

JUSTIFICATION

An introduction

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A difference of treatment between persons (or the failure to treat differently persons in relevantly different situations) violates Article 14 only if it ***“has no objective and reasonable justification.”***

That is, **“if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”**

(Molla Sali v Greece [GC], 2018 at [135]; Eweida & Others v United Kingdom at [88])

Bank Mellat v HM Treasury (No 2)

In *Bank Mellat* [2013] UKSC 39, Lord Reed JSC formulated the test for justification in four questions:

- “(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;*
- (2) whether the measure is rationally connected to the objective;*
- (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and*
- (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.”*

Bank Mellat v HM Treasury (No 2)

- Lord Reed commended this test/approach (with its roots in case law under the Canadian Charter of Fundamental Rights) in the following terms:
“Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit.”
- *Bank Mellat* was not an Article 14 case, but Lord Reed’s formulation has been used as a test for assessing justification under Article 14. It has been referred to in recent Article 14 cases as “*the conventional*” test/inquiry (see e.g. *R(DA) v SSWP* [2019] UKSC 21, at [55] per Lord Wilson).
- But it is not the last word.

The mapping of a different path: “manifestly without reasonable foundation”

- In *R (DA) v SSWP* [2019] UKSC 21, Lord Wilson observed, at [55]:
“This court has been proceeding down two different paths in its search for the proper test by which to assess justification under Article 14 for an economic measure introduced by the democratically empowered arm of the state”
- “*Manifestly without reasonable foundation*” had been treated as a distinct test of justification in social security context (in cases preceding *Bank Mellat*) e.g. *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18 (in the context of payment of state benefits, the test for whether a difference of treatment on the basis of sex could be justified was whether it was “*manifestly without reasonable foundation.*”)
- Question which has vexed courts is what part, if any, this formula has to play in assessing justification in the context of economic/social policy, and its relationship to the conventional *Bank Mellat* test.

The conventional test

Questions (1), (2) and (3)

- Question 1: does the impugned, potentially discriminatory, measure have a legitimate aim?
 - Not difficult hurdle to surmount.
 - Recent case which failed on this basis was *Gilham v MOJ* [2019] UKSC 44 (held no legitimate aim advanced for failing to extend protection of ‘whistle-blower’ legislation to judges).
- Question 2: is the measure rationally connected to that aim?
- Question 3: could a less intrusive measure have been used to achieve the aim?

The conventional test

Question (4): fair and proportionate balance

- Question 4: is the impact of the rights infringement proportionate to the likely benefit of the impugned measure (or, as its sometimes put, does the impugned measure strike a fair balance between the rights of the individual and the interests of the community)
- Relevant considerations include:
 - **The nature of the measure and context:** e.g. in matters of social and economic policy courts will afford appropriate weight and respect to the judgment of the executive/legislature (*R (Drexler)* [2020] EWCA Civ 502 at [57]; *R (JCWI)* [2020] EWCA Civ 542 at [141] & [143]). Extent of area of judgment depends on branch of state involved, the degree of economic and/or social policy involved, and the extent to which the executive/legislature addressed their mind to potential adverse effects.

The conventional test

Question (4): fair and proportionate balance

- Relevant considerations (continued):
 - **The ground(s) of discrimination:** discrimination on certain, so-called, “suspect” grounds (e.g. sex, race, sexual orientation), will call for more stringent scrutiny/weightier reasons will be required to justify any potential discrimination (*R (Carson) v SSWP* [2005] 37 at [15]-[17]; *Drexler* at [56]; *JCWI* at [141])
 - **Extent to which measure achieves the aim pursued**
 - **Adverse effects of measure/nature and level of discrimination**
 - **Obligations under other international conventions** (may be of some relevance): e.g. *R (A) v Health Secretary* [2017] UKSC at 41 at [34]-[35], though see *R(SG) and others) v SSWP* [2015] UKSC 16