Judicial Miss Behavin’: a Defence of Process-Based Review of Public Authority Decisions under the HRA

by

David Mead∗

Abstract: This paper analyses the unanimous decision of the House of Lords in R (Begum) v Governors of Denbigh High School and to a lesser extent the later decision in Miss Behavin’ v. Belfast City Council. It considers the three reasons given by Lord Bingham in Begum to support his view that where decision-makers take no account of the human rights implications of their decision, the decision will not for that reason alone be struck down. The view of the House – what matters is the practical outcome not the quality of the decision-making process – is scrutinised and a defence of process-based review of public authority decision-making under the HRA is offered from several perspectives – particularly from a policy & practical viewpoint – for consideration.

Contact Details: David Mead, Norwich Law School, University of East Anglia, NR4 7TJ
D.Mead@uea.ac.uk

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∗ Senior Lecturer in Law, Norwich Law School, University of East Anglia. I am grateful to colleagues at a Law School seminar at which a draft of this paper was offered for discussion and to Michael Harker and Keith Syrett for detailed comments.
INTRODUCTION

In *R (Begum) v Governors of Denbigh High School* the House of Lords unanimously took the view that where public authorities take decisions that involve restricting (say) the right to privacy or free speech they need not have considered the impact of that decision for it later to be upheld, if challenged under the Human Rights Act (HRA), as a lawful one.\(^1\) This approach was in direct contrast to the reasoning and approach of the court below.\(^2\) The discussion of the House of Lords decision has largely focussed on the issues relating to the contested issue of religious freedom in a multi-faith society. The rejection of the formulaic approach taken by the Court of Appeal has either largely passed commentators by or been well-received.\(^3\) This paper will consider the extent to which the reasoning and approach of the House of Lords is and should legitimately be open to criticism. Since the House of Lords, Lord Bingham in particular, was heavily influenced by Tom Poole’s rejection of the Court of Appeal decision in *Begum*,\(^4\) this paper is to some extent also an indirect rejection of Poole’s view.

This paper will put forward the simple view that under the HRA not only is there room for judicial review of government decisions based on flaws in the decision-making process but that such an approach is justifiable and preferable. It will offer this defence of a process-based review of public authority decision-making under the HRA from several perspectives, not as a definitive answer but as a means to initiate debate.

CONTEXT AND BACKGROUND

Historically, judicial review at common law, since it is a form of review, has been concerned not with impugning the outcome or the merits or the substance of the decision under attack but with the process behind it: was the decision reached fairly (that is, was it reached in an unbiased fashion after a fair hearing?) without taking account of improper motives or irrelevant considerations and for the right reason (that is, to achieve not to frustrate the statutory purpose)? Only if review has been based on irrationality has there been any level of substantive review: is the decision one that other reasonable people would have reached or, in more modern phraseology, was the decision one that was within or beyond the range of responses open to a reasonable decision-maker?\(^5\)

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\(^1\) [2006] UKHL 15.
\(^2\) [2005] EWCA Civ 199.
\(^3\) See H. Fenwick *Civil Liberties and Human Rights* (Routledge, Abingdon; 2007) 275 “the House of Lords was right to reject the over-formalistic approach of the Court of Appeal which demanded that the school follow a Convention-based procedure in reaching its decision”. Tom Poole in his LSE Law Society and Economy Working Paper 12/2007 “The Reformation of English Administrative Law” talks of “a deeply unattractive jurisprudence that is both intrusive and formalist [that] would require courts to strike down decisions on purely …‘box-ticking’ grounds”: [http://www.lse.ac.uk/collections/law/wps/wps1.htm](http://www.lse.ac.uk/collections/law/wps/wps1.htm), access 11th April 2008.
Largely, that has all been turned on its head by the infusion into domestic law of Convention rights (those rights contained in the ECHR “brought home” in Schedule 1 to the HRA). Sections 6 and 7 of the HRA allow victims to use Convention rights offensively as a sword in legal proceedings. In essence under s.7(1)(a) those directly affected by public authority decisions may challenge them by applying for judicial review alleging, in effect, that there has been a violation of a Convention right. Since many of those rights – and certainly those contained in Articles 8-11 concerning privacy, religion, free speech and assembly - are not absolute but are qualified or limited, this has meant the advent of proportionality challenges to governmental decisions, mounted on the basis that restrictions are not “necessary in a democratic society”. Clearly, such an attack is by necessity an attack on the quality of the actual decision reached, that is on its outcome, rather than on what lies behind or informs that decision, that is the decision-making process. The extent to which judicial review under the HRA is solely about the former to the exclusion of the latter was at the heart of Begum and so is the central theme of this paper.

