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Skype kids and the price elasticity of demand: constructing the common law constitution

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Abstract

In 2017, the Supreme Court held that it was unlawful to charge a British citizen earning £15,000 a year approximately £160 to bring a claim to an employment tribunal, but lawful to prevent their partner from living with them in the UK. This article analyses these two decisions in relation to the Common Law Constitution (CLC). It shows that there was a profound discrepancy in the judicial approach, with structurally different tests employed at sharply different intensities, despite the two cases raising similar legal issues and both plausibly involving interests which have been protected at common law. It is argued that the CLC is being used as guise to promote a distinctive ideology, focused on a set of court-centred norms. This article questions the constitutional legitimacy of this development, which privileges certain norms whilst marginalising others, especially those conducive to the interests of the poor and equal citizenship.

Keywords: public law; common law constitutional rights; protection of fundamental rights; family life; judicial partiality.

Introduction

In a much-celebrated judgment, described by one leading public lawyer as 'a tour de force that ought to be compulsory reading for every Minister and parliamentarian', the Supreme Court in *R (UNISON) v Lord Chancellor*[1] struck down the employment tribunal fees regime.[2] This was a welcome outcome, especially for those on low and modest incomes with some savings who, under the means-tested system, had to pay up to £1200 to bring a tribunal claim. Three months earlier, low-income families had fared less well in the Supreme Court. The legality of the minimum income requirement (MIR), which means that only British citizens earning at least £18,600 can live in the UK with their partner, was upheld in *R (MM (Lebanon)) v Secretary of State for the Home Department*.[3] This article argues that this discrepancy in treatment, which holds that it is lawful to prevent a British citizen earning £15,000 a year from living in the UK with their family, yet unlawful to expect them to pay (after means-testing) approximately £160 to take a case

1 [2017] UKSC 51.

2 M Elliott, 'The rule of law and access to justice: some home truths' (2018) 77 Cambridge Law Journal 5. Some of the other praise, but only a sample, is collected in the first paragraph of M Ford, 'Employment tribunal fees and the rule of law: *R (UNISON) v Lord Chancellor* in the Supreme Court' (2018) 47 Industrial Law Journal 1.

3 [2017] UKSC 10.

to an employment tribunal, is not based on any sound legal principle, but is indicative of the ideological partiality of the highest courts. In particular, the flexibility provided by the turn to the Common Law Constitution (CLC) is being used to promote a narrow court-centred set of rights, principles, interests and values, whilst other norms – far more morally compelling – conducive to the interests of the poor and equal citizenship are ignored. This article argues as such that the central problems of the law of judicial review are not confined to 'deference' or 'overreach' or even 'palm tree justice' but must also include ideological partiality.

By the CLC this article means the set of norms – rights, interests, principles and values – that the courts robustly protect and promote in public law cases when such protection has not been expressly authorised by statute (e.g. by the Human Rights Act 1998 (HRA) or EU law). Three mechanisms of robust protection are identified: treating the issue as one for the court to determine itself on the merits, proportionality and radical interpretation of statute. It is argued that describing norms according to which the courts have at times developed private law or that have attracted an 'anxious scrutiny' test as 'constitutional' obscures understanding of public law and, in particular, the hierarchy of norms constructed by the courts. Although this article is primarily concerned with Common Law Constitutional Rights (CLCR), which were at issue in *MM* and *UNISON*, to understand the nature of such rights it is important that they are placed in the wider context of the CLC. Part of the argument of this article is that, once seen in this context, it will be recognised that 'CLCR' and the 'CLC' are misnomers. What actually exists is a narrow court-centred constitution and associated rights.

Current discussion of the CLC and CLCR has been prompted by a series of recent decisions, starting with *Guardian News*,[4] in which the courts have stressed the continuing importance of the common law as a source of rights, principles and values. This set of cases has received considerable attention from judges, practitioners and academics, often focused on the relationship between CLCR and the rights contained in the European Convention on Human Rights, especially the capacity of the common law to 'step in' if the HRA were to be repealed.[5] This article takes a different approach squarely focusing on the identification of the norms that the CLC has been used to protect, promote and marginalise, the techniques of such protection, the rationalisations provided and the subsequent legitimacy of this development.

This article proceeds as follows. In the first section, background on the two cases is provided and the judgments analysed. In the second section, the different structure and far more intensive approach to review in *UNISON* is highlighted. In the third section, it is argued that this discrepancy cannot be explained by the principles that it is typically claimed should guide the judicial approach to substantive review – indeed, the usual principles favour a more stringent standard in *MM*. In the fourth section, the argument that this discrepancy stems from the nature of the common law, which recognises access to a court as a common law norm unlike family life or citizenship, is rejected. In the final section, the discussion is widened to consider other CLC cases. It is argued that the 'CLC' is used as a guise to promote a narrow set of court-centred norms, with the courts failing to engage in a principled way with the nature or history of the common law.

4 *Guardian News and Media Ltd v City of Westminster Magistrates' Court* [2012] EWCA Civ 420.

5 The literature includes: M Elliott, 'Beyond the European Convention: human rights and the common law' (2015) 68 Current Legal Problems 85; R Clayton, 'The empire strikes back: common law rights and the Human Rights Act' [2015] Public Law 3; E Bjorge, 'Common law rights: balancing domestic and international exigencies' (2016) 75 Cambridge Law Journal 220; C Lienen, 'Common law constitutional rights: public law at a crossroads?' [2018] Public Law 649.

1 Background to the two cases and analysis of the judgments

Background to *UNISON*

The details of *UNISON* have been discussed elsewhere.[6] In brief, fees were introduced by the Employment Appeal Tribunal Fees Order 2013 under section 42 of the Tribunals, Courts and Enforcement Act 2007 which provides that the 'Lord Chancellor may by order prescribe fees payable in respect of' the Employment Tribunal and the Employment Appeal Tribunal. No fees were previously charged. Under the new system, single type A claims, such as unpaid wages, cost £390 (£160 issue fee, £230 hearing fee) and type B, including unfair dismissal, cost £1200 (£250, £950). Under the means-testing scheme, if a claimant had savings above £3000 at each stage, then the fee was to be paid in full. If not, a 'specified amount' was allocated depending on whether the claimant was single (£1085) or in a couple (£1245), with this amount increased by £245 for each child. If their gross monthly earnings were less than their specified amount, no fee was charged. Above this, for every £10 of additional income, £5 must be paid towards the fee. An order would normally be made by the tribunal for the respondent to reimburse the fee if the claimant was successful.

The Supreme Court quashed the fees. Lord Reed's judgment, with which all the other justices agreed, proceeded in three-stages, expressly following the distinctive methodological approach – a common law proportionality test – employed in a set of cases decided prior to the introduction of the HRA: *Leech*, *Witham*, *Pierson*, *Simms* and *Daly*.[7] At the first-stage, Lord Reed claimed that the fees interfered with the 'constitutional right of access to the courts'.[8] The correct test for establishing such interference, according to Lord Reed, was whether there was a 'real risk' that the right was interfered with – 'conclusive evidence'[9] that there are specific individuals for whom the fees made it not 'simply unattractive but in practice impossible to pursue a claim', as held by the Court of Appeal, was not required.[10] For Lord Reed, the court must consider the 'impact of the fees on behaviour in the real world', with two pieces of evidence sufficient to show that the real risk test was met: first, the substantial fall in the number of claimants bringing cases after the introduction of the fees; and, second, that the level of fee although means-tested still required some claimants to forego 'reasonable expenditure' based on the Joseph Rowntree Foundation's minimum income standards.[11] Nor was this interference ameliorated by the existence of the Lord Chancellor's discretionary power of fee remission, which was too restrictive, since it would only be used 'where the Lord Chancellor is satisfied that there are exceptional circumstances which justify doing so'. The problem with the fees was 'not confined to exceptional circumstances: they are systemic'.[12]

The second stage concerned whether this interference could be justified. Lord Reed accepted that the government's aims in introducing the fees – namely, reducing the cost to taxpayers and the number of weak and vexatious claims – were legitimate. However,

6 In addition to texts cited above (n 2), A Bogg, 'The Common law constitution at work' (2018) 81 Modern Law Review 509.

7 *R v SSHD, ex p Leech* [1994] QB 198; *R v Lord Chancellor, ex p Witham* [1998] QB 575; *R v SSHD, ex p Pierson* [1998] AC 539; *R v SSHD, ex p Simms* [1999] QB 349; *R (Daly) v SSHD* [2001] UKHL 26.

