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The Forbidden Process Element in Human Rights Review

THE RELATIONSHIP BETWEEN the Human Rights Act and administrative law is an uneasy one. On the one hand, the Human Rights Act can be viewed as an administrative law add-on, as adding to the grounds of illegality on which a decision made by a public authority will be held to be ultra vires (s 6), as enacting the principle of legality as a rule of domestic law with added bite (s 3), and as providing new damages and declaratory remedies not previously available in judicial review proceedings, without interfering with the doctrine of parliamentary sovereignty (ss 4, 8). The Act has, moreover, mainly been used in administrative law claims, as a means of challenging the discretionary decisions of public officials. Direct challenges to primary legislation are relatively few and far between.[1] In these respects, the Human Rights Act has been contrasted with the New Zealand Bill of Rights 1990 and the Canadian Charter of Rights and Freedoms 1982, which have been viewed in those countries as constitutional measures with only indirect, and until recently marginal, effect on administrative law.[2] But on the other hand, if the Human Rights Act is viewed as establishing the boundaries of a rights-based democracy in a constitutional document, and establishing standards of legality rather than standards of review, it seems to inhabit the world of constitutional, rather than administrative law.[3]

One area where this tension has come to the fore is in relation to process review. Process review is judicial review of a decision on the basis that the decision has been reached in the wrong way, rather than that the outcome is contrary to some right, or is unreasonable, perverse or disproportionate. Process review is usually based on the doctrines of relevant and irrelevant considerations, retention and fettering of discretion, and the duty to supply adequate reasons. What is required of decision-makers varies with context, and challenges to administrative decisions

[1] This is unsurprising, since usually both the claimant and the Government will prefer a s 3 solution to a s 4 declaration: claimants seek to avoid s 4 because it does not affect their legal entitlements and does not provide an effective remedy in their case, and the Government seeks to avoid s 4 because it can lead to a confrontation with Parliament.

[2] See generally, ch 2, pp 28–29. On the principle of legality see ch 4, pp 105–108.

[3] See *A and others v Secretary of State for the Home Department (No 1)* [2005] 2 AC 68 [42] (Lord Bingham) citing J Jowell. On standards of legality and standards of review, see ch 4, pp 99–108. This distinction is of less utility in the present context, since process standards generally operate both as procedural standards of legality and are part of the applicable standard of review.

have succeeded on other process grounds in addition to these, such as that public officials have failed to make sufficient inquiries or have failed to give a matter conscientious consideration.[4] This chapter considers the availability of such review under the Human Rights Act and whether the enactment of the Human Rights Act should have implications for the application of the common law grounds of procedural judicial review.

Process Review: The Forbidden Method

The teeth of public law are in process review. Most successful judicial review claims succeed on the basis that the decision-maker has done something in the wrong way, rather than that the decision-maker has made a decision that is, all things considered, unjustifiable. Process review has two principal advantages over substantive review. First, since the court does not have to address the substance or outcome of the decision, it is less controversial and easier to establish a process failing than a substantive one. Judges prefer to quash decisions on this basis, not only because it avoids the most difficult questions but also because it is more delicate and less confrontational than finding that a public official has acted irrationally, has breached a fundamental right or has gone against the terms of the empowering statute. Secondly, process review has the advantage that the decision can be remade on a proper basis by the person or body responsible for making it, often with a more or less firm judicial steer as to how the court would look on any renewed application for judicial review, but without any options as to which decision the public official is entitled to reach having been taken off the table. It therefore promotes good decision-making without cutting down the scope of discretion.

By way of example, *R v Camden LBC, ex p H* concerned the decision of a committee of school governors to reverse a decision of a head teacher to exclude two pupils for bringing to school a pellet gun and with it injuring a third pupil, the plaintiff.[5] The Court of Appeal held that the school governors had failed to investigate inculpatory accounts of the incident and had failed to consider what the effect of reversing the head teacher's decision would have on the plaintiff and on school discipline more generally. In this way the Court never had to turn its mind to the question of whether redeeming the pair of ruffians was itself reasonable, and the Court directed that the matter should be re-determined by a differently constituted committee of governors in the light of their judgment identifying the matters of importance.

[4] See M Fordham, *Judicial Review Handbook*, 5th edn (Oxford, Hart Publishing, 2008) ch 51, 483–93 (duty of sufficient inquiry). Oddly, given that it is the engine of judicial review, process review found no place in Lord Diplock's trichotomy of grounds of judicial review in *GCHQ* [1985] AC 374, 410–11.

[5] *R v Camden LBC, ex p H* [1996] ELR 360.

It is therefore only natural that, looked at from the perspective of administrative law, the Human Rights Act would be understood as imposing similar process requirements when a decision interferes with a Convention right. But more than this, there is a natural and understandable—indeed justifiable—tendency for judges to prefer to impose process requirements and fix upon process failings where possible. This is a characteristic feature of public law adjudication. It is also an example of the exercise of the passive virtues, because it avoids the courts having to determine the most controversial issues.[6] There is nothing in the Human Rights Act itself which precludes process review. Section 6(1) states that it is unlawful for a public authority to act incompatibly with a Convention right, but it leaves open what constitutes a breach of such a right and whether Convention rights may impose *procedural obligations.*

Before moving on, it is worth being absolutely clear about the nature of procedural obligations with which we are here concerned. Both the common law and Convention rights impose obligations of fairness on public authorities, such as rights to be heard, rights to make an effective challenge to a decision and rights to disclosure of information. We are not here concerned with these obligations. Such obligations are procedural obligations, in the sense that they impose obligations on public officials to ensure that individuals affected by their decisions are able to participate in (or at least know about) the decision being taken. Such obligations are imposed by the requirements of fairness both at common law and under Article 6 of the European Convention, and the ECtHR has also recognised that they can arise under certain substantive articles of the Convention.[7] There is no doubt that such procedural obligations arise under the Human Rights Act, where the Convention rights demand. But we are here concerned with whether the Convention rights and the Human Rights Act impose other types of procedural obligation relating to the way decisions affecting Convention rights are taken, even where all affected individuals have been treated fairly.

Just as the Convention rights have been interpreted so as to impose positive operational obligations on contracting states to take steps to protect Convention rights,[8] so Convention rights could be interpreted so as to impose positive duties on States in respect of their decision-making when this affects Convention rights. Article 8, at least, is termed in a way that would be conducive to the recognition of such duties, since it is a right to 'respect' for private and family life, a right that seems to demand that public authorities have due regard to the impact of their actions on the family relations and private lives of affected individuals.

However the House of Lords has ruled out such an approach. In three cases—*R (SB) v Governors of Denbigh High School, Belfast City Council v Miss Behavin' Ltd*

[6] On which see ch 3, pp 72–76.

[7] For example, deportation decisions are 'public law' decisions and so do not give rise to any rights under Art 6, but Art 8 has been recognised as imposing certain obligations to provide a means of challenge to such a decision and a right to be heard: eg *Lupsa v Romania* (2008) 46 EHRR 36; *CG v Bulgaria* (2008) 47 EHRR 51.

[8] For instance in the Art 2 context, see *Osman v United Kingdom* (2000) 29 EHRR 245.

and *Nasseri v Secretary of State for the Home Department*[9]—the House of Lords has overturned decisions of lower courts that have upheld Human Rights Act complaints on the basis that the public officials have made some error in reaching their decisions, irrespective of whether or not the outcome of the decision could have been found to be compatible with a Convention right. In *Miss Behavin' Ltd* Baroness Hale made explicit that a departure from the traditional approach to administrative law was envisaged:

> The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.[10]

Lord Hoffmann said that Article 9 confers no right to 'have a decision made in any particular way'; what matters is the 'result' of its decision-making process.[11]

Miss Behavin' Ltd and *Denbigh High School* involved qualified rights, which require the court to undertake a balancing of respective interests.[12] The cases held that the Human Rights Act does not require public authorities to carry out such a balancing exercise or to weigh the respective interests in any particular way, or have regard to any particular considerations, as long as the outcome of the decision is itself consistent with a fair balance between respective interests. But the logic of the reasoning of the House of Lords in both cases was clearly broader and applied even where the Convention does not require a balance to be struck between competing interests but also where it imposes absolute obligations on state agencies. The logic of the cases was that public authorities cannot be found to have acted incompatibly with absolute Convention rights under section 6 of the Human Rights Act just because they have failed to recognise that their decisions might affect such rights or because they have failed to consider what such rights require.[13] This was confirmed by *Nasseri*, in which the House of Lords rejected a challenge under Article 3 of the European Convention to a decision to deport an asylum-seeker to Greece. The Judicial Committee held that if the deportation gave rise to a real risk of the individual suffering inhuman or degrading treatment or torture, then it would violate Article 3, but it did not matter that the immigration

[9] *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 *R (Nasseri) v Secretary of State for the Home Department* [2010] 1 ACI 23. The approach has been applied by the House of Lords in other cases: *DA v Her Majesty's Advocate (the High Court of Justiciary Scotland)* [2007] UKPC D1 (PC) [82] (Lord Rodger); and *Down Liburn and Social Services Trust v H (AP)* [2006] UKHL 36 [64] (Lord Carswell).

[10] *Miss Behavin' Ltd* (n 9) [31].

[11] ibid [68].

[12] In *Miss Behavin' Ltd* ibid, the qualified right was Art 10 (right to freedom of expression); in *Denbigh High School* (n 9) the right was Art 9 (right to manifest religion).

[13] As we have seen, both qualified and unqualified rights establish standards of legality that public authorities must comply with: the injunction that 'no one shall be deprived of his life intentionally' no more demarcates the scope of Art 2 than the stipulation that, 'no one's freedom of expression shall be denied unnecessarily' demarcates the scope of Art 10. See ch 4, pp 108–109.

authorities had not enquired—and indeed were precluded from enquiring—into whether or not a real risk arose on the particular facts of the case, because Greece was included on a statutory list of safe countries. Lord Hoffmann, giving the leading speech, expressed some sympathy with the trial judge who had found to the contrary in a belief that the Human Rights Act was administrative law-*plus*:

> It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. . . . But that is not the correct approach when a challenge is based on an alleged infringement of a Convention right.[14]

The effect of the House of Lords' judgments in these three cases is that even where a decision-maker decides a case by an irrational process of reasoning, or even without any consideration at all, it will be compatible with Convention rights and it will be consistent with the decision-maker's responsibilities under the Human Rights Act, as long as the *outcome* is compatible with Convention rights. The three decisions of the House of Lords are particularly powerful not only because the reasoning led to the overturning of lower court judgments in each case but also because this approach did not provoke a single dissenting voice in any of these cases. The approach without doubt has become Human Rights Act orthodoxy. But it has not yet caught on, and there are so many problems with it that it must be doubted whether the breadth of the principle established by the House of Lords is sustainable in the long term.

