ECHR AND COMMON LAW ACCOUNTABILITY OF STATES FOR PAST ATROCITIES

The appellants in *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2015] 3 WLR 1665 sought unsuccessfully to challenge a refusal to hold a public inquiry under section 1(1) of the Inquiries Act 2005 into the killing of 23 unarmed civilians by British troops in their village in Malaysia in 1948. Their claim invoked three possible "gateways" (at [205]): an entitlement to an inquiry under the freestanding procedural obligation created by Article 2 of the European Convention on Human Rights ('the Convention'); an entitlement arising from customary international law ('CIL'), incorporated into the common law; and an argument that the refusal constituted disproportionate or irrational executive action, contrary to the requirements of judicial review. Lord Kerr and Baroness Hale emphasised that the third 'gateway' concerned not a fundamental right but the administrative decision whether or not to hold an inquiry (at [279], [283], [304]).

The outcome, Lord Kerr suggested, was "an instance where the law has proved itself unable to respond positively to the demand that there be redress for the historical wrong that the appellants so passionately believe has been perpetrated" (at [285]). This does not detract from the significance of the Supreme Court's decision, for *Keyu* powerfully illustrates the possibility of simultaneous 'twin-track' challenges to government action under the Convention and the common law. It also leaves open the door to the general recognition of proportionality review in the common law, and three judgments seemingly deployed proportionality in practice when considering the third 'gateway'. Furthermore, *Keyu* illustrates the temporal and purposive limits to courts' jurisdiction when considering Article 2 claims for redress for atrocities prior to Convention accession.

The first 'gateway' required consideration of the temporal effect of Convention rights (and thus the HRA). Baroness Hale categorised the "ambitious" challenges confronting the appellants as constructing a 'bridge' between the killings in 1948 and the UK's ratification of the Convention in 1953 in order to establish a retroactive obligation to hold an inquiry, and a second 'bridge' between that obligation and the HRA (at [289]). In determining jurisdiction, the Court faced a stark choice between two critical dates: 1953, and 1966, when the UK accorded the right of individual petition to Strasbourg.

As we shall see, because the Grand Chamber's pronouncements on jurisdiction could be read in different ways, the choice of date necessitated further analysis of the strength of the HRA section 2 obligation to "take account of" Strasbourg judgments: including Lord Bingham's *dictum* in *R (Ullah) v Special Adjudicator* ([2004] UKHL 26, [2004] 2 AC 323 at [20]) that national courts must "keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less", alongside Lord Brown's addendum in *R (Al- Skeini) v Secretary of State for Defence* ([2007] UKHL

26, [2008] 1 AC 153 at [106]) that unless Strasbourg had given clear guidance on the nature and content of a Convention right, UK courts should refrain from new expansionist interpretations.

Lord Kerr reiterated his opposition (stated in *Ambrose v Harris Procurator Fiscal* ([2011] UKSC 43, [2011] 1 WLR 2435) to the view that the content of rights under the HRA should mirror Strasbourg jurisprudence, noting that a departure from "a rigid application" of the *Ullah* mirror principle was "discernible" in recent judgments (at [233], citing *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901 at [105], *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72 and *Surrey County Council v P* [2014] UKSC 19, [2014] AC 896). Without clear guidance from Strasbourg on the jurisdictional issue, "this court should not be deterred from forming its own judgment" (at [235]).

Lords Neuberger and Hughes agreed with Baroness Hale that it was unnecessary to follow Convention jurisprudence "slavishly" (at [291]). Baroness Hale identified four "broad propositions" (at [291]). First, a claimant who clearly would win in Strasbourg would normally win at national level, provided that the "clear and constant" line of Strasbourg authority was "not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle" (citing *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, at [48]). Second, a claimant who would clearly lose in Strasbourg would normally lose before domestic courts. Third, where Strasbourg would clearly regard a matter as falling within states' margin of appreciation, national courts must decide which institution should take the decision (e.g. *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657). Fourth, where a clear and constant line of Strasbourg jurisprudence had not yet emerged, domestic courts must try to produce an answer as a matter of principle (e.g. *Rabone*), considering Strasbourg principles alongside the UK's "legal, social and cultural traditions" (at [291]).

