

DEFERENCE IN HUMAN RIGHTS ACT 1998 CLAIMS

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Matrix

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INTRODUCTION/SUMMARY

- Standard of review: different in human rights and domestic law (respectively proportionality and rationality).
- Intensity of review: a spectrum, on which there may be some overlap between human rights and judicial review cases.
- Factors influencing how intensely a court will review a measure:
 - Decision maker;
 - Subject matter;
 - The extent to which the decision maker considered matters relevant to proportionality;
 - Whether the measure is a “bright line” rule.
- Move in recent years to more nuance in approach to deference—examples:
 - The approach to manifestly without reasonable foundation/strict scrutiny in SC [2021] UKSC 26.
 - The approach by appellate courts to proportionality judgments of first instance courts.
- Margin of appreciation does not apply in domestic law, but it remains relevant. Is the margin of appreciation having a resurgence of importance in the case law?

STANDARD OF REVIEW

STANDARD OF REVIEW: PROPORTIONALITY

- Requires: “an exacting analysis of the factual case advanced in defence of the measure” Bank Mellat [2013] UKSC 39, [20].
- Four questions:
 - Is the objective sufficiently important to justify the limitation of a fundamental right;
 - Is the measure rationally connected to the objective;
 - Could a less intrusive measure have been used;
 - Has a fair balance been struck between the individual’s rights and the interests of the community.
- Proportionality is for the court to determine, to be judged objectively: Begum [2006] UKHL 1 at [30].
- It is not, however, a merits review; Bank Mellat [20]:
 - “None of this [referring to the four questions] means that the court is to take over the function of the decision-maker”.
- Not (yet) a standard of review in judicial review: Keyu [2015] UKSC 69, [132]-[133].

STANDARD OF REVIEW: REASONABLENESS

- “beyond the range of responses open to a reasonable decision-maker”: ex p. Smith [1996] QB 517.
- Insufficient to meet the requirements of the Convention; A [2004] UKHL 56 at [44]: “[t]he greater intensity of review now required in determining questions of proportionality”.
- Flexible standard; “the more substantial the interference with human rights, the more the court would require by way of justification under the reasonableness test”; Smith.
- Where judicial review claims concern fundamental common law rights the review may be more intrusive:
 - Unison [2017] UKSC 51: the SC assessed affordability for itself.
 - Per Lord Reed [95]. “the Fees Order will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice ... the fundamental problem is the assumption that the right of access to courts and tribunals can lawfully be made subject to impositions which low to middle income households can only meet by sacrificing ordinary and reasonable expenditure for substantial periods of time”

INTENSITY OF REVIEW

INTENSITY OF PROPORTIONALITY REVIEW

- “The intensity with which the [proportionality] test is applied—that is to say the degree of weight or respect given to the assessment of the primary decision-maker—depends on the context”: Bank Mellat [2013] UKSC 39, [69].
- “an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention”: Kebilene [1999] UKHL 43.
- Why? Lord Carlile [2014] UKSC 60 at [22]: (i) the separation of powers; and (ii) the relative institutional competence of government, executive and the judiciary.
- Not the same as the margin of appreciation, although some commonality:
 - Margin of appreciation has “no application in domestic law”; Re G [2008] UKHL 38 at [118], but domestic courts have “generally endeavoured to apply an analogous approach”, SC [2021] UKSC 26 at [142].
 - Thus, width of margin of appreciation in Strasbourg will often guide intensity of review domestically: “when we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states, it seems to me that this House should not attempt to second guess the conclusion which Parliament has reached”: Countryside Alliance [2007] UKHL 52, [126].

REASONABLENESS AND PROPORTIONALITY AS A SPECTRUM OF INTENSITY OF REVIEW

- “Asking whether a decision is *Wednesbury* reasonable is less demanding—or more deferential—than asking whether there are cogent reasons for it; asking whether a decision is reasonable is less demanding than asking whether it is proportionate; asking whether a decision is reasonably necessary is less demanding whether it is strictly necessary....”: Mark Elliott, “*From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification*”.
- *Bank Mellat* [20]: “the requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap”.
- *Lord Carlile* [2014] UKSC 60 at [32]: “... there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically”.
 - See, for example, *Geller v. SSHD* [2015] EWCA Civ 45 at [37]-[38].
- Where on the spectrum a claim falls will depend on context alone.