Take for example the comments made obiter by Lord Walker in *Doherty*, a case decided before *Nasseri* but after the other two judgments had been delivered. His Lordship said that, 'Public authorities are bound to take account of human rights. As our domestic human rights jurisprudence develops and becomes bedded down, this should be seen as a normal part of their functions, not an exotic introduction.' His Lordship went to on state that the purpose of the Human Rights Act is to domesticate Convention rights and that must be 'woven into the fabric of public law'.[15] On the face of it, these comments are starkly at odds with the decisions of the House of Lords in *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri*, given that the House of Lords in those cases disclaimed any requirement for public authorities to have regard to Convention rights and distinguished Human Rights Act review from the approach taken by the common law. And there are numerous examples where the courts, including the House of Lords, seem to have assumed that the Human Rights Act does in fact impose procedural requirements on decision-makers that absent the Human Rights Act would not have arisen. In *R (Laporte) v Chief Constable of Gloucestershire Constabulary*[16] a challenge was made to a decision of the Gloucestershire Constabulary to prevent a coach con-

[14] *Nasseri* (n 9) [12].

[15] *Doherty v Birmingham City Council* [2009] 1 AC 367 [109]. Citing A Lester and D Pannick, 'The Impact of the Human Rights Act on Private Law: The Knights Move' (2000) 116 *LQR* 380 at 383.

[16] *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105.

taining anti-war protesters from attending a demonstration at RAF Fairford in Gloucestershire because some of the passengers were known trouble-makers. In finding that escorting the coach back to London was disproportionate, Lord Rodger reasoned that, 'under the Human Rights Act 1998 the police must have regard to the rights to freedom of expression and freedom of assembly which protesters, such as the claimant, are entitled to assert.'[17] And Lord Carswell held that the police should have 'given consideration' to removing identified trouble-makers and dangerous items from the coach and the possibility of allowing the rest of the protesters to proceed to the site of the demonstration and to any necessary further action there, which would have been a less intrusive course of action.[18] *Laporte* is a decision of the House of Lords itself which was premised on reasoning that must be regarded as wrong in law.

There are other examples to be found in speeches given in House of Lords in other cases, such as Lord Hope's statement in *A (No 1)* that Article 15 requires contracting states 'to consider with the greatest care whether an alternative course of action can be taken to deal with the exigencies of the situation . . .'; or Lord Nicholls' statement in *Re S (Care Plan)* that, 'Although Article 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by Article 8'; or Lord Bingham's statement in *R v Shayler* that when senior officers of the Intelligence Services decide whether to authorise disclosure of information they must consider the documentation 'with care' and 'weigh the merits' whilst 'bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate'.[19] If one looks to decisions of lower courts, the examples could be multiplied many times over.[20]

[17] *Laporte* ibid [85].

[18] *Laporte* ibid [105].

[19] *A and others v Secretary of State for the Home Department (No 1)* 56, [2005] 2 AC 68 [121]; *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 [99]; *R v Shayler* [2003] 1 AC 247 [30]. In *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 [17] Lord Bingham stated that the reviewing court must 'ask itself essentially the questions which would have to be answered by the adjudicator', and then listed specific questions relating to Art 8 to be taken into account (also Baroness Hale at [60]). In *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 [60] Lord Carswell stated that whether police had had regard to rights of the child is 'a matter which may be relevant in determining whether the actions of the police satisfied the obligation placed on them by Article 3'.

[20] See eg *R (Hafner) v City of Westminster Magistrates' Court* [2009] 1 WLR 1005 [25] (a magistrates' court nominated under s 15 of the Crime (International Co-operation) Act 2003 must have regard to Art 8 rights) (Phillips CJ); *Pascoe v First Secretary of State* [2007] 1 WLR 885 [66], [84]–[85] (in making a compulsory purchase order inspector and Secretary of State must have carried out necessary balancing exercise); *R (X) v Chief Constable of the West Midland Police* [2005] 1 All ER 610 [47] (courts will not interfere with chief constable's decision taken properly on the basis of the evidence then available); *Shala v SSHD* [2003] EWCA Civ 233 (decision fell outside margin of discretion where Secretary of State had not reflected on consequences); *R (D) v SSHD* [2003] 1 FLR 979 [20]–[23]; *R (Goldsmith) v Wandsworth LBC* [2003] EWHC 1720 (Admin); AB *(Jamaica) v SSHD* [2008] 1 WLR 1893. For an example from the employment law context (age discrimination), see *Bloxham v Freshfields Bruckaus Deringer* [2007] Pens LR 375.

The implications of the anti-process rule now established are potentially far reaching and as yet not fully appreciated. For instance, cases that have held that Convention rights preclude the application of blanket policies and require, in some contexts at least, public officials to give individual consideration to the facts and circumstances of individual cases, seemed to be uncontroversial but now appear to be wrong.[21] Let us consider just one final example here, the decision of the Court of Appeal in *Rafferty and Jones v Secretary of State for Communities and Local Government*. The decision is of interest not only because it post-dates *Nasseri* but also because it shows just how ingrained into public law adjudication process review under the Human Rights Act has become. The question for the Court of Appeal was whether a planning inspector had acted contrary to Article 8 in refusing an application for a change of use of land to permit it to be used as a Gypsy caravan site. The Court of Appeal, consistently with the House of Lords cases, rejected the suggestion that the planning inspector's decision was unlawful because he had (wrongly) considered that Article 8 was not engaged (because the Gypsies were not yet on-site), but then, inconsistently with those cases, held that the process by which the planning inspector had reached his conclusion had complied with the requirements of Article 8:

> There is no doubt that the inspector had in mind and took into account the particular needs of the appellants, albeit he did not do so under the Article 8 label. . . . It seems to me therefore that even if the inspector had concluded Article 8(1) was applicable he would inevitably have reached the same conclusion on the appeal. In this case he weighed all the factors as planning considerations that would have to be weighed under Article 8(1).[22]

As is clear from the last few words of this quote, the entire premise of the Court of Appeal's reasoning, and indeed of the arguments in the case, was mistaken.

These cases are reflective of underlying tensions in the terms and purpose of the Human Rights Act, which were introduced in chapter 2. If the Human Rights Act is understood as protecting domestic law rights, it is a small step to recognising that these impose procedural as well as substantive obligations on domestic authorities. This is precisely the reasoning of Lord Walker in *Doherty* suggesting that human rights principles must be taken into account by public authorities and woven into the fabric of domestic public law. Whereas the approach that was taken by the House of Lords in *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri* was closely linked to the influential idea that the Human Rights Act is intended simply to provide a remedy in domestic courts for violations of the UK's international

[21] See in particular *R (P) v Secretary of State for the Home Department* [2001] 1 WLR 2002 (a prison policy requiring children to be removed from female prisoners at six months old was contrary to Art 8 insofar as it excluded consideration of individual circumstances) and *R v Shayler* [2003] 1 AC 247 (above: Lord Bingham held that a rubber-stamping approach to disclosure requests would not be consistent with Art 10); also see *R (Baiai) v Secretary of State for the Home Department* [2008] QB 143 (CA) (blanket application of criteria for determining when individuals subject to immigration control can marry is contrary to Art 9), affirmed on slightly different grounds [2009] 1 AC 287 (HL).

[22] *Rafferty and Jones v Secretary of State for Communities and Local Government* [2009] EWCA Civ 809 [38]–[39] (Scott-Baker LJ giving judgment of the court).

obligations. Relying on this idea, their Lordships reasoned that since in their view the ECtHR does not find violations of the Convention on the basis of a defective decision-making process, but only where the substance of a decision is incompatible with Convention rights, recognising procedural obligations (beyond those relating to fairness) would go beyond Parliament's intention in enacting the Human Rights Act and would provide additional rights of action not available to a litigant in Strasbourg.[23]

It will be suggested that the approach of the House of Lords has gone too far. The Human Rights Act is capable of being understood as imposing process requirements as well as requirements of outcome; in precluding this, the House of Lords has greatly reduced the impact that the Human Rights Act will have on administrative decision-making. The decisions also greatly reduce the potency of the Human Rights Act as a means of protecting human rights. These points will be developed below.

Despite this, it is not contended that the decisions in *Denbigh High School*, *Miss Behavin' Ltd* or *Nasseri* were actually wrong. It is simply that the reasoning on which the Committee based its conclusions was too broad and went too far. If it is now impossible to reverse the approach taken by the House of Lords, then it is submitted that the common law must be pressed into service. The new statutory ground of illegality under the Human Rights Act should be recognised as having implications for the common law grounds of process review. The common law and the Human Rights Act must be viewed symbiotically. Common law doctrines can be applied sensitively to the statutory context to mitigate the worst effects of the House of Lords' decisions. This will not be to reverse the effects of those decisions by the back door. The procedural rights would be located in the common law and not developed out of Convention rights. Moreover the common law is applied in a context-specific way and would not go as far as the lower courts' judgments that were overruled in *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri*.

[23] The first reason for forbidding process review under the Human Rights Act given by Lord Bingham in *Denbigh High School* (n 9) was that, 'the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg. . . . But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated' ([29]). See also at [68] (Lord Hoffmann). It is notable that the approach of the House of Lords, by adhering to a standard of legality, as opposed to a standard of review, approach can combine a remedial or pragmatic view of the Human Rights Act. On this, see especially Lord Bingham in *Denbigh High School* at [30]. This approach exhibits a further dimension of the tensions embedded in the Act as discussed in ch 2, pp 25–49.

Throwing the Baby out with the Bathwater

In both *Denbigh High School* and *Miss Behavin' Ltd* the House of Lords was faced with decisions made by lower courts that imposed unjustifiably extensive procedural obligations on public bodies. In *Denbigh High School* the Court of Appeal, reversing the first instance judge, held that a decision by the defendant school's governing body to refuse to allow a female Muslim student to attend school wearing a jilbab was incompatible with Convention rights because the school had not properly addressed itself to the interference with the claimant's right to manifest religious belief protected by Article 9 of the Convention. The school had, however, undertaken extensive consultations with parents, students and local mosques in drawing up its uniform policy, had gone to some lengths to explain its dress code to prospective pupils and parents, and had consulted religious authorities again after the claimant had refused to comply with the policy.[24] Brooke LJ, giving the leading judgment, held that the school authorities should have structured their decision-making process by reference to six questions directed at considering whether the interference was proportionate.[25] The House of Lords held that this was not necessary and that the action of the governors was proportionate because they were entitled to implement a uniform policy that permitted wearing other forms of Muslim dress but did not permit the wearing of the jilbab (which is full body length).

