Clayton Comments

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KEEPING A SENSE OF PROPORTION: POLITICAL PROTEST AND THE HONG KONG COURTS

As the relationship between Hong Kong and the People's Republic of China becomes more problematic, the Hong Kong courts have been confronted with some sensitive issues. Several recent court decisions have attracted considerable controversy. The former Lord Chancellor, Lord Falconer QC, published an open letter to *The Guardian in October 2017*, complaining that the rule of law was under threat in Hong Kong—because three activists convicted for illegal assembly were imprisoned by the Hong Kong Court of Appeal after earlier having been given community service,[2] and the Court of Final Appeal (CFA) has now granted leave to appeal the sentences, subsequently, quashing the prison sentences and reinstating the community service orders imposed by the Magistrate.[3] On 1 September 2017 the CFA refused permission to appeal against the conviction of two opposition legislators, who controversially refused to take the legislative oaths after being elected to the Legislative Council.[4] The constitutional right to demonstrate has been extensively analysed in cases concerning the "Occupy Central" Campaign in the centre of Mongkok.[5] Complaints that a few judicial review claims are politically motivated has led some to argue that legal aid should be cut back.[6]

Since the International Covenant on Civil and Political Rights was domesticated by the Bill of Rights Ordinance in 1991, the Hong Kong courts have developed a sophisticated jurisprudence to nurture constitutional rights. Ma CJ in *Leung Kwok Hung v HKSAR* [7] took the view that freedom of expression enjoys a privileged position in the hierarchy of rights—for the reasons given by Lord Steyn in *R. v Secretary of State for the Home Department Ex p. Simms* .[8] Furthermore, *Hysan Development Co Ltd v Town Planning Board* reaffirmed the generous approach[9] the Hong Kong courts have always taken to human rights decisions from other jurisdictions,[10] and also took the opportunity to refine and develop the proportionality principles which justify interferences with constitutional rights.

Nevertheless, there are now important tensions in Hong Kong's constitutional order, exemplified by the CFA's 2016 decision in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*, which held that it was constitutional to prohibit legislators from resigning to create by-elections to promote their political objectives. [11] The CFA's holding that these prohibitions were constitutional, itself, reflects the challenging implications of applying the highly complex and loosely formulated proportionality test devised by the CFA in *Hysan*.

I shall argue that the CFA's approach in *Kwok Cheuk Kin* is open to question on several grounds. First, the CFA failed expressly to acknowledge that the nature and effect of the ban was to stifle a political campaign to achieve universal suffrage and might have a chilling impact on this wider political debate. Secondly, the CFA took a light touch approach to proportionality which is difficult to understand, given the context of the case. Whilst the CFA's analysis was in line with the complex analysis it developed in *Hysan*, the CFA failed to grapple with some basic issues of principle, and, in particular, failed to address the fact that the political questions in issue raised profound questions about the current constitutional arrangements in Hong Kong, which the applicants were seeking to challenge.

The Government's proposal to prevent legislators resigning to fight by-elections

In *Kwok Cheuk Kin* the CFA considered the appellant's challenge to the constitutionality of s.39(2A) of the Legislative Council Ordinance,12 which restricted the right to stand for election as contained in art.26 of the Basic Law13 and the right to participate in public life under art.21 of the Hong Kong Bill of Rights.14 InJanuary 2010 five pan-democratic members of the Legislative Council resigned from each of Hong Kong's five geographical constituencies, thereby triggering a by-election in which all Hong Kong citizens could participate. Although the Basic Law does not provide for official referenda, the pan-democrat members hoped to achieve this by being re-elected on a manifesto of real political reform and the abolition of functional constituencies. All five were, in fact, re-elected in May 2010.

Section 39(2A) was then enacted to bar a legislator who resigned from the Legislative Council from standing in the by-election within six months of resignation. This statutory bar was the subject of intensive political debate, and a subsequent consultation. The Government argued that it was an "abuse" for a member of the Legislative Council to resign in order to become a candidate in a by-election. The political debate in the Legislative Council was heated and a judicial review challenge by Mr Leung to the procedure was unsuccessful.15
Since the right to stand for election is not an absolute right, the CFA determined the constitutionality of s.39(2A) by asking whether the Government was acting proportionately.