THE ISSUE

Where a court is seized under s.7(1)(a) with the task of reviewing a public authority’s decision for compliance with the statutory duty contained in s.6 of the HRA not to act in violation of Convention rights, is it relevant that decision makers have not even addressed their minds to the Convention rights of any person affected by the decision, let alone considered the impact or effect of its decision? In 2006 following Begum, the position seemed very clear.

The school refused to allow a pupil to attend wearing a jilbab. School uniform policy, agreed after consultation with the local Muslim community, permitted the wearing of the shalwar kameez but not the fuller length jilbab. She claimed that she had been suspended or excluded from school for a disciplinary reason and that this constituted an unlawful interference with her right to manifest her religious freedom under Article 9, a qualified right.

On that second question, the Court of Appeal found for the school largely on the basis not that the ban was disproportionate – indeed if it were taken again, the same outcome could be reached quite lawfully – but because the school’s decision-making process was flawed. “[B]ecause it approached the issues in this case from an entirely wrong direction and did not attribute to the claimant's beliefs the weight they deserved, the school is not entitled to resist the declarations she seeks”. Brooke L.J. continued:

“The decision-making structure should therefore [have gone] 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

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6 [2005] EWCA Civ 199 [78] Brooke L.J.
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)? …The school did not approach the matter in this way at all. Nobody who considered the issues on its behalf started from the premise that the claimant had a right which is recognised by English law, and that the onus lay on the school to justify its interference with that right. Instead, it started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school.”

The House of Lords overturned the decision of the Court of Appeal. Both Lord Bingham and Lord Hoffman were very critical of that court’s approach. The focus of the court should be on outcomes not processes. Lord Bingham offered three reasons for concluding the Court of Appeal’s approach was wrong.

(1) 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.

(2) It was clear that the court’s approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting.

(3) “As argued by Poole…the Court of Appeal's approach would introduce ‘a new formalism’ and be ‘a recipe for judicialisation on an unprecedented scale’. 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. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger’s task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.”

Lord Hoffman considered that Article 9 was concerned with substance, not procedure, such that 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)? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did

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7 Ibid. [75]-[78].
8 [2006] UKHL 15 at [29]-[31].
not approach the question in the structured way in which a judge might have
done. Head teachers and governors cannot be expected to make such decisions
with textbooks on human rights law at their elbows. The most that can be said is
that the way in which the school approached the problem may help to persuade
a judge that its answer fell within the area of judgment accorded to it by the
law.”

The remainder of this paper will assess that approach, the limits and the extent of that
unanimous view and its ramifications.

Not long afterwards, the House was asked to revisit the issue. In Belfast City Council v Miss
Behavin’ Ltd, it held to the firm, procedurally-abstemious line it had developed in Begum. However, certain dicta are instructive and might allow for a subtler reading of the rigid
delineation between outcomes and process supposedly established in Begum. In the case,
the potential owner of a sex-shop – whose application for a licence was rejected by the
local council – argued that in deciding whether or not a sex shop was appropriate in the
locality, the council ought to have had regard to its obligation under s.6 of the HRA to
respect the owner’s freedom of expression. The Court of Appeal did not hold the refusal
was a disproportionate restriction on Article 10 but, as it had done in Begum, held instead
that Convention rights had been violated by the way the council had arrived at its
decision: in its reasons, the council had not shown that it was conscious of the Convention
rights which were engaged. The decision was therefore unlawful unless it was inevitable
that a reasonable council which instructed itself properly about Convention rights would
have reached the same decision. On appeal to the House of Lords, the House gave
judgment for the Council holding as decisive the reasoning in Begum.