The rejection of Brooke LJ's structured approach was unsurprising and surely right. It is unrealistic to require public officials, such as teachers, nurses, policemen and other professionals to structure their decisions in such a manner when performing their day-to-day functions. As Lord Hoffmann put it, head teachers and school governors 'cannot be expected to make such decisions with textbooks on human rights law at their elbows'.[26] However, the reasoning of their Lordships on which this finding was premised was much wider, and, as we have seen, was to the effect that no shortcomings in the process by which a decision is reached are capable of rendering the decision disproportionate, because proportionality relates only to the outcome of a decision and its effect on the individual or individuals

[24] *R (Begum (Shabana)) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199 [7]–[8], [13]–[15].

[25] *Denbigh High School* ibid [75]: 'The decision-making structure should therefore go along the following lines. (1) Has the claimant established that she has a relevant Convention right which qualifies for protection under article 9(1)? (2) Subject to any justification that is established under article 9(2), has that Convention right been violated? (3) Was the interference with her Convention right prescribed by law in the Convention sense of that expression? (4) Did the interference have a legitimate aim? (5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim? (6) Was the interference justified under article 9(2)?'

[26] *Miss Behavin' Limited* (n 9) [68]. Lord Bingham stated in the *Denbigh High School* case (n 9) that the 'Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them' ([31]).

concerned. The House of Lords did not need to go this far. Their Lordships could have said that although Article 9 does not require a legalistic, highly structured decision-making process, it may nonetheless impose procedural obligations on public authorities, in appropriate cases, such as requiring that public authorities weigh the competing interests and consider adopting less injurious measures.

The House of Lords confirmed the breadth of its reasoning in the *Miss Behavin' Ltd* case, in which the claimant, Miss Behavin' Ltd, had been refused a licence to run a sex shop in premises in Gresham Street in Belfast by the council's Health and Environment Services Committee. The Committee had decided that the particular locality was not suitable for any sex shops and after considering the merits of Miss Behavin's application decided that no exception to this policy was warranted in its case. In so deciding the Committee did not expressly address Miss Behavin' Ltd's right to freedom of expression under Article 10 of the Convention or its right to enjoyment of its possessions under Article 1 of the First Protocol. The Court of Appeal in Northern Ireland held that the Committee's failure to address these rights rendered the decision contrary to the Human Rights Act.[27] The House of Lords found that it was not necessary for the Convention rights of Miss Behavin' Ltd to have been addressed by the Committee in reaching its decision. Lord Hoffmann stated that the decision of the Court of Appeal was 'contrary to the reasoning' in the *Denbigh High School* case, as well as being 'quite impractical'.[28] Baroness Hale made explicit that a departure from the traditional approach to judicial review was envisaged, as we have previously seen.[29]

Again, the House of Lords was surely right to have held that the Committee did not need to have explicit regard to Article 10 or Article 1 of the First Protocol, in the circumstances of the case. This was not a case where there was a serious infringement with human rights, Article 10 was engaged at only a 'low level',[30] and Article 1 of the First Protocol probably not at all (the point was never decided). The decision, like that of the school governors in *Denbigh High School*, was firmly at the administrative rather than judicial end of the spectrum and, most importantly of all, it was clear

[27] *In the matter of an application by Misbehavin Limited for judicial review* [2005] NICA 35 [58], [63] and [64].

[28] *Miss Behavin'* (n 9) [13]. Lord Rodger stated: '. . . if the refusal did not interfere disproportionately with the applicant's right to freedom of expression, then it was lawful for purposes of section 6(1)—whether or not the Council had deliberated on that right before refusing. . . . This is just to apply what was said by Lord Bingham of Cornhill and Lord Hoffmann in *R (SB) v Governors of Denbigh High School*' ([23]–[24]). See also Baroness Hale at [71], Lord Mance at [44]–[45] and Lord Neuberger at [90], indicating that the sole issue is whether the court considers there was violation of Art 10 and it is only where the Convention itself confers procedural rights that the process of decision-making can constitute a breach of a Convention right.

[29] *Miss Behavin'* (n 9) [31]. In the *Denbigh High School Ltd* case (n 9), Lord Hoffmann likewise stated: 'In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)?' ([68]).

[30] *Miss Behavin'* (n 9) [16] (Lord Hoffmann), [94]–[95] (Lord Neuberger) also [39] (Baroness Hale).

from the way the Committee had in fact approached its decision that it had appreciated what was at stake for the applicant, taken this into account and advanced cogent reasons for refusing the licence.[31] But by resting its decision on the broad, anti-process reasoning that also underpinned the *Denbigh High School* case, the House of Lords went much further and ruled out a role for the Human Rights Act irrespective of how badly and inconsiderately the decision might have been made.

This brings us to *Nasseri*, the third case in the trilogy. Two issues that remained outstanding, at least theoretically, after *Denbigh High School* and *Miss Behavin' Ltd*, were, first, whether the application of the reasoning applied to cases where a decision interferes with an absolute right and, secondly, whether it applies where the decision is made by a judicial body. For instance, Gillen J in the High Court of Northern Ireland had distinguished *Denbigh High School* in holding that the Billy Wright Inquiry Panel had erred by not addressing Article 2 correctly when determining whether to grant witness anonymity, in part on the basis that the panel had not been addressing proportionality but an unqualified right, and in part because the decision made by the Panel was a judicial one.[32] *Nasseri* confirmed that the reasoning in *Denbigh High School* applies to all challenges to decisions where it is said that a Convention right has been infringed.

The appellant in *Nasseri* was an Afghan national who was claiming asylum in the UK but who had first claimed asylum in Greece. The relevant law provides that asylum-seekers who first claim asylum in another EU state must be returned to that state to have their application processed there. The appellant objected that there was a real risk that if returned to Greece he would be sent back to Afghanistan where he would suffer mistreatment, contrary to Article 3 of the Convention. Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 lists certain countries in relation to which return is deemed not to violate Article 3 of the Convention. The Secretary of State accepted that this would breach Article 3 in cases where return to such a country would in fact give rise to a real risk of a person suffering ill-treatment contrary to Article 3, but the judge held that a failure to conduct an investigation of the risks of loss of life or torture in every case *itself* constituted a breach of Article 3. The Court of Appeal rejected this contention. Since the judge had not actually considered the risk of being returned to Afghanistan, the Court of Appeal then examined the factual material on this question for itself and concluded that whilst Greece had a 'shaky' history of compliance with its non-refoulement obligations, there were no removals

[31] The Committee stated that it had given consideration to the character of the locality, including the type of retail premises located there, the proximity of public buildings such as the Belfast Public Library, the proximity of ships that would attract children and families, and the proximity of places of worship. Indeed, it appears that the Committee also appreciated that freedom of speech was engaged: 'solicitor representing the respondent told the Committee that the right to free speech under the Convention was engaged by the Application, and the minutes of the meeting record that what had been said on behalf of the respondent had been taken into account. While that cannot be said to suggest any sort of careful consideration of Article 10, it does indicate that some regard was had to it.' ([96] (Lord Neuberger)).

[32] *A & Ors, Re Application for Judicial Review* [2007] NIQB 30 [36].

taking place to Afghanistan.[33] The House of Lords upheld the Court of Appeal on the basis of the *Denbigh High School* and *Miss Behavin' Ltd* line of authority. It held that there had been no need for the immigration authorities themselves to consider whether there was a risk of the appellant suffering mistreatment on return; Lord Hoffmann, giving the leading speech, made the remarks already cited.

But yet again, the House of Lords went further than it needed to have done, and failed to consider the implications of such a broad rule for other cases. What was at issue in *Nasseri* was Greece's history of compliance (or non-compliance) with its international obligations. Mr Nasseri did not allege that there were any factors specific to him that gave rise to a real risk in his case. It must be right that the government does not have to consider general country conditions in every case, just as the Immigration Appeals Tribunal itself relies on previous country conditions cases in later cases so that the exercise of assessing country conditions does not have to be undertaken in every case. The government is entitled to have a deeming list, whether that is established in primary or delegated legislation, or whether it is in some other published form. But the question is quite different where an individual raises factors specific to themselves that give rise to a real risk on removal. Here the common law certainly requires that such factors are at least considered by the immigration authorities (and the House of Lords has previously suggested that this is also required by Article 8[34]). The ratio of the House of Lords' ruling is that such specific factors do not need to be considered in order for immigration officials or the IAT to comply with the Human Rights Act. Moreover they do not have to consider Convention law on, for example, the circumstances in which deportation will constitute an unjustified infringement with a family's Article 8 right.

The prudent course would have been to avoid articulating such a general rule which forbids process requirements being developed out of Convention rights in domestic law in any context. It is unfortunate that the first two cases directly on this point that came before the House of Lord concerned decisions made by authorities that, in the respective contexts, reached and reasoned the decisions in a perfectly adequate way, giving due weight to the effect on the claimants, but had been condemned on appeal in judgments that imposed artificial and highly juridified procedural requirements on the public authorities in question.[35] This led their Lordships

[33] *R Nasseri v Secretary of State for the Home Department* [2008] 3 WLR 1386 [41].

[34] *Razgar* (n 19) in which Lord Bingham ([17]) and Baroness Hale ([60]) suggested that an immigration adjudicator ought to ask themselves a series of questions directed at determining whether deportation would breach Art 8. Baroness Hale stated: 'the adjudicator is an integral part of the decision-making process and thus would have to consider the issue of proportionality on the evidence before him.'

[35] David Dyzenhaus considers that, whilst the Court of Appeal was wrong to impose such a formalistic set of requirements, the Court of Appeal was right to regard the process of decision-making as defective because the school ought to have at least started from the premise that the claimant had a right recognised by English law: 'Militant Democracy in the House of Lords?' (unpublished paper, on file with author, cited here with permission). But even this is probably too formalistic. The school and its governors are not lawyers; the House of Lords itself found that the decision did *not* amount to an interference with Art 9; and the school was acutely aware of the impact of the policy on religious freedom in the more general sense (which accounted for the extensive consultation including with religious authorities).

into error. There are contexts, such as immigration decisions, where a structured form of decision-making process—with explicit regard to applicable Convention rights—should be required, but it is surely right that it should not be required of school governors or licensing committees. Unfortunately, in reversing the appellate courts in these cases, the House of Lords threw the baby out with the bathwater, and then in *Nasseri* threw the tub out as well.

Muzzling the Human Rights Act

The approach taken by the House of Lords in rejecting the notion that the Human Rights Act imposes process obligations on public authorities has greatly reduced the potency of the Human Rights Act. The effect of the decisions is not only that public authorities do not need to turn up the most recent human rights law learning before making their decisions, but they are not required by the Act to consider the impact of their decisions on individuals concerned at all, they are not required to make inquiries, they are not required to weigh competing interests and they are not required to consider whether other less intrusive alternatives exist. There are a number of specific reasons for questioning the desirability of this approach. We will consider these in turn.

