

## DEFERENCE & PROPORTIONALITY

### Introduction:

1. What follows is intended to provoke discussion: it is neither a statement of HMG's position, nor of my own.

### What are the concepts?

2. Proportionality & deference arise in this way:
  - 2.1. The Convention sets out certain fundamental rights & freedoms.
  - 2.2. It then specifies certain legitimate purposes for which those rights can be restricted.
  - 2.3. 'Proportionality' is the key criterion for determining whether a restriction is lawful.
  - 2.4. In applying that test, the ECtHR has developed the concept of a 'margin of appreciation', which is its label for recognising the legitimacy of different national judgments.
  - 2.5. In translating the same process to the domestic level, the domestic courts have evolved a comparable concept of the Courts allowing a:
    - 'discretionary area of judgment' to the elected decision-makers, or
    - keeping a 'principled distance' from their decisions, or
    - allowing them 'latitude' in their decisions, or
    - exercising 'judicial self-restraint' or 'caution', or
    - showing 'respect' or 'deference' to their decisions:  
see *Kebilene* at 380-1, *Brown v. Stott* at 710-1 *Mahmood* at §33 & *Daly* at §27.

### What are the issues?

3. From this, three problematic questions seem to emerge:
  - 3.1. Is there a legitimate place for a doctrine of 'deference' in domestic law at all?
  - 3.2. How in practice is 'proportionality' to be assessed – i.e. what degree of 'deference' or independence must the domestic court show?
  - 3.3. Should proportionality venture outside the territory of the Convention & the HRA?

**(1) Can the notion of ‘deference’ be justified?**

4. The concept is said to be based on the rule of law & the separation of powers: Lord Hoffmann in *ProLife* at §§74-7. But in practice the separation of powers is imperfect, & in certain respects it is diminishing:
  - 4.1. Cabinet Ministers sit in the Legislature.
  - 4.2. In a 2-party system supervised by Whips, the Executive controls the Legislature.
  - 4.3. Heavy reliance is placed on delegated legislation.
  - 4.4. Even primary legislation is only the creature of the elected representatives at a fairly general level.
  - 4.5. Administrative decisions are in practice often taken by departmental officials, not by Ministers.
  
5. The more important question is to analyse the degree of separation between, on the one hand, the Judiciary, and on the other the Executive & the Legislature taken together. There is no serious risk of political influence on the Judiciary. The more difficult issue is how far the Judiciary are entitled to trespass into the political / administrative fields – i.e. it is a question of analysing the functions that the Judiciary are now entitled to perform under the HRA. In particular, should the Judiciary show any deference at all?
  
6. One answer offered by Lord Hoffmann in *ProLife* at §§74-7 is that ‘deference’ (with its connotations of servility) is a misnomer. In identifying a decision as falling within Parliament’s (as opposed to the Court’s) decision-making power, & in defining the legal limits of that power, the Court is not showing ‘deference’, but deciding a legal issue.
  
7. That may be true as a matter of classification, but it does not help to identify the test, or the criteria by reference to which that test is applied, when determining whether a particular decision falls within the legal limits of the decision-making power. Having allocated a particular decision to the Legislature, in order to determine the scope of that power:
  - 7.1. does the Court simply abdicate, saying it is a matter for the Executive / Legislature, & that it will not second guess their judgment, or
  - 7.2. does each Court take its own view *de novo* based on the evidence before it, or
  - 7.3. does the Court take a middle course, ‘deferring’ to the judgment of the suitable decision-maker in suitable cases?

8. Conclusion: there is not only room for a doctrine of ‘deference’, but there is a positive need for it, & that appears to have been the view of Lord Walker in *ProLife* at §§131-8, notwithstanding his tribute to Lord Hoffmann’s speech at §144.

**(2) What are the contours of ‘deference’ & of ‘proportionality’?**

9. The approach that emerges from *De Freitas* at p.80 via *Daly* at §27 (recently approved in *ProLife* at §133) involves a 3 stage test:
  - 9.1. Is the objective sufficiently important to justify restricting the right?
  - 9.2. Are the measures rationally connected with that objective?
  - 9.3. Are the means used no more than is necessary to accomplish the objective?
10. Does that provide sufficient guidance, & does it beg an anterior question: What is the correct starting point for assessing proportionality?
11. In seeking to answer these questions, there has to be a ‘*principled* distance’ between the judicial functions of the Courts, & the legislative functions of Parliament, & the administrative functions of the Executive. The emphasis is on principles: it will be impossible to develop a set of rules that can be applied in all cases.
12. In *Roth* at §§81-7, Laws LJ offered 4 guidelines (which appeared to receive some recognition from Lord Walker in *ProLife* at §§136-7, even if their application did not assist him in deciding that case):
  - 12.1. More deference will be shown to primary legislation than to Executive decisions or delegated legislation: see the reference to “unimpeachable democratic credentials” in *Marper* at §16.
  - 12.2. More deference will be shown in relation to a decision where the Convention itself requires a balance to be struck: see *ProLife* at §137.
  - 12.3. More deference will be shown in relation to decisions within the constitutional responsibility of the Legislature / Executive: see *Spath Holme & Poplar Housing*.
  - 12.4. More deference will be shown in relation to decisions within the practical expertise of the Legislature / Executive: see e.g. *A v. Secretary of State* at §40 – but, even in that case, the Court still considered it was entitled to examine whether the decision was based on “objective, justifiable & relevant grounds”: *ibid* at §47.

