DEFERENCE

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White Paper Conference

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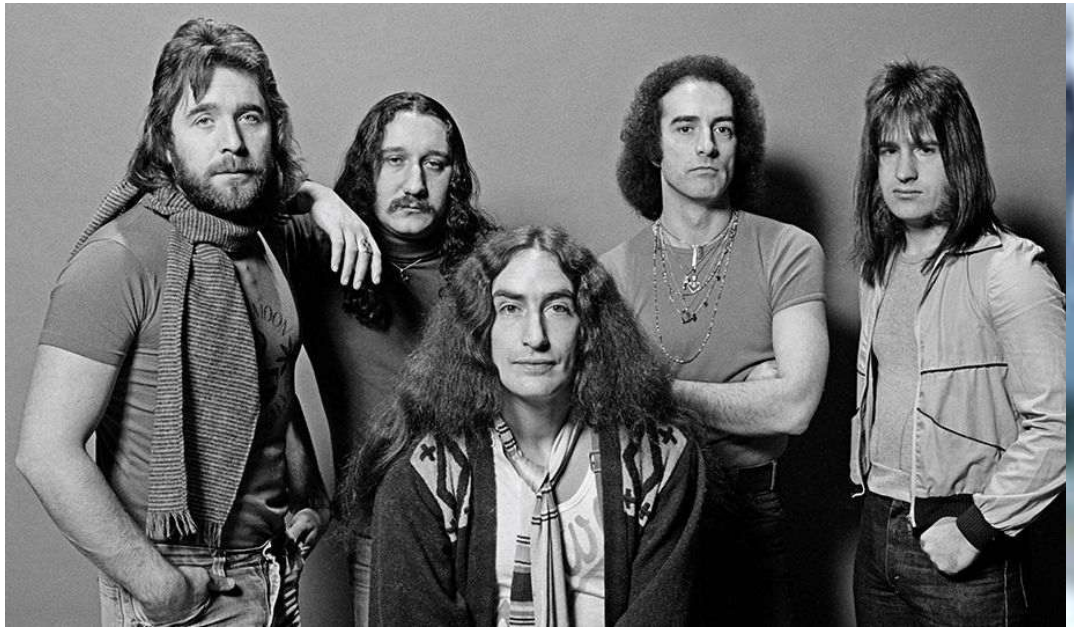
QUESTION

- What is the court's current approach to deference and public body decision-making?
- What factors will make a difference…
- Where will future challenges come from?

ANSWER

- Courts must be ‘umble, if the context and subject matter calls for it?

- **NO**: deference is not “*cringing abstension in the face of superior status*”…
  => it is a simple recognition of the separation of the powers:
- 1] Institutional competence, and 2] Democratic accountability



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STRUCTURE

1] The vital importance of deference – the view from the top

2] National security – the test, examples, and the factors at play

3] The limits: *Rwanda* and Article 3 ECHR

4] Environmental judicial review - a source of future challenges?

5] Closing thoughts

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LORD REED

- “Trust in the Courts in an age of populism” – 13 June 2025
- https://www.supremecourt.uk/speeches
- Careful articulation of the importance of the separate of the powers to ensure respect for the independent judiciary, now more than ever

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THE *MILLER* LEGACY

"We could not allow ourselves to be intimidated… In the face of the Government's assertion …that Parliament only sits as and when the Government pleases, the court was the last line of defence of a constitutional settlement based on the supremacy of Parliament that has endured since the [17th c]. We must remain vigilant in defending the values that underpin our democracy."