Good Decision-Making and a Culture of Human Rights

We have seen that one of the purposes of the Human Rights Act was to create a 'culture of human rights'.[36] The Joint Committee on Human Rights has examined the idea of a culture of human rights and has suggested that it has two dimensions: a 'moral or personal' dimension and an 'institutional dimension'.[37] The institutional dimension requires that 'human rights should shape the goals, structures, and practices of our public bodies. In their decision-making and their service delivery, schools, hospitals, workplaces and other organs and agencies of the state should ensure full respect for the rights of those involved.' As the Constitution Unit at University College London has put it, the culture of human rights requires that human rights become 'part of the process (rules of the game) of government

[36] See ch 2, pp 23–24

[37] JCHR, 'The Case for a Human Rights Commission', Sixth Report 2002–03 (HL 67-I, HC 489-I), paras 1–9. 'The moral or personal dimension refers to the feelings of individuals in society that they have an entitlement to the affirmation of their fundamental rights together with a sense of social responsibility and social obligation towards others' (para 7). See further the submission paper to the JCHR on behalf of the Constitution Unit, University College London, 2 March 2001, describing the steps made by public authorities and the Government's Human Rights Task Force up to that date, available at: www.ucl.ac.uk/constitution-unit/files/HR.pdf.

and political life . . .'.[38] The courts have an important role in developing the institutional dimension of human rights by insisting that these emerging principles of public decision-making are observed as a matter of law.[39] That is not to say that the courts should enforce best practice or ideal forms of decision-making. The courts can however set minimum requirements for decision-making in human rights cases that require basic procedural steps to be taken and, where reasons for a decision are appropriate, that ensure that the decision-maker has given consideration to the impact of the decision on the affected person. The approach of the House of Lords effectively precludes such an approach.

This point is very well illustrated if we dig a little deeper into the history of the *Miss Behavin' Ltd* case. A point which does not appear to have been raised before the House of Lords was that in the years following the introduction of the Human Rights Act the Northern Ireland courts had developed a jurisprudence under the Act in which they required public authorities to give 'explicit recognition' to individual rights affected by their decisions, and that unless recognition of such impact would have made no difference to the outcome, the decision would be held unlawful.[40] This approach was a direct response to systemic failures by many public authorities in Northern Ireland to appreciate the need to respect human rights and to adjust their practices to conform to the Human Rights Act. The 'explicit recognition' doctrine was developed by the Northern Irish courts in an attempt to inculcate a culture of human rights in public authorities in Northern Ireland. Community Health and Social Services Trusts came in for particular criticism for failing to review their decision-making procedures in order to comply with Convention rights.[41] The approach taken by the Northern Ireland courts has now

[38] Submissions to JCHR, 1 March 2001: www.ucl.ac.uk/constitution-unit/files/HR.pdf, para 2.2. This is reflected in the training given to public officials and numerous booklets and guidance published by the Government to assist public officials in public authorities in identifying when a decision will affect Convention rights and how to approach such a decision. See eg two publications by the Department for Constitutional Affairs: *Making Sense of Human Rights, A short introduction*, 30 October 2006 and *Human Rights: Human Lives: A handbook for public authorities*, 10 October 2006.

[39] 'The differences which the Act has made in the approach to the issues in asylum appeals such as those before the House, in the material put before the courts and in the content and reasoning of decisions are profound, as may be seen from the opinions given by your Lordships': *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [54] (Lord Bingham).

[40] This was essentially the approach taken by the Court of Appeal in *Rafferty* (n 22). See *AR v Homefirst Community Trust* [2005] NICA 8; *Re Jennifer Connor's application* [2004] NICA 45; *In the matter of an Application by the Landlords Association for Northern Ireland* [2005] NIQB 22; *In the Matter of J (Care Order: Adoption Agencies)* [2002] NIFam 26; *W and M's application* [2005] NI Fam 2. *AR v Homefirst Community Trust* was considered by the House of Lords in *Down Lisburn Health and Social Services Trust v H (AP)* n 9. Lord Nicholls stated that the case should not be understood to mean that where a trust has considered a Convention right, 'that failure *ipso facto* invalidated its decision' (at [64]). His Lordship said that where the court is properly satisfied that the acts and decisions of the body concerned have been proportionate, 'then it may correctly conclude that no breach of article 8 has occurred, even if that body did not realise that article 8 was engaged and explicitly address the question of compliance' (ibid). In stating that the court 'may' conclude a decision was proportionate, his Lordship was not as emphatic as the Committee in *Denbigh High School* (n 9) and *Miss Behavin' Ltd* (n 9).

[41] See the staunch criticism expressed in *W and M* (n 40).

had to be abandoned.[42] Although the problems in Northern Ireland were acute, they are illustrative of the importance of procedural obligations in creating a culture of human rights. Thus, a study on behalf of the Scottish Executive in 2004 advocated the development of procedural obligations in order to achieve the 'internalisation' of human rights norms and 'improve the standards of the initial decision-making' across a wide spectrum of public authority functions in Scotland.[43] But such an approach has now been ruled out.

It might be argued that the House of Lords has retained an incentive for public officials to make decisions well. The Committee in *Denbigh High School* and *Miss Behavin' Ltd* emphasised that the decision-maker will be given credit if they do consider the impact on Convention rights, in the sense that the Court will give weight to a decision that has been fully informed and taken in a considered way.[44] However, there are several reasons why this does not provide a strong incentive for public officials to adopt good processes of decision-making. Most significantly, it does not alter the fact that there is no *requirement* for decision-makers to make decisions well. They can take their chances. A sloppy, ill-reasoned or hasty decision might be perfectly consistent with the public authorities' obligations under the Human Rights Act if it *happens* to be the case that the outcome of the decision does not infringe a Convention right.

Furthermore, the mere fact that a decision-maker has engaged in an impeccable decision-making process logically does not itself entitle the decision to any particular weight or respect. The court should only give weight to an assessment made by a public official where that official has superior knowledge or expertise in relation to one or more consideration relevant to the decision. It may be, of course, the case that in carrying out an impeccable decision-making process the public official acquires knowledge not shared by the court. This can be seen from the *Denbigh High School* case, in which the governors of the school had consulted widely on the impact of their school uniform policy on its Muslim students and had thus acquired considerable knowledge and local understanding not shared by

[42] *Denbigh High School* (n 9) was followed by the Northern Ireland High Court in *Northern Ireland Commissioner for Children and Young People v Secretary of State* [2007] NIQB 52, [38]–[40] and *Re Application for Judicial Review by William Mullen* [2006] NIQB 30.

[43] P Greenhill, T Mullen, J Murdoch, S Craig and A Miller, *The Use of Human Rights Legislation in the Scottish Courts* (Edinburgh, Scottish Executive Social Research, 2004) [6.26]. In the introduction to a book on the Equality and Human Rights Commission, the author notes: 'There is little or no understanding of the Human Rights Act 1998 as a means of balancing the rights of one individual against another . . . Applying human rights may well assist public service providers in making difficult decisions where there are competing interests and needs. Greater engagement with the Act could lead to more confident decision-making.': S Makkan, *The Equality Act 2006: A Guide to the Constitution and Functions of the Commission for Equality and Human Rights* (Callow Publishing, London, 2008) 19.

[44] In *Denbigh High School* (n 9), Lord Bingham said that if 'it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt the challenger's task will be harder' ([31]). In *Miss Behavin'* (n 9), Lord Mance said, 'where a council has properly considered the issue in relation to a particular application, the court is inherently less likely to conclude that the decision ultimately reached infringes the applicant's rights.' ([91]).

the court.[45] But in such a case it is the acquisition of knowledge to which respect is paid, not the process of decision-making as such.[46]

It follows that decision-makers are not given credit simply for engaging in a good decision-making process: it will depend on whether they have some superior expertise or experience that the court does not share. Thus, an immigration official's assessment of the impact of deportation on a family might be A+ standard, but the Immigration Appeal Tribunal ought not to afford it any weight because it will be better appraised of the facts relating to the impact of the decision on the family than the immigration official was.[47] As Lord Hoffmann stated in the *Denbigh High School* case, the 'most that can be said' is that the way in which a public authority approaches a problem 'may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law', but there is no reason why the fact that a public authority has engaged in an impeccable decision-making process *as such* should be given any weight.[48] In other words, the decisions given by a public authority are themselves of no more value than counsel's skeleton argument.

There is a further reason why giving credit to well-reasoned decisions is, on close inspection, far from a strong incentive for public officials to engage in a good process of reasoning. The more detailed reasons provided by public officials, and the more explicitly that they invoke Convention rights or principles such as proportionality, the greater the likelihood that they will commit an actionable error of law. Faced with the option of potentially being given some credit for engaging in a comprehensively reasoned decision or running the risk of tripping up on some recent Strasbourg authority, public authorities would be well advised in most cases (absent a team of lawyers to review their decision in draft) to say less rather than more and to steer away from referring to the Convention requirements.

Disadvantages to Aggrieved Individuals and Difficulties for Human Rights Adjudication

As we have seen, the effect of the decisions of the House of Lords is that even where a decision-maker has paid no regard at all to the impact of a decision on an affected individual, the decision will survive a Human Rights Act challenge if sufficient evidence and arguments can be marshalled to justify it. An important implication of this is that public authorities are not tied to the decisions that they have made, the way the decision has been arrived at, or the evidence that was considered at the time, when defending Human Rights Act claims. They can legitimately alter the justification for the decision, introduce further evidence and invent new arguments.

[45] It was also the case that the head teacher and governors had existing expertise not shared by the court: see ch 5, p 150.

[46] These points are developed in ch 5, pp 150–53 in the discussion of weight.

[47] See the discussion of *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 [15], discussed in ch 5, pp 132–35.

[48] *Denbigh High School* (n 9) [68].

This will seriously disadvantage affected individuals and is a further muzzling effect of the decisions of the House of Lords.

Claimants in judicial review cases invariably object to attempts by public authorities to rationalise their decisions on an ex post facto basis, and the courts have been relatively firm in preventing public bodies from doing so.[49] It is not difficult to see why allowing public authorities to advance ex post facto justifications disadvantages claimants. It permits public authorities a second bite at the cherry, and the introduction of witness statements and other evidence (which might include empirical studies, reports, or even expert evidence, depending on the nature of the decision under challenge) is extremely difficult and costly for claimants to respond to. Furthermore, where reliance can be placed on ex post facto justifications it is also much more difficult for claimants to predict in advance their chances of success. This is, in practice, a critical point. An individual who is aggrieved by a decision made by a public authority that interferes with his or her Convention rights is able to take advice on the likelihood of that decision being quashed. But if the authority is able to advance unlimited further reasons and evidence to justify that decision, even though these were not taken into account at the time, it becomes a great deal more difficult to predict whether the decision will be found unlawful under section 6 of the Human Rights Act.[50]

Of course, even if the courts recognised that failings of process could constitute breaches of Conventions rights, that would not mean that the focus would shift entirely to the process of decision-making. Claimants would still be able to say *in addition* that the outcome of the decision made contravened their Convention rights.[51] And ex post facto reasons and evidence would be admissible in relation to that issue. But allowing claimants to bring process challenges would at least mean that claimants with strong process grounds for complaint could assess their chances of success with greater certainty because it would be no defence for a public authority to show that the substance of the decision was compatible with Convention rights. On well-established judicial review principles, unless the defendant public authority could show that the decision would inevitably have been the same had it been properly made, the decision would be sent back to the primary decision-maker to be made on a proper basis.