FACTORS THAT MAY CONDITION THE INTENSITY OF REVIEW

DECISION MAKER (1)—PARLIAMENT

- Parliament's judgment is not “immune from challenge”, but “respect should be paid to the recent and closely-considered judgment of a democratic assembly...”: Countryside Alliance [2007] UKHL 52 at [47].
- Degree of respect shown to Parliament's judgment will depend on the circumstances: SC [2021] UKSC 26 at [180]:
 - Subject matter of the legislation
 - Whether it is relatively recent or dates from an age with different values from the present time
 - Whether Parliament can be taken to have made its own judgment of the issues which are relevant to the court's assessment.
- “The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament”: Countryside Alliance at [45].

DECISION MAKER, CONT (2)

- Executive:
 - MM (Lebanon) [2017] UKSC 10: the tribunal should “attach considerable weight to judgments made by the Secretary of State” [75].
 - This was for two reasons [75]: “... first, the constitutional responsibility of the Secretary of State for setting national policy in this area; and secondly the expertise available to her and her department in setting and implementing that policy”.
- Expertise of other decision makers:
 - Begum [2006] UKHL 1: “It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision” [34].

SUBJECT MATTER: AREAS OF RESPECT (1)

- “Even in the context of Convention rights, there remain areas which although not immune from scrutiny require a qualified respect for the constitutional functions of decision-makers who are democratically accountable”; Lord Carlile [28].
- Social and economic policy: SG [2015] UKSC 16
 - “The benefit cap is, of course, quintessentially a matter of social and economic policy. In such matters.... It will be easier for the courts to recognise a discretionary ‘area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention”.
 - Manifestly without reasonable foundation: art 14 cases concerning general measures of economic or social strategy, the court will respect the policy choice of the legislature or executive unless it was manifestly without reasonable foundation.
- But cf Tigere [2015] UKSC 57, where the SC applied more intense scrutiny as “education is rather different” to access to cash welfare payments [28]-[32].

SUBJECT MATTER: AREAS OF RESPECT (2)

- National security:
 - Rehman [2001] UKHL 47: “decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive” [50]; “It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process...” [62]; see also A [2004] UKHL 56, [29] and Lord Carlile [2014] UKSC 60, [99], [105].
 - Begum [2021] UKSC 7: review of national security assessment “confined to reviewing the reasonableness of the Secretary of State’s assessment, bearing in mind the limitations of the judicial role which were explained in Rehman and other cases” [110].
- Allocation of finite resources: Michalak [2002] EWCA Civ 271, [41].

SUBJECT MATTER: AREAS WHERE A COURT IS MORE LIKELY TO INTERVENE

- Discrimination—
 - Re G [2008] UKHL 38 at [48]: “Cases about discrimination, even in an area of social and economic policy, falls within the constitutional responsibility of the courts”.
 - Discrimination on particular grounds, e.g. race, sex, nationality or sexual orientation require “strict scrutiny”, so that “particularly convincing and weighty reasons to justify”, see Steinfeld [2018] UKSC 32 at [20].
- Liberty—
 - A [2004] UKHL 56: the majority of the House of Lords subjected the government’s claim that national security justified detention without trial to close scrutiny (and found that justification lacking).

NUANCE IS ALL: MANIFESTLY WITHOUT REASONABLE FOUNDATION VERSUS STRICT SCRUTINY

- Supreme court in SC [2021] UKSC 26:
 - MWRF still had a part to play: low intensity of review generally appropriate, all other things being equal, in cases concerned with judgments of social and economic policy [158].
 - This means that the judgment of the legislature will generally be respected unless manifestly without reasonable foundation [161].
 - Intensity of review will be influenced by a wide range of factors: “*very weighty reasons*” needed, intensity of review high, where treatment on a “*suspect ground*” [158].
 - Even where no suspect ground, there may be factors that call for a stricter standard of review, e.g. impact of measure on best interests of children.
 - The standard of review is accordingly flexible/nuanced depending on facts.
- Article 14 cases as presenting a particular risk of undue influence by the courts in the sphere of political choices [162].