In Lord Hoffman’s view, the approach the Court of Appeal took was:
“...not only contrary to the reasoning in the recent decision of this House in
[Begum] but quite impractical. What was the council supposed to have said?
‘We have thought very seriously about your Convention rights but we think
that the appropriate number of sex shops in the locality is nil’? Or: ‘Taking into
account article 10 and article 1 of the First Protocol and doing the best we can,
we think that the appropriate number is nil’? Would it have been sufficient to
say that they had taken Convention rights into account, or would they have
had to specify the right ones? A construction of the 1998 Act which requires
ordinary citizens in local government to produce such formulaic incantations
would make it ridiculous. Either the refusal infringed the applicant’s
Convention rights or it did not. If it did, no display of human rights learning
by the Belfast City Council would have made the decision lawful. If it did not,
it would not matter if the councillors had never heard of article 10 or the First
Protocol.”

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9 Ibid. at [68].
10 [2007] UKHL 19.
11 Ibid. at [13].
In other words, the outcome is all. In contrast, although they sided with him in a unanimous decision, Baroness Hale and Lord Neuberger differed from Lord Hoffman on whether an informed decision-making process – one that addressed its impact – should play a role on review. Baroness Hale considered that the court “… has to decide whether the authority has violated the Convention rights. In doing so, it is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted-for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of others. But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.”

Equally strident was Lord Neuberger who argued that because “… the issue involves careful scrutiny by the court of the decision, a council faced with an application for a sex establishment licence would be well advised to consider expressly the applicant's right to freedom of expression, and to take it into account when reaching a decision as to whether to grant or refuse the licence. While the fact that a council has expressly taken into account article 10 when reaching a decision cannot be conclusive on the issue of whether the applicant's article 10 rights have been infringed, it seems to me, consistently with what Lord Bingham and Lord Hoffmann said in the Denbigh High School case, at paras 31 and 68, that 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.”

It is difficult to see the emphasised words above as being anything but a dilution of the absolutist approach adopted in Begum. How might the two be reconciled? In Begum, Lord Bingham did indicate that if “it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder”. Lord Hoffman opined that the “most that can be said is that the way in which

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12 The dicta in the speeches of the latter two are broadly consistent with the dissent of Lord Scott in R (ProLife Alliance) v BBC [2003] UKHL 23 at [94]-[96].
13 Miss Behavin’ n.10 at [37].
14 Ibid. at [91].
15 Lord Bingham in Begum n.1 at [31].
the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law.”

What Lord Neuberger and Baroness Hale appear to be offering in Miss Behavin’ is a third-way review, one that permits judges to take some account of how the decision was reached and what questions were asked. At least if the council did ever address issues such as: the impact and reach of a decision; whether the objective was one that could be achieved at all; if so, whether alternative and less restrictive means could be employed (and if not why not); and the overall balance of rights and social interests, then that decision would be more robust in the eyes of the reviewing judges later. Conversely, the absence of any consideration would not render a decision unlawful – all that would matter then would be the substantive outcome as sanctioned (or rejected) by the court later. It is that matter that we will now address.

**A DEFENCE OF PROCESS-BASED JUDICIAL REVIEW**

The assessment of *Begum* in this paper is structured largely around the three reasons offered by Lord Bingham and, in doing so, will provide a limited normative and policy-influenced reflection. It will show that Strasbourg case-law does not necessarily support the line taken in *Begum*. It will consider the nature and intensity of review under the HRA. It will reject the idea that taking any other line that the line take in *Begum* will lead to greater judicialisation.

**Strasbourg jurisprudence**

Lord Bingham first drew on Strasbourg jurisprudence. Section 2 of the HRA requires domestic courts to “take account” of Strasbourg case law and jurisprudence but does not bind them to it. After the early start in which some judges talked of an indigenous human rights jurisprudence heavily influenced by and reliant on Strasbourg but not subservient to it, the dominant domestic discourse is now that the HRA is by and large about translocating Strasbourg rights to UK, no more no less - what Jonathon Lewis calls the mirror principle. Generally, domestic courts should follow “clear and constant Strasbourg jurisprudence except in special circumstances”. In *Ullah*, Lord Bingham concluded that it was “open to member states to provide for rights more generous than those guaranteed by the Convention but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it.” On the same point, Lord Hope had

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16 Ibid. at [68].
17 On this topic see L. Blichner and A. Molander “Mapping Juridification” (2008) 14 European Law Journal 36 in which the authors consider five dimensions of juridification of which one is, broadly, judicialisation.
18 This can be seen in cases such as *Begum v Tower Hamlets* [2002] EWCA Civ 239 at [17] Laws L.J..
19 Most prominent is *R (Ullah) v Special Adjudicator* [2004] UKHL 26, especially Lord Bingham at [20].
21 *Ullah*, n.19 drawing on the speech of Lord Slynn in *R (Alconbury Investments) v Secretary of State for the Environment* [2001] UKHL 23 at [26].
22 *Ullah* above n.19 at [20].
this to say in *N v Secretary of State for the Home Department*: “It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it not as we would like it to be.”