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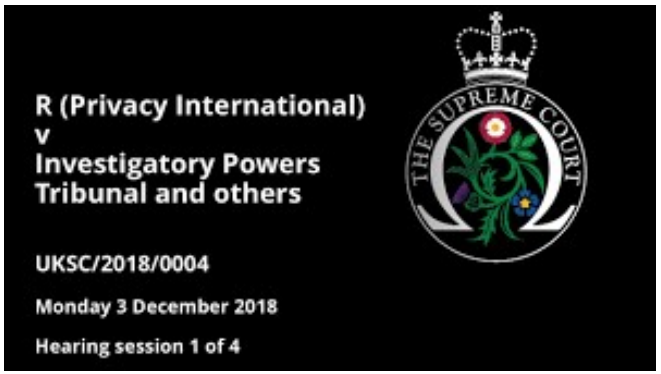
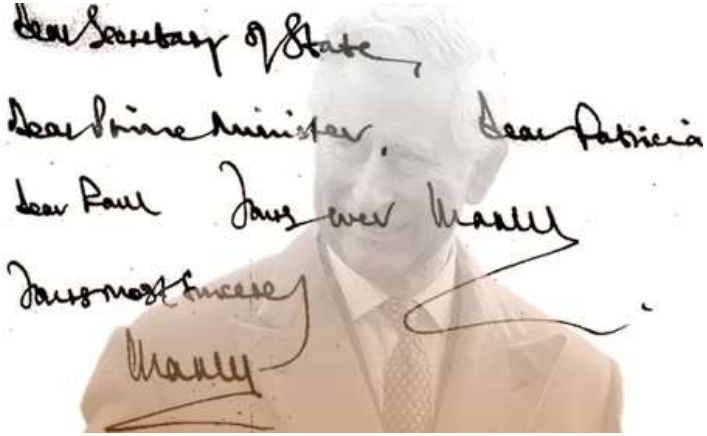
DISTRUST OF THE COURT?

- Nonetheless, the Court must be aware of the fact that:

"…populism can undermine the rule of law by diminishing trust in the institutions which uphold the rule of law and undermining support for judicial independence…"

"...It is worrying that there should be a distrust of the courts [even amongst Parliamentarians]… but we should not deceive ourselves into thinking that the reasons for [this] have nothing to do with the Courts…"





LORD REED'S PRESCRIPTION:

- *"… [the Court] also has to …display a sensitivity towards the other institutions of the state, and towards public opinion, if it is to avoid being perceived as a political actor…"*
- *"It needs to deploy judicial statecraft, and to communicate effectively with politicians, with the media and with the general public."*
- In recent years, the Courts have been *"more attentive to the separation of the powers"* but *"the more ambitious decisions and dicta of the past have not been forgotten."*
- => The essential message:
- *"to encourage trust where there may have been distrust,*
- *to encourage politicians and judges alike to see the courts and political institutions as having a shared responsibility for the rule of law,*
- *to help politicians and the public to understand that the courts' independent role in the interpretation and application of the law is legitimate and necessary."*

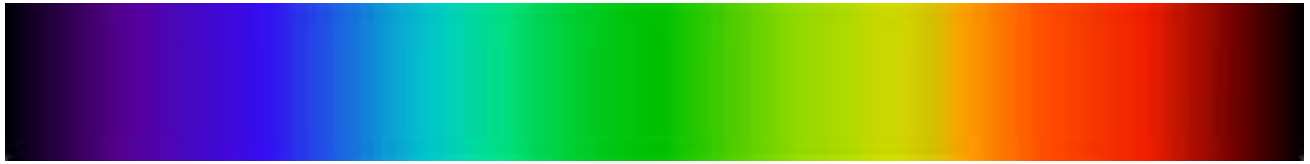
~~DEFERENCE~~ (RE)DEFINED:

- National security*: Begum v SIAC* [2021] A.C. 765; *U3 v SIAC* [2024] 1 W.L.R. 4269
- Deference has been "*subject to powerful academic criticism…with its overtones of cringing abstension in the face of superior status*" (see Lord Sumption at [22] in *Lord Carlile*, in turn referring to Lord Hoffmann in *Rehman* [2003] 1 AC 153)

- What does it actually mean? Lord Reed at [66-68] in *U3* full answer, not using word deference.
- 1] When Court is reviewing discretionary judgment by decision-maker entrusted by Parliament, court or tribunal will always attach weight to assessment made by primary decision-maker – for two reasons:
- 2] Institutional competence: specialist expertise and advice
- 3] Democratic accountability: legitimacy of decision taken by those to whom the people have entrusted the decisions through the democratic process

- Application in context: *Duke of Sussex v SSHD* [2025] EWCA Civ 548
- Royal Security Committee (known as RAVEC) had failed to follow its 2017 policy and had not undertaken a risk assessment about level of future royal security required in the UK; instead said would allocate it on an *ad hoc* basis depending on need at time

- Cs argued that RAVEC had departed from its policy without good reason;
- SoS argued that, as well as giving significant weight to judgment on security issues, Court should only review reasons for departure on a *Wednesbury* basis
- Court of Appeal = rejected that approach



- The Master of the Rolls: a simple question of public law, even in this sensitive context– were there good reasons for departing from policy?

