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CASE AND COMMENT

STUMBLING TOWARDS THE CONSTITUTION

ONE way in which governments may exercise political control over their subjects is by removing their status as citizens. Doing so – denying the individual the political and social rights that are constitutive of full membership of their community – involves making a radical choice, and accordingly such a decision must be properly regulated. One of the ways in which UK law does so is by preventing the exercise of the broad statutory power to rescind the citizenship of a UK national because it is "conducive to the public good", where doing so would render that person stateless (British Nationality Act 1981, s. 40(2), (4)). Individuals may only be stripped of their citizenship under this provision on the condition that they remain full members of another political community.

The first argument made by the applicant in the decision of the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 W.L.R. 1591 was that this condition had not been met his case. Pham was born in Vietnam in 1983, thereby automatically becoming a citizen of that country. He was granted asylum in the UK in 1989 and citizenship in 1995. In 2011–12, Pham spent time in Yemen where, according to the Security Services, he received training from a terrorist group. On the basis of an assessment that he would pose a threat to national security, the Secretary of State made an order under s. 40(2) of the 1981 Act to deprive Pham of his citizenship and ordered his deportation to Vietnam. However, subsequently to the making of the order and upon being made aware of Pham's existence, the Vietnamese Government refused to accept him as a citizen. This, he argued, meant that the Secretary of State's decision was in breach of s. 40(4) of the 1981 Act, the condition preventing statelessness.

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Did the Secretary of State's decision fall foul of s. 40(4)? The Supreme Court held that it did not. Any action on the part of the Vietnamese Government in relation to Pham's Vietnamese citizenship – a status he gained at birth and which had never before been called into question – post-dated the declaration by the Secretary of State, so he was undeniably a citizen of Vietnam at the time that the s. 40(2) declaration was made. On this point the applicant lost and his appeal was dismissed.

But Pham had a further argument. The loss of British citizenship would automatically entail the loss of European Union citizenship – the latter status being conferred on any national of a Member State of the EU – so the Secretary of State's decision should be treated as falling within the ambit of EU law. This had the consequence, Pham argued, that the declaration ought to be scrutinised in accordance with the standards of EU administrative law including, crucially, the principle of proportionality rather than the domestic standard of *Wednesbury* reasonableness.

On the question of whether the removal of UK citizenship was controllable by general principles of EU law, the Supreme Court declined to give a final answer. The issue had not been raised before the Special Immigration Appeals Commission where the case began and it was important, as Lord Carnwath said at [59], "that this tribunal of fact should first identify the respects, if any, in which a decision on these legal issues might become necessary for the disposal of the present case". Whilst Pham had relied "in general terms on the EU requirement of proportionality… he had not shown how … it would differ in practice … from principles applicable under domestic law". Nonetheless, several members of the court cited with approval the argument of Laws L.J. in *R. (G1) v Secretary of State for the Home Department* [2012] EWCA Civ 867; [2013] Q.B. 1008. Here Laws L.J. reasoned that, because EU citizenship was a status that was fully dependent upon national citizenship, principles of EU law could not be used to control its grant or removal. "EU citizenship has been attached by Treaty to citizenship of the Member State. It is wholly parasitic upon the latter. I do not see how this legislative circumstance can of itself allocate the grant or withdrawal of State citizenship to the competence of the Union" (*R (G1)*, at [39]). This is the right view – if A depends upon B then A can have no role in establishing the veracity of B – and it is unfortunate that the European Court of Justice appears to have suggested otherwise on several occasions (See e.g. Case C-135/08, *Rottmann* EU:C:2010:104).