The thrust of these inhibiting adjurations is aimed at courts who wish to extend the scope of rights guaranteed under the ECHR when those rights are brought into British law; it is not so clearly aimed at the modalities of rights-protection within domestic frameworks, as concerns us here.

It is perfectly plausible to subscribe to the views expressed by Lord Bingham and Lord Hope while still considering Lord Bingham’s worries, in *Begum*, about the dangers of domestic over-expansionism to be misplaced. Indeed, the House of Lords has not always felt overly encumbered by Strasbourg case law and in recent times has felt able to depart even from clear “guidance” where there is good reason to do so. In *Animal Defenders International*, the House of Lords declined to follow the so-far only Strasbourg case on political advertising, *VgT Verein gegen Tierfabriken v Switzerland*, when it decided that the absolute bar on political advertising in the broadcast media (contained in s. 321 of the Communications Act 2003) was not a disproportionate restriction on the right of free speech contained in Article 10.

In any event, is Strasbourg’s line on process-based review “clear and constant”? It is clear that the weight of Strasbourg case-law is as Lord Bingham indicates. However what is not true is his maintaining that the only areas where elements of process have permeated the grounds of Strasbourg review are the housing/eviction cases under Articles 6 and 8. There are two prisoner cases in which the European Court, while assessing domestic restrictions (both UK) for compatibility with the ECHR, was concerned that the domestic decision-makers had not themselves adverted to the proportionate impact of the measures on the individual in question. Admittedly in neither case were the issues similar to those raised in *Begum* so we should beware about transposition from Strasbourg to the Strand as Lord Bingham warned in *Gillan*. The first case was *Hirst v UK*. In this case concerning the blanket ban on prisoners being able to vote in elections, the ECHR does place some value and emphasis on fact that Westminster had never addressed the impact of voting restrictions on prisoners.

The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners’ right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion.

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23 [2005] UKHL 31 at [25].
24 For a broader-ranging critique, see Lewis above n.20.
26 [2008] UKHL 15.
27 This is an area that is ripe for empirical investigation. It seems unlikely that I have chanced upon the only two cases while preparing for an undergraduate seminar!
28 *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12 at [23].
29 (2004) 38 EHRR 40 at [51].
to deprive a convicted person of his right to vote. The Court would observe that there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners.

It would be possible to sideline *Hirst* as an irrelevance to our discussion of *Begum*, as its concern is the assessment of the proportionality of a restriction by the legislature rather than by the government. That cannot be said for the second prisoner case, *Dickson v UK*, a case which in fact which offers this alternative view of *Hirst*: if the Court were prepared to look at the reasoning utilised by the legislature, it would be equally or even more prepared to do so for the reasoning employed by the executive. In *Dickson* – in relation to a challenge brought by a prisoner denied access to facilities for artificial insemination – the Grand Chamber noted that the UK’s policy placed an inordinately high “exceptionality” burden on Dickson: prisoners deprived of such facilities had to demonstrate both that this might prevent conception altogether and that their circumstances were “exceptional” within the meaning of the remaining criteria of the policy. That did not allow a balancing of competing individual and public interests, a proportionality test, by the Secretary of State or the domestic courts as required by the Convention. The Grand Chamber continued:

> [T]here is no evidence that, when fixing the policy the Secretary of State sought to weigh the relevant competing individual and public interests or assess the proportionality of the restriction. Further, since the policy was not embodied in primary legislation, the various competing interests were never weighed, nor were issues of proportionality ever assessed, by Parliament.

Both of these cases indicate that the ECtHR does not uniformly fail to consider – as part of its process for assessing the lawfulness of a state’s restriction on a qualified right – the extent to which the state, either via its legislature or its government, has itself weighed the competing interests or assessed the proportionality of its measure. The occasions and reasons for when it will do so and when it will abstain are not at all clear and will need to be worked out on a principled basis by the Strasbourg Court and in turn by the British courts but that is not a reason for wholesale rejection by the latter.