The authority of the four Justices' *dicta* concerning adherence to Strasbourg jurisprudence remains unclear, for whilst the Court unanimously concluded that the appellants could not cross the first 'bridge', different interpretations of earlier Article 2 decisions were offered (discussed below).

The Grand Chamber had bifurcated Article 2 into substantive and procedural autonomous obligations, the latter being to investigate a suspicious death or disappearance and to hold accountable those responsible (*Šilih v Slovenia* ((2009) 49 EHRR 996) and *Varnava v Turkey* (App nos 16064/90 and 16068-16073/90)). Under these authorities, the procedural obligation became capable of binding a signatory state even when the triggering event took place before the Convention had entered into force there (described as the 'critical date'), provided the authorities could reasonably be expected to take effective investigative steps within the post-ratification period. In *Re McCaughey*, Lord Phillips voiced consternation at this reversal of the Grand Chamber's previous position on

retroactivity, not least because of the "totally Delphic" criteria for identifying the critical date ([2011] UKSC 20, [2012] AC 725, at [49]). The Supreme Court nonetheless felt bound to accept the change, holding that where a death occurred before the HRA came into force, but a significant part of the investigation was to take place after that time, the investigation had to be Convention-compliant. In *Janowiec v Russia* ((2014) 58 EHRR 30), concerning the Soviet massacre of Polish prisoners of war in 1940, the Grand Chamber sought to elucidate and constrain the backward reach of Article 2 within pragmatic limits, holding that a state party is obliged to investigate deaths and disappearances predating the 'critical date' only where *either* (at [147]-[151]):

A. There was a *'genuine connection'* between the triggering event of the death and the critical date, meaning that:

   A.1 the period of time between the death and the critical date was reasonably short, i.e. no more than ten years; *and*

   A.2 a major part of the investigation had been, or ought to have been, carried out after the critical date;

   or:

B. As an exception, extraordinary circumstances existed:

   B.1 where the triggering event amounted to the negation of the very foundations of the Convention (e.g. war crimes, genocide or crimes against humanity); *and*

   B.2 the triggering event did not predate the adoption of the Convention on 4 November 1950.

'Genuine connection' is enigmatic, but the reference to the long-stop of ten years suggests that the connection is one of time only. Unfortunately, the Grand Chamber did not define the 'critical date' from which to count back to the triggering event.

A key argument arose from this omission in *Keyu*. The appellants contended that 1953 was the critical date; reasoning that as the killings had occurred only three years before the UK's ratification, this created a right to an effective inquiry which (relying upon *Janowiec* at [144]) had been revived by significant new information in a 2009 exposé of an alleged cover-up by successive UK governments. The government accepted 1953 in the Court of Appeal, but opted for 1966 in the Supreme Court – which, if correct, rendered the claim out of time. This was where the different interpretations were important. Lords Neuberger and Hughes concluded that "this is an area on which we should follow, but go no further than Strasbourg jurisprudence" (at [90]), which dictated 1966 as determinative. Lord Kerr reluctantly concurred (at [239]). However, Baroness Hale accepted 1953 (at [299]), while concluding that the first 'bridge' could not be constructed. Criminal or other proceedings were not feasible for Article

2 purposes 66 years after the triggering event, and these – rather than "establishing a historical truth" (*Janowiec* at [143]) – were the proper objectives of the Article 2 investigative obligation.