[49] See for instance *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302, 311–12; *R (Sporting Options plc) v Horserace Betting Levy Board* [2003] EWHC 1943 (Admin) [197]. In practice, public authorities usually seek to supplement their decisions with additional supporting reasons and evidence. In some circumstances this is expressly permitted; often the court acquiesces in the evidence being submitted even if it is not ultimately relied upon by the court.

[50] For the same reasons, the focus on substance can also be expected to increase the length and complexity of judicial review proceedings. Whilst it is true that public authorities could still advance this material if they could be held to have acted disproportionately in respect of *both* procedural failings and the outcome of the outcome of their decisions, there would be much less incentive for public authorities to throw the kitchen sink at proving a measure is, in substance, proportionate if they are at risk of having failed properly to weigh the respective interests or investigate the matter properly in the first place (and it would not be a proportionate way to conduct litigation). Indeed, in many cases where a public authority is vulnerable on points of procedure, the proceedings will not be defended at all.

[51] Contrast Lord Bingham in *Denbigh High School* (n 9) [30].

Claimants will also be disadvantaged in an even more straightforward way: they will be forced to challenge administrative decisions for breach of human rights on the far more difficult substantive terrain. Judges are better suited to assessing matters of procedure and, as we saw at the outset of this chapter, are more inclined to invalidate decisions on process grounds. Being forced to address human rights complaints to the substance of the decision made is particularly disadvantageous to affected individuals because it is so difficult for courts, particularly in relation to decisions involving specialist knowledge or decisions that are made in areas of social and economic policy, to second-guess the decisions that have been made. In such cases courts are likely to give very considerable weight to the assessment made by the primary decision-maker relevant to whether in substance the decision is consistent with Convention rights. The individual then risks falling between two stools: the court refuses to engage with the decision-making process because that cannot affect the legality of the decision, whilst at the same time the court confers considerable weight to the decision-maker on the substance because it is better able to make the decision than the court.

A particular problem arises in cases where the primary decision-maker has not carried out an assessment of the respective interests at all, or has done so in a misconceived way, and where that decision-maker's assessment would ordinarily be afforded considerable weight by the court because of its superior knowledge and expertise. The court will not be able to find that the decision is vitiated under the Human Rights Act by a procedural defect. It will have to attempt to ascertain whether the measure is justified but without the benefit of any contemporary assessments made by the primary decision-maker. It is difficult to see how such an assessment made by the court could be sound.[52] Take for example a situation where a public authority has failed to consider the possibility of an alterative less injurious alternative, or its potential effectiveness, in a complex policy area. If an affected individual then claims that the failure to take this less injurious course was disproportionate, the court will have to attempt to determine for itself whether that alternative—which had not even been adverted to by the primary decision-maker—should have been taken. No doubt the public authority will produce ex post evidence and arguments to the effect that it was not necessary to take the alternative measure. Ordinarily such self-serving ex post material would have to be treated with extreme caution by the courts, but is difficult to see what option the court would have other than to accept it where it is self-confessedly unable to weigh properly the respective interests itself.[53]

The position is likely to cause injustice and it is out of step with the idea—central to traditional public law—that an individual is entitled to have a decision affecting him or her properly made by the decision-maker with primary responsibility for

[52] See, for example, the regulation of tobacco advertising in *R (British American Tobacco) v Secretary of State for Health* [2004] EWHC 2493 (Admin): '. . . the Court is in no position on a judicial review application to weigh up the pro's and con's of particular levels of this type of advertising.'([52] (McCombe J)).

[53] This problem is not limited to assessments of competing alternatives. The court would be faced with the same difficulty in many other situations, for instance, where a prisoner suffers harm and the prison authorities have failed to carry out a risk assessment (or a thorough risk assessment).

making it unless it can be shown that the procedural defect would have made no difference and the decision would inevitably have been the same had it not been made. The exclusive focus on substance denies courts the opportunity to protect human rights by insisting that the public authority with principal responsibility for making the decision, in accordance with Convention rights, makes the decision on a proper basis with due regard to such rights. And it ties the courts' hands because the court is often not in a position to assess the substantive issues itself where there has been a significant procedural failing. There was no need for such difficulties to have arisen. They have only arisen because of the House of Lords' dogmatic attachment to substantive illegality.

Several of the points just made can be illustrated by reference to *Chapman v United Kingdom*. The case concerned a failed application by a Gypsy for planning permission to develop land that she owned and on which she lived in a caravan with her family.[54] In the course of its judgment rejecting the application under Article 8 the ECtHR stated that it simply could not weigh the 'multitude of local factors' in such a case to determine whether planning permission should have been granted. But it went on to state:

> In these circumstances, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.[55]

The ECtHR considered the process of decision-making in some detail and concluded that,

> In the circumstances, the Court considers that proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interest under Article 8 and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The decisions were reached by those authorities after weighing in the balance the various competing interests. It is not for this Court to sit in appeal on the merits of those decisions, which were based on reasons which were relevant and sufficient, for the purposes of Article 8, to justify the interferences with the exercise of the applicant's rights.[56]

The Court has therefore recognised that, in contexts where it cannot weigh the respective interests for itself, the only way it can effectively protect the right to respect for family life is to examine the process of decision-making. It is moreover clear from *Chapman* that had the proper process of decision-making not been gone through, a violation of Article 8 would have been found. This takes us to the third problem with the House of Lords' approach, which is that it is in fact out of step with the Strasbourg jurisprudence.

[54] *Chapman v United Kingdom* (2001) 33 EHRR 399 [92].
[55] ibid [92].
[56] ibid [114].

Out of Step with Strasbourg

We have seen that the decisions of the House of Lords in *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri* were premised on what the House of Lords regarded as the outcome-orientated approach of the ECtHR and that this was connected to the idea that the purpose of the Human Rights Act is simply to provide individuals with the same remedy they could obtain in Strasbourg. But the approach fails to appreciate the nuances in the approach taken by the Strasbourg Court. In *Chapman v United Kingdom*, for instance, we have seen that the ECtHR did in effect engage in process review because it was unable to assess whether or not planning permission ought to have been granted in order to comply with Article 8. In other cases the ECtHR has said that where a proper process is not gone through, the ultimate decision falls outside the margin of appreciation.[57] Since a state will have breached the Convention where it has exceeded this margin, inadequacies in the process are capable of amounting to a breach of the Convention. This is what occurred in *Dickson v United Kingdom*, a decision of the Grand Chamber which post-dates *Denbigh High School* and *Miss Behavin' Ltd* and which was not referred to the House of Lords in *Nasseri*. The Grand Chamber held that the Home Secretary's decision to refuse a life prisoner access to artificial insemination facilities breached Article 8. The breach of Article 8 was attributable to the fact that the Home Secretary's policy of only allowing access to artificial insemination facilities in 'exceptional circumstances' set too high a threshold, because it prevented the Home Secretary from considering specific considerations relevant to a person's Article 8 rights. The Grand Chamber stated, 'the policy as structured effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case'.[58] Furthermore, there was no evidence that the competing interests had ever in fact been weighed by the Secretary of State or by Parliament. Therefore, 'in the absence of such an assessment' the decision was found to fall outside an acceptable margin of appreciation, 'so that a fair balance was not struck between the competing public and private interests involved'.[59] This is clearly in contrast with the approach that has been taken by the House of Lords. If it had applied such an approach, the Grand Chamber would have held that the failure to weigh the respective interests did not itself lead to a breach of Article 8, which would depend on whether the actual refusal of access to artificial insemination facilities was on the facts necessary. It would be artificial to seek to reconcile the cases on the basis that the Grand Chamber was simply affording weight to the

[57] In such cases the ECtHR is using the margin of appreciation doctrine in the second of the two ways described in ch 4, pp 123–25. The Strasbourg Court also places very significant weight on the process leading to the impugned measure and the degree to which competing interests are weighed and considered by domestic authorities: eg *Hirst v United Kingdom* (2006) 42 EHRR 41 [79].

[58] *Dickson v United Kingdom* (2008) 46 EHRR 41[82].

[59] ibid [83] and [85].

assessment made by national authorities: the Grand Chamber was undoubtedly engaged in process review.[60]

Another example is provided by the case of *Moser v Austria*, concerning a decision to take the first applicant's son into care. The case was in part about the implied rights of a parent to participate in such a decision, but the ECtHR considered separately the question of whether the process of decision-making had been adequate. It stated, 'a case like the present one called for a particularly careful examination of possible alternatives to taking the second applicant into public care'.[61] Although the Court rejected the applicant's contention that no consideration at all had been given to possible alternatives, it held that insufficient consideration to alternatives had been given. It reasoned:

> . . . no positive action was taken to explore possibilities which would have allowed the applicants to remain together, for instance by placing them in a mother-child centre. In this connection, the Court notes that according to the Government the fact that the applicants were foreigners did not exclude them from admission to a mother child centre under the Vienna Youth Welfare Act. However, this possibility was apparently not contemplated and no other measures such as clarifying the applicant's residence status were taken. . . .
>
> This failure to make a full assessment of all possible alternatives is aggravated by the fact that no measures were taken to establish and maintain the contact between the applicants while the proceedings were pending . . .[62]

Given the failure to have regard to these alternatives, together with additional failures to involve the applicant in the decision-making process, the Court found that the reasons supplied by the authorities for taking the child into care were not sufficient. The crucially important point is that the ECtHR in *Moser v Austria* did not decide that the child ought not to have been taken into care and that taking the child into care breached Article 8; it decided that the child ought not to have been taken into care *until a proper assessment had been carried out.* The Court made clear that there were minimum procedural pre-conditions that domestic authorities must satisfy which went beyond ensuring that the affected individuals were treated fairly.

It follows that even if the courts are right in their attachment to the idea that domestic courts can only provide claimants with a remedy where their claims would succeed in Strasbourg, the wholesale rejection of process review is contrary to that idea.