**The nature of review under the HRA**

The second reason propounded by Lord Bingham – the fact that HRA review is more intensive than common law judicial review – does not *per se* mean that it no longer encompasses process-based review. So to hold would be to throw the baby out with the...
bath water. *Begum* supposes that decisions allegedly violating Convention rights can only be challenged by means of s.7(1)(a) of the HRA and then by reference to the proportionality of the outcome. There is no reason why applicants could not also argue that public law decision-makers have failed to direct their minds to their duty under the HRA either properly or at all, where the duty is not to act disproportionately. This is, in other words, the mounting of an old-style common law *Fewings*-type challenge, that the public authority has failed to take account of this relevant consideration: when qualified rights at least at stake, it is duty-bound under s. 6 not to take a disproportionate decision. The HRA was meant to increase the responsibility (if not the liability) of the state and increase our access to human rights and to the availability of asserting and claiming them (against the state at least), not to reduce it. It would be an ironic twist if, in re-configuring and expanding the relationship and balance of power between citizen and state, we were to lose the range of challenges by adding a more substance based review at the expense of how the decision was made, the traditional focus of common law judicial review.

Tom Poole’s likely rejoinder to the argument that decision-makers are bound not to reach disproportionate decisions and are duty bound to consider whether they are doing so would be to assert that “proportionality is the test that judges are required to apply” rather than it being a matter for consideration by governmental bodies.\(^{34}\) That seems rather to miss the point and to oversimplify the matter. There is nothing in the ECHR that indicates that proportionality should be used either as a test *ex post facto* and externally by judges when they review or as a prospective internalised gauge for decision-makers. It is a judge-made concept, that is true, but one that was engineered to help us understand a little better and a little more clearly what it means to say that restrictions on, say, privacy either are or are not ones that are “necessary in a democratic society”. It is, it is true, a judicial invention for when judges assess the lawfulness of government action since it is judges alone who decide whether there have been breaches of the ECHR whether they be judges sitting in Strasbourg or in national supreme courts. However, it does not follow from that premise that it is not also – or might not also be – a test for national decision makers. At a positive level, we have seen that in certain – admittedly few so far – cases this has been the approach of the Strasbourg Court. At a theoretical level this is so too. The human rights in the ECHR must – if rights they be – have correlative duties. These, it has long been accepted, fall on the state, whether they be duties of restraint or duties of positive action or enablement. Thus, states – and states bodies – must not act (or in cases of positive rights fail to act) where to do so violates a right in the ECHR. A measure that is taken or a decision that is reached *will* violate a right if it is one that is “not necessary”, that is if it is judged *ex post facto* to be disproportionate. States and states bodies are therefore bound to act proportionately for fear that they may be judged later to have acted disproportionately. Proportionality thus becomes a quality or criterion which determines the scope of the state’s lawful decision-making power. For the House of Lords to entertain the idea that judges must – but public authorities need not – ask whether any given measure is actually proportionate seems a beguiling one.


\(^{34}\) Tom Poole above n.4 at 689.
A “new formalism”? 

The third and last defence offered by Lord Bingham – that to do otherwise would introduce a “new formalism” and “judicialisation” – is asserted not substantiated. Why would requiring process-based review mean that decision-makers need legal advice or, presumably, need it more than they already do – with the further inference that this would be on-going and regular, bespoke and detailed? Why can we not assume that any competent local authority lawyer should be able – prospectively – to devise a sufficiently general procedural check-list and questions to ask/approaches to adopt that would cater for most situations confronting (say) housing officers or headmasters? The only real difficulty thrown up by the Court of Appeal’s line in Begum would be that at the outset of the process, decision-makers with legal advice would need to identify whether or not a decision to be taken engaged a Convention right in the first place. In contentious cases – such as Diane Pretty’s and most recently the case brought by the parents of Ross Gentle – this is no simple task and is one that is obviated if the outcome is all: if the only matter is whether or not the decision is a proportionate one, then it does not matter that the decision-maker had no idea that the decision would involve a potential restriction on (say) privacy.

