches.

As noted by Saara Idelbi, a dichotomy in the Supreme Court also serves to disprove this argument.4 Whether or not the doctrines are similar or dissimilar would have major implications on the process by which change in the standard of administrative review would take place. If they are similar, as argued by many judges5 and Paul Craig,6 then changing the standard of review would be simple. But the current consensus is that it would be a large constitutional change to adopt a new standard of review, one which would require a bench of 9 judges7 and possibly can only come from Parliament.8 If the implications of replacing Wednesbury are great, then the judicial argument that the doctrines are similar falls apart on examination.

D. The Daily Dilemma

In *ex parte Daly*,9 Lord Steyn raised three differences between the two doctrines.10 Paul Craig explains the desire to do so by his Lordship, as “Daly was inextricably linked with the need to deal with *Smith and Grady v United Kingdom*, where the ECtHR decided that even heightened review was not sufficient for the purpose of the Convention.”12 What are Lord Steyn’s three non-exhaustive

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2 *ex parte Smith and Grady* (n 12) (Sir Thomas Bingham MR).
3 *Smith and Grady v United Kingdom* (n 23).
5 *Key* (n 18).
6 Craig (n 2), 151.
7 *Key* (n 18) [132] (Lord Neuberger).
8 Goodwin (n 10), 453.
9 *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 WLR 1622.
10 ibid [27].
11 *Smith and Grady v United Kingdom* (n 23).
12 Craig (n 2) 148.
examples and can any hope be salvaged for the argument that the two doctrines are similar? Lord Steyn held that:

“First, the doctrine of 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. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test … is not necessarily appropriate to the protection of human rights.”

The first two criticisms can be addressed by Professor Craig’s article as explored earlier in this essay. With ‘weights’ being a central tenet of Wednesbury review, both doctrines require the reviewing court to assess the balance. The third however, requires a more in-depth analysis.

This has been subject to notable academic debate in recent history. It is a debate that has been renewed in the context of the proposed repeal of the HRA 1998, which allowed proportionality review to be used by the courts in respect of ‘Convention’ rights. Many have analysed whether the common law, in the absence of the HRA 1998, would continue to provide a broad level of protection without proportionality review. This is of particular importance as some believe it to provide a greater level of protection. Sir Philip Sales, writing extrajudicially, notes that “the proportionality standard involves a significantly greater power of review for the courts.”

Academics, such as Conor Gearty, and organisations, such as Liberty, have argued in favour of retaining the Act for this reason, as they feel that a loss of proportionality that would be consequential to the repeal would result in a lapse in the standard of human rights protection. By contrast, other academics, such as Goodwin and Bjorge, advocate for Wednesbury review. They argue that the common law has provided an adequate level of protection. Bjorge

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1 ex parte Daly (n 31) [27] (Lord Steyn).
2 Craig (n 2).
4 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights (ECHR)).
6 Conor Gearty “Why the Human Rights Act should not be repealed: an Irish perspective” [electronic].
7 Liberty “Human Rights Act Mythbuster” [electronic].
8 Goodwin (n 10).
9 Bjorge (n 19).
raises the argument that “whilst it is obviously possible to repeal the [HRA 1998], it is not possible to expunge from the law reports the judgments in which the [HRA 1998] has done its work, and the indelible imprint it has left on the common law.” This raises an interesting point: if the Act were to be repealed, what would be left behind? Whether there has been a change in the fundamental nature of the doctrines is to be the subject of the second chapter of this paper.

Proponents of proportionality review point to the distinction between two key cases, *Fitzpatrick v Sterling Housing Association Ltd* and *Ghaidan v Godin-Mendoza*. These two cases had markedly similar facts, were decided 5 years apart, but had antithetical outcomes. To highlight how remarkable this is, I will explore the facts briefly. The relevant statutory provision was the Rent Act 1977 Schedule 1 s.2(2), which held that to continue the tenancy held by a deceased partner, the surviving party to the relationship needed to have lived “with the original tenant as his or her wife or husband.” Failing this, the surviving party could potentially claim to be part of their family. This only granted an assured tenancy under s.3, a weaker legal position for the purposes of continuing the tenancy. The homosexual claimants would therefore be at a disadvantage were they not able to be included under s.2(2). On this issue, the House of Lords in *Fitzpatrick* was unanimous in their view that though the relationship was loving and hard to be unsympathetic towards, it did not fall under that section. Lord Hutton in particular held that:

“A person can only live with a man as his wife when that person is a woman, and accordingly Mr. Fitzpatrick cannot claim to have been living with Mr. Thompson as his wife. Similarly, a person can only live with another person as a husband when that other person is a woman, and accordingly, Mr. Fitzpatrick cannot claim to have been living with Mr. Thompson as his husband.”

