

## Introduction

# JUDICIAL PANEL SELECTION IN THE UK SUPREME COURT: BIGGER BENCH, MORE AUTHORITY?

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## 1 Introduction

Now in its seventh year of publication, this latest volume of the UK Supreme Court Yearbook ('the Yearbook') reviews the jurisprudence of the UK Supreme Court ('the Court') in the 2015-16 legal year. As in previous years, the Court's caseload during this time has been broad and highly varied and significant discussion of many of the issues raised before it during the past twelve months can be found in the pages that follow. One interesting institutional aspect of the Court that continues to emerge in the disposition of its caseload is the determination of the size of the panel that will constitute the Court for the authoritative disposition of its caseload and the selection of Justices to comprise any such panels.

On 8 November 2016, the Court announced that it had granted permission to appeal in *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* ('Miller'),<sup>1</sup> a case now popularly known (even by the Court) as 'the Article 50 case' or 'the Brexit case' in which the Court will determine an appeal by the Government from the Divisional Court that notice under Article 50 of the Lisbon Treaty of the UK's intention to leave the European Union cannot be given by the Prime Minister without the agreement of the UK Parliament.<sup>2</sup>

On any view, the Article 50 case raises a series of fascinating substantive questions, many of which will be considered in detail in our next volume.

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<sup>1</sup> *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

<sup>2</sup> See UK Supreme Court, 'Permission to Appeal: Article 50 ('Brexit') Case' (*UK Supreme Court*, 8 November 2016) <[www.supremecourt.uk/news/permission-to-appeal-decision-08-november-2016.htm](http://www.supremecourt.uk/news/permission-to-appeal-decision-08-november-2016.htm)> accessed 20 November 2016.

In this volume, Lord Millett offers readers a preview of that important case by analysing what he believes is the 'real question' in the appeal, which will be heard by the Court on 5-8 December 2016.<sup>3</sup> This Introduction focuses, at least initially, on the decision of the Court to hear the appeal in *Miller en banc* before all 11 of its current full-time Justices, the first time that it has chosen to take such a step. The Court is somewhat unusual in the common law world in not sitting *en banc* as a matter of course; as observed earlier, *Miller* will be the first occasion in which the Court will do so in what will be eight years of its operation.<sup>4</sup> The Court is also unusual in the selection of Justices to comprise its panels in that it occasionally invites persons who are not full-time Justices of the Court, including retired Justices, to sit on panels as an *ad hoc* Justice to constitute the Court in the disposition of its caseload.<sup>5</sup>

As a result of these anomalies and the increased attention paid by the Court to the importance of its panel sizes, this Introduction considers the procedures which govern the process of panel selection in the UK Supreme Court before then going on to formally introduce the specific contents contained within this volume. Two key questions frame our analysis and observations: first, how is it (ordinarily) decided which of the Justices will sit on a given case; and second, how is it decided in what size panel this will be?

## 2 Which Justices Sit on Which Cases?

There is presently minimal information in the public domain concerning how it is decided which Justices will sit on a case before the Court. No reference to this issue is, for example, to be found on the Court's website or in its rules of procedure, nor was such guidance (at least publicly) available

<sup>3</sup> Lord Millett, 'Prerogative Power and Article 50 of the Lisbon Treaty' (2016) 7 The UK Supreme Court Yearbook [x].

<sup>4</sup> The Supreme Courts of Canada (9 Justices), New Zealand (5 Justices) and the US (9 Justices), usually sit *en banc* to decide cases, although the US Supreme Court has sat for most of the present calendar year with only 8 Justices following the death of Justice Scalia on 12/13 February 2016 and in the absence of a new appointment to fill that vacancy. Like the UK Supreme Court, the High Court of Australia routinely sits in panels comprising a selection of its Justices, rather than *en banc*; however, all of its Justices will sit together to decide cases of considerable, typically constitutional, importance. See High Court of Australia, 'Operation of the High Court' <[www.hcourt.gov.au/about/operation](http://www.hcourt.gov.au/about/operation)> accessed 20 November 2016 ('Cases which involve interpretation of the Constitution, or where the Court may be invited to depart from one of its previous decisions, or where the Court considers the principle of law involved to be one of major public importance, are normally determined by a full bench comprising all seven Justices if they are available to sit.').