Though what follows runs the risk of being countered by my own point above – that it is an unsubstantiated assertion – it does seem plausible to argue that the House of Lords decision will mean greater, not less, judicialisation – or perhaps, more accurately judicialisation rather than juridification. If decision-makers were required to address and then make explicit their views on the proportionate impact of their decisions – on pain otherwise of acting unlawfully – that greater level of transparency might well mean that fewer applicants would be disappointed with the outcome and fewer would seek a judicial remedy. Apocryphally, students whose coursework scripts are explained to them – and they are provided with the reasoning behind the figures – tend more willingly to accept the mark and to renounce their demand to have the paper re-marked, made when the mark list and no more was put up on a faculty notice board. If in the public law arena, decision makers are not required to address the proportionality of decisions they

35 Complaining that courts strike down decisions “on purely …’box-ticking’ grounds” (Poole n.3 above) – made in respect of the Court of Appeal decision in Begum – is akin to complaining about criminal convictions being overturned on technical or procedural grounds. 

36 R (Gentle) v Prime Minister [2008] UKHL 20. 

37 Or, rather, using Blichner and Molander’s typology (above n. 17, 44-47), increased judicial power (“judicialisation”) rather than increased conflict solving by reference to law, which seems to most closely to resemble the worries of Lord Bingham and Lord Hoffman. 

38 To some extent, there are parallels with Thibaut & Walker’s classic psychological study (J. Thibaut & L. Walker Procedural Justice: A Psychological Analysis (Erlbaum, Hillsdale; 1975)) that demonstrated that processes for resolving conflict have a far greater influence on participants’ perceptions of fairness than overall outcomes. I am grateful to Ian Edwards for this insight into criminal justice policy. See also D. Galligan Due Process and Fair Procedures: A Study of Administrative Procedures (Clarendon Press, Oxford; 1996). 

39 There is clearly something here worth developing empirically. In the UK, the only real empirical work that has been carried out has been done in the realm of housing law decisions to show the interplay between judicial review and local authority decision-makers and administrators, and the (limited) impact of the former on the latter: see S. Halliday Judicial Review and Compliance with Administrative Law (Hart, Oxford; 2004).
take then what avenue is left to disgruntled applicants than to seek judicial review where, at least, they will be able to have that very question examined and will be able to ask decision-makers to demonstrate it? The thrust of their Lordships’ approach – and largely of the various legal monographs on the HRA – is to see the HRA as being about courts and administrators or as being about courts and Ministers or as being about courts and governmental power or as being about courts and legislators: courts, judges and the law are at the epicentre of each and every dynamic HRA-relationship. *Begum* overemphasises the external and underplays the internal and prospective contribution to protection human rights. Taking the *Begum* line must surely mean that a greater number of decisions will eventually come before the courts for resolution: hyper-critically – and hyperbolically – we could see *Begum* as a job creation scheme for judges and lawyers.

Let us also unpick the notion of proportionality a little. It has been taken to include or extend to elements of process. In the leading case on the “new” approach to review and to proportionality (*Daly*\(^41\)), Lord Steyn talks of the need to show a “rational connection” – long-accepted as part of the mantra of proportionality at Strasbourg – when assessing the necessity of any restriction on a Convention right. Of course, in isolation that statement is capable of supporting both Tom Poole’s view and the view offered in this paper. In the former, whether or not there is a rational connection between the objective and the means chosen to reach it is something solely within the judicial province, evidence called upon by judges in assessing the lawfulness of a decision after the event. In the latter, as part of their own processes decision-makers should be addressing whether or not there is a rational connection – that is, they have given (some) thought to the effects, results and impact of a decision that leads to a restriction – as well as considering that they may later need to show it. The later case of *Gough*, which develops and expands the *Daly* test, shows the swing is to the latter. There, Lord Phillips M.R. indicated that for a decision (to impose a football banning order) later to be seen as proportionate required individual consideration by the decision maker; this must surely mean that decision-makers address and attend to the impact and effects of each and every decision?\(^42\)

**CONCLUDING WORDS**

*Begum* seems all the more surprising if we consider the practical and policy implications. The House of Lords has removed any incentive to comply with human rights norms. For a decision to pass judicial scrutiny, a decision-maker needs only to demonstrate that the