This reflects the concerns raised in the Court of Appeal, particularly by Ward LJ, that to recognise Mr. Fitzpatrick’s claims would be to exceed the limits of judicial creativity, and that it was a matter for Parliament to legislate and decide upon. The court was conflicted between both this concern and the desire to give justice to Mr. Fitzpatrick who they sympathised with. As a compromise, they granted homosexual couples the status of family members, granting Mr. Fitzpatrick an assured tenancy. Their Lordships were very eager to apply Parliament’s intentions, a theme which recurred in *Ghaidan* five years later.

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1 ibid [229].
4 Fitzpatrick (n 45).
5 ibid [57] (Lord Hutton).
6 Ghaidan (n 46).
Here, the facts were the same except for one notable exception: the deceased partner in the homosexual relationship had died after the HRA 1998 had come into force. A case was brought on the grounds that the wording of s.2(2) of the Rent Act 1977 was incompatible with Article 14 in conjunction with Article 8 of the ECHR. The former is the prohibition of discrimination in the exercise of other rights. The specific right it is attached to is the ‘[r]ight to respect for private and family life.’ A majority in the House of Lords upheld that judgment of the Court of Appeal that the phrase “as his or her wife or husband” should be interpreted to mean “as if they were his wife or husband” (emphasis added). This was done under Section 3(1) of the HRA 1998 which states that “[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” In doing so, the court was able to both give effect to Parliament’s intentions and address the discrimination. They were unable to do this under Wednesbury review, but were under proportionality review. This is another case that distinguishes the two doctrines, leading to the conclusion that they are dissimilar.

Proponents of the HRA 1998 and the proportionality review that it brings to cases of human rights breaches have a strong argument in the dichotomy above. The HRA 1998 gave their Lordships the opportunity to interpret primary legislation in a way that could resolve disproportionate and discriminatory situations. From this position, we must return to the issue raised earlier. What is the current position of the common law? Would surviving partner Mr. Godin-Mendoza be forced into the same position as Mr. Fitzpatrick if the HRA 1998 were repealed? It may appear hard to defend, in the light of these cases, the argument that the doctrines are similar. Though the weights and divergent verdict arguments outlined earlier are persuasive, I cannot conclude that the doctrines as applied are similar. The dichotomy between the applications of traditional grounds of review seen in Fitzpatrick² and ex parte Smith and Grady³ cannot compare to the level of protection afforded under Ghaidan⁴ and Smith and Grady⁵ respectively. The greater protection afforded under proportionality review leaves a fundamental distinction between the two doctrines, answering the title of the chapter in the affirmative. There is, however, a concerted and discernible move towards each other by both doctrines.

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¹ ECHR (n 38).
² Fitzpatrick (n 45).
³ ex parte Smith and Grady (n 12).
⁴ Ghaidan (n 46).
⁵ Smith and Grady v United Kingdom (n 23).
II. ARE THE TWO DOCTRINES CONVERGING?

Having established that the two doctrines are dissimilar in nature, are there any current developments in the law that are challenging this assertion? In other words, is the law moving towards a position where the doctrines are coalescing? This chapter will argue that, contrary to popular academic opinion, the main area of change is to proportionality. The chapter is divided into changes to each doctrine, though as the chapter will argue that the two doctrines are moving together, there will be considerable overlap.