WHETHER AND TO WHAT EXTENT THE PROPORTIONALITY VALUES AND INTERESTS WERE CONSIDERED BY THE DECISION MAKER

- Generally, where a public authority has addressed the particular issue before the court, and has taken account of the relevant human rights considerations, the court will be slow to upset the balance struck.
- Conversely, where there is no evidence this has been done:
 - *Miss Behavin* [2007] UKHL 19: “[t]he court’s scrutiny is bound to be closer and the court may... have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision maker on matters he or it did consider” [47].
 - *Brewster* [2017] UKSC 8: “[t]he margin of discretion may... take on a rather different hue when... it becomes clear that a particular measure is sought to be defended (at least in part) on grounds that were not in the mind of the decision maker at the time the decision was taken” [50].
 - Post hoc reasons will “call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised”, but “[e]ven retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide” [52].

BRIGHT LINES

- “... a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases...” Animal Defenders (2013) 57 EHRR 21.
- Gallagher [2019] UKSC 3 at [50]:
 - The task of the court is to assess the proportionality of the categorisation and not of its impact on individual cases. “The impact on individual cases is not more than illustrative of the impact of the scheme as a whole. Indeed... the stronger the justification for legislating by reference to pre-defined categories, the less the weight to be attached to any particular illustration of its prejudicial impact in individual cases”.
 - That will require examination of (i) whether the use of bright lines is justified [50], and (ii) whether the measure draws the boundaries of the relevant category in the right place [56].
- Examples:
 - Ziegler [2021] UKSC 23; Tigere [2015] UKSC 57.
 - Generally legitimate to use bright line criteria to govern the availability of social welfare benefits: SC [2021] UKSC 26, [204]; Hackney [2020] UKSC 40, [85].

PROPORTIONALITY IN THE APPELLATE COURTS

- Two possibilities:
 - The appellate court does not make its own assessment of proportionality unless the first instance court has exceeded the boundary of what is reasonable (effectively a rationality review).
 - The appellate court does not defer to the judgment of the first instance court and will assess proportionality for itself.
- The former is the approach most often adopted by appellate courts:
 - Elias LJ in *R (C) v. SSWP* [2016] EWCA Civ 47 at [34], approved by the SC in *CC of Greater Manchester* [2018] UKSC 46 at [64]: “the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong”.
 - *Ziegler* [2021] UKSC 23: “if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found”.

- But examples of cases in which the appellate court did not defer to the first instance court and assessed proportionality for itself abound:
 - Generally, the appeal concerned rules/policies where facts of the individual case not significant:
 - Belmarsh [2004] UKHL 56; Bank Mellat [2013] UKSC 39; Elan Cane [2021] UKSC 493.
- Safe Access Zones [2022] UKSC 32 at [33]:
 - The determination of proportionality is not an exercise of fact-finding, rather it “involves the application, in a factual context (often not in material dispute), of the series of legal tests.... together with a sophisticated body of case law, and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act, or the development of the common law” [30].
 - “That approach is capable of being applied flexibly, since the test or standard applied in deciding whether a decision is wrong can be adapted to the context...” [33].
 - The SC noted previous cases in which “a more interventionalist approach was adopted by this court in order to enable it to fulfil its constitutional function and to perform its duty under the Human Rights Act” [33].

WHEN WILL AN APPELLATE COURT ADOPT A MORE INTERVENTIONALIST APPROACH?