8 *UNISON* (n 1) [66].

9 Ibid [87], [93].

10 *R (UNISON v The Lord Chancellor)* [2015] EWCA Civ 935, [67] (Underhill LJ).

11 *UNISON* (n 1) [93].

12 Ibid [95].

for the fees to be lawful, it had to be shown that these aims could not have been achieved through less intrusive means – that they were necessary. According to Lord Reed, this test was not met, since the government had assumed that the higher the price charged the more effective it would be in transferring costs to users. This assumption was false since 'the price elasticity of demand was greatly underestimated'. Hence, it was not shown that a less onerous fee 'would have been any less effective in meeting the objective of transferring the cost burden to users'.[13]

It should be noted that Lord Reed's claim that it is 'elementary economics, and plain common sense' that 'the fees were not set at the optimal price' itself seems false.[14] If, as the Impact Assessment makes clear, the average cost of a tribunal is considerably less than the fee charged, how could charging lower fees reduce the cost burden to the government if it makes a loss on each tribunal provided?[15] Even if, in the short run, fixed and sunk costs may mean that losses are minimised by maximising revenues, this is hardly likely to be the case over the medium to long term when, again as the Impact Assessment makes clear, a large proportion of the costs – approximately half – derive from judicial salaries and associated fees.[16] Given this, maximising revenues by lowering the price will almost certainly increase and not reduce the cost burden to the government. Lord Reed's argument only appears plausible because he subtly shifts the government's aims from transferring 'some of the cost burden to users',[17] which likely would be achieved (depending on fixed and sunk costs) by higher fees to 'obtain[ing] the maximum revenue' which was not the government's aim.[18]

At the third-stage, Lord Reed claimed that such unnecessary interference with the right of access to a court caused by the fees would only be lawful if it was expressly authorised by primary legislation. However, since 'section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals' then it follows the fees regime was ultra vires.[19]

Background to *MM*

Changes in 2012 to the Immigration Rules introduced a minimum income requirement (MIR) that any British citizen, person with settled status, refugee or person with humanitarian protection in the UK, who wishes to sponsor a partner (i.e. spouse or civil partner or somebody living in an equivalent relationship) must have a gross annual income of at least £18,600.[20] Those who do not meet the threshold can rely on savings, but the rules are very strict: they must control savings above £16,000 for at least six months, which are at least two-and-a-half times any shortfall between annual income and the threshold. Hence, a sponsor with no income requires savings of at least £62,500 (£18,600*2.5 + £16,000). The MIR was based on a report by the Migration Advisory Committee (MAC) which identified the £18,600 threshold as 'the point at which the [childless] family is not entitled to receive any income related benefits (including Tax

13 Ibid [100].

14 Ibid.

15 Average cost: type A: £760; type B: £2890 or £3380. Ministry of Justice, *Impact Assessment: Introducing a Fee Charging Regime into Employment Tribunals and the Employment Appeal Tribunal* (IA: TS007 2012) paragraph 1.28.

16 Ibid paragraph1.27.

17 Also, ibid 1: 'Government intervention is needed because taxpayers are currently subject to an excessive financial burden as this free service has become increasingly utilised.'

18 *UNISON* (n 1) [100].

19 Ibid [87].

20 The MIR and other financial requirements are contained in the Immigration Rules: Appendix FM.

Credits)'.[21] In addition, the government claimed as a secondary aim that the MIR would promote integration, although no supporting evidence was provided and this aim barely featured in the judicial review litigation.[22]

A review of the MIR brought by a group of affected British citizens and refugees on both human rights and common law grounds was successful at the High Court.[23] Blake J accepted that the MIR was rationally connected to a legitimate aim but held that the MIR was neither necessary nor struck a fair balance. Blake's reasoning was based on the conflict of the MIR with both Article 8 of the HRA and British citizens' 'constitutional right' of abode at common law and under the Immigration Act 1971. Blake held that a lower threshold at the level of the annual income of a full-time job at the minimum wage would be compatible with Article 8 and British citizens' constitutional rights. Although Blake declined to declare the MIR unlawful, he held effectively that it would be when applied in individual cases to all British citizen and refugee sponsors earning the annual minimum wage or above.[24]

However, Blake's approach was rejected by the Court of Appeal and the Supreme Court, which both unanimously upheld the legality of the MIR. In the sole judgment, Lady Hale and Lord Carnwath emphasised that the challenge was to the Immigration Rules as such or in principle, rather than their application in an individual case. This led the court to adopt an 'incapable' test, according to which the MIR would only be unlawful under Article 8 if 'couched in a form which made non-compliance in individual cases practically inevitable'.[25] Given the nature of this test, the Supreme Court reasoned that, since there was provision within the rules for consideration of 'exceptional circumstances', as well as an appeal to a tribunal on human rights grounds, then the rules were not incapable of being applied consistently with Article 8. As such, since the MIR was lawful under the HRA, it followed that the case must 'stand or fall under common law principles'.[26]

The court characterised the common law challenge as whether the MIR is 'based on a misinterpretation of the 1971 [Immigration] Act, inconsistent with its purposes, or otherwise irrational'.[27] In two brief paragraphs, the court's answer was that the challenge on such grounds fails because the MIR has 'entirely legitimate' aims – 'to ensure, so far as practicable, that the couple do not have recourse to welfare benefits and have sufficient resources to be able to play a full part in British life' – and that there is a 'rational connection' between the aims and the income threshold chosen, since the 'work of the Migration Advisory Committee is a model of economic rationality … it arrived at an income figure above which the couple would not have any recourse to welfare benefits'. Given this, the court held that 'it is also not possible to say that a lesser threshold, and thus a less intrusive measure, should have been adopted'.[28] Hence, the MIR was lawful at common law.

21 Migration Advisory Committee, *Review of the Minimum Income Requirement for Sponsorship under the Family Migration Route November* (2011) 72.

22 Home Office, *Impact Assessment: Changes to Family Migration Rules* (IA: HO0065 2012) 9. As noted by H Wray, 'The MM case and the public interest: how did the government make its case?' (2017) 31(3) Journal of Immigration, Asylum and Nationality Law 227, 235.

23 *R (MM (Lebanon) v SSHD)* [2013] EWHC 1900 (Admin).

24 Ibid [142]–[144].

25 *MM* (n 3) [67].

26 Ibid [60].

27 Ibid.

28 Ibid [82]–[83].

2 Contrasting structures and intensity of review

The legal issues in dispute in the two cases share important similarities. Both cases involved the commodification or marketisation of rights, to family reunification and access to justice, in order, the government claimed, to save public money in a political context of austerity. Both cases were heard in 2017, by which time the government and the media no longer regarded the size of the deficit 'as the most important issue of all'.[29] Both were reviews of the legality of a general rule, rather than its application to a specific case. The Home Secretary and the Lord Chancellor both retained a discretion to waive the rule in 'exceptional circumstances', which was little used: 26 grants of leave from 30,000 refusals from 2012 to 2014; 51 fee remissions between July 2015 and December 2016.[30] Both cases were arguable on human rights and common law grounds and both disproportionately affected women and ethnic minorities raising a discrimination claim.[31] In respect of Convention rights, it is strongly arguable that both the MIR and the fees would be regarded by the ECtHR as within a state's margin of appreciation. Both cases were heard by seven member panels, reflecting the important issues at stake. Finally, few would argue that fees or a MIR could never be lawful (or equally could never be unlawful unless expressly authorised by Parliament), with the key legal question being whether the level set in each case unlawfully interfered with the relevant right.