<sup>5</sup> For the list of *ad hoc* Justices of the UK Supreme Court for the past legal year, see 'Composition of the Court' (2016) 7 The UK Supreme Court Yearbook [x].

when the Court previously sat as the Appellate Committee of the House of Lords ('the Appellate Committee'). Indeed, even some of the former Law Lords of the Appellate Committee appear to have been unsure of how exactly the judicial panel selection process worked. As Professor Penny Darbyshire discovered in her penetrating research on this issue published in 2011 for example, 'it was clear in 2005 and 2008 that the Law Lords did not fully understand the selection criteria. "We just say when we're available."<sup>6</sup>

Nonetheless, some overarching selection conventions are evident from the general practice of the Court, including: that at least one of the Scottish Justices will sit on appeals from Scotland; that the Northern Irish Justice will sit on appeals from Northern Ireland;<sup>7</sup> that Justices do not sit on cases which they heard when in the Court of Appeal; and that Justices do not sit on panels hearing appeals from cases previously decided by a close family member – e.g. Lord Mance does not sit on cases heard by his wife, Lady Justice Arden. It would also seem to be the case that Justices with specialisms in certain fields of law will sit on panels raising issues in those fields and that they may often subsequently take a lead role in writing the relevant judgment in such cases.<sup>8</sup> Even observing those apparent conventions from the general practice of the Court however, their day-to-day application remains somewhat of a mystery, even to those persons who are otherwise well-versed in the Court's internal operational workings.

In his masterful scholarly contribution, *Final Judgment: The Last Law Lords and the Supreme Court*, however,<sup>9</sup> Professor Alan Paterson traces the development of the processes concerning the selection process for judicial panels in the Appellate Committee from the 1970s and, in particular, from the time of the arrival of Lord Bingham as the senior Law Lord in 2000. By this time, Professor Paterson notes that:

The composition of the Appellate Committees was, in practice, largely in the hands of the Principal Clerk to the Judicial Office, who oversaw the drawing up of the proposed panels

<sup>6</sup> Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judge* (Hart 2011) 369.

<sup>7</sup> There is also a developing convention that a Welsh Judge will sit in cases originating from Wales. Given the present lack of a Welsh Justice on the Court this is currently usually Lord Thomas CJ.

<sup>8</sup> See e.g. Jonathan Crow QC, Lara Hassell and Emma Horner, 'Commercial Law and Financial Regulation' (2016) 7 *The UK Supreme Court Yearbook* x, y (observing the prominent roles played by Lord Mance, Lord Clarke and Lord Sumption in the commercial law cases and noting their commercial law backgrounds); Guy Fetherstonhaugh QC, 'Land, Housing and Tenancy Law' (2016) 7 *The UK Supreme Court Yearbook* x, x (observing the roles played by Lord Neuberger and Lord Carnwath in the land, housing and tenancy law cases and noting their property-related backgrounds).

<sup>9</sup> Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013).

[...] Although, by Convention, the final say lay with the two most senior Law Lords [but] in practice neither of them made many changes [...] [E]specially in nine-judge cases [however], Lord Bingham took the view that the Committee should consist of the more senior Law Lords [...] in the case of a normal five-Judge panel, the Clerk took account of a number of factors including availability, conflicts of interest, workload, who had sat on the Appeal Committee and the needs of Privy Council [...] The most significant factor was specialisation and here [...] the Clerk [...] worked with his notion of 'A' teams. [T]owards the end of the [Appellate Committee however] it was not unknown for some Law Lords, but by no means all, to ask if they could sit on that appeal [but] such requests were not the norm.<sup>10</sup>

In addressing whether anything has changed since the transition from the Appellate Committee to the Court, Professor Paterson continues:

Not much appears to be the answer. The panels to hear appeals are largely selected by the Registrar, in practice, using the same criteria as in the last years of the [Appellate Committee]. There have [however] been two small changes from the House. [...] [First], heeding the protests of the more junior Justices, [the President] no longer [chooses] the composition of the larger Courts mainly on seniority. Secondly, it was agreed by the Justices that they would not ask the Registrar to consider their names for selection when interesting cases were coming up. Nonetheless it appears that some do ask and are occasionally successful and that those appointed after 2009 have not been told of the 'ruling' [...] In short, in the Supreme Court as in the [Appellate Committee] under Lord Bingham, the senior Justices have the most say in which appeals are admitted and in whether they get to participate in the hearing.<sup>11</sup>

Notwithstanding these undoubtedly perceptive insights, the processes behind the determination of panel size and composition of the Court remain little understood, in particular by the wider public. One might of course ask, why does this matter? It clearly cannot be said that the outcome of a case can

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<sup>10</sup> *ibid* 71.

<sup>11</sup> *ibid* 72–73.

be pre-determined simply by looking at the identity of the specific Justices responsible for hearing it.<sup>12</sup> As Professor Brice Dickson has noted in this regard:

The judges are [...] very much constrained by the specific facts of the appeals in question, and sometimes by concessions which have been made by the parties' lawyers. In addition, judges can be persuaded to change their initial opinion on a case by the force of the arguments put to them by barristers representing the opposing point of view, or the view of an intervener. As Alan Paterson has so ably demonstrated, judges may also change one another's minds during their post-hearing deliberations.<sup>13</sup>