[60] A similar approach was taken by the Grand Chamber in *Hatton v United Kingdom* (2003) 37 EHRR 611 in which it held that the regulation of night-time flights at Heathrow Airport was within the UK's margin of appreciation under Art 8, relying in part on the detailed investigations and consultations that had been carried out by the Government. The Court treated this as a 'procedural aspect' (at [129]) of Art 8. This procedural aspect of Art 8 is distinct from the implied procedural right to fair procedures which arises under Art 8, since it was not suggested that these investigations were required in fairness to anyone (*cf McMichael v United Kingdom* (1995) 20 EHRR 205 [92]). In the *Denbigh High School* case (n 9), Lord Hoffmann attempted to distinguish *Hatton v United Kingdom*, by treating it as a case about implied procedural rights to fairness (at [51]); but the Grand Chamber's judgment went beyond fairness. For another case analogous to *Hatton*, see *Giacomelli v Italy* (2007) 45 EHRR 38 [83].

[61] *Moser v Austria* (App no 12643/02) 21 September 2006, [2007] 1 FLR 702, [69]

[62] ibid [70]–[71].

A New Formalism?

One of the reasons that led Lord Bingham in the *Denbigh High School* case to reject process review under the Human Rights Act was that the approach of the Court of Appeal would lead to a 'new formalism' and 'judicialisation on an unprecedented scale'.[63] This was the basis of criticism of the Court of Appeal's judgment by Thomas Poole, which was adopted by Lord Bingham.[64] Following the Court of Appeal decision, Poole had argued that requiring public authorities to adopt a highly structured proportionality analysis would impose a straight-jacketed approach that would have a 'stifling' effect on good administration.[65] In so arguing, Poole contended that the proper approach under the Human Rights Act must be entirely substantive and that no procedural obligations should be imposed as part of the test of justification at all. He stated, for example, that:

> striking down decisions of public authorities on 'pure' procedural grounds would amount, I suggest, not to the imposition of a higher standard of rights protection but rather to the erection of a new formalism which, in seeking to avoid coming to a conclusion about the substance of the decision or policy at issue, will threaten to make a fetish of procedure.[66]

He made clear that in his view, there is no legitimate basis for striking down a decision because it had not been made in the proper way if, in substance, it was found to be proportionate.[67]

It should now be clear that Poole, like the House of Lords, was over-reaching. His concern about the judicialisation of administrative decisions if public authorities were to be always required to adopt a highly structured rights-based reasoning process (as suggested by the Court of Appeal) does not support his argument for the rejection the imposition of *any* procedural requirements when judging whether interferences with qualified rights are justified. For example, the courts could require that public authorities have due regard to the fact that a deportation decision affected not only the individual concerned but also his or her family.[68] That would not require explicit consideration of Convention rights as such, nor would it require decision-makers to have books on human rights at their elbows.

[63] Note. Likewise, in the *Miss Behavin'* case, Lord Hoffmann stated: 'A construction of the 1998 Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous': 9 [31] [13].

[64] T Poole, 'Of headscarves and heresies: the *Denbigh High School* Case and public authority decision making under the Human Rights Act' [2005] *PL* 685.

[65] For example at n 9, 695.

[66] Poole, 'Of headscarves and heresies' ibid, 691.

[67] Poole justified this approach in part on the basis, he claimed, that the focus of s 6 of the HRA is 'result-orientated' and that the test that the court ought to apply is therefore a 'substantive one'. For example ibid 690–91.

[68] In assessing whether there has been a breach of Art 8 rights, attention must be given to the effect of a decision on the family as a whole, and not just the impact on the individual member to whom the decision is addressed: *Beoku Betts v Secretary of State for the Home Department* [2009] 1 AC 115.

Thus, the Strasbourg Court in *Chapman v United Kingdom* referred to the domestic authority having had regard not to Article 8 itself, but to the 'interests safeguarded' by the Convention.[69] This does not require public authorities to employ the language of the Convention or even the language of rights. Nor would such obligations be unduly onerous. As we have seen, these were just the sort of procedural steps that were taken by Denbigh High School and Belfast City Council.

In a more recent paper, Poole has changed his tune. In this article Poole states that the basic issue in the *Denbigh High School* case will continue to arise because, 'there are some occasions when the imposition of an obligation to consider an issue in Convention rights-specific terms is justified'. It will, he now says, be entirely appropriate in some context for the decision-maker to 'bring its mind to bear directly on rights-related issues'.[70] The object of Poole's criticism in his more recent article is what he describes as 'a general duty on public authorities to approach decisions through an ECHR prism'. By this, Poole must be taken to mean a requirement that all decision-makers, in whatever context, expressly advert to applicable Convention rights and engage in a structured, staged, proportionality assessment. The problem with this argument is that, the overturned Court of Appeal judgment in the *Denbigh High School* case aside, Poole is unable to identify a single person who argues for such an approach.[71] And unsurprisingly: it would be palpable nonsense to argue, for example, that doctors, teachers and social workers making day-to-day decisions should explicitly identify relevant Convention rights, have a quick peek in Lester, Pannick & Herberg's *Human Rights Practice*, and then engage in a structured assessment of the competing interests reflecting the most recent case law. With the Court of Appeal's judgment

[69] *Chapman v United Kingdom* (n 54).

[70] T Poole, 'The Reformation of English Administrative law' (2009) 68 *CLJ* 142, 150, an earlier version of which is also published in the LSE Law, Society and Economy Working Papers Series 12/2007, LSE Law Department, www.lse.ac.uk/collections/law/wps/wps.htm. Poole gives the example of deportation decisions, but he does not refer to *Nasseri*, or explain how such an assertion is consistent with his previous views that were accepted by the House of Lords in *Denbigh High School* which led directly to *Nasseri*. Poole is right to recognise that procedural obligations are imposed in immigration decisions in relation to individual-specific factors. Of numerous examples that could be given, see eg *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302 [18]–[22], [29]; *R (Razgar) v Secretary of State for the Home Department* [2003] Imm AR 529 (CA) [8] (Dyson LJ), and see the comments in *Ullah* (n 39) [41].

[71] Poole refers to work by TRS Allan, Jeffrey Jowell and David Beatty, and asserts, 'it is *plausible* to *assume* that they might favour the imposition of a general duty on public authorities to approach relevant decision-making through a Convention framework' ((2009) 68 *CLJ* 142, 153–54) (emphasis added). No such assumption is in fact warranted, and Poole gives no reasons for why he says such an assumption is plausible. He then goes on to refer to views of this author, as another 'hardliner' who 'share[s] the same root assumptions' as the rest (ibid). Although it is unclear what assumptions this author is assumed by Poole to hold, it can at least be said that in this book many of the views of the scholars referred to by Poole are in fact rejected. Poole then accurately summarises the position taken by the author in a draft paper (an early version of this chapter), and then, bizarrely, associates it with the approach taken by the Court of Appeal in *Denbigh High School* (n 9). His conclusion is that the approach is 'flawed because it is blind (or insensitive) to institutional context' (ibid). But it seems that Poole has come round to the same way of thinking as at least this author. It is actually the approach that Poole himself took in his earlier article that was formalistic and insensitive to context and which, regrettably, led the House of Lords astray.

in the Denbigh High School case having, rightly, been overturned, Poole is left shadow-boxing.

The approach argued for here is neither formalistic nor does it require a juridified approach to administrative decision-making. The considerations to which decision-makers would have to advert, the degree of investigation and inquiry that they ought to undertake, and the extent to which they ought to address Convention rights and legal tests explicitly (if at all) would depend on the type of decision and the context in which it was taken. What would be required of a school would not be the same as what would be required of a planning committee, and neither could be equated with decision-making by immigration officials. There is nothing novel in this. It is how administrative law has always worked. It is why education lawyers have books on education law at their elbows, whereas planning lawyers have books on planning law, and immigration lawyers have books on immigration law (and why generalist public lawyers have to buy a lot of books).

The point is that there is no one-size-fits-all formula. That is what is wrong with approach taken by Poole and endorsed by the House of Lords: it forbids process review under the Human Rights Act across the board, irrespective of the context. The effect is that the House of Lords has substituted one formalistic solution for another.

Re-enter the Common Law

If the House of Lords has now gone so far up the garden path that it cannot or will not be led back down, the most obvious potential solution is to fall back on the common law. The Human Rights Act has not of course displaced the existing requirements at common law that a decision-maker must have regard to all relevant considerations and the other process grounds considered at the beginning of this chapter. The question is whether the existence of the Human Rights Act can be relied upon as having changed the common law base-line and as requiring enhanced procedural requirements in cases where human rights issues are engaged. On one view the answer to this question seems obvious. The existence of the Human Rights Act alters the legal context in which decisions are made and establishes new, constitutionally significant, substantive obligations which public authorities must comply with. This must affect the considerations that are relevant to decisions taken by public authorities. For instance, the obligation on public authorities to act proportionately might well, and certainly in important contexts would, give rise to a requirement on decision-makers to have regard to less intrusive alternatives that are obviously open to them. It might even be argued that in appropriate cases the public authority ought to have express regard to the Convention right that will be affected by its decision, in the same way as it could be argued that a prison governor who wishes to inspect privileged legal

correspondence must have regard to the privileged nature of that correspondence, a common law constitutional right.[72]

But this argument is not a sure-fire winner. In the first place it could be said to undermine the ground from under the feet of the House of Lords' decisions in *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri*. It might also be pointed out that the Human Rights Act has been treated as a reason for not advancing the common law in other contexts.[73] The counter-argument would be that Parliament has enacted new remedies to protect human rights, and the courts should not go beyond Parliament's intention.

The House of Lords considered the relationship between Convention rights and the relevant considerations doctrine in *R (Hurst) v London Northern District Coroner*.[74] The question was whether a decision by a coroner not to open an investigation into a violent death was unlawful. The Human Rights Act did not apply because the death occurred before the Act came into effect. It was nonetheless argued that when making the decision (which post-dated the Human Rights Act) the coroner should have had regard to Convention rights. The House of Lords rejected the view of Buxton LJ in the Court of Appeal that the coroner was 'bound to give full weight' to the Convention at common law. Their Lordships nonetheless unanimously accepted that a public official will be bound to give 'direct consideration' to the UK's obligations under the European Convention where it is 'obviously relevant'.[75] On the facts, however, the majority held that Article 2 is not 'obviously relevant' to the decision whether to reopen an investigation. This was a surprising conclusion given that inquests are the principal means that the investigatory obligation under Article 2 is satisfied in the UK.[76]

Hurst's case might therefore be taken to suggest that it will only be in rare cases that the courts will recognise that Convention obligations are a relevant consideration. However there are several reasons why this is probably not the case. What is 'obviously relevant' to a decision will depend on the facts and circumstances of each decision. The finding that Article 2 was not 'obviously relevant' is probably limited to pre-Human Rights Act inquests and need have no wider resonance. In other contexts it has been suggested that Convention rights *are* obviously relevant

[72] See *R v Secretary of State for the Home Department, ex p Leech (No 2)* [1994] QB 198; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

[73] See *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395; *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681. See ch 2, pp 52–56.