A. Changes in Wednesbury Review

One way in which the two doctrines could change would be the abolition of one, most likely Wednesbury. Wednesbury is a doctrine that has come under intense judicial scrutiny, most notably in the Court of Appeal judgment in ABCIFER. Here, Dyson LJ giving the judgment of the court had a most damning condemnation of the doctrine, describing the existence of two regimes as “unnecessary and confusing.” He held that “[w]e have difficulty in seeing what justification there is now for retaining the Wednesbury test. But it is not for this court to perform its burial rites.” In this case, the Court reluctantly applied Wednesbury, believing that it should not be the applicable standard. With an understanding of judicial hostility towards the doctrine, the subsequent caselaw becomes clearer. The senior judges are, whether deliberately or not, trying to perfect what they feel to be an imperfect doctrine. There is, however, a reluctance that can be inferred amongst the judiciary. It could be argued that the judges appear hesitant to replace Wednesbury with proportionality.

The development of the most recent movement to replace Wednesbury can arguably be charted across four key cases. The first case, Kennedy v Charity Commission, has a paragraph that became the lynchpin of subsequent judicial reasoning against the doctrine. Lord Mance states that “[t]he common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle… The nature of judicial review in every case depends on the context.” This comment, though obiter, would be cited frequently in subsequent judgments and would form the basis of the judicial assault on Wednesbury.

In Pham, Lord Sumption held that “although English law has not adapted the principle of proportionality generally, it has for many years stumbled towards a

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1 ABCIFER (n 18).
2 ibid [34].
3 ibid [34]-[35].
5 ibid [51] (Lord Mance).
6 Pham (n 18).
concept which is in significant respects similar.” When viewed in the context of the judicial hesitation that will be subsequently explored, this statement reveals volumes. It can be argued that Lord Sumption is following the hesitation trend in which the judges are taking such a fundamental change slowly. This idea is supported by the main case, *Keyu*. Here, Lord Neuberger PSC, came extraordinarily close to replacing Wednesbury review with proportionality. Though, on the surface, Lord Neuberger’s judgment does not suggest whether or not his Lordship would support such a change, his views can be inferred. He suggests that “it would not be appropriate for a five-Justice panel of this court to accept, or indeed reject, this argument.” This appears to be a balanced and neutral standpoint, but is subsequently undermined by a later paragraph. Despite agreeing with the Court of Appeal’s application of Wednesbury, he later discusses whether it would be disproportionate or not to grant the inquiry. This is *obiter*, but from it an inference could be made that Lord Neuberger supports the application of proportionality review, for why else would his Lordship apply it to the facts? Lord Kerr also agreed with the Lord Neuberger’s proposal, but interestingly stated that "I suspect that this question will have to be frankly addressed by this court sooner rather than later.” Lord Reed raised the argument that his Lordship would not pass comment on the debate as it had not “been the subject of detailed argument,” though this would no longer remain an excuse in the final of the four cases.

In *R (Youssef)*, an Egyptian national arrived in the United Kingdom in 1994 claiming asylum. This was rejected due to his membership of Al-Qaeda. Mr. Youssef could not be deported due to fear that he would be tortured, a breach of Article 3 ECHR. Mr. Youssef was convicted by an Egyptian court *in absentia* and the Egyptian government successfully applied to the United Nations Security Council to have his assets frozen. The proceedings relate to the conduct of two Foreign Secretaries and their involvement in the situation. Senior counsel for Mr. Youssef, Timothy Otty QC, argued that there were four grounds of appeal. The fourth is relevant to the debate:

“Given the gravity of the context, the courts below were wrong to limit the standard of review to that of Wednesbury unreasonable or irrationality. Following the more recent

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1 ibid [105] (Lord Sumption).
2 *Keyu* (n 18).
3 ibid [132] (Lord Neuberger).
4 ibid [128] (Lord Neuberger).
5 ibid [136] (Lord Neuberger).
6 ibid [271] (Lord Kerr).
7 ibid [119] (Lord Reed).
8 *R (Youssef)* (n 18).
9 ECHR (n 38).
guidance of the court in *Kennedy*... and *Pham*... the appellant was entitled to a ‘full merits review’, or at least one involving a ‘proportionality analysis.’”