Despite this, the cases which come before the Court are often capable of being decided in a number of different ways, each of which will represent an entirely plausible solution to the matter at hand. Likewise, such cases may require the Justices to pass judgment on the merits of competing claims concerning matters of public policy and/or the lawfulness of controversial State actions. Legitimate minds may well (and frequently do) differ over the reasoning and result of the many complex cases before the Court. *Nicklinson* remains a sombre example in which a panel of nine Justices of the Court diverged considerably on whether the Court had the power to declare that the statutory law prohibiting assisted suicide was incompatible with the European Convention on Human Rights ('ECHR') and, if so, whether it ought to do so.<sup>14</sup> One cannot help but wonder whether the substitution of one of the Justices in a narrow majority in such a controversial case with another Justice not hearing the case, would have made a difference to the result. As Professor Erika Rackley has observed, 'once we accept that who the judge is matters, then it matters who our judges are.'<sup>15</sup>

<sup>12</sup> Baroness Hale, 'Appointments to the UK Supreme Court' (2016) 7 *The UK Supreme Court Yearbook* [x], [x].

<sup>13</sup> Brice Dickson, 'Activism and Restraint within the UK Supreme Court' (2015) 21(1) *European Journal of Current Legal Issues*.

<sup>14</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] 1 AC 657, [111]-[130] (Lord Neuberger (with whom Lord Mance and Lord Wilson agreed)), [230]-[235] (Lord Sumption (with whom Lord Clarke, Lord Reed and Lord Hughes agreed)), [324]-[325] (Lady Hale (dissenting (with whom Lord Kerr agreed))); cf *Carter v Canada (Attorney-General)* [2015] SCC 5 (*per curiam*). See Daniel Clarry, 'Judicial Law-Making and Parliamentary Sovereignty in the UK Legal Order' (2014) 5 *The UK Supreme Court Yearbook* 1; Lord Hodge, 'Judicial Law-Making in a Changing Constitution' (2014) 5 *The UK Supreme Court Yearbook* 58, 68; Lord Justice Elias, 'Are Judges Becoming Too Political?' (2014) 5 *The UK Supreme Court Yearbook* 109, 123-25.

<sup>15</sup> Erika Rackley, *Women, Judging and the Law* (Routledge 2013) 164.

For this reason, it not only matters who is appointed to become a Justice of the Court, as recent efforts to enhance the diversity in judicial officers, together with heightened attention paid to improving the selection process generally evidence,<sup>16</sup> but it also matters, after appointment, which Justices will be selected to determine which cases and how it is decided which of the Justices will sit in any given case. This also correlates with the increasing development of a body of academic evidence concerning the identification of general trends amongst the different Justices in regards their openness to engaging in acts of judicial law-making. As Professor Brice Dickson explains in this volume:

[o]f the 12 Justices sitting in the Court (at the time of writing, the membership is the same today as it was then), six could be said to be relatively restrained in their approach to judicial law-making (Lord Sumption, Lord Clarke, Lord Hughes, Lord Toulson, Lord Reed and Lord Hodge), four others appeared more willing to develop the law but still hesitated to do so (Lord Neuberger, Lord Mance, Lord Wilson and Lord Carnwath), and only the two remaining Justices could be said to be very supportive of judicial activism (Lord Kerr and Lady Hale).<sup>17</sup>

Taken together, these points suggest that it may well be impossible to conclusively say that a given case may not 'have been different if a differently composed panel had sat'.<sup>18</sup> Indeed, whether or not one personally accepts this as a justified concern, it appears that many of the actors within the Court itself are at least alive to it as a possibility. As Professor Darbyshire thus explains, 'this point remains so well-accepted [by the Court] that it was even mentioned by a personal assistant (not a judicial assistant) to one of the Justices while she was showing my students around the Court in 2014'.<sup>19</sup> Furthermore, the notion that a bigger bench exudes more authority is supported by contemporary evidence of judicial panel selection in the Court and, in particular, its decision to hear the appeal in *Miller* before all of 11 its current full-time Justices (*en banc* as it were).<sup>20</sup> Indeed, Lady Hale

<sup>16</sup> See Baroness Hale (n 12).

<sup>17</sup> Brice Dickson, 'UK Supreme Court Justices and Human Rights in the 2015-16 Legal Year' (2016) 7 *The UK Supreme Court Yearbook* 199, 199; cf *Nicklinson* (n 14).

<sup>18</sup> Paterson (n 9) 72.

<sup>19</sup> Penny Darbyshire, 'The UK Supreme Court – Is There Anything Left To Think About?' (2015) 6 *The UK Supreme Court Yearbook* 148, 150.

<sup>20</sup> *Miller* (n 1); UK Supreme Court (n 2). Following Lord Toulson's retirement from the Court on 22 September 2016, the Court remains a (wo)man down from its full complement of 12 Justices. See 'Composition of the Court' (2016) 7 *The UK Supreme Court Yearbook* [x]. As to future appointments and judicial diversity, see Baroness Hale (n 12).

observes in this volume that one of the reasons for larger panels constituting the Court is 'the greater authority it gives to a decision, the greater the number of justices who agree upon it.'<sup>21</sup> At the very least, this indicates that the rules, which shape the selection process for determining the Court's panels, should be made generally available so as to provide additional clarity as to how this process works in practice. This would enable greater public scrutiny of the rules and would serve to ensure that judicial transparency is enhanced as a consequence.