13. Other factors that may condition the degree of deference shown by the Court are likely to include:

- 13.1. where the issue concerns the existence or scope of positive obligations under the Convention – this being an archetype of the situation where a balance needs to be struck: see *Greenfield v. Irwin* at §§35-7;
- 13.2. where the decision involves an allocation of scarce resources – this being an example of a decision within the responsibility & competence of the Executive: see *ITF & Hooper* at §§106-7;
- 13.3. the constitutional importance of the right in issue: see *Kebilene* at 380-1 & *Ghaidan* at §19;
- 13.4. the gravity of the interference: see the majority view in *Roth*;
- 13.5. the gravity of the potential consequences of not interfering: see *Rehman* at §62;
- 13.6. the process by which the decision was taken – e.g. after consultation &/or expert advice: this may be nothing more than an illustration of Laws LJ's 4<sup>th</sup> principle;
- 13.7. whether the decision was in reality taken by a Secretary of State personally after careful consideration, rather than by a departmental official: see *Farrakhan* at §72.

14. What evidence is the Court entitled to look at, in order to reach its decision?

- 14.1. The issue is essentially a legal one, so the answer is that the Court will look principally at the terms of the legislation or decision itself.
- 14.2. It may also look at background material – such as White Papers, Law Commission Reports etc. in order to understand the context in which some piece of legislation was enacted, & the social problem with which it was intended to deal.
- 14.3. But the Court will not (other than in exceptional circumstances) look at Hansard in order to assess proportionality – because it is not sitting as a court of appeal, judging the quality of the debates in Parliament: see *Wilson*.

**(3) Should proportionality venture outside the Convention?**

15. The final question is whether proportionality itself is to become the overriding test for the future, and whether the traditional domestic JR tests should fall away. There has been some judicial speculation that it should, from Lord Cooke in *Daly* at §32, & from Lord Slynn in *Alconbury* at 1406-7.

16. The answer is “no”. The test of proportionality & the traditional JR tests fulfil completely different functions, for completely different purposes:
- 16.1. Proportionality is a tool for determining the lawfulness of an interference with a defined, legally enforceable right.
  - 16.2. Traditional JR tests are the reverse: they are designed to determine whether the impugned decision represents a lawful exercise of a power conferred for specific purposes, within certain limits.
17. It is clear, following the authority of *Brind* in the HL & the *ABCIFER* decision in the CA (permission to appeal to the HL having been refused), that the Courts are not going to permit proportionality to trespass outside its human rights (& EU) confines.
18. At the end of the day, too much effort may be spent in trying to analyse & categorise the principles & tests whose application in practice make little difference to the outcome of actual cases. As Lord Steyn said in *Daly* at §27, most cases would be decided in the same way whether proportionality or *Wednesbury* reasonableness were applied.

### **Conclusions**

19. The complementary functions of proportionality & deference reflect the complementary roles of the Judicial & of the Executive / Legislative branches of Government:
- 19.1. By applying the test of proportionality, the Court retains its supervisory role, under which it judges the lawfulness of Government action.
  - 19.2. The function of deference is define that role, confining the Court to judging whether the Government is governing lawfully, & not allowing it to trespass into judging whether the Government is governing well. That is for Parliament & ultimately the electorate.

**Jonathan Crow**  
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## AUTHORITIES

1. *A v. Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 2 WLR 564
2. *Associated Provincial Picture Houses Ltd v. Wednesbury Corpn* [1948] 1 KB 223
3. *Brown v. Stott* [2003] 1 AC 681
4. *De Freitas v. Permanent Secretary of Ministry of Agriculture etc.* [1999] 1 AC 69
5. *Ghaidan v. Godin-Mendoza* [2002] EWCA Civ 1533, [2003] 2 WLR 478
6. *Greenfield v. Irwin* [2001] EWCA Civ 113, [2001] 1 WLR 1279
7. *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728
8. *Poplar Housing & Regeneration Community Association Ltd v. Donoghue* [2001] EWCA Civ 595, [2002] QB 48
9. *R v. Chief Constable of Sussex, ex parte International Traders Ferry Ltd* [1999] 2 AC 418
10. *R v. DPP, ex parte Kebilene* [2000] 2 AC 326
11. *R v. Secretary of State for the Environment, Transport & the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349
12. *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696
13. *R v. Shayler* [2002] UKHL 11, [2003] 1 AC 247
14. *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport & the Regions* [2001] UKHL 23, [2001] 2 WLR 1389
15. *R (Association of British Civilian Internees: Far Eastern Region) v. Secretary of State for Defence* [2002] EWCA Civ 473, [2003] 3 WLR 80 (CA); [2003] 1 WLR 1813 (petition to appeal to HL dismissed)
16. *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 21, [2001] 2 AC 532
17. *R (Farrakhan) v. Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391
18. *R (Hooper) v. Secretary of State for Work & Pensions* [2002] EWHC Admin 191
19. *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840
20. *R (Marper) v. Chief Constable of the South Yorkshire Police* [2002] EWCA Civ 1275, [2002] 1 WLR 3223
21. *R (ProLife Alliance) v. BBC* [2003] UKHL 23, [2003] 2 WLR 1403
22. *R (Robertson) v. Wakefield MDC* [2001] EWHC Admin 915, [2002] QB 1052
23. *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47, [2003] 1 AC 153
24. *Wilson v. First County Trust (No. 2)* [2003] UKHL 5, [2003] 3 WLR 568 (HL); [2001] EWCA Civ 633, [2002] QB 74 (CA)