Nonetheless, despite these similarities, the Supreme Court's approach was radically different in the two cases. The most striking difference is the use of different common law tests – in *MM* a two-pronged structure, with no 'reasonably necessary' or proportionality stage as with *UNISON*. It was sufficient for the MIR's lawfulness at common law that it was rationally connected to a legitimate aim. If this test had been employed in *UNISON*, then the fees almost certainly would have been lawful, since there was 'no dispute that the purposes which underlay the making of the Fees Order are legitimate'.[32] Why essentially a *Wednesbury* rationality test was appropriate in *MM* which would seem to involve 'fundamental' rights is never explained by the court. This relates to another important difference; whilst *UNISON* cites a number of authorities and follows the same approach adopted in the *Leech* set of cases, no authorities at all are cited for the common law approach adopted in *MM*, despite the standard of review at common law, especially when involving fundamental rights, being a live issue amongst judges and academics.[33]

A related difference is the contrasting intensity with which the two tests are employed. In *UNISON*, although the government would only recover less than half of the estimated unit cost of a tribunal from the fee, along with the inevitable uncertainty in predicting how potential tribunal users would react to the fees (which is flagged in the Impact Assessment),[34] Lord Reed employs a stringent conception of necessity: since the government's aim (which Lord Reed incorrectly treats as maximising revenue) could have

29 Jon Snow in a 2014 TV interview with Ed Miliband: 'Is Ed Miliband ready to become Prime Minister?' (*Channel 4 News*, 24 September 2014) <www.channel4.com/news/ed-miliband-labour-politics-jon-snow-interview>.

30 *UNISON* (n 1) [44]; MM (n 3) [25].

31 The discrimination claim was successful in *UNISON* and unsuccessful in *MM*. The Supreme Court did not address the issue in *MM* (n 3) [78], agreeing with the reasoning of the lower courts that no separate issue arose.

32 *UNISON* (n 1) [86].

33 *Kennedy v Information Commissioner* [2014] UKSC 20; *Pham v SSHD* [2015] UKSC 19; *Keyu v SSFCA* [2015] UKSC 69.

34 'Price elasticity of demand for ET and for EAT is unknown, so two scenarios have been used to capture a plausible range of demand responsiveness among employees and employers.' Ministry of Justice (n 15) 2.

been achieved with less interference, the fees were unlawful. In contrast, in *MM* the justification for the MIR was not probed at all, with the MAC report described as a 'model of economic rationality'.

The irony is that the MAC, a body comprised of academic economists, was essentially answering a question of social security law; as the court put it, what is the 'income figure above which the couple would not have any recourse to welfare benefits'? Answering this question does not involve anything resembling economic reasoning and perhaps unsurprisingly, given the complexities of social security law, the MAC made an extremely important error – it overlooked that when a British citizen forms a couple with a partner subject to immigration control their benefit entitlement cannot increase (whilst, as the MAC recognised, individuals subject to immigration control have no independent entitlement).[35] Hence, it is strongly arguable that the MIR is not rationally connected to a legitimate aim, since granting leave to a partner at the 'leave to enter' or 'further leave to remain' stages cannot increase social security entitlement. Yet, because the evidence was not probed or scrutinised at all, this central aspect of the case was completely missed by the court. Hence, remarkably, in one case the court mischaracterised the government's aims and then second-guessed an economic question – what price will maximise revenues – and in the other case it deferred on a question of law – the social security entitlement of couples where one partner is subject to immigration control – incorrectly answered by economists.

3 Potential justifications

It is of course no surprise that significant differences exist in the standard of review the courts employ, with many judges and academics expressly supporting a 'variable intensity' or 'contextual' approach to substantive review. However, this section argues that the principles which it is most commonly claimed guide, or at least ought to guide, the standard of review cannot explain the discrepancy in structure and intensity in *UNISON* and *MM*.

Unrepresented minorities

A common justification for judicial review is that it provides a safeguard for minorities who may be unrepresented in or lack influence on Parliament. Such a view was expressed by Lord Bingham in *Huang v Secretary of State for the Home Department* who rejected the claim that the executive should be accorded the same level of deference in challenges to the Immigration Rules on Article 8 grounds as is provided to such challenges to housing policies.[36] Echoing Hart Ely's influential process-based theory of judicial review in which measures that burden groups marginalised or excluded from the political process are constitutionally suspect,[37] Lord Bingham held:

> The analogy is unpersuasive. Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented ... The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate

35 Child Poverty Action Group, *Welfare Benefits and Tax Credits Handbook 2019/20* (CPAG 2018) 1026–1050. For discussion, see: C Rowe, 'Family reunification, the minimum income requirements and the welfare myth' (2020) 34(1) Journal of Immigration, Asylum and Nationality Law 30.

36 [2007] UKHL 11.

37 J Hart Ely, *Democracy and Distrust – A Theory of Judicial Review* (Harvard University Press 1981).

> in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.[38]

Although Lord Bingham's claim that tenants' interests have been 'fully represented' in Parliament is doubtful, his approach appears apposite for the issue of tribunal fees. The case itself was brought by UNISON, the UK's largest trade union, with the links between unions and the Labour party manifold, which strongly opposed the fees in Parliament. A vote, held under the affirmative resolution procedure, led to a clear split on party lines.[39] This is not surprising: not only did the fees affect powerful interest groups – employers, trade unions, lawyers and the legal system – but the issue maps onto the left–right political divide over flexible labour markets, the 'managerial prerogative' and the general commodification and marketisation of public services. Prior to the hearing, the Modern Law Review published an article criticising the fees,[40] which were also condemned in a letter signed by over 400 barristers.[41] This coalition of interests opposing the fees looks much more like the (perhaps temporary) loser in an ongoing political struggle than an unprotected minority. Curiously, Lord Reed was alert to the concern of political conflicts being relitigated in the courts in the context of the benefits cap but seemingly not in respect of tribunal fees.[42]

In contrast, the opposition to the MIR could not have been more different. Its most effective opponent has been a grassroots campaign conducted through a blog and social media by a couple new to any form of political activism, with opposition also from the migrant-friendly non-governmental organisations.[43] Unlike with tribunal fees, there was no party division over the MIR, which was part of a wider set of changes to the Immigration Rules. The government unusually held a House of Commons debate prior to the introduction of the new rules, which were almost unanimously supported. Like the then Shadow Home Secretary, Yvette Cooper, who did not mention the MIR, most MPs focused on expressing support for the government's attempts to strengthen the deportation rules for 'foreign criminals'. A few backbenchers – Jeremy Corbyn, John McDonnell and Pete Wishart – did criticise the changes including the MIR, although no one 'prayed' against them and so there was no vote.[44] Within legal academia the MIR has been of little interest outside the specialist Journal of Immigration, Asylum and Nationality Law, with no articles published prior to the Supreme Court hearing, which could have influenced the decision (even if only to flag to the court that important issues – direct discrimination against the poor, two-tier citizenship – were at stake). Clearly, therefore a difference in representation or influence cannot explain the contrasting treatment of the two cases – in fact, far more scrutiny would have been expected of the MIR if the court were to take Lord Bingham's *Huang* approach seriously.

38 *Huang* (n 36) [17].

39 The order was approved by 272 votes to 209, HC Deb 12 June 2013, vol 564, col 465.

40 A Adams and J Prassl, 'Vexatious claims: challenging the case for employment tribunal fees' (2017) 80 Modern Law Review 412.

41 Employment Law Bar Association, 'Open letter to Chris Grayling' <http://elba.org.uk/wp-content/uploads/2015/03/ELBA-Fees-Letter.pdf>.

42 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [92]–[96].

43 BritCits 'was formed in 2012 in direct response to the attack on British citizens and residents with non-EEA family members' <http://britcits.blogspot.com/p/about-us.html>.