### 3 What Size Panel Sits in Each Case?

The second issue considered herein concerns how the size of the panel in which the Court is to sit in each case is determined. In light of the discussion above, it might be thought desirable for the Court to always (or at least more frequently) sit *en banc* and thus to mirror the practice of other final appellate Courts including the US Supreme Court. Indeed, this proposal was suggested as long ago as 1972 by Louis Blom-Cooper QC, Professor Brice Dickson and Professor Gavin Drewry and also appears to be favoured by at least some of the Justices themselves.<sup>22</sup> As one member of the Court thus explained in an interview with Professor Darbyshire published in 2011, '[i]n a perfect world, [...] we would probably reduce the whole court to nine and then always sit as the whole court.'<sup>23</sup> Despite this, the Court routinely sits in a 'basic' panel of 5 Justices and only convenes larger panels of 7 or 9 (or 11 as in *Miller*) when it considers this necessary on a case-by-case basis. Conversely, the Court shrinks its panel size to say, three Justices, in relatively straightforward matters in which it is not being asked to decide major questions of law, but rather a question that is of importance to the parties alone (e.g. applications for permission to appeal to the Court).<sup>24</sup>

The decision as to panel size is made initially by the Registrar, albeit this is again subject to final approval from both the President and Deputy President of the Court.<sup>25</sup> In making this decision, a set of guidelines are

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<sup>21</sup> Baroness Hale (n 12) [x].

<sup>22</sup> See Louis Blom Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords* (OUP 2009) 153.

<sup>23</sup> Darbyshire (n 19) 169.

<sup>24</sup> But see *BPE Solicitors v Gabriel* [2015] UKSC 39, [2015] 1 AC 1663 (in which an application for directions as to the costs of a pending appeal was heard by a panel of five Justices); *BNY Mellon Corporate Trustee v LBG Capital No 1* [2016] UKSC 29, [2016] Bus LR 725 (in which a panel of five Justices heard an appeal raising 'no questions of wider legal significance', see especially [49] (Lord Sumption (with whom Lord Clarke agreed)) ('This case is of considerable financial importance to the parties but raises no questions of wider legal significance. There is therefore no point in dissenting at any length.'). See Crow QC, Hassell and Horner (n 8) x.

<sup>25</sup> Paterson (n 9) 72–73.

used which, since 2010, have been available on the Court's website.<sup>26</sup> The guidelines provide that the Court will be more likely to sit in larger Panels if:

- (a) The Court is being asked to depart, or may decide to depart from a previous decision.
- (b) A case is considered to be of high constitutional importance.
- (c) A case is considered to be of great public importance.
- (d) A case where a conflict between decisions in the House of Lords, Judicial Committee of the Privy Council and/or the Supreme Court has to be reconciled.
- (e) A case raises an important point in relation to the European Convention on Human Rights.<sup>27</sup>

The reasons behind these criteria appear to be two-fold. First, it appears that it is felt by the Court to be desirable for its most complex, important and controversial cases to receive consideration from a greater number of Justices so as to ensure that the legal issues raised therein are fully probed and tested in Court and during deliberations among the Justices afterwards (*curia advisari vult*). Thus, in *Patel v Mirza*,<sup>28</sup> it is understandable that the Court would want to convene a panel of nine of its Justices in an attempt to settle the law of illegality, which has vexed the Court in recent years.<sup>29</sup> Unfortunately, however, a larger panel size may only serve to entrench the division and instability in the law, if a larger plurality of Justices disagree on the essential reasoning for the disposition of an appeal, as the Court did in *Patel v Mirza* with a 5:4 split, even if concurring as to the outcome. Whilst unanimity is to be welcomed in the disposition of appeals, latent difficulties may emerge in the future application of the law if the waters remain muddied as to the flow of the common law in the essential reasoning that is deployed to determine the outcome of such cases.

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<sup>26</sup> UK Supreme Court, 'Panel Numbers Criteria' (UK Supreme Court 2010) <[www.supremecourt.uk/procedures/panel-numbers-criteria.html](http://www.supremecourt.uk/procedures/panel-numbers-criteria.html)> accessed 20 November 2016.

<sup>27</sup> *ibid.*

<sup>28</sup> [2016] UKSC 42, [2016] 3 WLR 399.

<sup>29</sup> See *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889; *Les Laboratoires v Apotex Inc* [2014] UKSC 55, [2015] AC 430; *Bilta (UK) Ltd (in liq) v Nazir* [2015] UKSC 23, [2016] 1 AC 1. See also Graham Virgo, 'Judicial Discretion in the UK Supreme Court' (2015) 6 The UK Supreme Court Yearbook 233; James Goudkamp, 'The Doctrine of Illegality: A Private Law Hydra' (2015) 6 The UK Supreme Court Yearbook 254.