- Philip Sales, Proportionality Review in Appellate Courts (2021) Judicial Review 26(1), 40 at 59:
 - The nature of the measure;
 - The range of cases affected by it;
 - The extent to which the first instance court had a superior opportunity to assess the evidence;
 - The extent to which the fine detail of the evidence is of significance for the judgement which falls to be made;
 - The degree to which the appellate courts can feel confidence that the relevant issues (or some sub-set of them) have already been considered by the first instance courts.

MARGIN OF APPRECIATION: THE COMEBACK

MARGIN OF APPRECIATION: WHEN WILL IT MATTER AND WHY?

- Shaping the margin of discretion; Countryside Alliance [2007] UKHL 52.
- Providing the complete answer? What happens when the ECtHR would regard a measure as falling within the UK's margin of appreciation, and thus would not find a breach of a Convention right? Could this nevertheless be incompatible with Convention rights within the meaning of the HRA?
- Previously:
 - Re G [2008] UKHL 38: even if the ECtHR would view the issue as falling within the margin of appreciation, it was open to the domestic courts to hold that the legislation violated the ECHR rights guaranteed by the HRA.
 - Nicklinson [2014] UKSC 38: a measure could be “incompatible at the domestic level” whilst being simultaneously “compatible at the international level” [188]; the disconnect arising due to the difference between the margin of appreciation and the domestic margin of discretion; albeit that a domestic court would “normally be very cautious” before reaching this conclusion [75].
- Elan Cane [2021] UKSC 56: a Strasbourg finding of no breach of the ECHR because of the margin of appreciation constitutes a concrete determination of ECHR compliance.
 - (i) Comments in *Re G* were obiter; (ii) were based on a misunderstanding of the nature of the margin of appreciation doctrine; (iii) are difficult to reconcile with the structure and purpose of the HRA; (iv) result in an encroachment on Parliamentary sovereignty which Parliament was unlikely to have intended; (v) undermine legal certainty; and (vi) are inconsistent with the prevailing approach of the HL and SC both prior and subsequent to that decision.

CONSENSUS AMONGST COUNCIL OF EUROPE MEMBER STATES

- The ECtHR will apply a wide margin of appreciation where there is no consensus between member states either as to the relative importance of the interest at stake or as to the best means of protecting it: Hämäläinen (2014) EHRR 55.
- Consensus may signpost the wide of the domestic margin of discretion:
 - Elan Cane [2021] UKSC 56 at [59]; TT [2020] EWCA Civ 559.
- Consensus may act as a cross-check on the domestic court's application of the fair balance limb of the proportionality test:
 - In Re McLaughlin [2018] UKSC 48: the SC held that the restriction of widowed parents' allowance to the spouse of civil partner of the deceased was a disproportionate breach of Art 14 taken with Art 8 or A1P1.
 - “the great majority of member states of the Council of Europe” provided survivor pensions to children or the surviving parent regardless of whether the parents were married. This was “evidence of a European consensus which is always relevant to the width of the margin of appreciation which Strasbourg will allow” [41].

PRACTICAL IMPLICATIONS FOR LITIGATORS

- Lord Sales, “The Developing Jurisprudence of the Supreme Court on Convention Rights” [58] provides a hint/warning:
 - “...lawyers arguing cases involving Convention rights and courts deciding them would be well advised to give careful thought to how to frame the argument surrounding the width or narrowness of the margin of appreciation applicable in a given context. The margin of appreciation is often not merely one factor ranked alongside others in Convention rights adjudication. It can, and I would venture to suggest often will be, the determinative factor in whether a claimant is able to establish a breach of their Convention rights in a domestic court... If the margin of appreciation is wide, the scope for the legislature or the executive to take action without violating Convention rights is correspondingly wide. Despite the importance of this concept, however, submissions in relation to the width of the margin of appreciation can be treated as an uninteresting or rather subordinate bolt-on to a general discussion of whether there is a violation in the case at hand. They are often of a rather general nature, involving bald assertions on each side with little careful analysis. It would be desirable, however, if submissions in relation to the width of the margin of appreciation become drafted with a level of care and detail commensurate to its potential prominence in driving the practical outcome in the determination of disputes in a Convention rights context.”



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