44 HC Deb 19 June 2012, vol 547, cols 760–824.

Importance of the norm

There is widespread agreement amongst judges on the common-sense proposition that the standard of any review, at common law or under the HRA, should be in part at least determined by the importance of the norm at stake. As Lady Hale put it, account has to be taken of 'the comparative importance of the right infringed in the scale of rights protected'.[45] Although different scales suggest themselves, such as the importance of a norm for democracy, perhaps the most intuitive standard is according to a norm's significance for well-being: the greater the harm any interference causes a group or individual, *ceteris paribus* the more intensive should be the standard of review. This is reflected in the focus in *UNISON* on showing that the fees were not 'reasonably affordable'. On Lord Reed's account, the right would not have been interfered with if the fees – as is almost always the case with any price system – simply altered the choices made by potential litigants, with some now choosing not to bring a claim. It was necessary to go further and show that the fees harmed some people by forcing them to forego reasonable expenditure. However, it is difficult to see how relative harm can make sense of the contrasting approaches in the two cases. The fees were one of innumerable public spending cuts, but unusually were reasonably protective of the poorest who were largely exempt due to means-testing. As shown by the UN Special Rapporteur on Extreme Poverty in his UK visit, this was far from typical: 'great misery has ... been inflicted unnecessarily'[46] by policies, including those held to be lawful by the Supreme Court such as the bedroom tax[47] and the benefits cap,[48] that directly cut the living standards of the poorest – people whose incomes even before the cuts were below the Joseph Rowntree minimum standards. It is noteworthy that the review itself was brought by UNISON rather than in the name of an affected individual – one possibility is that nobody was identified who felt both strongly about the fees and was in a financial position which evoked sufficient hardship. There is also a certain irony about the fee 'victory'. Trade unions paid the fees of their members and few developments would be of greater benefit to workers collectively than a significant increase in union membership.

For poor families, however, there is no collective organisation they can join – let alone for a modest monthly fee conferring a host of other benefits – which will take them to the MIR threshold. As the Supreme Court acknowledged in *MM*, the 'MIR may constitute a permanent impediment to many couples, because the sponsor will never be able to earn above the threshold'.[49] Similarly, whilst there may be some doubts about the level of hardship the tribunal fees have caused, as the court held '[t]here can be no doubt that the MIR has caused, and will continue to cause, significant hardship to many thousands of couples who have good reasons for wanting to make their lives together in this country, and to their children'.[50] For many British citizens the MIR means a choice between relocating to one of the poorest countries in the world with a life of great hardship and poverty or remaining in the UK without their family. Many earning less than £18,600 in the UK will do the types of low-skilled jobs which are extremely poorly paid in developing

45 *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [124]. This point has been made innumerable times – in relation to the CLC, Lord Mance in *Kennedy* (n 33) [54]: 'In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved.'

46 P Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights on his visit to the United Kingdom of Great Britain and Northern Ireland' (Human Rights Council 2019) paragraph 11.

47 *R (Carmichael) v SSWP* [2016] UKSC 58.

48 *SG* (n 42), *R (DA) v SSWP* [2019] UKSC 21.

49 *MM* (n 3) [81].

50 Ibid [80].

countries, if such work is even available to British citizens. The strain of the MIR, combined with the very high visa fees and the bureaucratic hurdles, has led one affected person to speak publicly about how refusal led to a suicide attempt,[51] while the rules have also been linked to several suicides.[52] Many more speak about feeling like second-class citizens, discriminated against because they are low paid. As such, as bad as tribunal fees might be, there is no comparison between the harm caused by being prevented from living with one's family and being unable, without a one-off means-tested financial sacrifice – which could have been avoided by joining a union – to take a claim to an employment tribunal. It is difficult to imagine anybody thinking otherwise – even lawyers.

Deference

Both *MM* and *UNISON* engage a set of interrelated and much-discussed public law concepts which it is often claimed should guide the intensity of any review. If a case is polycentric (i.e. affects unrepresented third parties) or engages expertise (e.g. requires the court to assess complex evidence or question the views of 'experts') or involves the allocation of resources, then the court, it is claimed, should defer or assign weight or provide a greater area of discretionary judgement to the decision-maker. However, these concepts cannot make sense of the differing approaches in the two cases. *UNISON* directly involved resource allocation, since, by quashing the fees, the income foregone (and higher future costs due to an increase in demand from the abolition of the fees) has to be found from elsewhere in the Ministry of Justice budget. Yet, although the decision to quash the fees was clearly polycentric in a policy area which has seen some of the largest budget cuts,[53] no weight or deference at all appears to have been assigned to the decision of the policy-makers or 'experts' in the ministry as to how to most effectively allocate their very scarce resources.

In contrast, the consequences for resource allocation of declaring the MIR unlawful would have been far more limited. If the decision of the High Court was left to stand, with the £18,600 threshold replaced with one at the minimum wage, then only one subset of partners who would receive leave to enter or remain – those at the 'indefinite leave to remain' (ILR) stage – could have increased welfare payments. This limited impact could have been avoided entirely if the MIR was only quashed in relation to couples at the stages prior to ILR. In any case, a uniform threshold at the level of the minimum wage, a European norm,[54] would not have caused any immediate budget shortfall that would require, as with *UNISON*, resources to be allocated from elsewhere. In the long-term, any savings from the MIR are highly speculative and contested – most of the forecast savings in the Impact Assessment resulted from reductions to child benefit and tax credit

51 'Families torn apart as visa misery hits foreign spouses' (*The Guardian*, 18 August 2018) <www.theguardian.com/uk-news/2018/aug/18/visa-britons-foreign-spouses-families-split-hostile-environment>.

52 An immigration solicitor describes some tragic cases: S Pasha and N Kandiah, 'The real-life cost of the minimum income requirement for spouse visas' (*Electronic Immigration Network*, 30 January 2020) <www.ein.org.uk/blog/real-life-cost-minimum-income-requirement-spouse-visas>. Also: J Penrose, 'Donna Oettinger Purley rail deaths: mum had tried to commit suicide just months ago' (*Daily Mirror*, 2 April 2015) <www.mirror.co.uk/news/uk-news/donna-oettinger-purley-rail-deaths-1781828>.

53 In 2017, the year *UNISON* was heard, the Institute for Fiscal Studies calculated that in the decade following 2010, the Ministry of Justice's budget would be cut by around 40 per cent. House of Commons Library, *The Spending of the Ministry of Justice* (1 October 2019) 2.

54 H Wray et al, 'A family resemblance? The regulation of marriage migration in Europe' (2014) 16 European Journal of Migration and Law 209.

payments for British citizen children who are no longer being brought up in the UK. A briefing paper which criticised these assumptions was not mentioned by the court.[55]

Moreover, as pointed out above, the MIR was based on a question of social security law – the threshold at which an individual and families cease to be eligible for in-work benefits – and so there could have been no 'expertise'-based objection to the court at least carefully scrutinising the MIR. Immigration is of course a 'polycentric' issue, but then few legal issues are not.[56] As Lord Reed points out in *UNISON*, cases such as *Donoghue v Stevenson* have 'implications well beyond the particular claimants'.[57] Declaring the MIR unlawful may have had similar positive implications, such as diminishing the unfairness in treatment between not only low-income British citizens and their more affluent counterparts, but low-income European Economic Area nationals resident in the UK, who were not subject to the MIR – an apparent injustice which led some to vote leave in the EU referendum.[58]

4 The nature of the common law

The obvious explanation for the different treatment of the two cases, it might be thought, lies not in general legal principles, but in the common law itself. The common law developed over centuries in an inegalitarian and class-divided society, and so it is hardly surprising that it protects certain norms over others even if they might be considered morally less compelling. Accordingly, almost all of the recent CLC cases involve in some way court-related or quasi-judicial norms: open justice within (*Al Rawi*, *Guardian News*, *A v BBC*, *Cape Intermediate Holdings*) and outside the courts (*Kennedy*); access to a court (*Ahmed*, *DSD*) and a right to an oral hearing (*Osborn*).[59] The court-centric focus of the CLC is equally plain in the precedents most commonly cited in support of these decisions, which originated the proportionality at common law test: *Leech* (prisoner communication with a solicitor), *Pierson* (prison sentence retrospectively increased), *Simms* (prisoner communication with a journalist), *Daly* (confidentiality of a prisoner's legal correspondence) and *Witham* (access to a court for someone on benefits).[60] Similarly, in recent cases where the Supreme Court has adopted an especially strained interpretation of statute, this has been to protect court-related principles – the importance of the court retaining jurisdiction (*Privacy International*) and the supremacy of court or tribunal judgments (*Evans*).[61] Hence, although there may be questions about the legitimacy of this turn to the CLC – how can the fact norms were posited (assuming they were and are not simply being invented today) by judges in a undemocratic, unjust society justify their current use as constitutional or fundamental norms when these norms were not chosen by democratically accountable representatives or based on their moral or political significance? – the nature of the common law can at least explain the discrepancy in

55 H Wray and E Kofman, 'The fiscal implications of the minimum income requirement: what does the evidence tell us?' (Middlesex University Briefing, June 2013).