Secondly, however, as Professor Darbyshire has explained, if ‘we accept the argument that two separate groups of five judges may differ in their treatment of any case, then it follows that they should sit in sevens or nines as often as possible’.<sup>30</sup> *A fortiori* the Court ought to be comprised of the largest size possible in the most serious, controversial and/or complex cases, so as to avoid speculation that the size or composition of the panel constituting the Court had a bearing on the outcome of the case or that a different panel of Justices may have decided the case in a different way or for different reasons.<sup>31</sup> Such considerations would seem to raise engineering faults in the very design of the common law tradition or, perhaps worse, concerns for the rule of law in a lack of transparency in the administration of justice at the highest level of judicial decision-making.

In practice, however, it is not clear that these criteria are always applied consistently. This is illustrated by contrasting the approach of the Court in two of the most important and interesting cases which it decided during the 2015-16 legal year, namely *R v Jogee* and *Ruddock v The Queen* (*Jogee* and *Ruddock*)<sup>32</sup> and *Keyu v Secretary of State for Foreign and Commonwealth Affairs* (*Keyu*),<sup>33</sup> both of which are considered in detail in the articles which follow later in this volume.<sup>34</sup> In *Jogee* and *Ruddock*, for example, the Court sat as a ‘basic’ panel of 5 Justices, albeit this did include the President, the Deputy President, the Lord Chief Justice of England and Wales and two Justices of the Court with extensive subject matter specialisms in the issue under review.<sup>35</sup> In its decision, however, the Court abolished an entire species of criminal responsibility, namely ‘parasitic accessorial liability’ (‘PAL’) and overruled ‘30 years of jurisprudence, including a number of authorities from high authority’<sup>36</sup> such as *Chan Win Siu v R*<sup>37</sup> and *R v Powell, Daniels and English*.<sup>38</sup> It did so without reference to the Practice Statement<sup>39</sup> and by

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<sup>30</sup> Darbyshire (n 19) 151.

<sup>31</sup> Baroness Hale (n 12) x (noting that one of the reasons for the increased usage of larger panel sizes by the Court is ‘the (apparently) reduced risk that the composition of the panel will dictate the result.’).

<sup>32</sup> [2016] UKSC 8, [2016] UKPC 7, [2016] 2 WLR 681. *Ruddock v The Queen* was an appeal to the Judicial Committee of the Privy Council from Jamaica, which was conjoined to the appeal to the Court in *R v Jogee* such that the Court and the Privy Council sat simultaneously in the disposition of both appeals.

<sup>33</sup> [2015] UKSC 69, [2015] 3 WLR 1665.

<sup>34</sup> See Julian B Knowles QC, ‘Joint Enterprise After *Jogee* and *Ruddock*: What Next?’ (2016) 7 The UK Supreme Court Yearbook x; Thomas Poole and Sangeeta Shah, ‘A Very Successful Action? *Keyu* and Historical Wrongs at Common Law’ (2016) 7 The UK Supreme Court Yearbook x.

<sup>35</sup> Lord Neuberger, Lady Hale, Lord Thomas, Lord Hughes and Lord Toulson, respectively.

<sup>36</sup> Knowles QC (n 34).

<sup>37</sup> [1984] UKPC 27, [1985] AC 168.

<sup>38</sup> [1997] UKHL 57, [1999] 1 AC 1.

<sup>39</sup> See UK Supreme Court Practice Directions, 3.1.3 and 6.6.10, adopting the approach of the

dismissing ‘a central plank of the prosecution’s case that even if PAL was flawed, it was a matter for Parliamentary reform and not a matter for the courts’<sup>40</sup> via a simple statement that:

As to the argument that even if the court is satisfied that the law took a wrong turn, any correction should now be left to Parliament, the doctrine of secondary liability is a common law doctrine (put into statutory form in section 8 of the [Accessories and Abettors Act 1861]) and, if it has been unduly widened by the courts, it is proper for the courts to correct the error.<sup>41</sup>

Furthermore, it appears that the impetus for such an outcome had in fact come directly from the Court itself. As Julian Knowles QC, lead counsel for Mr Ruddock in the case, has noted in this volume:

Leave to appeal was granted in both cases in early March 2015. When the Appellants’ solicitors received the Court’s orders granting leave they also received a letter indicating that there was to be a joint hearing of both appeals by the Supreme Court and the Privy Council. The letter said:

The second certified question in *Jogee* and the grounds raise issues beyond the suggested distinction between foresight of possibility and foresight of ‘real probability’. The Court will accordingly wish to hear argument upon the foundations of secondary liability for offences of violence and to examine the cases from *Hui Chi-Ming v The Queen* [1982] 1 AC 34 [sic] onwards, together with *Anderson v Morris* [1966] QB 110 [sic].

