Deference, regulation & JR

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39 ESSEX CHAMBERS

Deference to regulatory panels

- The right to a “rehearing” on appeal to High Court: PD 52D para. 19.1(2)
- Applicable in statutory appeals under Architects Act, Chiropractors Act, Dentists Act, Health Professions Order, Medical Act, Medicines Act, Nursing and Midwifery Order, Opticians Act, Osteopaths Act, Pharmacy Act and Order: PD52D para. 19.1(1)

Deference to regulatory panels

- Notwithstanding the requirement that the appeal is by way of a rehearing, role of deference explicitly recognised in 2 key respects
- See e.g. Ali v GMC [2017 EWHC 741 (Admin) (Fraser J)
- *"the court should give respect and due weight to the expertise of the MPT to make the required judgment about what is necessary to maintain public confidence and proper standards in the profession"*
- *"the court will correct material errors of fact and of law… However, in relation to errors of primary fact, the court would be reluctant to interfere, especially where a finding is based upon an assessment of credibility of witnesses"*

Raschid/Fatnani v General Medical Council

- [2007] 1 W.L.R. 1460 per Laws LJ
- *"As it seems to me there are in particular two strands in the relevant learning before 1 April 2003. One differentiates the function of the panel or committee in imposing sanctions from that of a court imposing retributive punishment. The other emphasises the special expertise of the panel or committee to make the required judgment."*

- *"The panel then is centrally concerned with the reputation or standing of the profession rather than the punishment of the doctor. This, as it seems to me, engages the second strand to which I have referred"*.

Fatnani continued

Marinovich v General Medical Council [2002] UKPC 36

Lord Hope, at para.28. …

"the Professional Conduct Committee is the body which is best equipped to determine questions as to the sanction that should be imposed in the public interest for serious professional misconduct. This is because the assessment of the seriousness of the misconduct is essentially a matter for the committee in the light of its experience. It is the body which is best qualified to judge what measures are required to maintain the standards and reputation of the profession."

Adds at para. 29: *"That is not to say that their Lordships may not intervene if there are good grounds for doing so"*

Fatnani continued

- Laws LJ at para. 19:

"As it seems to me the fact that a principal purpose of the panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the panel."

- *Ghosh v General Medical Council [2001] 1 WLR 1915* , 1923, para 34: *"the Board will afford an appropriate measure of respect to the judgment of the committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the committee's judgment more than is warranted by the circumstances."*

Fatnani continued

- Criticism of approach of first instance judge
- Although Collins J in both cases (Rashid, Fatnani) acknowledged in one way or another the need for a degree of deference to the panel, still the exercise he undertook came very close, if it did not constitute, an exercise in re-sentencing: "*His view in Raschid (para 25) that Dr Raschid was "trying to maintain a doctor/patient relationship" was a view of the case expressly rejected by the panel itself."*
- Collins J's views in Raschid as to the period of suspension and the lack of need for a review hearing *"were in reality a substitution of one view of the merits for another. So also the judge's view in Fatnani that the panel took an overly severe view of the facts"*
- Judge failed *"to give special place to the judgment of the specialist tribunal".*

Application to other regulatory bodies

- Ayodele v Nursing and Midwifery Council
- [2018] EWHC 721 (Admin)
- First theme: constitutional role of the specialist tribunal
- *"in relation to findings which reflect a professional judgment concerning standards of professional practice and conduct, the court will exercise distinctly secondary judgment and give special place for the judgment in a professional body as the specialist tribunal entrusted with the maintenance of the standard of the profession."*

Application to other regulatory bodies

- Ayodele v NMC
- Second theme: expertise
- *"In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standard in the profession and sanctions, with diffidence*"

Application to other regulatory bodies

- Limitation to deference/diffidence:
- There may be matters, such as dishonesty or sexual misconduct, where the court *"is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal…": (*e.g. *Council for the Regulation of Healthcare Professionals v GMC and Southall [2005] EWHC 579* (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11)
- Approach of courts to appeals by Professional Standards Authority and by GMC under section 40A Medical Act

Application to other regulatory bodies

- This approach endorsed by the Supreme Court in Khan v General Pharmaceutical Council [2016] UKSC 64, [2017] 1 WLR 169
- *"An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence. In a case such as the present, the committee's concern is for the damage already done or likely to be done to the reputation of the profession and it is best qualified to judge the measures required to address it"*
- But:
  - Exercise of appellate powers to quash committee's direction "somewhat less inhibited than previously"
  - Court can more readily depart from committee's assessment of the effect on public confidence of misconduct which does not relate to professional performance than in a case in which the misconduct relates to it (Khan – domestic violence)
  - Removal was harsh, unnecessary and disproportionate: 4 months suspension substituted