56 J King, 'The pervasiveness of polycentricity' [2008] Public Law 101.

57 *UNISON* (n 1) [69].

58 Interviews with MIR-affected families found some 'palpably angry at the apparent discrepancy' and who stated 'they would vote to leave in the upcoming referendum'. M Griffiths, '"My passport is just my way out of here"…' (2019) Identities 1, 12.

59 *Al Rawi v The Security Service* [2011] UKSC 34; *Guardian News* (n 4); *A v BBC* [2014] UKSC 25; *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38; *Kennedy* (n 33); *HM Treasury v Mohammed Jaber Ahmed* [2010] UKSC 2; R *(DSD) v Parole Board* [2018] EWHC 694 (Admin); R *(Osborn) v The Parole Board* [2013] UKSC 61.

60 *Leech*, *Pierson*, *Simms*, *Daly* and *Witham* (n 7).

61 R *(Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; R *(Evans) v Attorney General* [2015] UKSC 21.

treatment between *UNISON* and *MM*: one interest, access to a court, is recognised and protected by the common law, whilst equal citizenship and family life are not.

This argument may have some plausibility as an explanation of certain areas of recent senior courts' jurisprudence. It is striking, for instance, that the recent set of cases around social security and austerity – benefits cap,[62] two-child cap,[63] bedroom tax[64] – have all been decided entirely independently of any notion of CLCR. Although Van Bueren has forcefully argued that 'socio-economic rights are a part of the English legal heritage', she acknowledges that socio-economic rights case law is 'scarce', which would seem to be a serious impediment to any recognition of a CLCR to a minimum standard of living or the like.[65] This though may be to set the bar too high: the German Constitutional Court, for instance, has recently robustly protected basic socio-economic rights in part through its interpretation of the 'dignity' clause of the German Constitution, holding that benefit sanctions are subject to a 'strict proportionality' test, with mandatory sanctions and those exceeding 30 per cent of entitlement unconstitutional.[66] Lord Reed has also claimed that 'dignity' is a core value of the common law,[67] which suggests that if the Supreme Court had really wanted, like its German counterpart, to place some limits on at least the harshest austerity measures – the human consequences of which were powerfully captured by the UN Special Rapporteur on his UK visit – then it would not have been too difficult to identify resources within the common law that could trigger a proportionality test or, if the interference is contained in primary legislation, a strained interpretation of the statute. Of course, the fact that, when considering the Convention compatibility of such measures, the Supreme Court has adopted the most deferential proportionality test available, the manifestly without reasonable foundation standard, which is even laxer than the test it employed to protect the property rights of firms from legislation compensating the NHS for costs arising from asbestos-related disease, suggests that the priorities of the UK's highest court are quite different from its German counterpart.[68]

However, none of the familiar worries which caution against the judicial recognition of socio-economic rights apply to family life and citizenship: case law is not scarce, both are protected in civil and political international human rights instruments,[69] and both will often, as discussed above in respect to *MM* and *UNISON*, raise concerns around resource allocation and expertise less acutely than for court-centred norms. Indeed, the significance of family life and marriage has at times been recognised by the common law for ill, with the supposed impossibility of marital rape the most egregious case.[70] The common law rule of spousal privilege is another well-known example. Section 10 of the British Nationality and Status of Aliens Act 1914, which stated that 'the wife of a British

62 *SG* (n 42); *DA* (n 48).

63 *R (SC) v SSWP* [2019] EWCA Civ 615.

64 *Carmichael* (n 47).

65 G Van Bueren, 'Socio-economic rights and a Bill of Rights – an Overlooked British tradition' [2013] Public Law 821, 837.

66 BVerfG, 1 BvL 7/16 of 5 November 2019 *Sanktionen im Sozialrecht*.

67 *Osborn* (n 59) [68].

68 *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3, [52]. For discussion of this contrast, see M Cousins, 'Social security, discrimination and justification under the European Convention on Human Rights' [2016] 23(1) Journal of Social Security Law 20.

69 The International Covenant on Civil and Political Rights, Article 17 (right to family life) and Article 24 (right to nationality).

70 The impossibility of marital rape under English common law was declared by M Hale's *History of the Pleas of the Crown* (1736), vol 1, 629. Likewise, the first edition of J Archbold's *Pleading and Evidence in Criminal Cases* (1822) 259.

subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien', is a legislative instance of the common law principle of 'conjugal unity'. As Baty put it:

> When we consider the enormous power with which a husband is invested over his wife by the Common Law, it seems monstrous that she could ever conceivably be thought to be subject to a competing control exercised by an alien power … [it is] flatly incompatible with the unity of person which is the essential basis of the common law view of marriage.[71]

The idea that the common law does not recognise the importance of marriage or family life as such is not credible. Similarly, the right to abode was recognised by Blackstone[72] and in a number of recent cases.[73] Moreover, as mentioned above, at the High Court Blake J explicitly grounds his decision in part on the 'constitutional right' of abode of British citizens. Yet this 'constitutional right' was not even mentioned by the Supreme Court in *MM*, although the appeal was on both common law and human rights grounds.

Blake's reasoning explicitly followed Sedley LJ's judgment in *Quila v Secretary of State for the Home Department*.[74] The case concerned an immigration rule which prevented the granting of a spouse visa, again absent exceptional circumstances, if either partner was under the age of 22. In a judgment notable for the clarity with which CLCR are approached, Sedley begins, under a section heading 'Proportionality at Common Law':

> In … *Daly*… the House of Lords, on the eve of the coming into force of the Human Rights Act 1998, took the opportunity to make it clear that proportionality was already required by the common law where an executive measure would interfere with a fundamental individual right.[75]

Sedley then points out that the 'critical initial question is therefore what right, if any, either appellant can rely on in order to found a case on proportionality' – indeed, this is the critical question, expanded to include other norms but rarely, if ever, directly engaged with by other judges when approaching the CLC. For Sedley:

> Two such rights are founded upon here: the right of a citizen of the United Kingdom to live here, and the right of an adult to marry. The first is an indefeasible and unconditional right, for the British state has no power of exile. The second is a right which is governed and qualified by statute, but it is in the eyes of the common law a fundamental right with which the state may interfere only within measured limits – for example, in relation to age, consent, formality and so forth.[76]

As with the MIR, Sedley points out that the rule does not 'prevent anybody from marrying', and 'it does nothing to prevent cohabitation elsewhere in the world'. Hence, a

71 T Baty, 'The nationality of a married woman at common law' [1936] Law Quarterly Review 52, 247. See also: H Wray, *Regulating Marriage Migration into the UK: A Stranger in the Home* (Routledge 2016) 27–40.

72 But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' W Blackstone, *Commentaries on the Laws of England* 15th edn (1809) vol 1, 137.

73 *Bancoult v SSFCA* [2001] QB 1067, [39], Laws LJ: 'I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen.' *DPP v Bhagwan* [1972] AC 60, [77], Lord Diplock referred to 'the common law rights of British subjects … to enter the United Kingdom when and where they please and on arrival to go wherever they like within the realm'. See also: *Bancoult v SSFCA (No 2)* [2008] UKHL 61, [70] (Lord Bingham); *Lukaszewski v The District Court in Torun, Poland* [2012] UKSC 20, [31] (Lord Mance).

74 [2010] EWCA Civ 1482.

75 Ibid [34].

76 Ibid [37].

British citizen 'is still free … to enjoy family life with his or her spouse even while both are under 22'.[77] However, for Sedley:

> In the eyes of the common law it is not simply the right to marry and not simply the right to respect for family life but their combined effect which constitutes the material right: that is to say a right not merely to go through a ceremony of marriage but to make a reality of it by living together. For the state to make exile for one of the spouses the price of exercising the right to marry and embark on family life requires powerful justification.[78]

For Sedley, as for Blake, that powerful justification was not forthcoming and so the rule was disproportionate.