Turning to the customary international law 'gateway', it was undisputed (at [144]-[145]) that obligations acquired by the UK under CIL are automatically incorporated into domestic common law unless they conflict with a statute or a constitutional or common law value (*Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, at 553, *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136, at [29]). For Lord Neuberger, the duty to investigate at least some deaths had been recognised in CIL within the past 25 years. However defined, though, any duty had to be subject to a practical cut-off, set at 40 years (at [113], [116]). Lord Mance, the other Justices concurring, added that: "… the presumption … is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt" without Parliamentary intervention (at [150]). Here, it was inappropriate to import a CIL duty to hold an inquiry "because Parliament has effectively pre-empted the whole area of investigations into historic deaths" (at [151]) through the Coroners and Justice Act 2009 and the Inquiries Act 2005. (This conclusion seems curious as neither Act claimed to supplant previous common law powers to appoint inquiries, both replaced a succession of statutes predating 1948, and neither restricted the dates of matters to be investigated; it is also doubtful whether either fully engages with international human rights and humanitarian law obligations to investigate gross violations).

The proportionality/irrationality 'gateway' may be the most intriguing in terms of what it portends for future national-level judicial decision-making. In *Bank Mellat v HM Treasury (No 2)* ([2013] UKSC 39, [2014] AC 700), Lords Sumption and Reed articulated a four-stage test for proportionality: whether the objective was sufficiently important to justify limiting a fundamental right, whether the measure was rationally connected to the objective, whether a less intrusive measure could have been used, and whether a fair balance had been struck between the claimant's rights and community interests. *R (Lumsdon) v Legal Services Board* ([2015] UKSC 41, [2015] 3 WLR 121) clarified that this test operated "in relation to the justification under domestic law (in particular, under the Human Rights Act 1998) of interferences with fundamental rights", but *not* to proportionality in cases involving EU law (Lords Reed and Toulson, at [26]). While the words "in particular" imply that the test applies in cases involving common law rights (which are protected alongside Convention rights: *Osborn v The Parole Board* [2013] UKSC 61, [2014] 1 AC 1115, at [54]-[63]; *Kennedy v The Charity Commission* [2014] UKSC 20, [2015] AC 455, at [45]-[56], [133]), the *Keyu* appellants argued that it should be extended *throughout* domestic judicial review, replacing the irrationality test in non-rights cases – a proposition rebutted by Lords Neuberger, Hughes, Mance and Kerr.

Lord Neuberger suggested that it "would not be appropriate for a five-

Justice panel of this court" to determine whether to approve the general use of proportionality, which had implications which were "profound in constitutional terms and very wide in applicable scope" (at [132]). Proportionality would require courts to consider the merits of decisions, in particular whether the decision-maker had appropriately balanced competing interests (albeit without displacing ministers as primary decision-makers). Lord Kerr suspected that the matter "will have to be frankly addressed … sooner rather than later" (at [271]), but suggested that its constitutional importance might be less than was often assumed: proportionality did not involve *substitution* of judgment, and the notion of a stark choice between proportionality and irrationality might be misplaced. Significantly, by accepting that a larger panel *could* determine the question, the *Keyu* Court effectively abandoned Lord Ackner's stipulation in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 763 that proportionality required *Parliamentary* authorisation (granted for Convention rights by the HRA).

Lord Kerr noted that "interference with a fundamental right has been the setting where proportionality has most frequently been considered" (at [279]), and questioned whether the *Bank Mellat* legislative objective and 'least intrusive means' analyses could apply to proportionality in non-rights cases (a point supported by Baroness Hale). In *Pham*, Lord Reed had distinguished proportionality as a basis for scrutinising justifications for interference with fundamental rights from non-rights claims, which focused on confining the decision-maker's exercise of power to means proportionate to the ends pursued. Lord Kerr thus envisaged "a more loosely structured proportionality challenge where a fundamental right is not involved" (at [282]), testing the impugned decision by reference to its suitability or appropriateness, its necessity, and the balance between benefits and disadvantages, but accepted that the question whether irrationality and proportionality were mutually exclusive or parts of a sliding scale remained open. It is unclear whether Lord Neuberger agreed with this analysis (Lord Mance concurred with both Justices), but he accepted that whether a court should employ proportionality rather than irrationality "may depend on the nature of the issue" (at [134]).