The Hong Kong approach to proportionality

When ruling on the constitutionality of banning creating by-elections, the CFA applied the proportionality principles recently re-formulated in *Hysan*. *Hysan* concerned the protection conferred by arts 616 and 10517 of the Basic Law on private property rights in connection with planning restrictions laid down by the Town Planning Board.18 Ribeiro PJ reviewed the Privy Council decisions in *Attorney General of Hong Kong v Lee Kwong-Kut* 19 (which rejected the Canadian approach to proportionality now used under the HRA) and the rather different test applied in *Ming Pao Newspapers Ltd v Attorney General of Hong Kong* .20 The CFA examined *Bank Mellat v HM Treasury (No.2)* , where Lord Sumption confirmed that proportionality under the Human Rights Act (HRA) required an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.21 Ribeiro PJ overruled some older Hong Kong authorities which had followed Lord Clyde's approach in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* ,22 and adopted the four limbed proportionality test used under the HRA .

Ribeiro PJ focused, in particular, on the third element of the proportionality inquiry: whether the court should ask whether the interference is no more than reasonably necessary to achieve the legitimate aim or whether it should, instead, ask whether the interference is manifestly without

reasonable foundation. He held that the difference between these two standards is one of degree and that both standards are on a spectrum of reasonableness. He pointed out that the manifestly unreasonable standard has been used in cases where the court recognises that the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim, and affords a wide margin of discretion. He observed that the manifestly unreasonable standard has been applied in cases involving implementation of political, social or economic policies but was not confined to such cases. He also decided that the manifestly unreasonable standard is closely related to the concept of "margin of appreciation" in European Court of Human Rights (ECtHR) jurisprudence.23 The CFA said that the question of which standard should be applied depended on the circumstances of the case, the factual basis for the interference, its significance and the degree it interfered with the right, the identity of the decision-maker, and the nature and features of the interference so far as they are relevant to ascertaining the margin of discretion.

The judgment in *Hysan* is a magisterial survey of the various doctrines international courts have used when identifying the key elements of the proportionality doctrine; and implicitly articulates a methodology for developing a theory of judicial deference. But the views expressed by Ribeiro PJ leave a number of questions of principle uncertain: how and in what respects does the manifestly unreasonable standard differ from the conventional rationality principle in administrative case law; why were the Hong Kong courts treating proportionality as a rationality question, at a time when the UK Supreme Court appear to be moving in the opposite direction—apparently, replacing rationality with a structured proportionality test as the key judicial review principle used when reviewing public law decisions on merits grounds24; importantly, whether the manifestly unreasonable standard accords sufficient respect to justify interferences with constitutional rights; whether and to what extent Ribeiro PJ's analysis extends beyond planning; and how, in practice, a town planning officer should apply the manifestly unreasonable test in his day to day work.

The approach in *Kwok Cheuk Kin* to proportionality

In line with *Hysan*, the CFA in *Kwok Cheuk Kin* applied its complex principles to the rather different political context of banning legislators from resigning to create a by-election. It decided that electoral laws which involve political or policy considerations ought generally to be accorded a wide margin of appreciation, as the courts are generally not equipped to determine political questions. Consequently, the appropriate intensity of review regarding s.39(2A) should be the manifestly unreasonable test. Section 39(2A) fell within the range of reasonable options open to the legislature to adopt in order to deal with the perceived mischief of the undermining of the electoral system by legislators resigning in order to cause a by-election in which they would stand. The encroachment on the constitutional right to stand for election was a relatively small one, as it only applied to by-elections and the bar was solely against the resigning member who was perfectly entitled to stay in office as a legislator if he or she had wanted to. Even then, the bar was only for six months.

However, it is not self-evident that a legislator who resigns to run in a by-election to promote political objectives is guilty of an "abuse". There are no such prohibitions on UK parliamentarians: and in recent years a number of MPs have done so. Thus, David Davis MP, the current Secretary of State for Exiting the European Union, resigned in 2008 to spark a wider debate on civil liberties

arising from anti-terrorist legislation. In 2016 Zac Goldsmith MP resigned in protest at the government's proposal to build a third runway at Heathrow Airport, stood as an independent candidate and lost the by-election, but was reselected as a Conservative Party candidate in 2017, when he narrowly won. Even more strikingly, in June 2017 the Prime Minister, Theresa May, called an early general election to consolidate her position for the negotiations to take place to leave the European Union, overriding the recently enacted Fixed Term Parliament Act in doing so.