In response to Blake, Aikens LJ at the Court of Appeal claimed that '[t]here is nothing in the 1971 Act or the common law that grants a "constitutional right" of British citizens to live in the UK with non-EEA partners',[79] but provided no further elaboration even though he was bound by Sedley's judgment in *Quila*, and so arguably the decision was *per incuriam*. The closest the Supreme Court has come to addressing the issue of CLCR in the immigration context is *Agyarko v Secretary of State for the Home Department*, where Lord Reed very briefly addresses the claim under the 1971 Act. According to Lord Reed it 'does not advance the argument', since the Act does not entitle a British citizen to 'insist that his or her non-national partner should also be entitled to live in the UK'.[80] Whatever the force of this response in respect to a claim made under the Act, it is hopeless as a counterargument to the CLCR position advanced by Blake and Sedley. Their point was not that CLCR are absolute, allowing citizens to 'insist' on the right to live with their family members in the UK, but – precisely like Lord Reed's argument in *UNISON* – that any interference must be proportionate.

In these circumstances, it is very difficult to regard the Supreme Court as a 'forum of principle' or as a body which takes social justice seriously. The MIR is a measure which, it acknowledges, causes great hardship, conflicts with equal citizenship and directly discriminates against the poor, whilst the court has frequently emphasised the importance of common law norms, that 'litigants … should look first to the common law to protect their fundamental rights' and so on.[81] Yet in *MM* it failed to mention CLCR despite forming part of the *ratio* at first instance, based on the judgment of one of the most eminent public lawyers of his generation, Sir Stephen Sedley. This is not the courts developing the common law incrementally but choosing, consciously or not, to marginalise certain norms and prioritise others – to the detriment of the disadvantaged who are not even considered to be owed an explanation as to why their interests are not deemed 'constitutional' or 'fundamental'.

77 Ibid [39].

78 Ibid [48].

79 *R (MM (Lebanon)) v SSHD* [2014] EWCA Civ 985, [138].

80 [2017] UKSC 11, [68].

81 Lady Hale, 'UK constitutionalism on the march?' (speech to ALBA, 12 July 2014) 15. See also *Kennedy* (n 33) [46], Lord Mance: 'the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene' and [133] Lord Toulson observing 'a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.'

5 The CLC as a set of court-centred norms

A HOOK TO HANG IT ON

One explanation for why the Supreme Court did not regard *MM* as raising any issues of CLCR can be found in an extra-judicial speech of Lord Carnwath, who gave the joint judgment in *MM*. For Lord Carnwath:

> In 19 years as a judge of administrative law cases I cannot remember ever deciding a case by simply asking myself whether an administrative decision was 'beyond the range of reasonable responses' .... My approach I suspect has been much closer to the characteristically pragmatic approach suggested by Lord Donaldson … 'the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take'. If the answer appears to be yes, then one looks for a legal hook to hang it on. And if there is none suitable, one may need to adapt one.[82]

It may be that the state, imposing a choice on low-income British citizens of 'exile' or family life and 'skype kids' growing up without a parent is not seen by Lord Carnwath and colleagues as the type of matter on which something has 'gone wrong'. This is perhaps unsurprising – Lord Carnwath likely knows few people on a low income and rather more who earn the MIR figure or more in a week. Lord Sumption, for instance, is taken to remark that he left academia so that he could afford his 'grocery bills', while the fees at his and Lord Carnwath's old school is more than twice the MIR threshold.[83] It has been plausibly argued that 'empathy gulfs' emerge in very unequal societies such as the UK, which 'harden attitudes above', with the most privileged unable to identify with the lives of the poor.[84] It would be no surprise if the most successful barristers and judges thought £18,600, or less, was no figure on which to support a family or, equally, as professional lawyers, that a sharp fall in the number of employment tribunal cases was very concerning. The CLC, as such, may be a convenient hook on which judges can hang what they think has 'gone wrong'.

Elliott has criticised the pragmatism of Lord Carnwath's remarks for failing to 'to grapple with the underlying need for a normative ordering of the values that warrant judicial protection' calling for 'a greater sense of the underlying principles and the theoretical framework in which they sit'.[85] Similarly, Lienen has argued, specifically in relation to CLCR, that 'it is very difficult to devise a model of [CLCR] because the jurisprudential approach lacks coherence' and 'consistency',[86] whilst almost everybody who has written on CLCR has concurred with Lady Hale's observation that 'that no two lists … would be the same'.[87]

Nonetheless, whatever the psychological process underlining the decision-making of Lord Carnwath and colleagues, the normative ordering, and as a result the constitutional

82 Lord Carnwath, 'From judicial outrage to sliding scales – where next for Wednesbury?' (ALBA Annual Lecture, 12 November 2013) 18.

83 An anecdote that has stood the test of time for Lord Sumption. Repeated in 'The historian as judge' (Speech at training session for tribunal judges, 6 October 2016) 1; and 'Lawyer of the week' *The Times* (London, 6 November 2001).

84 I Shapiro, *The State of Democratic Theory* (Princeton University Press 2003) 135.

85 M Elliott, 'Where next for the Wednesbury principle?' (UK Constitutional Law Association, 20 November 2013) <https://ukconstitutionallaw.org/>.

86 Lienen (n 5) 649 and 667.

87 Lady Hale (n 81) 15.

ordering, constructed by the Supreme Court in respect to the CLC is clear enough, including the 'underlying principles', 'jurisprudential approach' and, indeed, the rights, principles, values and interests that the CLC will protect and promote. If a measure interferes with or engages a court-centred norm, involving access to a (quasi) court, (quasi) court processes, the supremacy of (quasi) court decisions or a court's jurisdiction, then a stringent form of review will be applied, with robust protection provided by the court for the relevant norm in one of three ways. If the court treats the decision under review as a 'hard edged issue of law',[88] then the court can (re)take the decision itself on the merits – this is the approach when the issue involves court processes, such as the disclosure of information in court proceedings.[89] Alternatively, a proportionality test will be employed, usually when a non-judicial decision-maker (e.g. a prison governor or a minister) takes a decision which interferes with a court-centred norm – this could be charging court fees or restricting a prisoner's legal correspondence. If the interference with the norm, however, stems directly from the authorising statute, say, by restricting the court's jurisdiction, then the court may take the third option of a strained or radical interpretation which, in effect, rewrites the statute to protect the relevant norm. In court-centred norm cases limited, if any, weight will be assigned to the views of the original decision-maker (if there is one). Indeed, it is likely the court will be eager to show that the norm at stake can be protected by the common law and that there is no need to rely on the HRA, with the protection provided by the common law just as strong as that provided in other jurisdictions.[90]

If a measure interferes, however, with the rights of low-income citizens to live in this country with their families or maintain a basic standard of living, then a very lax standard of review will be applied both at common law and under the HRA. Indeed, the common law may not be seen as relevant and nor will the court be concerned whether the protection provided by the common law is weaker than that provided by other legal systems. Both the Supreme Court and the Court of Appeal in *MM* were indifferent that EU law, as flagged by the High Court, provides much stronger protection for the family reunification rights of EU citizens, with the Court of Justice of the EU, striking down a MIR in excess of the minimum wage.[91] Nor were they concerned that a comparative study of immigration policies in 38 developed countries found that British '[s]eparated families now face the least "family-friendly" immigration policy in the developed world'.[92]

The crucial point is not that the common law cannot be very plausibly interpreted to protect other important norms – interests at the very centre of human well-being, such as family life, or at the centre of democracy, such as equal citizenship – but the Supreme Court in particular has chosen not to do this. It has chosen to focus almost exclusively on protecting and promoting a set of court-centred norms. But these were not choices, conscious or not, determined by the nature or history of the common law, but choices made by today's judges reflecting their own distinctive ideology.

88 Clayton (n 5), 10.

89 *Guardian News* (n 4) [132], (Lord Toulson).

90 *Witham* (n 7) [23], Laws J: 'As regards the ECHR jurisprudence I will say only that, as it seems to me, the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg.' *Maftah v SSFCA* [2011] EWCA Civ 350, [32] (Lord Judge).