[74] *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189.

[75] *Hurst* ibid [18] (Baroness Hale), [57] (Lord Brown, with whom Lords Bingham and Rodger agreed) and [78] (Lord Mance), approving Cooke J in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 183. Lord Brown's speech is unfortunately apt to give rise to some confusion, because before citing Cooke J's comments, his Lordship referred to considerations which the 'decision maker may choose for himself whether or not to take into account' ([57]; see the concerns of Lord Mance at [78]). Since Lord Brown went on to consider whether Art 2 was 'obviously relevant' to the coroner's decision, he did not mean to contradict Cooke J, who he expressly approved. His remark appears to have been directed at matters which, while not obviously so, are nonetheless relevant. Cooke J's remarks were also approved by a unanimous House of Lords in *Re Findlay* [1985] AC 318, 334.

[76] See *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182. This was the subject of strong, and it is respectfully submitted, persuasive, dissenting speeches by Baroness Hale and Lord Mance.

particularly after the enactment of the Human Rights Act. This indeed seems to be the best justification for comments made by the Court of Appeal in *Lough*.[77] In that case Pill LJ (with whom Keene LJ and Scott Baker LJ agreed) made the following comments in the context of a challenge to the decision of a planning inspector that planning permission should be refused:

> Recognition must be given to the fact that article 8 and article 1 of the First Protocol are part of the law of England and Wales. That being so, article 8 should in my view normally be considered as an integral part of the decision maker's approach to material considerations and not, as happened in this case, in effect as a footnote. The different approaches will often, as in my judgment in the present case, produce the same answer but if true integration is to be achieved, the provisions of the Convention should inform the decision maker's approach to the entire issue. There will be cases where the jurisprudence under article 8, and the standards it sets, will be an important factor in considering the legality of a planning decision or process.[78]

This statement is important for several reasons. First, it expressly recognises that the Human Rights Act has established new substantive principles and that this will have necessary effects on a decision-making process, including what should be regarded as 'relevant considerations'. Indeed, the Court was explicit in holding that the existence of the Human Rights Act led to enhanced procedural requirements at common law in the planning context.[79] Secondly, the Court of Appeal linked the approach to the need for 'integration' of human rights principles. We have seen that integration of human rights considerations into administrative decision-making is integral to creating a culture of human rights. This is consistent with the Court of Appeal's reasoning. Thirdly, the Court of Appeal went on to hold that the fact that the inspector had not expressly used the word 'proportionality' did not vitiate his decision. What was required was that in substance the decision had been made in a sound way with due regard to the affected interests and that competing consideration had been properly weighed. The approach taken by the Court of Appeal was therefore not akin to the approach taken by the Court of Appeal in the

[77] And also provides a source of justification for the later approach of the Court of Appeal in *Rafferty* (n 22); considered at the outset of this chapter.

[78] *Lough v The First Secretary of State* [2004] 1 WLR 2557 [48]. Also see on Convention rights as relevant considerations, *R v Secretary of State for the Environment, ex p National Administrative and Local Government Officers' Association* (1992) 5 Admin LR 785, 798 (Lord Templeman); *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, 692 (Neil LJ giving the judgment of the Court of Appeal); *Diba v Chief Immigration Officer, Heathrow Airpor* (CA 19 October 1995) (Staughton LJ); *R v Lyons* [2003] 1 AC 976 [13] (Lord Bingham). See for discussion of the law up to 1997, M Hunt, *Using Human Rights Law in English Courts* (Oxford, Hart Publishing, 1997) 230–42, noting 'a growing judicial sympathy for the relevance of the ECHR to the exercise of administrative discretion' and 'an emerging judicial recognition of Art 8 as a relevant consideration in the immigration context'. Contrast H Woolf, J Jowell and A Le Sueur (eds), *De Smith's Judicial Review*, 6th edn (London, Sweet & Maxwell, 2007) 5-123: '. . . it still remains the case that a decision will not be held unlawful just because a public authority has failed to take into account an unincorporated treaty provision.'

[79] It stated that the issue on appeal was 'the impact of the 1998 Act, and in particular article 8 of the Convention which the Act incorporates into English law, upon the way that planning decisions . . . are taken'. It made clear that absent the Human Rights Act, the inspector had had regard to all relevant considerations and his decision could not have been impugned (*Lough* (n 78) [15]–[16]).

Denbigh High School case. It was sensitive to the institutional context and avoided requiring inspectors to adopt a formalistic approach to planning decisions.

Whilst in *Hurst* and *Lough* the issue was in part whether the public officer in question ought to have expressly considered the fact that Convention rights would be affected by the decision, other cases show how the relevant considerations doctrine can be used to impose process obligations on public authorities without requiring direct or explicit consideration of the Convention. It can require consideration of the underlying interests (such as injury to dignity or family life). This would be in line with the approach taken by the ECtHR in *Chapman v United Kingdom*, in which, as we have seen, the ECtHR referred to the need for domestic authorities to afford due respect to the 'interests safeguarded' by Article 8.[80] Such an approach can be seen in the Court of Appeal's judgment in *R v North and East Devon Health Authority, ex p Coughlan*, in holding that the defendant authority had unlawfully resiled from a promise that a care home would be the claimant's home for life. The Court criticised the authority in part because it was, 'clear from the health authority's evidence and submissions that it did not consider that it had a legal responsibility or commitment to provide *a home*, as distinct from care or funding of care, for the applicant and her fellow residents.'[81] The significance of the difference between responsibility for providing a home and funding care is attributable in large part to the substantive obligations imposed on public authorities by the Human Rights Act, but the court did not criticise the authority for failing to have regard to Article 8 itself (although it held it to be engaged). Thus, the process requirements imposed by the common law are capable of being applied sensitively without always requiring explicit regard to articles of the European Convention.

Additional support for enhanced common law process requirements in the human rights context can be found in recent cases requiring public officials to have regard to their international human rights obligations and fundamental rights. In *E v Chief Constable of the Royal Ulster Constabulary*, for example, Lord Carswell stated that the principle that all actions concerning children should be based on the best interests of the child, as required by the UN Convention on the Rights of the Child 1989, was 'a consideration which should properly be taken into account by the state and its emanations in determining upon their actions'.[82] A further example is provided by *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*. A majority of their Lordships recognised a fundamental right of citizens to reside in their homeland.[83] Lord Hoffmann said it was an 'important right' and that the 'importance of the right to the individual is also something which must be taken into account by the Crown in exercising its

[80] See above at text to n 69, p 246.

[81] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 [88] (emphasis supplied).

[82] *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 [60].

[83] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 [110]–[111] (Lord Rodger), [131] (Lord Carswell), [151] Lord Mance. Lord Hoffmann did not consider that any fundamental right was in play.

legislative powers.'[84] This recognition of a minimum process requirement, even in the context of the exercise of legislative powers which were at issue in *Bancoult*, indicates that *Hurst* certainly does not close the lid on the development of common law process requirements in the human rights context. It does not follow, of course, that all emanations of the state must have regard to the rights of the child or the right of abode or of Convention rights in *everything* that they do or decide that affects such rights: it will depend upon context. But the cases do suggest that the human rights context can and should properly lead to enhanced process requirements notwithstanding the decisions of the House of Lords in *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri*.

Nonetheless, for the relevant considerations doctrine to be used effectively as a way of ensuring that public authorities observe an adequate process in reaching decisions affecting Convention rights, it would be necessary for the courts to give common law process requirements a new lease of life. The courts cannot be hamstrung by the traditional approach that prevents the court from examining the weight or priority given to relevant considerations[85] or the restrictive approach taken to the duty to make sufficient enquiries.[86] A more robust and dynamic approach is required in a context where public authorities are under a specific statutory duty to act compatibly with Convention rights and given the common law's recognition of the importance of human rights. Thus, in the context of the property rights, Laws J has stated:

> . . . reasonableness itself requires in such cases that in ordering the priorities which will drive his decision, the decision-maker must give a high place to the right in question. He cannot treat it merely as something to be taken into account, akin to any other relevant consideration; he must recognise it as a value to be kept, unless in his judgment there is a greater value that justifies its loss.[87]

Laws LJ's pre-Human Rights Act comments have until recently looked decidedly out of line with other more conservative cases on common law procedural requirements. But they now provide an important component in the development of enhanced common law process requirements in the human rights context.

[84] ibid [47]. *Laporte* (n 16) could also be interpreted as an example of process requirements being imposed by the common law.

[85] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 763 (Lord Keith), 770 (Lord Hoffmann); *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447.

[86] eg *R (Khatun) v LB Newham* [2005] QB 37 [35] (Laws LJ): '. . . it is for the decision-maker and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of inquiry'. The courts have traditionally been reluctant to find that a factor to which a decision-maker has not had regard is a mandatory consideration. Courts are much more inclined to find that irrelevant matters have been considered. See, for example, *R v Secretary of State for Transport, ex p Richmond LBC* [1994] 1 WLR 74, 94 (Laws LJ); *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154.

[87] *Chesterfield Properties Plc v Secretary of State for the Environment* (1998) 76 P & CR 117, 130. For another pre-Human Rights Act authority, see *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855 [68], eg: 'the tribunal . . . does not seem to have paid sufficient attention' to the perception of fairness in denying anonymity, 'The tribunal may not have attached to the Widgery assurance the weight which we consider it should.'

The common law therefore provides a potentially powerful way of providing process protection for human rights. A revitalised common law would mitigate the worst effects of *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri* without requiring the introduction of a 'new formalism'. The development of the common law should not be stunted by the presence of the Human Rights Act. Since the House of Lords has held that section 6 does not impose process requirements, the development of common law process requirements would provide a *different* rather than overlapping remedy.[88] Moreover, the presence of the Human Rights Act (as well as the recognition of fundamental rights at common law) actually requires such an approach, because the common law works in harmony with primary legislation, and the requirements of the common law reflect the legal context in which administrative decisions are made.[89] The Human Rights Act was not enacted in a vacuum. It was enacted in the context of existing context-sensitive public law principles. Parliament can therefore be presumed to have intended that the Human Rights Act would have knock-on effects for process grounds of judicial of review.

Statutory Duties to have 'Due Regard'

In the context of race, sex and disability discrimination, Parliament has provided that public authorities must have 'due regard' to the need to eliminate discrimination and promote equality. For example, the relevant provisions relating to disability discrimination, contained in section 49A of the Disability Discrimination Act ('DDA') provide that public authorities must have due regard to, amongst other things, the need to eliminate disability discrimination, the need to promote 'positive attitudes towards disabled persons', and the need to 'promote equality of opportunity between disabled persons and other persons'. Moreover, regulations made pursuant to the statutory provisions require public authorities to publish race, disability and gender discrimination 'schemes' that demonstrate their proposals for assessing the likely impact of their policies and proposals on equality.