Despite concluding that the appeal failed, Lord Neuberger (Lord Hughes concurring) proceeded to assess the proportionality of the respondent's refusal to hold an inquiry, as did Lord Kerr. This involved – as a practical example of proportionality review in a non-rights context – relatively low-intensity, broad-brush scrutiny, not the high-intensity and closely-focused analysis seen in rights cases. Lord Neuberger saw the appellants' reasons for seeking an inquiry – to discover the historical truth about a possible war crime and to bring closure – as understandable, but neither Article 2 nor CIL required an inquiry, and the reasons for refusing (including cost and difficulty in ascertaining the truth) were coherent and relevant. A positive duty to investigate so long after the event "would, at least without more, open the door to demands that all suspicious deaths, however long ago, would have to be investigated" (at [137]). A potential duty owed to the deceased villagers' relatives had greater force, but was not sufficiently

powerful to render the refusal disproportionate. Lord Kerr, applying his 'more loosely structured' approach, questioned whether the right balance had been struck between protecting the public purse from the cost of an inquiry of little practical benefit, and vindicating the appellants' long-standing and worthy campaign to expose historic crimes: two "incommensurate values" (at [283]). Since a fundamental common law right could not be identified, it was difficult to find disproportionality. It is an open question whether proportionality would entail such an approach if formally adopted in non-rights cases. Since irrationality is often thought to involve less intensive and/or structured review, it is noteworthy that Lord Neuberger's treatment of each standard was not dissimilar. The appellants' request had been seriously considered and rejected for individually defensible reasons, which – considered cumulatively – made it impossible to find the decision irrational, particularly given the expense of an inquiry. Lord Neuberger did not openly evaluate the balance struck – Lord Kerr's characterisation of 'more loosely structured' proportionality – but his treatment of *both* standards seemingly involved a form of balancing, in *each* case without detailed inquiry into the plausibility of the respondent's *individual* reasons.

Baroness Hale posited that a rational decision-maker would first take into account certain points of background history, including the enormity of the alleged atrocity, the inadequacy of the initial investigation, later confessions under police caution, the premature ending of previous inquiries, the thorough analysis of the evidence in the 2009 exposé, and the persistence and strength of the injustice felt by the survivors and the victims' families. The decision-maker would then consider the advantages of an inquiry, including the possibility that the record might be set straight, rectification of the deficiencies of earlier inquiries, and the benefits of catharsis and accountability. They would also weigh the disadvantages: the passage of time, difficulties in establishing the facts now, conflicts of evidence, the improbability that useful lessons might be learned, and associated costs. The respondent's refusal had focused on whether there would be practical lessons for army organisation and training, and for race relations, at the expense of the "bigger picture" of "balancing the prospect of the truth against the value of the truth" (at [312]), and so was irrational.

Baroness Hale seemingly used a form of irrationality review more *intensive* and *structured* than either Lord Neuberger's or Lord Kerr's proportionality analyses, involving a detailed articulation of the factors to be balanced – perhaps enhancing the argument that the formal categorisation of the type of review deployed may not conclusively indicate its character, including its intensity. This might suggest that, notwithstanding Lord Kerr, proportionality and irrationality are not mutually exclusive.

To conclude, whether *Keyu* hastens the general recognition of proportionality as a general review standard, given Lord Neuberger's reference to a larger Supreme Court panel and the practical application of proportionality to the appellants' non-rights claim on the facts, remains to be seen. However, by considering common law 'gateways' alongside the

appellants' Article 2 claim, *Keyu* clearly highlights the continuing importance of common law techniques alongside the HRA (or any successor). The decision is thus of considerable significance. Nonetheless, Lord Kerr's concern at the substantive outcome – namely, the law's failure to respond to a grave historical wrong – may carry weight at Strasbourg level given that a consequence of the decision, in which the available evidence was detailed, is that the UK government seemingly benefited from an earlier documented blockade of inquiries, over successive decades, into a possibly unlawful mass killing of civilians by its own forces.

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