- Dependent on i) the nature of the policy, and ii)…
  - *"…the deference that the court ought to pay to the decision maker in deciding whether it had good reasons to depart from the policy."* [66]
  - Institutional competence and democratic accountability (citing dicta above)
  - Deference is on a spectrum ([66]):
  - *"At the one end, there will be reasons given for departing from policies on the most sensitive issues of national security where the court can rarely second guess the expertise of Government agencies, and at the other end will be run-of-the mill decisions on routine cases (perhaps on immigration or benefits issues), where deference to the expertise of the decision maker may be less obviously required. That will be particularly so where a cogent explanation is lacking."*

ROYAL SECURITY - CONCLUSION

- The spectrum determined how closely the Court would examine the reasons, but no bright line rule that good reasons can only be reviewed if unreasonable or irrational. Not any less justiciable.

- Here where national or royal security – par excellence, the Court would respect experts in the field: their knowledge / expertise and they are the ones who are democratically accountable.

- Court gave weight to judgments and in fact found there was compelling reasons for departure.
- Unsurprising result, but reasons and ‘spectrum’ approach instructive

THE LIMITS: RWANDA POLICY

- Evidence of torture / Art 3: *R (AAA) Syria v SSHD* [2023] UKSC 42
- SC rejected SSHD's suggestion ([56]) that *"assessing the value of assurances given by another country, in the present context, is analogous to assessing whether a particular course of action is in the interests of national security, and that the role of the court is correspondingly limited…"*

- Even where national security is at issue – if the issue is Article 3, this is irrelevant. *"If there is a danger of torture, the [Govt] must find some other way of dealing with the threat to national security… no constitutional prerogative."* (cf Hoffmann in *Rehman* again)

MOVING ALONG THE SPECTRUM?

- A different description of the “spectrum of scrutiny” – Fordham J in *R (Fighting Dirty Ltd) v Environment Agency* [2024] EWHC 2029 (Admin) ([30-34])

- *“The language of "deference" has fallen into disuse, but reference is made of a "light touch" approach (Packham §51).”*

- *“…does not involve substitutionary review on a correctness standard; but a reasonable justification, from the reasons put forward, recognising who is the primary decision-maker with the built-in latitude for evaluation and choice.”*

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5 POINTS FROM *FIGHTING DIRTY*

- 1) Environmental JR can attract a close intensity of reasonableness review.
- 2) Context specific features will point towards or away form a heightened intensity or a narrower latitude
- 3) *"The seriousness of an environmental problem and a publicly recognised necessity for change are capable of pointing in favour of a contextually higher intensity…so can the importance of issue."*
- 4) Where function is legislative or *"political, policy-laden, complex or predictive quality of the decision"* => lower intensity; as will institutional or process limitations of the court;
- 5) If fundamental rights at stake => heightened standard. Includes "ecocentric" rights not just human (anthropocentric) rights
- (And 6) depends on extent and quality of reasoning of decision-maker)

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CLOSING THOUGHTS:

- Weight to be given to primary decision-maker judgment is a spectrum
- Rationale is i) institutional competence and ii) democratic accountability

- With exception of Art 3 context, national security = always significant weight / light touch

- Similarly, significant weight even in other Convention rights cases – in context of socio-economic policy or similar contexts: e.g. *SC v SSWP* [2022] AC 223; *ALR v HM Treasury* [2025] EWHC 1467 (Admin)

- Environmental cases – a future context in which courts might be willing to give less weight to primary decision-maker? Climate and biodiversity context, developing rapidly and rights-based approaches developing (see *Finch* [2024] UKSC 20; *Verein KlimaSeniorren v Switzerland* (2024) 79 EHRR 1. Dependent on context… and Fordham J's 5 factors.

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