Application to other regulatory bodies

- Salsbury v Law Society [2008] EWCA Civ 1285, [2009] 1 WLR 1286
- Solicitor altered cheque to increase amount payable, convicted of obtaining money transfer by deception. SDT concluded he should be struck off. High Court said this was at the bottom of scale of dishonesty and that the order was excessive and disproportionately harsh. CA allowed Law Society's appeal and reinstated SDT's order for striking off.
- *"The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere."*

Application to other regulatory bodies

- Salsbury v Law Society
- The court had not been entitled to interfere with the sentence imposed – it ought to have *"paid proper respect to the decision of the tribunal, which was an expert and informed body, particularly well placed to assess what measures were required to deal with Mr Salsbury and to protect the public interest"*

Application to other regulatory bodies

- Thilakawardhana v Office of the Independent Adjudicator for Higher Education v University of Leicester [2018] EWCA Civ 13
- *"… as is well-established, the Court approaches decisions of professional and university tribunals dealing with matters of FTP (or professional discipline) with deference, both as to findings of impairment to practise and as to sanction - though a Court can more readily depart from a tribunal's decision in a case where the misconduct in question does not relate to professional performance. The foundation for such deference is that professional and university tribunals are likely to be better attuned to the context than a Court and are, at the least, unlikely to have less insight as to the question/s in issue. Moreover, the professional or university tribunal may well have had the benefit of seeing and hearing from the practitioner or student in question."*

Application to other regulatory bodies

- *Higham v The University of Plymouth [2005] EWHC 1492 (Admin); [2005] ELR 547* - a medical student expelled in the first year of his course. Per Stanley Burnton J:
- *"28. It is obvious that judgments as to whether an individual is fit to enter and to continue in an academic course leading to practise as a doctor are best taken by academics who are responsible for the conduct and teaching of that course, and that the staff who are medically qualified have a special part to play in such decisions. Judges are not, in general, medically qualified, and do not have experience of medical practice or of teaching and training students to become practising doctors……*
- *29. In deciding whether the [University's] decision should be set aside, the court, which is less qualified to make the decision under challenge than the decision maker, must approach that decision fairly made by those qualified to make it with the respect and deference due in such circumstances. In Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 …. Sedley LJ said, at 1992 E-F…..*

> *'disputes suitable for adjudication under [a university's] procedures may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate…..'*

I would add to Sedley LJ's list of questions on which the judgment of the court is likely to be inappropriate the question whether a student is fit to continue his medical studies, and whether, if allowed to proceed, he will ultimately be fit to practise as a doctor. The degree of respect and deference appropriate to such a decision is increased by the consideration that the original decision maker, here the committee, had the advantage of seeing and hearing the witnesses and, perhaps most importantly, Mr Higham himself, and were able to form a view of him and his personality that a consideration of the documents by this court cannot approach. "

Hussain v General Pharmaceutical Council

- [2018] EWCA Civ 22 – most recent statement of these principles is in the judgment of Singh LJ at paras 66 onwards
- *“The jurisdiction of the High Court in proceedings such as these is an appellate one, not a supervisory one. It is therefore not akin to judicial review proceedings. Moreover, it is an important part of the overall structure (embracing both the Committee and the Court) which enables there to be compliance with Article 6 of the Convention rights, as set out in Sch. 1 to the HRA , in particular the requirement that there should be access to an independent and impartial court or tribunal when a person's civil rights and obligations are determined. On the other hand, as the authorities in this area make clear, it is not the role of the Court simply to take the decision as to sanction again and substitute its own view for that of the Committee. As it was put by Sales J (as he then was) in Yeong v General Medical Council [2009] EWHC 1923 (Admin); [2010] 1 WLR 548 , at paragraph 58, a body such as this Committee must be afforded a "margin of judgment."*

The Bawa-Garba case

- [2018] EWHC 76 (Admin)
- Doctor convicted of manslaughter by gross negligence; sentenced to two years imprisonment, suspended
- MPT found fitness to practise impaired, imposed sanction of 12 months suspension from register, found erasure would be disproportionate
- Appeal by GMC under section 40A Medical Act
- Founded on MPT’s own lack of deference/respect for the decision of the jury

The Bawa-Garba case

- “Was the Tribunal decision wrong? I have to respect its findings of fact on which it heard evidence, and I should defer, in the legal sense, to its evaluation particularly in areas where its expertise exceeds that which Courts may have, respecting its specific functions and institutional experience…Nonetheless, I have come firmly to the conclusion that the decision of the Tribunal on sanction was wrong”

- “Full respect had to be given by the Tribunal to the jury's verdict: that Dr. Bawa-Garba's failures that day were not simply honest errors or mere negligence, but were truly exceptionally bad. The Tribunal's approach did not respect the true force of the jury's verdict nor did it give it the weight required when considering the need to maintain public confidence in the profession and proper standards.”