Thus, the impetus for the re-examination of the soundness of the PAL principle in *Jogee* and *Ruddock* came very much from the Court itself.<sup>42</sup>

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House of Lords contained in *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. See also *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, [2011] 1 AC 355, [24]-[25] (Lord Hope (with whom Lord Brown and Lord Kerr agreed)).

<sup>40</sup> Knowles QC (n 34) [x].

<sup>41</sup> *Jogee and Ruddock* (n 32) [85] (Lord Hughes and Lord Toulson (with whom Lord Neuberger, Lady Hale and Lord Thomas agreed)).

<sup>42</sup> Knowles QC (n 34) 77.

By contrast, the case of *Keyu* concerned a challenge to a decision by the UK Foreign Secretary not to hold a public inquiry into the Batang Kali Massacre in Selangor (modern-day Malaysia) by British armed forces in 1948.<sup>43</sup> In this case, the Court was invited to replace the longstanding test of unreasonableness as the basis of an action for judicial review as set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>44</sup> with a new test of proportionality. While the legal merits of this question are debated elsewhere in this volume,<sup>45</sup> of note here is the view of the Court (again sitting as a panel of 5) that:

It would not be appropriate for a five-Justice panel of this court to accept, or indeed to reject, this argument, which potentially has implications which are profound in constitutional terms and very wide in applicable scope. Accordingly, if a proportionality challenge to the refusal to hold an inquiry would succeed, then it would be necessary to have this appeal (or at any rate this aspect of this appeal) reargued before a panel of nine Justices.<sup>46</sup>

Such a ruling is surprising, not least because of the Court's ability to set its own Panel sizes. More particularly, the Court had recently indicated its support for precisely such a development in *Pham v Secretary of State for the Home Department*,<sup>47</sup> a case which was itself heard by a panel of 7 Justices. As Jake Rylatt and Joseph Tomlinson have pointed out in an insightful post on the UK Constitutional Law Blog, 'it is apparent that nine Justices *could* have been allocated to *Keyu*, on the basis of its profound constitutional implications, to paraphrase Lord Neuberger. It is less apparent why this was not the case.'<sup>48</sup> The depth of this quandary may be further plumbed if one also contrasts the approach of the Court in *Keyu* on this issue with the far less restrictive approach to overruling longstanding and significant past judicial authorities taken by the Court in *Jogee* and *Ruddock*, in which a similar panel of 5 Justices so strongly asserted its own ability to change a fundamental aspect of the criminal law in both

<sup>43</sup> *Keyu* (n 33) [8]-[14], [26] (Lord Neuberger (with whom Lord Hughes agreed)). See Poole and Shah (n 34) [x]-[y].

<sup>44</sup> [1948] 1 KB 223.

<sup>45</sup> See e.g. Poole and Shah (n 34).

<sup>46</sup> *Keyu* (n 33) [132] (Lord Neuberger (with whom Lord Hughes agreed)).

<sup>47</sup> [2015] UKSC 19, [2015] 1 WLR 1591.

<sup>48</sup> Jake W Rylatt and Joseph Tomlinson, 'Neuberger's Novelty: *Keyu* and the Substantive Review Debate' (UK Constitutional Law Blog, 17 February 2016) <[www.ukconstitutionallaw.org/2016/02/17/jake-w-rylatt-and-joseph-tomlinson-neuberger-s-novelty-keyu-and-the-substantive-review-debate/](http://www.ukconstitutionallaw.org/2016/02/17/jake-w-rylatt-and-joseph-tomlinson-neuberger-s-novelty-keyu-and-the-substantive-review-debate/)> accessed 20 November 2016.

England and Wales (via the UK Supreme Court side of the decision) and in Jamaica (via the Privy Council side of the decision), with the concomitant effect that such a historic ruling has on a number of States around the world.<sup>49</sup>

In any event, while it is not uncommon for the Court to seek to rehear a case before a larger panel if the case under review is considered more complex than was originally thought after its initial hearings have been completed,<sup>50</sup> a move which is not itself necessarily problematic, the implication that it would be improper for the Court not to do so before making a significant legal development is itself also surprising in so far as it appears to suggest that a legal distinction exists between the value of decisions made by panels of the Court of differing sizes. While it is clearly beyond the scope of a mere introductory piece such as that contained herein to draw firm conclusions on this issue, this undoubtedly marks a novel development in the jurisprudence of the Court concerning the value of its own judgments. As a consequence, it will be interesting to see how this idea is developed in future cases and in particular, whether it is referred to by the Court in its judgment handed down following the completion of oral argument in *Miller*. Stay tuned, therefore, for Volume 8 of the Yearbook to see whether any further statements from the Court or by leading commentators during the 2016-17 legal year serve to illuminate this aspect of the decision (or, indeed, any others).