The approach taken by the Council of Europe's advisory body on constitutional law, the Venice Commission, is also of interest. A *Report on the Exclusion of Offenders from Parliament written in 2015* published following a boycott of Parliament in Albania stated that about one third of the Council of Europe countries have detailed constitutional provisions concerning parliamentary candidates containing various restrictions that prevent convicted persons from running for elections, including convictions for certain offences, e.g. electoral offences or for certain identified offences (such as convictions for an offence involving moral values such as honesty, worthiness, honour and reputation). 25 However, the report does not consider disqualification for any offence comparable to the one considered by the CFA in *Kwok Cheuk Kin*. The Commission's approach was refined in June 2017 in an amicus brief drafted for the ECtHR concerning the minimum procedural guarantees the state must provide when disqualifying from holding an elective office for the impending Grand Chamber hearing in *Berlusconi v Italy*.26 The Commission argued that legality is the first element of the rule of law and this principle implies that the law must be followed both by individuals and by the public authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of the rule of law principle, which is a prerequisite of democracy, and may therefore endanger the democratic nature of the state.

These principles suggest that it is vital to scrutinise the actual rationale which is said to justify imposing the ban on by-elections. There is an important distinction in principle between, on the one hand, prohibiting a political tactic to promote a political objective like resigning to campaign to extend democracy (which, in substance, involve freedom of expression issues), and, on the other, preventing parliamentary candidates with serious criminal offences from running for election. It is further submitted that the CFA's failure in *Kwok Cheuk Kin* to acknowledge the political purpose and effect of s.39(2A) calls into question its conclusion, particularly because it is so widely accepted as a matter of international human rights law that a constitutional right to freedom of expression requires great weight to be given political speech, whenever the state seeks to restrict it.

Accordingly, it is arguable that the CFA proceeded on an erroneous basis—by understating the significance of the interference on political speech and by failing to acknowledge that the prohibition might stifle the campaign to achieve universal suffrage, which would, inevitably, have a chilling impact on this wider political debate.

The CFA's approach to deference

In *Kwok Cheuk Kin* the CFA applied the *Hysan* principles and various authorities were examined in detail: *Ždanoka v Latvia* where the Grand Chamber found it proportionate to bar a candidate for her past membership of the communist party,27 the prisoner vote case, *Hirst v United Kingdom*

(No.2) ,28 the Canadian prisoners vote case, *Sauvé v Attorney General of Canada (No.2)* 29 and from a very different context, *R. (on the application of Lord Carlile of Berriew) v Secretary of State for the Home Department* where the Supreme Court rejected an HRA challenge brought by a dissident Iranian politician excluded from entering the UK to address parliamentarians.30 Importantly, however, none of the authorities considered directly bore on the issues before the CFA.31 Critically, the CFA held that32

> "political decisions or legislative provisions reflecting political judgments are often precisely those areas where the courts are likely to afford a large margin of appreciation. Where electoral laws involve political or policy considerations, a wider margin of appreciation ought generally to be accorded. The authorities from the United Kingdom [and the European Court of Human Rights] are consistent with this approach when politics and political judgments are involved. In particular, where there has been active political debate on an issue or piece of legislation, the Court will again be inclined to give a wider margin of appreciation. The reason for this approach is evident: the courts are generally not equipped (certainly not better equipped than others) to determine political questions, although of course there are limits".

However, the CFA appears to have erred in principle by reading the Strasbourg and HRA case law across to the very different constitutional arrangements which apply to Hong Kong. Surely, the point in issue in *Kwok Cheuk Kin* was whether it was proportionate to prevent politicians from resigning to campaign in by-elections that Hong Kong should adopt universal suffrage, a highly contentious political question which has been widely debated over many years.

This sort of question lies at the very heart of constitutional adjudication, and falls within the scope of a court's "constitutional competence" to determine an issue of law33: by adopting the distinction drawn by Ronald Dworkin between principle and policy—principle as moral, and policy as utilitarian, to ensure that, when there is a conflict, the principle should trump the policy.34 As Lord Bingham stressed in the seminal HRA case concerned with national security issues, *A v Secretary of State for the Home Department* , the HRA gives the courts a very specific, wholly democratic, mandate; they have been charged by Parliament with delineating the boundaries of a rights-based democracy.35 Furthermore, to carry judicial deference to the point of accepting Parliament's view "simply on the basis that the problem is serious and the solution difficult" diminishes the role of the courts in a constitutional process: see McLachlin CJ in *RJR-MacDonald Inc v Canada (Attorney General)*.36 These perspectives have even greater force when applied to the Hong Kong constitutional setting.