The Bawa-Garba case

“the decision on sanctions, on a fair reading, shows that the Tribunal did not respect the verdict of the jury as it should have. In fact, it reached its own and less severe view of the degree of Dr. Bawa-Garba's personal culpability.”

Deference to the fact finder

- Southall v General Medical Council [2010] EWCA Civ 407 per Leveson LJ
- *"...as a matter of general law, it is very well established that findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, are virtually unassailable."*
- Gupta v General Medical Council [2002] 1 WLR 1691
- *"...the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct that any decision of a court which cannot deploy those factors when assessing the position."*

Deference and Judicial Review

- What is meant by deference?
- Multiple academic treatises
- Article by Stephen Gageler, Justice of High Court of Australia, entitled Deference (2015) 22 AJ Admin L 151
- *"The standard dictionary definition of deference includes two alternative meanings. One meaning is respectful regard for the judgment or opinion of another. Another meaning is respectful acknowledgement of the authority of another. The two meanings point to two different forms of deference. Neither meaning equates deference to servility, much less to an abdication of duty."*

Deference and Judicial Review

- *“An example of a court exhibiting the first form of deference towards the legislature or the Executive would be for the court, having determined that it is the court’s own judgment or opinion on a particular subject-matter that is to have operative effect, to give weight to a legislative or executive judgment or opinion on that subject-matter in forming its own judgment or opinion”.*
- *“An example of a court exhibiting the second form of deference towards the legislature or the Executive would be for the court to determine that it is the judgment or opinion of the legislative or of the Executive on a particular subject-matter that is to have operative effect, either unconditionally or subject to a condition such as that the legislative or executive judgment or opinion must be made in good faith or must be reasonable.”*

Deference and Judicial Review

- Both types of deference well established in US administrative law: the first is called *Skidmore* deference, the second *Chevron* deference.
- "*Overall, Skidmore deference is about a court giving weight to an administrative agency's view on a particular question of interpretation which the court considers that a statute, on its proper construction, makes a question for the court. Chevron deference is about the zone of authority which a court considers a statute, on its proper construction, to confer on an administrative agency; it is about declaring and respecting the authority of an agency to form its own reasonable view on a particular question of interpretation which the court considers that the statute makes a question for the agency.*"

What is deference?

- Mark Elliott in essay entitled *From bifurcation to calibration: twin-track deference and the culture of justification* identifies two forms of deference
- "The first of these forms can be thought of as *intrinsic deference*. This is an established phenomenon, even if the language of deference is less familiar in this context. Indeed, the notion is hard-wired into the traditional, doctrine-led approach to substantive review. Asking whether a decision is Wednesbury reasonable in the normal sense 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 than asking whether it is strictly necessary…"

What is deference?

- “That type of deference needs to be distinguished from what might be called *adjudicative deference*. In this guise, deference may call for the ascription of respect to the decision-maker’s view when the reviewing court assesses whether the burden of justification should be taken to have been discharged. The court might, for instance, be willing to attach greater weight to the view of the decision-maker when deciding whether imposing a particular restriction upon a right was necessary, on account of the fact that the decision-maker was peculiarly institutionally well-placed to form such a view and deployed its expertise in doing so. Or a reviewing court might ascribe a degree of respect to the view of the decision-maker when deciding whether the restriction placed by the impugned measure upon the relevant right (or other value) is justified by a public policy gain, such that the measure can be considered to have struck a “fair balance”, or to be proportionate in the “strict” or “narrow” sense.”

Deference & Judicial review

- Deference on grounds of expertise/expert judgment
- Deference on the ground that this is a field unsuited to judicial oversight e.g. technically difficult & thus inviting deference on competence grounds
- Deference on grounds of the nature of the measure in question
- Deference in cases involving decisions as to allocation of scarce resources
- Deference on account of the decision-maker’s superior institutional competence or democratic legitimacy

Expertise/expert judgment

- R (MM) (Lebanon) v SSHD [2017] UKSC 10 (minimum income requirements for sponsoring spouses or partners)
- "although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy. He cites Lord Bingham's reference in *Huang* to the need to accord appropriate weight to the judgment of a person "with responsibility for a given subject matter and access to special sources of knowledge and advice". As that passage indicates, there are two aspects, logically distinct: 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. Both are relevant in the present case, but the degree of respect which should be accorded to them may be different. The weight to be given to the rules or Departmental guidance will depend on the extent to which matters of policy or implementation have been informed by the special expertise available to the Department. A good illustration in a different factual context is to be found in the *Denbigh High School* case, above, on which Lord Wilson in *Quila* (para 46ff) placed particular reliance as explaining "the nature of the court's inquiry" under the "fair balance" part of the four-stage test. Lord Bingham (para 30) referred to the "value judgment" required, in which proportionality was to be judged "objectively, by the court …" It is notable however that the "objective" inquiry actually undertaken by Lord Bingham in that case (concerning school uniform policy as applied to Muslim girls) involved giving substantial weight to the judgment of the school:

  > "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." (para 34)

Expertise/expert judgment

- “this approach is consistent with the margin of appreciation permitted by the Strasbourg court on an “intensely political” issue, such as immigration control. However, this important principle should not be taken too far. Not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (*Hesham Ali*, para 46). Similar considerations would apply to rules reflecting the Secretary of State’s assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise.”