Lord Carnwath, giving the lead judgment with the agreement of all four other Justices, disagreed with this assertion. The reasoning was that “[o]n the other hand, in many cases, perhaps most, application of a proportionality test is unlikely to lead to a different result from traditional grounds of judicial review. This is particularly true of cases involving national security.” This is interesting and indeed bears a rather ironic twist. What began as a challenge to the legitimacy of Wednesbury review in *Kennedy* culminated in proportionality being changed. Here, in the context of national security cases, the defining feature of proportionality being more inflexible has been reduced to reflect the deferential nature of Wednesbury. As noted earlier, in cases of national security or Parliamentary approval, the court views the matters as less justiciable under Wednesbury. By refusing to draw a distinction between the outcomes of the two doctrines, Lord Carnwath is helping to move proportionality towards Wednesbury, by adding an assessment of deference to the standard of review. This was also seen in *R (Carlile)* in the judgments of certain particular Justices.

In this case, a controversial speaker wanted entrance into the country to address certain distinguished Members of Parliament. The speaker was a dissident Iranian politician and the *de facto* leader of an organisation that, for three decades, used terrorism against the State. This case came at a time of tense relations with Iran, with international financial sanctions being imposed on the State in 2011 and Iranian suspicions of the United Kingdom’s involvement in the assassination of an Iranian nuclear scientist. With the Government needing cooperation on matters of security, the Home Secretary, on advice of the Foreign Office, rejected entrance. A case was brought to determine whether the breaches of Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) *ECHR* were proportionate. The Supreme Court held, by a 4-1 majority (Lord Kerr dissenting), that it was proportionate.

The majority here adopted a proportionality review approach that was flexible in matters that would traditionally, under Wednesbury review, warrant deference. The language of Lord Sumption in particular is very conducive to an environment in which proportionality is moving towards Wednesbury. His Lordship stated that deference is a concept that is “no more than a recognition that a court of review does not usurp the function of the decision-maker, even when Convention rights are

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1. *R (Youssef)* (n 18) [105] (Lord Sumption).
2. ibid [57] (Lord Carnwath).
5. *ECHR* (n 38).
engaged’ (emphasis added). This recurs later in the judgment, when Lord Sumption notes the inability of the court to make assessments on national security matters, citing a lack of expertise and evidence in comparison with that of the Foreign Office. Lord Neuberger and Lord Kerr both comment upon this issue. The former believes that since the threats of violence cited by the Government are not guaranteed to materialise, more deference to the government should be given for reasons of democratic accountability. Lord Kerr, by contrast, believes on moral grounds that, as the violence is antidemocratic, the court should not take it into consideration. In addition to this, his Lordship rebuts the assertion that deference is a feature of proportionality review. This is in contrast with both Lord Sumption and Lady Hale, who both feel that it is. Lord Sumption, in particular, argues that, as they lack the competence to review the balance effectively as required under proportionality review, their assessment must instead be whether the Home Secretary followed the correct procedure in her decision. This was supported by Lord Neuberger who said that:

“Lord Sumption is surely right to the extent that, unless it can be shown to be based on wrong facts or law, not genuinely held, or irrational, the nature of the decision in this case is such that the court would require strong reasons before it could properly substitute its own decision for that of the Secretary of State.”

The court here has amended proportionality review so that it is more similar to Wednesbury review, giving more deference to the Government in areas such as national security in which, as Lady Hale noted, the Government are “more qualified” to make the decision. This is moving away from assessments as to whether the decision was correct towards a procedural analysis, a feature of Wednesbury.

**B. Changes in Proportionality Review**

Though one may be forgiven after reading academics in favour of abolishing Wednesbury review to think that proportionality review is an immovable concept,
it too is changing. In many key ways, these changes are making it appear more like Wednesbury review.