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\(^40\) To that extent and in this context, it is worth recalling that there is in domestic public law no general duty on administrators and decision-makers to give reasons for their decisions (see e.g. *R v Secretary of State for the Home Department ex p Doody* [1994] 1 A.C. 531) and where any duty has been imposed it has been in situations where an aberrant decision needs explaining (*R v Civil Service Appeal Board ex p Cunningham* [1991] 4 All E.R. 310) or where without it, the individual would not know if she could avail herself of an appeal or review (*Doody*). Although the courts have recognised a “perceptible trend towards greater transparency” in decision making (*R v Ministry of Defence ex p Murray* [1999] C.O.D. 134) such a normative perspective has not yet informed the development of a general rule: see generally H.W.R. Wade and C.F. Forsyth *Administrative Law* 9th ed. (OUP, Oxford; 2004) 522-527 and P. Craig *Administrative Law* 5th ed. (Sweet and Maxwell, London; 2003) 436-444.

\(^41\) *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [27].

\(^{42}\) *R (Gough) v Chief Constable of Derbyshire* [2002] EWCA Civ 351 at [68].
decision it took was what a panel of judges consider to be proportionate: the court will ask, for example, could other less restrictive measures have been employed but if the decision-maker did not actually consider that fact, that will have no bearing on the result. Given that, why do decision-makers not just toss a coin? There is a 50% chance that the decision to ban a protest march, to take one example, will – after the event – be viewed as proportionate. Such decisions are not hedged in shades of grey – they either are or are not proportionate. If public law decision-making can – quite lawfully – be stripped down to a random game of chance, then the project to bring rights home starts to look very fragile indeed. An internalised, prospective process-driven model of human rights protection creates – or at least has the potential to create – human rights equally for all. That is its beauty. The judicial enforcement of fair procedures, where decision-makers know they must ask the right questions in the right order for the right reasons should mean that your rights are as well protected as mine: protection is systemic and institutionalised. In contrast, systems in which outcomes are all may well mean aggrieved citizens pursuing individualised one-off legal remedies to protect their rights, with (incidentally) the costs of enforcement and protection shifted onto them.

Lastly, let us consider the government’s standpoint. In 2006, at the same time as the judicial approach to human rights protection in Begum could be seen as undermining the relevance of internal policies, the DCA engaged in a long review of the impact of the HRA on selected public bodies.43 Similarly, given the pre-eminence attached to outcomes, why did the Audit Commission undertake a survey in 2003 of the implementation of the HRA across the public sector?44 Although there is little mention at all in the parliamentary speeches about its impact on administrators and governmental bodies, Lord Irvine in 1998 (writing extra-governmentally) shed some light on government thinking. He wrote that if “there are to be differences or departures from the principles of the Convention they should be conscious and reasoned …Ministers and administrators will be obliged to do all their work keeping clearly and directly in mind its impact on human rights”, that “the process should produce better thought-out, clearer and more transparent administration”, that “The Bill will …promote …a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike” and that “the courts will be less concerned whether there has been a failure in this sense [the following of rules by decision-makers rather than the overall subjective merits] but will inquire more closely into the merits of the decision”.45 We can see this last not as an abandonment of process but merely as a reduction in reliance on it.46 It is clear from the remainder of what he says

46 At Third Reading, Jack Straw said “Government Departments and other public authorities … will need not only to review their legislation and practices for compatibility with the convention but to ensure that their staff are trained in an awareness of the convention rights so that those rights permeate all the decisions
that changing the culture of public service providers to one where human rights discourse permeates thinking at all levels was one of the Government’s avowed intentions in introducing the HRA.

The light-touch review offered by Baroness Hale and Lord Neuberger in *Miss Behavin’* (and to some extent implied more subtly by Lord Bingham and Lord Hoffman in *Begum*) would go some way towards alleviating the concerns set out in this paper but would only do so where the body had addressed the matter – what Tom Poole calls the sin of commission.\(^{47}\) The full weight of *Begum* will bear down if the body does not consider the matter at all. Then, what matters is the outcome; the sin of omission plays no role in any subsequent judicial finding that there has – or has not – been a violation. As this paper has shown, only if judges could and do investigate the approach adopted by decision-makers – as well as (rather than in substitution for) assessing the substantive proportionality of any decision – when considering whether or not a convention right has been lawfully infringed, will domestic law better protect human rights so as to realise the governmental aim of bringing human rights home, pervasively at the point of delivery.

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\(^{47}\) LSE working paper above n.3.