A court's constitutional competence is of course to be sharply differentiated from a court's institutional capacity, where it will be appropriate to defer to the executive's expertise in, e.g. its superior intelligence-gathering capacity on to answer a factual question accurately in national security cases37 or, perhaps, when considering a polycentric policy issues which have far-reaching implications on other policy areas and affects the interests of other parties not before the court.38

However, the key problem in the CFA's reasoning is that it never explicitly addressed its constitutional adjudicatory role in a case which concerned campaigns to promote universal suffrage

in Hong Kong. In this context, the Strasbourg case law is very pertinent. The Grand Chamber in *Zdanoka v Latvia* said: 39

> "Democracy constitutes a fundamental element of the European public order. That is apparent, first, from the Preamble to the Convention , which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. The Preamble goes on to affirm that European countries have a common heritage of political traditions, ideals, freedom and the rule of law. This common heritage consists in the underlying values of the Convention; thus, the Court has pointed out on many occasions that the Convention was in fact designed to maintain and promote the ideals and values of a democratic society. In other words, democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it."

The Grand Chamber decision in *Socialist Party v Turkey* is also illuminating. The state successfully obtained an order from the Constitutional Court dissolving the Sociality Party because its political activities encouraged separatism, which was said to be incompatible with the Constitution and the fundamental principles underpinning the Republic of Turkey. The Grand Chamber held that40 "one of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned".

Conclusion

The decision in *Kwok Cheuk Kin*, therefore, raised several issues of principle, which were not specifically addressed in the CFA judgment. At a time when the constitutional arrangements between Hong Kong and the People's Republic of China are under increased scrutiny, it is unfortunate that the CFA did not consider the question of whether the prohibition on legislators from creating by-elections to promote universal suffrage amounts to a serious interferences with the political freedom of expression because it, in substance, interfered with a freedom to express political views. It is firmly established that freedom of expression applies to ideas that "offend, shock or disturb" so that, for example, in *Jersild v Denmark* the ECtHR held that convicting a journalist for aiding and abetting racist insults in a television programme was disproportionate to the need to protect those whom he had insulted,41 and it is, therefore, surprising that this viewpoint did not find a place in the CFA's reasoning.

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Footnotes

1
This paper is based on a series of lectures I gave in October 2017 at the University of Hong Kong Centre for Public and International Law on Contemporary issues in Public Law. I am grateful for the comments of Professor Johannes Chan SC and Frederick Reynold QC. Any errors and omissions are my responsibility.

2
B. Haas, "UK lawyers say Hong Kong rule of law under threat after jailing of activists", The Guardian, 16 October 2017, https://www.theguardian.com/world/2017/oct/16/uk-lawyers-say-hong-kong-rule-of-law-under-threat-after-jailing-of-activists [Accessed 17 April 2018]

3
See https://www.theguardian.com/world/2017/oct/16/uk-lawyers-say-hong-kong-rule-of-law-under-threat-after-jailing-of-activists [Accessed 17 May 2018].

4
Chief Executive of HSKAR v Sixtus Leung Chung Hang and Yau Wai Ching FAMV No.9 of 2017

5
Chiu Luen Public Bus v Unlawful Persons [2014] HKCFI 1891; HCA 2086/2014

6
Lau Kar Wah and Philip Tang, Public Law Milestone (October 2017), endorsed by Ng Man Kin and Chan Choi Hi.

7
Leung Kwok Hung v HKSAR [2005] HKCFA 40; (2005) 8 HKCFAR 229.

8
R. v Secretary of State for the Home Department Ex p. Simms [2000] 2 A.C. 115 at 126, where Lord Steyn said that: "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market". *Abrams v United States (1919) 250 U.S. 616, 630*, per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see *G. Stone, L. Seidman, C. Sunstein and M. Tushnet, Constitutional Law, 3rd edn (Aspen Publishing, 1996), pp.1078–1086*."

9

Hysan Development Co Ltd v Town Planning Board [2016] HKCFA 66; (2016) 19 HKCFAR 372; [2016] 6 HKC 58; FACV 21/2015 (26 September 2016) at [50].

10

HKSAR v Lam Kwong Wai [2006] HKCFA 84; (2006) 9 HKCFAR 574 at [37].

11

Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs FACV No.12 of 2016.

12

- (2A) "A person is also disqualified from being nominated as a candidate at a by-election if—
  - (a) within the 6 months ending on the date of the by-election—
    - (i) the person's resignation under section 14 as a Member took effect; or
    - (ii) the person was taken under section 13(3) to have resigned from office as a Member; and
  - (b) no general election was held after the relevant notice of resignation or notice of non-acceptance took effect."