#### 4 Volume 7 of the Yearbook: Compilation and Constituent Parts

As in previous years, the Yearbook is comprised of five constituent parts. In addition to this Introduction, we have also continued our tradition of featuring a Foreword to the volume as a whole, which precedes those five parts. This year, we are delighted to feature an excellent Foreword by Chief Justice Robert French of the High Court of Australia in which, amongst other matters, the Chief Justice considers the cases in which his Court has diverged from the approach of its British counterpart during the past legal year, including in criminal joint enterprise, penalties and vicarious liability.<sup>51</sup>

<sup>49</sup> cf *Miller v The Queen* [2016] HCA 30. See Chief Justice Robert French, 'Australia and the United Kingdom: A Bit Like Family, Much in Common But a Lot of Difference' (2016) 7 The UK Supreme Court Yearbook [x], [y]-[z].

<sup>50</sup> See e.g. *International Energy Group v Zurich Insurance PLC* [2015] UKSC 33, [2015] 2 WLR 1471; *R v Waya* [2012] UKSC 51, [2012] 1 AC 294.

<sup>51</sup> Chief Justice French (n 49) [y]-[z].

Part I of the Yearbook contains a collection of eight articles which analyse a range of institutional and jurisprudential issues relating to the work of the Court in the preceding legal year and, somewhat exceptionally this year, a preview of the important case of *Miller* by Lord Millett in which his Lordship considers what he believes is the ‘real question’ in the upcoming appeal to the Court.<sup>52</sup> In addition to Lord Millett, Part I contains contributions from the President and Deputy President of the Court (Lord Neuberger and Lady Hale), five leading academics (Professor Kate Malleson, Professor Paula Giliker, Professor Sarah Worthington, Professor Thomas Poole and Associate Professor Sangeeta Shah) and Julian B Knowles QC, who led the successful appeal before the Court in the high-profile case of *Jogee* and *Ruddock* as lead counsel for Mr Ruddock (on the Privy Council side). Amongst the topics addressed in these pieces, readers will find critical analyses of the judgments of the Court in cases such as *Keyu*,<sup>53</sup> *Jogee* and *Ruddock*,<sup>54</sup> *Makdessi v Cavendish Square Holdings BV*,<sup>55</sup> *Mohamad v WM Morrison Supermarkets Plc*<sup>56</sup> and *Cox v Ministry of Justice*,<sup>57</sup> as well as the thorny issues for the Court of judicial innovation, politics and appointments.

Part II of the Yearbook contains a symposium of five articles concerning the work of the Court in the field of human rights law, which are preceded by another excellent Foreword, this time by Dominic Grieve QC MP. The Protection of Human Rights by the UK Supreme Court symposium contains contributions by a third, recently retired member of the Court (Lord Toulson), two leading academics (Professor Brice Dickson and Professor Helen Fenwick) and three leading barristers (Kirsty Brimelow QC, Richard Hermer QC and Eleanor Mitchell). In addition to an excellent piece by Professor Brice Dickson examining the views of individual Justices on the protection of fundamental rights in general, the issues discussed include the role of the Court in the sub-fields of common law rights, counter-terrorism, legal accountability for military campaigns abroad and ensuring the continuation of open justice in the courtroom despite the challenges faced in protecting our national security.

Parts III and IV of the Yearbook contain a series of thematic analyses and overviews of the cases decided by the Court in the 2015-16 legal year. Part III includes a set of reflections on the jurisprudence of the Court in six

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<sup>52</sup> See Lord Millett (n 3).

<sup>53</sup> *Keyu* (n 33); Poole and Shah (n 34).

<sup>54</sup> *Jogee* and *Ruddock* (n 32); Knowles QC (n 34).

<sup>55</sup> [2015] UKSC 67, [2015] 3 WLR 1373; Sarah Worthington, ‘The Death of Penalties in Two Legal Cultures’ (2016) 7 *The UK Supreme Court Yearbook* [x].

<sup>56</sup> [2016] UKSC 11, [2016] AC 677; Paula Giliker, ‘Vicarious Liability in the UK Supreme Court’ (2016) 7 *The UK Supreme Court Yearbook* [x].

<sup>57</sup> [2016] UKSC 10, [2016] AC 660; Giliker (n 56).

main areas, namely: Administrative Law and Judicial Review; Commercial Law and Financial Regulation; Criminal Law, Evidence and Procedure; European Dimensions; Human Rights Law; and Private Law. Part IV then provides a pithy overview to each and every case decided by the Court during the 2015–16 legal year through the medium of 18 ‘overviews’ that analyse the contributions made by the Court in the relevant subject areas. Many of these pieces are written by the same advocates who were responsible for arguing those cases before the Court, making them the ideal persons to provide a clear insight into the decisions reached by the Court on each occasion and to elucidate the significant contributions made by the Court in each field of law.

The Yearbook is finally completed in Part V by a selection of Appendices. These contain detail concerning the composition of the Court, including *ad hoc* Justices who sat on panels constituting the Court, a presentation of key statistical information concerning the work of the Court, and an index detailing the pages on which each case is cited so as to facilitate ease of reference and use for our readers. We hope that this information, which includes voting patterns within the Court, will appeal to those interested in gaining further insights into the work of the UK’s top court and in comparing it to other judicial institutions both domestically and internationally.