Pham's argument about the practical relevance of EU law to his appeal relied on the assumption that it would have made a real difference to the way in which the court approached the decision of the Secretary of State. But does EU law allow a different and more far-reaching form of review over the substance of administrative decisions than UK law? Not necessarily. Lord Carnwath began by noting how the Supreme Court had in

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previous cases "endorsed a flexible approach to principles of judicial review, particularly where important rights are at stake" (at [60]). The intensity of court scrutiny over the substance of administrative decisions, he noted, varied both when performing reasonableness review and under a proportionality-based approach. In either case, the context, and in particular the importance of the interests at stake, would inform the court's attitude towards the administration. Such considerations, Lord Carnwath concluded, were particularly important "in a case such as the present where the issue concerns the removal of a status as fundamental … as that of citizenship". This was not to say that there is no difference. To draw attention to the context-sensitivity of reasonableness review, Lord Reed pointed out, at [115], "is not to say that the *Wednesbury* test … is identical to the principle of proportionality as understood in EU law". Moreover, he suggested, it was "not the occasion to review those authorities" that had "declined to accept that proportionality had become a distinct head of review in domestic law". Lord Mance went further. For him, it was not merely that the flexible test of reasonableness may, dependent upon context, approach the standard of scrutiny which features in proportionality analysis but that "the tool of proportionality is one which would … be both available and valuable for the purposes" of reviewing certain decisions of the administration even absent a European Union Law or Human Rights Act element (at [98]). Where fundamental interests are at stake the reviewing court should ask directly whether the decision of the administration really was proportionate, not merely whether it was reasonable. Lord Sumption bolstered Lord Mance's conclusion by noting, at [105], that "although English law has not yet adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar".

Is it time, then, to complete the journey? The answer depends upon whether the differences between the approach under a flexible standard of reasonableness and proportionality mark a constitutional distinction worth saving. The first point to recognise is that in the context of fundamental interests the standard of reasonableness may well require as much in the way of reasoned justification from the administration as that of proportionality. All other things being equal, the greater the cost to the individual of an administrative action, the less likely it is that the primary decision-maker can be seen to have acted in a way which is justifiable. And, at the limit, it may be that the only reasonable action is that which a well-informed judge would assess to be truly proportionate to the interests at stake. But the starting point of the analysis is different in each case. The test of reasonableness begins with the notion that the relevant decision is properly for the administration and holds that the courts may only intervene when they are able to recognise, from a distance, that an agent in the position of the administrator could not justifiably make the decision that was made. By way of contrast, the test of proportionality involves the court's starting with the question of

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fair balance as between the interests at stake. It is then for the administration to convince the judges that their decision was the right one.

This distinction between reasonableness and proportionality is not merely a matter of theory, for it reflects an important constitutional difference. Reasonableness review, even in its most intrusive form, takes as its point of departure that the administration has decision-making authority. Proportionality, on the other hand, does not. This helps to explain, for example, why proportionality is the right approach under the Human Rights Act 1998. Here there has been an explicit grant of power to the courts. They and not the administration have primary decision-making capacity with regard to questions of rights and so it is constitutionally legitimate for them to begin with the issue of fair balance (see on this point Baroness Hale in *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19; [2007] 1 W.L.R. 1420, at [31]). An important question, not addressed in the judgments in *Pham*, is whether, absent circumstances of this type, the adoption of proportionality as a general standard of review would be consistent with the statutory allocation of power which forms the normal context of administrative law.

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ENHANCING SEXUAL ORIENTATION AND GENDER-IDENTITY PROTECTIONS IN STRASBOURG

IN *Identoba and Others v Georgia* (Application No 73235/12), 12 May 2015, the Fourth Section of the European Court of Human Rights held that Georgia's failure to prevent, and effectively investigate, attacks against an anti-homophobia march violated Articles 3 and 11 of the European Convention on Human Rights (ECHR), read in conjunction with Article 14.

Identoba, a lesbian, gay, bisexual and transgender (LGBT) rights group, sought to organise a peaceful march in the Georgian capital, Tbilisi, to mark the International Day against Homophobia (IDAHO). The group submitted details of the march to the authorities, and was assured that a police force would be deployed to protect against anticipated anti-LGBT demonstrations.

On the day of the march, members of two religious groups organised a counter-protest. They formed a human chain and prevented the march from proceeding along the agreed route. The counter-demonstrators insulted the march participants, calling them "sick" and "faggots". They shouted that the marchers should be "burnt to death". The protestors

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