13

"Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote an d the right to stand for election in accordance with law".

14

"Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions—

- (a) to take part in the conduct of public affairs, directly or through freely chosen representat ives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and e qual suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in Hong Kong [cf. Internati onal Covenant on Civil and Political Rights art.25]. "

15

Leung Kwok Hung v President of the Legislative Council (No.1) (2014) 17 HKCFAR 689.

16

"The Hong Kong Special Administrative Region shall protect the right of private ownership of propert y in accordance with law. The land and natural resources within the Hong Kong Special Administrativ e Region shall be State property."

17

"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of indi viduals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the

real value of the property concerned at the time and shall be freely convertible and paid without un due delay. The ownership of enterprises and the investments from outside the Region shall be prote cted by law."

18

Hysan Development Co Ltd v Town Planning Board (2016) 19 HKCFAR 372

19

Attorney General of Hong Kong v Lee Kwong-Kut [1993] A.C. 951 .

20

Ming Pao Newspapers Ltd v Attorney General of Hong Kong [1996] A.C. 907 .

21

Bank Mellat v HM Treasury (No.2) [2013] UKSC 39; [2014] A.C. 700 .

22

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 A. C. 69 at 80.

23

Note that the UK courts have taken a radically different view of the relevance of the margin of appre ciation in the Strasbourg case law, deciding that the doctrine has no application to the proportionalit y issue. As Lord Hope observed in the very first case under the HRA , *R. v DPP Ex p. Kebeline [2000] 2 A.C. 326* at 380–381: "By conceding a margin of appreciation to each national system, the court has r ecognised that the Convention, as a living system, does not need to be applied uniformly by all state s but may vary in its application according to local needs and conditions. This technique is not availa ble to the national courts when they are considering Convention issues arising within their own coun tries."

24

See, e.g. *Kennedy v Charity Commission [2014] UKSC 20; [2015] A.C. 455* , *Pham v Secretary of State f or the Home Department [2015] UKSC 19; [2015] 1 W.L.R. 1591* and *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] A.C. 1355* ; *R. (on th e application of Youssef) v Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC 3; [2016] A.C. 1457* .

25

Venice Commission, Report on the Exclusion of Offenders from Parliament (Council of Europe, 2015), Opinion No.807/2015.

26

Venice Commission, Amicus curiae brief for the European Court of Human Rights in the case of Berlus coni v Italy (Council of Europe, 2017), CDL(2017)029.

27

Ždanoka v Latvia 45 E.H.R.R. 478 at [106].

28

Hirst v United Kingdom (No.2) (2004) 38 E.H.R.R. 40 .

29

Sauvé v Attorney General of Canada (No.2) [2002] 3 SCR 519.

30

R. (on the application of Lord Carlile of Berriew) v Secretary of State for the Home Department [2014] UKSC 60; [2015] A.C. 945 .

31

The CFA did not consider South African Constitutional Court decision in *United Democratic Movemen t v President of the Republic of South Africa, 2003 (1) SA 495*, where it held that a prohibition on legis lators prohibiting floor crossing, is not an essential component of multi-party democracy, nor of prop ortional representation, and the Constitution does not demand an anti-defection provision

32

Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs, FACV No.12 of 2016 at [42].

33

See Lord Hoffmann in *R. (on the application of Prolife Alliance) v BBC [2003] UKHL 23; [2004] 1 A.C. 1 85* at [75]: "… although the word 'deference' is now very popular in describing the relationship betw een the judicial and the other branches of government, I do not think that its overtones of servility, o r perhaps gracious concession, are appropriate to describe what is happening. In a society based upo n the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts".

34

J. Jowell, "Judicial deference: civility, civility or institutional capacity" [2003] P.L. 592.

35

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 A.C. 68 at [42].

36

RJR-MacDonald Inc v Canada (Attorney General) [1995] 3 SCR 119 at [136].

37

See, e.g. J. King, "Institutional approaches to Judicial Restraint" (2008) 28(3) O.J.L.S. 409.

38

For an interesting discussion of these issues in the Hong Kong context, see C. Chan, "Deference and t he Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences " (2011) 41 Hong Kong Law Journal 7.

39

Zdanoka v Latvia (58278/00) unreported ECtHR (First Section) at [98].

40

Socialist Party v Turkey (1999) 27 E.H.R.R. 51 at [45].

41

Jersild v Denmark (1994) 19 E.H.R.R. 1 .