[88] By contrast with tort cases, such as *Watkins* (n 73), where the claimants were urging the court to develop overlapping tort remedies. One potential implication of a court finding that there is a procedural failing which renders a decision ultra vires in a context where there has been an interference with a protected right, is that such an interference will not be 'in accordance with law' and therefore, where there has been an interference with a protected right which must be in accordance with law, there will be a breach of the substantive article. See *R (Laporte) v Chief Constable of Gloucester Constabulary* [2007] 2 AC 105 [45], [56] (Lord Bingham, Lord Mance agreeing), [90] (Lord Rodger); *R v Governor of Brockhill Prison, ex p Evans* [2003] 3 WLR 843; *Pascoe v First Secretary of State* [2006] EWHC 2356 (Admin). Of course, in considering any remedy under s 8, where the process is one failing issues of causation of harm, and questions about whether the same decision would inevitably have been made in any event will arise.

[89] eg Lord Hoffmann stated in *Re McKerr* [2004] 1 WLR 807 [71], 'The common law develops from case to case in harmony with statute'.

In each case there is also a statutory code of practice.[90] These somewhat piecemeal provisions may well soon be superseded by a broader 'public sector equality duty' currently contained in section 143(1) of the Equality Bill, which will require public authorities to have due regard to the need to eliminate specified forms of discrimination, including in addition to the three presently covered, age, gender reassignment, pregnancy and maternity, sexual orientation and religion and belief, as well as to the need to advance equality of opportunity and the need to foster good relations in respect of those who have a relevant protected characteristic.[91]

The origin of the equality duties is to be found in the criticism made in 1999 by Sir William Macpherson in his inquiry into the police investigation of the racist murder of Stephen Lawrence. The Macpherson report criticised the Metropolitan Police for 'institutional racism' and also stated that it was incumbent on every institution to 'examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.'[92] The equality duties are intended to improve public authority decision-making and assist in the development of a culture of equality and non-discrimination. The requirement to have *due* regard means that the nature and degree of consideration that needs to be given by public authorities to the need to eliminate discrimination (and the other specified matters) will vary depending upon the context. The terms of the duty also makes plain that this is not an obligation 'to achieve results or to refer in terms to the duty'.[93] The question is whether in substance the process has been sufficiently sensitive to discrimination issues and not whether any particular method of decision-making has been adopted. Summarising the case law on these provisions in *Domb*, Rix LJ stated that, 'the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind; and that it is a non-delegable duty'.[94]

The courts have recognised that in interpreting the equality duties, they must balance the need to ensure sufficient regard is had by public officials to discrimination issues against the need not to hamper effective decision-making. In *Meany*, Davis J stated that local councils 'have a difficult enough task as it is without legalistic hurdles being set for them at every stage'.[95] The duties as framed

[90] s 49A of the Disability Discrimination Act 1995 (introduced by the Disability Discrimination Act 2005 s 3); s 71(1) of the Race Relations Act 1976 (introduced by the Race Relations (Amendment) Act 2000) provides: '(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need—(a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups'; s 76A of the Sex Discrimination Act 1975 (as amended by the Equality Act 2006). For a discussion of these provisions, see the Court of Appeal's judgment in *Domb v London Borough of Hammersmith and Fulham* [2009] EWCA Civ 941.

[91] s 143(1), in drawing the disability equality duty into line with the other equality duties, the Bill as it currently stands would slightly weaken the discrimination equality duty.

[92] Sir W Macpherson, 'The Stephen Lawrence Inquiry' (Cm 4262-I) [46.27]. For the historical origins of the duty, see K Monaghan, *Equality Law* (Oxford, Oxford Univeristy Press, 2007) 48–49.

[93] *Domb* (n 90) [52].

[94] ibid [52].

[95] *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin) [85] (Davis J).

by Parliament and as interpreted by the courts are therefore applied with sensitivity to institutional context. In interpreting and applying the duties, the courts have trodden a careful path between the approach taken by the Courts of Appeal in *Denbigh High School* and *Miss Behavin' Ltd* and the approach taken by the House of Lords in those cases. Let us briefly consider a few examples.

Domb concerned a decision of a London borough council to charge for home care services provided to disabled residents of the borough. The court held that since the council had approved a budget that included a 3 per cent cut in council tax, the only option open to it was either to cut services or impose charges. The equality duty did not require the budget to be unravelled, and since the decision had been taken on the basis of a report which had highlighted the adverse impact of charging disabled persons for services (which was in any event obvious), the duty had been complied with.[96] *Domb* can be contrasted with *Chavda*, in which the High Court held that a decision of a borough council to restrict adult care services was unlawful for failure to have due regard to the matters referred to in section 49A of the Disability Discrimination Act.[97] The fact that the claimant failed to establish any other ground of illegality, including failure to conduct a proper consultation and breach of Convention rights, shows how significant such procedural obligations can be. The Court considered that, given the extent of the consultation and decision-making process, the relevant equality duties ought to have been *expressly* considered. The judge held that it was not enough for the relevant documents to have referred obliquely to the statutory duties of the council, because 'this would not give a busy councillor any idea of the serious duties imposed' on them. It was not enough that the council had a good disability discrimination record.

Finally, we should consider the important case of *Elias*, in which the Government's policy for compensating British citizens who had been imprisoned by the Japanese during the Second World War (the so-called 'debt of honour') was challenged on a number of grounds, including breach of the race equality duty.[98] The claimant was a British citizen who lived in Hong Kong and had been interned by the Japanese between 1941 and 1945. Neither she nor her parents or grandparents had been born in the UK. Given the 'bloodlink' requirement under the policy, the claimant did not qualify for compensation. The High Court held that the government departments responsible for the policy had failed to recognise the racial discrimination to which it gave rise. The Court also held that the civil servants responsible had failed properly to investigate the impact of the policy on those citizens with insufficient 'bloodlink' to the UK and had failed to determine whether the policy could be formulated in a less discriminatory way.[99] John

[96] *Meany* (n 95) [63]. Although the court did float the possibility that equality duties might have an impact on setting the budget, this issue was not before the court. See at [60]–[63] (Rix LJ) and [78]–[80] (Sedley LJ).

[97] *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin).

[98] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293.

[99] 'The compensation scheme was not properly thought out in the first place, the issue of discrimination was not properly addressed at the relevant time and . . . poor standards of administration

Halford, a leading public law solicitor who represented Mrs Elias, has described the impact of section 71, as it was interpreted in that case, in the following terms:

> The complacent response of the civil servants who met to frame the bloodlink in March 2001 was to assert, in effect, 'that race equality was not considered at all because it was irrelevant'. That is indicative of a lack of self-awareness at an institutional level akin to the individual who protests 'but some of my friends are black!' when it is suggested that are making assumptions based on stereotype. It will simply not be good enough where there is discriminatory impact.[100]

These comments are borne out by the case law, in which the statutory equality duties have been successfully invoked by claimants even where public authorities have good records in relation to discrimination.[101] The rationale for these cases is that the need to eliminate discrimination must 'be integrated within the discharge of the public functions' of every public authority.[102] Thus, where decisions seriously impact on disadvantaged minorities, those decisions must be taken with a full appreciation of such impact and the responsibilities of the public authority with respect to equality.

The statutory equality duties underscore the importance of procedural obligations in internalising human rights considerations to government decision-making. They make clear the implications of *Denbigh High School*, *Miss Behavin' Ltd* and *Nasseri* in terms of frustrating Parliament's aim of inculcating a culture of human rights in public authorities through the mechanism of the Human Rights Act. The cases also demonstrate that the recognition of enhanced process obligations in the human rights context is not an all-or-nothing exercise. The courts can be trusted—as they have been trusted by Parliament under the equality legislation—to develop and apply process requirements in a manner that is sensitive to institutional context.

Whilst the Equality Bill, if enacted, will in general terms broaden the scope equality duties, it will have no application to decisions where no equality issues arise. The duties do however provide a model for a statutory reform that could

were evident. Consequently there was no proper attempt to achieve a proportionate solution by examining a range of criteria as a means of determining close links with the UK and by balancing the need for criteria to achieve the legitimate aim of close links with the UK with the seriousness of the detriment suffered by individuals who were discriminated against.' *Elias* ibid [176].

[100] J Halford, 'Statutory Equality Duties and the Public Law Courts' [2007] *Judical Review* 89, 98.

[101] For instance in *R (Chavda) v London Borough of Harrow* [2007] EWHC 3064 (Admin) [40]. In *Meany* (n 95) the High Court held that although a local authority had a 'strong culture' with regard to disadvantaged person, by deciding to cut a welfare grant by 80% without having regard to those duties, the council had acted unlawfully, even though the decision was not irrational. In *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 it was held that planning inspectors, in cases concerning relevant minorities, should refer explicitly to the equality duties as a matter of good practice, but on the facts the inspector had been well aware of the plight of Gypsies and there was no breach of s 71 RRA; see also *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [90]–[96] (Scott Baker LJ and Aikens LJ). At [91] the court stated: 'Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty' (at [91]).

[102] *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [92].

overturn the decisions of the House of Lords under the Human Rights Act. This is, moreover, something that could usefully be addressed in any new Bill of Rights. In this respect, the Victoria Charter of Human Rights is also informative. It provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.[103] A domestic Bill of Rights could mirror this wording in an amended form of section 6 of the Human Rights Act (whilst preferably substituting the term 'due regard' to ensure consistency with the jurisprudence on the equality duties).

Conclusion

The Court of Appeal decision in the *Denbigh High School* case set in train a series of unwelcome decisions by the House of Lords which have had the effect of muzzling the Human Rights Act. It has led to one formalistic approach—the rigid and juridical reasoning process that the Court of Appeal had said was required of public officials—being substituted for a different but equally formalistic approach, namely, the rule that human rights protection under the Human Rights Act is exclusively concerned with outcomes. It has been suggested in this chapter that in order to mitigate the worst effects of these decisions, the common law process review should be pressed into service and that common law procedural requirements should be applied sensitively to the legislative context of the Human Rights Act. It may be, however, that statutory reform will be needed in order for process requirements to be developed and applied with sufficient robustness to ensure the achievement of a culture of human rights within public authorities. This is unfortunate. The enactment of a provision requiring public authorities to have 'due regard' to Convention rights (such as in a future Bill of Rights) would leave as much to case-by-case judicial development as would have been the case if procedural obligations had been developed under s.6 of the Human Rights Act.

[103] s 38.