Field unsuited to judicial oversight?

- Particular caution as regards the review of decisions by commercial regulators
- E.g. R v Director General of Telecommunications ex p Cellcom (1999) COD 105: Lightman J, court very slow to impugn decisions of fact by expert and experienced decision-maker and even slower to impugn his educated prophesies and predictions for the future
- Great Northern Railway Ltd v Office of Rail Regulation [2006] EWHC 1942 (Admin): highly technical field where courts would adopt hands-off approach
- R (Grierson) v OFCOM [2005] EWHC 1999 award of commercial radio licences

Social and economic policy

- R (SG) v SoS for Work and Pensions [2015] UKSC 16
- The benefit cap is, of course, quintessentially a matter of social and economic policy. In such matters, as Lord Hope of Craighead observed in R v DPP, Ex p Kebilene [2000] 2 AC 326, at p 381, 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". As Lord Reed explains, the introduction of the cap was indeed extensively debated in Parliament and various amendments were proposed and resisted which would have mitigated the adverse effects with which we are here concerned. But the details of the scheme, including those adverse effects, were deliberately left to be worked out in regulations. It is therefore the decisions of the Government in working out those details, rather than the decisions of Parliament in passing the legislation, with which we are concerned.
- Furthermore, as Lord Hope went on to say in In re G (Adoption: Unmarried Couple) [2009] 1 AC 173, para 48, protection against discrimination, even in an area of social and economic policy, falls within the constitutional responsibility of the courts: "Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."
- Therefore, even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so. In many cases, the result will be to leave it to the legislature to decide how the matter is to be put right.”

Allocation of scarce resources

- Brewster's application for judicial review [2017] UKSC 8
- *"Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are par excellence the stuff of government. But where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished."*

R (Lord Carlisle) v SSHD [2014] UKSC 60

- *“As a tool for assessing the practice by which the courts accord greater weight to the executive's judgment in some cases than in others, the whole concept of “deference” has been subjected to powerful academic criticism: see, notably, TSR Allan, "Human Rights and Judicial Review: a Critique of 'Due Deference’ [2006] CLJ 671; J. Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] PL 592. At least part of the difficulty arises from the word, with its overtones of cringing abstention in the face of superior status. In some circumstances, “deference” is no more than a recognition that a court of review does not usurp the function of the decision-maker, even when Convention rights are engaged. Beyond that elementary principle, the assignment of weight to the decision-maker's judgment has nothing to do with deference in the ordinary sense of the term. It has two distinct sources. The first is the constitutional principle of the separation of powers. The second is no more than a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject-matter.”*

- Need to consider why the court is being invited to respect the autonomy of an executive decision?
- Is it being invited to respect the separation of powers and the special constitutional function of the executive? *"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. Examples are decisions involving policy choices (R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 at paras 75-76); broad questions of economic and social policy (Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816 at para 70); or issues involving the allocation of finite resources (Wandsworth London Borough Council v Michalak [2003] 1 WLR 617 at para 41 (Brooke LJ))."*

- *“Rather different considerations apply where the question is not what is the constitutional role of the court but what evidential weight is to be placed on the executive's judgment, a question on which the human rights dimension is relevant but less significant. It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise its own institutional limitations. In the first place, although the Human Rights Act requires the courts to treat as relevant many questions which would previously have been immune from scrutiny, including on occasions the international implications of an executive decision, they remain questions of fact. The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. Nonetheless, 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. Thirdly, where the justification for a decision depends upon a judgment about the future impact of alternative courses of action, there is not necessarily a single "right" answer. There may be a range of judgments which could be made with equal propriety, in which case the law is satisfied if the judgment under review lies within that range. A case like the present one is perhaps the archetypal example. Fourthly, although a recognition of the relative institutional competence of the executive and the courts in this field is a pragmatic judgment and not a constitutional limitation, it is consistent with the democratic values which are at the heart of the Convention, because it reflects an expectation that in a democracy a person charged with making assessments of this kind should be politically responsible for them. Ministers are politically responsible for the consequences of their decision. Judges are not. These considerations are particularly important in the context of decisions about national security on which, as Lord Hoffmann pointed out in Rehman, "the cost of failure can be high". It is pre-eminently an area in which the responsibility for a judgment that proves to be wrong should go hand in hand with political removability.”*

- *"The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed."*
- Lord Bingham in Huang