91 *MM* (Hight Court) (n 23) [34], referring to Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010] ECR 1-1839. The case concerned the Family Reunification Directive, 2003/86/EC to which the UK opted out. The family reunification rights of EU citizens who have exercised their freedom of movement rights (unlike Chakroun) have been strongly defended by the Court of Justice of the EU in cases such as Case C-60/00 *Carpenter* [2002] ECR I-6279.

92 T Huddleston, *Migrant Integration Policy Index 2015* (CIDOB, Migration Policy Group 2015) 213.

Property rights and other norms

This argument conflicts with an important strand in the contemporary literature on the CLC, which, whilst usually recognising the importance of court-centred norms, claims that other norms are also recognised. However, on closer inspection these arguments are not convincing. Bjorge, for instance, lists the rights of freedom of expression, not to be tortured, to life and not to be discriminated against as, at least, potential CLCR, whilst focusing on property rights.[93] He takes the view that:

> The common law will protect fundamental rights through the operation of the four stage test set out by Lord Sumption in *Bank Mellat*, a test which matches even the least intrusive means test crystallised by the ECtHR. On this approach, even the area of the law which traditionally was accorded the weakest protection – ordinary property rights – now enjoys strong protection.[94]

Leaving aside the surprising claim that 'traditionally' property rights have been accorded the weakest protection by the common law, *Bank Mellat v HM Treasury (No 2)* did not posit a four-fold proportionality test to protect property rights at common law.[95] Although Lord Sumption's judgment is somewhat vague as to the source of the proportionality test he is discussing, Lord Reed's dissent is explicit that the relevant challenge is under statute and the HRA.[96] The four-stage test is also different from how the proportionality test is presented at common law (i.e. the three-stage test outlined above), and the case has not been understood elsewhere as propounding a common law test.[97]

Property rights were nonetheless engaged in *Youssef v Secretary of State for Foreign and Commonwealth Affairs*,[98] one of the two recent Supreme Court CLC cases which did not directly concern court-centred norms, but in neither case was a proportionality test (or other robust protection) actually employed. In *Pham*, which involved the stripping of citizenship, proportionality was only discussed by some justices as the possible correct test,[99] whilst in *Youssef* Lord Carnwath held that, 'even applying a proportionality test', it would yield the same result as the *Wednesbury* test applied by the lower courts – he was not positing proportionality as the correct test for interference with property rights.[100] It would be, to say the least, strange if a more stringent test was imposed for means-tested employment tribunal fees than stripping somebody of their citizenship, but what test the courts will actually impose remains undecided,[101] whilst normatively unintuitive and unattractive decision-making, as per *MM*, is not uncharacteristic of the CLC.

Indeed, it is striking that, although prior to the HRA it was not uncommon for judges to make expansive claims, such as 'you have to look long and hard before you can detect any difference between the English common law and the principles set out in the

93 Bjorge (n 5), 222.

94 Ibid 229.

95 [2013] UKSC 39.

96 Ibid [67].

97 P Daly, for instance, describes the case as 'not exactly ground-breaking as a matter of law, and is certainly the poor relation of *Bank Mellat (No. 1)*' – an unlikely assessment if the leading judgment was positing a four-stage proportionality test for property rights at common law. 'First Principles: Substantive and Procedural Review on the UKSC' (*Administrative Law Matters*, 6 November 2020) <https://www.administrativelawmatters.com/>.

98 [2016] UKSC 3.

99 *Pham* (n 33) [120] (Lord Reed); [98] (Lord Mance).

100 *Youssef* (n 98) [59].

101 See *Pham* [2018] EWCA Civ 2064, [49]–[63].

Convention',[102] the only cases where a proportionality test was actually employed all concerned court-centred norms in the *Leech* set of cases. When it came to other norms, such as equal treatment in *Smith*,[103] or freedom of expression in *Brind*,[104] or the right to life in *Bugdaycay*,[105] the test was heightened or anxious scrutiny and not proportionality. In *B*, which involved the right to life – a child's access to expensive medical treatment – Laws J applied an especially intensive standard of review, employing a balancing test akin to proportionality with the health authority required to show a 'substantial objective justification' for the decision to decline treatment; i.e. that the 'financial constraints and other deserving cases are more pressing than at present appears', although this was 'hard ... to imagine'.[106] However, Lord Bingham, then Master of the Rolls, rejected Laws' stringent approach in favour of a conventional *Wednesbury* test (as per *Smith* albeit heightened in which he also gave the lead judgment).[107] Revealingly, Lord Bingham would though endorse a common law proportionality test for a court-centred norm in *Daly*. Little has changed in recent decisions, with the courts failing to recognise the right to life as a CLCR in *Zagorski*,[108] *Sandiford*[109] and *El Gizouli*,[110] whilst the CLCR of access to a court is sufficiently stringent (as per the *Worboys* case) that the barrier presented by the rule requiring the secrecy of parole board hearings to 'victims' legally challenging a decision of the board was such that the rule was ultra vires even though it had not prevented the victims in the case bringing a judicial review.[111]

It is not necessary to argue that it follows from the above that the right to life or to family life are not recognised as values by the common law because the courts do not employ a robust methodology – merits, proportionality or radical interpretation – to protect those norms. As Elliott has observed, the common law can exhibit 'normative sympathy for values that underpin some – perhaps many – Convention rights' even though it 'has not always delivered tangible protection'.[112] The common law can recognise those values in other areas – the law of defamation, for instance, has developed in some ways to recognise the value of freedom of expression,[113] whilst by employing an anxious scrutiny test the common law recognises that, say, the state firing somebody because of their sexuality is more normatively significant than a cinema's opening hours.[114] What does follow, however, is that it is deeply misleading to regard such norms as 'constitutional'. At the least 'constitutional' denotes norms which are in some real sense basic or fundamental, but this is not a meaningful description of norms which attract an anxious scrutiny test or according to which areas of private law are developed; the floodgates principle is presumably not a constitutional norm, regardless of how central it is to tort law. If we are to provide an accurate description of the nature of public or

102 *Brind v SSHD* [1990] 2 WLR 787, [797] (Lord Donaldson MR). Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] Public Law 397, 408: 'for most practical purposes the common law would provide protection to the individual at least equal to that provided by the E.C.H.R.'.

103 *R v Ministry of Defence, ex p Smith* [1996] QB 517.

104 *R v SSHD, ex p Brind* [1991] 1 AC 696.

105 *R v SSHD, ex p Bugdaycay* [1987] AC 514.

106 *R v Cambridge Health Authority, ex p B* [1995] 25 BMLR 5 (QB), [17].

107 *R v Cambridge DHA, ex p B* [1995] 1 WLR 898, [906].

108 *Zagorski v SSBIS* [2010] EWHC 3110 (Admin).

109 *Sandiford v SSFCA* [2014] UKSC 44.

110 *El Gizouli v SSHD* [2019] EWHC 60 (Admin).

111 *DSD* (n 59).

112 Elliott (n 5).

113 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

114 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

constitutional law in the UK, and in particular the hierarchy of norms constructed by the senior courts, then the affix 'constitutional' or 'fundamental' should only be used for those norms which are robustly protected by the courts – at present, outside the HRA and EU law, only court-centred norms consistently attract such protection.

The lawyers' constitution

Of course, there has been no 'constitutional moment' when the British people or their elected representatives decided that court-centred norms or perhaps the 'rule of law' required some special protection which rights to a basic standard of living or to family life or even to vote[115] did not. The CLC cases considered in isolation have a progressive cast, and from this perspective they appear a positive development – it is the cases, such as *MM*, where any CLC aspect is ignored and the hierarchy of norms this creates that is problematic, rather than decisions in *UNISON* or the other CLC cases being in and of themselves objectionable. Many of the cases have been of benefit to prisoners, and it is especially noteworthy that the courts, led by Lord Steyn, started to provide such robust protection at a period in the mid-1990s when the Home Secretary courted political popularity through attacks on prisoners' rights. This is not the common law that has troubled the British left for much of the twentieth century, albeit the mooting of a proportionality test for property rights in *Youssef* and especially Bjorge's suggestion that the CLC's openness to customary international law means that the CLC can provide greater protection for property rights than the ECHR does indicate potential for conflict given Labour's most recent manifestos.[116] If the courts were to take this approach – say if Labour were to nationalise, as was indicated, the utilities for less than their market value (albeit improbable under its new leadership) – they would likely have most of the elite, including the media, cheering them on. The range of values that the CLC promotes has been construed narrowly so far, but this can easily change, with *Youssef* suggesting the courts may be inclined to perceive the CLC as more relevant to property rights than to the family life or standard of living of the poor.