Proportionality review is undoubtedly becoming more flexible in its application. Proportionality is a doctrine that, in theory, should be more inflexible. With a rigid test, its structure has been praised judicially, such as by Lord Mance, who even asserted that Wednesbury could benefit from adopting such a formulation.1 In Pham2 and R (SG),3 the application of proportionality was potentially controversial, though the court still used it. In Pham,4 the deprivation of British citizenship was at stake, consequentially depriving him of EU citizenship under Article 9 of the Treaty on European Union. Accordingly, what was a national matter that should have engaged Wednesbury review became a supranational EU issue under an indirect technicality. Though, by virtue of Costa v ENEL,5 EU law has supremacy over conflicting national law, it seems more likely that the EU law dimension is rather a convenient factor to hide the real desire of the court—to use proportionality. This is remarkable, and the significance should not be underestimated; the court here is framing the facts in such a way to expand the scope of proportionality review. It is fair to argue that proportionality here is moving towards Wednesbury review by virtue of the fact that their spheres of application are beginning to overlap. If the two doctrines, dissimilar by nature as noted in Chapter One, are not moving towards each other, this overlap would not be possible. It would be obvious to the court which doctrine to apply, and issues like this would not arise.

A similar situation was seen in R (SG).6 Here, the dissenting minority framed the facts in such a way as to engage proportionality review. The issue here was whether it was lawful for the Secretary of State for Work and Pensions to impose a cap on the amount of welfare benefits which could be received by claimants in non-working households. This appears, prima facie, to require a Wednesbury review approach. It is the action of a Governmental minister fulfilling a manifesto commitment and it is fair to expect that the focus of scrutiny would be towards whether it was implemented in a reasonable way. Instead, Lady Hale adopted a proportionality review approach by stating that this was an interference with Article 1 of the First Protocol (the right to peaceful enjoyment of property) in conjunction with Article 14 ECHR.7 This is controversial: can a person have a right to property of the government because they previously had an interest in it? In other words, if a person received welfare benefits in the past, do they then have

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1 Kennedy (n 58), [54] (Lord Mance).
2 Pham (n 18).
4 Pham (n 18).
6 R (SG) (n 86).
7 ibid [180].
a right to continue to receive them in the future? Under *Stec v UK* [1] Article 1 of the First Protocol does not provide a right to acquire property, but in the context of benefit schemes the state must implement it “in a manner which is compatible with Article 14.”[2] Here, Lady Hale held that as the change would affect primarily single parents and victims of domestic violence, the majority of whom were women, this was indirect gender discrimination. In doing so, this would engage proportionality review by virtue of the HRA 1998. As with *Pham*,[3] the judges have expanded the application of proportionality review to cases that are not as clear-cut. The courts are willing to give weight to ancillary issues so that they may apply proportionality review. Doing so expands proportionality review into areas that would traditionally have been under Wednesbury review. Application is an area where in recent caselaw it is exceedingly clear that proportionality is moving towards Wednesbury. Expanding proportionality in areas of political questions has, however, been condemened by leading Parliamentarians. Lord Howard of Lymyne stated that:

“No-one questions the importance of judicial review based on the original Wednesbury principals. Ministers and other administrative bodies must act within the law. But questions of proportionality inevitably involve the balancing of some rights and interests against others. That is of the essence of political judgement and decisions of that kind should be made by Members of Parliament who are accountable to their electorates.”[4]

With clear movements amongst some in the judiciary to abolish Wednesbury review, it is fair to conclude that the common law in respect of the doctrine is not static. The majority of the changes, however, are in respect of proportionality, which has incorporated characteristics archetypal of Wednesbury. To answer the title of the chapter, both doctrines are converging.

**CONCLUSION**

Judicial review can be a frustratingly complicated area of law due to lack of clarity. This is not helped by the Court’s slow progress to resolve the debate. Fortunately, in the light of these recent developments in the case law, it is probable that the convergence between the two doctrines will result in a definitive answer soon. I must agree with the majority academic view that proportionality will

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1. [2006] ECHR 393.
2. *ibid* [53].
3. *Pham* (n 18).
eventually replace Wednesbury; that much is probable. Where I depart from convention is that what is understood to be proportionality review currently will not be the standard used in future cases. Instead, it will bear the hallmarks of both current Wednesbury and proportionality, becoming a new hybrid doctrine. This will hopefully provide clarity for practitioners and academics alike and will appease defenders of both doctrines. The Supreme Court should use any upcoming opportunity it has to clarify the outstanding issues when replacing the doctrine. Hopefully the Court will do so, but regardless of what happens the future remains positive. As noted by Bjorge, an “auspicious future lies ahead for domestic protection of fundamental rights through the common law.”

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1 Bjorge (n 19) 220.