## 5 Acknowledgements

At roughly 530 pages in length, Volume 7 of the Yearbook is the largest volume we have produced in the collection thus far. It includes contributions from over 50 authors, including three current Justices of the Court, the Chief Justice of the High Court of Australia, a retired Law Lord, a former Attorney General, seven Professors and Associate Professors and 40 prominent barristers, 33 of whom are leading silks (QCs). As in any publication of this kind, we are inevitably indebted to a great many people, without whom this project would simply not have been possible. First and foremost are Sarah Hack, who acts as our General Counsel for the overall production of the Yearbook and Sidney Richards and Valentin Jeutner, who act as our Chiefs of Information and Technology, respectively. We also wish to acknowledge the efforts of our five Managing Editors, David Birch, Alice Zheng, Matthew Eglezos, Emily Vale and Miriam Boxberg, who have provided us with a significant level of assistance, goodwill and patience in overseeing the copy-editing of the articles contained herein and with wise advice on the development of the Yearbook as a whole. Our Editors for Volume 7 are too numerous to list individually here (a full list can be found in the front matter of this volume), but their work is likewise essential in

ensuring that the Yearbook has been completed and for this we are most grateful.

The table of contents for the Yearbook from year-to-year reads like a veritable ‘Who’s Who’ of the legal profession, the contributions from whom make for such enjoyable reading from cover-to-cover. This would not be possible without the on-going support of so many dedicated and talented people in the legal profession and beyond who lend us their expertise which is essential to producing such a high quality Yearbook. We owe a significant debt of gratitude to our very many authors for their time, insightful contributions and their convivial correspondence, which has made Volume 7 of the Yearbook a pleasure to publish.

This year, we also owe a special debt of gratitude to our illustrator, Isobel Williams, who is an avid ‘Court-watcher’ and can be seen, if one looks carefully enough, seated discretely at the back of the courtroom with a sketchpad and pencil quietly sketching her wonderful illustrations of the Court’s proceedings. (For those astute readers wondering about her illustration at the front of Volume 7 of the Yearbook, the case illustrated is *Versloot Dredgin BV v HDI Gerling Industrie Versicherung AG*<sup>58</sup> – a case which the illustrator’s journal records as one involving ‘a stricken cargo vessel, a bilge alarm and a rogue mop head’<sup>59</sup> – and the advocate in question with the gold jacket lining is Colin Edelman QC, who appeared for the Respondents.) We are very pleased to be pleased to be publishing one of her excellent illustrations in this volume and we look forward to publishing more of her illustrations in the future.

We are additionally very grateful for the advice and on-going support from the members of our Advisory Board, which includes Lord Neuberger, the President of the Court (*ex officio*), Lady Hale, the Deputy President of the Court (*ex officio*), Lord Millett, Professor the Lord Norton of Louth, Lord Pannick QC, Advocate General Sharpston, Professor Sir David Edward, Professor John Bell QC (Hon) and Professor Alan Paterson. As ever, we likewise wish to express our sincere thanks to the hard working staff of the Court itself. In particular, we have continued to work closely with Mr Ben Wilson, the Director of Communications at the Court, who has again provided considerable on-going support for the Yearbook and for which we are most grateful. We have also been very pleased to welcome Mr Mark Ormerod as the new Chief Executive of the Court and the replacement for

<sup>58</sup> [2016] UKSC 45, [2016] 3 WLR 543.

<sup>59</sup> For other analyses of the case (*ibid*), see Crow QC, Hassell and Horner (n 8) [x]; Stephen Smith QC and Tim Akkouch, ‘Civil Procedure and Fraud’ (2016) 7 The UK Supreme Court Yearbook [x], [x]-[x].

Ms Jenny Rowe who has been most kind to us and has always given us her very considerable support.

This year, Volume 7 of the Yearbook will be launched at an event in the House of Commons on Monday, 12 December 2016, at which Julian B Knowles QC will give our Annual Lecture for 2016 expanding upon his excellent article on the future implications of the decisions in *Jogee* and *Ruddock*, especially for those persons who are serving mandatory life sentences for murder having been convicted on the basis of the (old) law of parasitic accessorial liability following the Court's historic overturning 30 years of authority on criminal joint enterprise. We are very grateful to Julian for his time in giving our Annual Lecture for 2016 and to Dominic Grieve QC MP for hosting the event.

And finally in this section, we wish to thank our respective family members for allowing us the time and space that is needed to complete the considerable work required in undertaking such a large project. We are most grateful for your help and support and we thank you for indulging us as we have put together the publication contained herein.

It only remains for us to offer one final concluding vote of thanks. To everyone who has contributed in any way with the production and publication of this volume, thank you for all your help and assistance, we wish you all well and we sincerely hope that you enjoy reading the pages which follow in the seventh volume of the Yearbook.