A progressive slant to the cases decided positively in accordance with the CLC is not, however, the only striking feature. This does not appear to be a constitutional order which is to be adhered to, or perhaps even known by the public – it is not a constitutional order, in a country which surely needs one, with an 'integrative function'.[117] More fundamentally, it seems highly unlikely that this is an order that many British people would want to subscribe to – modern constitutions contain commitments far more extensive, including to social rights, than to the court-centred norms protected and promoted by the Supreme Court. A constitutional order vaguely Hayekian in the nature and austerity of its commitments seems, to say the least, an unlikely choice in a country where a socialised healthcare system is its most popular institution.

Gearty, a forceful critic of the 'common law partisans', has also claimed that 'almost unnoticed, human rights have crept into the same position as a binding agent whose adhesive qualities (it is no exaggeration to say) help to preserve in place the whole national project'.[118] While there may be some truth in this at an elite level and perhaps more generally in Northern Ireland, when the heat was actually on for the national project, with the 'yes' vote ahead in the Scottish independence referendum polls and Gordon Brown

115 *Moohan v Lord Advocate* [2014] UKSC 67, [34] (Lord Hodge).

116 Bjorge (n 5) 242.

117 D Grimm, 'Integration by Constitution' (2005) 3 International Journal of Constitutional Law 193.

118 C Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford University Press 2016) 22, 180.

called on to give his 'speech that saved the union',[119] he did not once mention human rights or court-centred norms or the rule of law, but focused on the NHS and the welfare state.[120] These might not be the priorities for elites, judicial or otherwise, but these are surely the binding agents – along with, as Moran has argued, 'the cult of military remembrance'[121] – if there are any left in a fractured and divided country. But whilst the welfare state has been under siege, with life expectancy in decline,[122] austerity linked with an estimated 120,000[123] to 130,000[124] excess deaths and the human consequences made plain to the world by the UN Special Rapporteur, Ken Loach,[125] and others,[126] the judges have been preoccupied elsewhere, supposedly protecting 'fundamental' and 'constitutional' rights.

One further point is worth mentioning. Bogg has responded creatively to *UNISON* by attempting to leverage the access to a court principle as an instrument to influence the interpretation of the employment status of gig-economy workers, since if they are not classed as 'workers', Bogg argues, their access to a court will be limited and so, given the importance of this right, the courts should adopt an approach as 'inclusive' to employment status as possible.[127] Adler similarly has written on how the benefit-sanctioning regime conflicts with the rule of law.[128] Good lawyers will always try to utilise the concepts and concerns of the courts to promote the interests of their clients, or, in their cases, social justice. But the peculiarity of this development should not be missed. The UK does not have a codified written 'constitution', difficult to amend, which as a result encourages creative interpretation of a fixed text. Why then does the UK now have a constitutional order in which to argue that the courts should promote and protect equal citizenship, family life or the interests of the most disadvantaged it is necessary to appeal to court-centred norms or the rule of law? The short answer is that this constitutional order was constructed by the courts – primarily a small group of men: Lord Steyn, the innovator of the common law proportionality test, and Lord Justice Laws, Lord Toulson and Lord Reed, who have done most to further develop it – and reflects their ideological choices about what is important. The rest of us have to fit our constitutional arguments to these choices. But constitutions are not the property of judges and lawyers – they belong to every citizen and should reflect the core values of the political community as a whole. Rather than it being 'now time for workers to reclaim the common law as their own', as Bogg suggests,

119 'A reborn Gordon Brown could be the man who saved the Union' (*Financial Times*, 17 September 2014) <www.ft.com/content/34866df6-3e85-11e4-adef-00144feabdc0>.

120 Full speech available at: <https://gordonandsarahbrown.com/2014/09/gordon-browns-speech-at-the-love-scotland-vote-no-rally-in-glasgow/>.

121 M Moran describes remembrance as 'the most successful civic ritual created by the British state in the last century', in *The End of British Politics?* (Palgrave Macmillan 2017) 63 and 65.

122 P Collinson, 'Life expectancy falls by six months in biggest drop in UK forecasts' (*The Guardian*, 7 March 2019) <www.theguardian.com/society/2019/mar/07/life-expectancy-slumps-by-five-months>.

123 J Watkins et al, 'Effects of health and social care spending constraints on mortality in England: a time trend analysis' (2017) 7 British Medical Journal Open.

124 D Hochlaf et al, 'Ending the blame game: the case for a new approach to public health and prevention' (Institute for Public Policy Research 2019) 6.

125 K Loach, *I, Daniel Blake* (BBC Films, 2016).

126 P Goodman, 'In Britain, austerity is changing everything' (*New York Times*, 28 March 2018) <https://www.nytimes.com/2018/05/28/world/europe/uk-austerity-poverty.html>.

127 Bogg (n 6) 518.

128 M Adler, 'Benefit sanctions and the rule of law' (UK Constitutional Law Association, 23 October 2015) <https://ukconstitutionallaw.org/>.

which will only provide victories to citizens when incidental to the protection of court-centred norms, it is past time the constitution itself was claimed.[129]

Conclusion

When Sir Martin Moore-Bick was selected to lead the Grenfell Tower inquiry, many affected residents were resistant. Understandably, they wondered how anybody with his life experiences could appreciate their situation, albeit by not attending an elite public school they were perhaps less narrow than the 'quad-to-quad' life-course of most of his judicial brethren. In response, many in the legal community very reasonably pointed to his skills as a judge, a 'fact-finder … trained to root out the truth'.[130]

What though is 'the truth' or the facts or the law to get right in respect of the CLC? The judges are not attempting – with the odd exception, especially Sedley in both *Quila* and his extra-judicial publications[131] – to engage in any meaningful sense with the actual history of the common law in order to identify the norms it has recognised or thereafter develop principled criteria to determine which of the identified norms, if any, should be given a special protection or status today. Rather, they have simply identified a set of court-centred norms, which no doubt have some connection with the common law, whilst ignoring other norms which have an equally plausible connection.

This has created a legitimacy problem for the senior courts. *MM* raised issues of the highest importance for a liberal democracy – equal citizenship, direct discrimination against the poor – and yet, despite CLCR forming part of the *ratio* of the judgment at first instance, the issue was entirely ignored by the Supreme Court. British citizens prevented from living with their families on the basis that they are too poor deserve far better than this from the senior judiciary – at the very least, they are owed an explanation as to why their rights and interests do not merit the same standard of protection as others.

If, perhaps as a result of the Brexit imbroglio, the UK (or likely what was left of it) adopts a conventional codified constitution, the suggestion that it should be written by a collection of predominantly male multi-millionaires from the most socially exclusive schools and universities would be met with incredulity – however 'terrifyingly bright'[132] or effective as judges or advocates they may be, it would surely be pointed out that they are in no special position to identify the basic norms to not only constitute social and political life in the UK, but to express the type of society that the UK is and claims to be. But this is precisely the situation that has arisen with the CLC. Of course, any written codified constitution must be interpreted, but there is a fundamental difference between interpretation and the actual positing of the norms and their hierarchy. In the meantime, until a conventional constitution is adopted, if this set of judges cannot provide principled reasons why it is unlawful (that is, unconstitutional) for somebody earning £15,000 a year to be charged £160 a year to use an employment tribunal, but it is lawful to prevent them from living with their partner in the UK, then perhaps it is time a wider range of people with different skills, backgrounds and experiences were selected who can provide the UK with a constitutional order justifiable to all its citizens.

129 Bogg (n 6) 526.

130 The Secret Barrister, 'Grenfell Inquiry: critics of Martin Moore-Bick are dabbling in fearmongering' (*New Statesman*, 11 July 2017).

131 S Sedley, *Lions under the Throne: Essays on the History of English Public Law* (Cambridge University Press 2015).

132 The Secret Barrister (n 130).