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The standard of judicial review after the Human Rights Act

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Introduction

English administrative law had, prior to the Human Rights Act, failed to develop effective protection for human rights against incursions by public officials and authorities. Much of the blame for the parlous defence of civil liberties and human rights can be attributed to the judges' sentimental attachment to the *Wednesbury* test as the appropriate standard for reviewing official action. Under this test, action was only reviewable if it was so unreasonable that no reasonable decision-maker would have taken it.[1] Long criticised for its circularity, imprecision and excessive deference to the executive, *Wednesbury* nevertheless continues to hold considerable sway.[2]

Its influence can be seen clearly in *Brind*, in which – a mere fifteen years ago – the House of Lords ruled that the Home Secretary was not legally obliged to consider the Convention right of freedom of expression when imposing restrictions on television and radio interviews with people connected with a terrorist organisation.[3] Their Lordships considered that to hold otherwise would amount to what they described as 'back door' incorporation of the Convention and that they should not rush in where (at that time) Parliament had chosen not to. The Convention's relevance was limited to instances of statutory ambiguity – something which in the circumstances of the case (concerning a very wide power to give 'directions' to broadcasters) their Lordships were

* This chapter is a revised and updated version of a paper originally presented at a seminar in the Judicial Reasoning and the Human Rights Act series, on 3 December 2003.

[1] *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 KB 223.

[2] Andrew Le Sueur, 'The Rise and Ruin of Unreasonableness' [2005] *Judicial Review* 32.

[3] *R.* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL).

reluctant to find. At the same time, the House affirmed that proportionality was not part of United Kingdom law and that the broadcasting ban was not open to challenge on conventional grounds for irrationality.

Nevertheless, very belatedly, in the interval between *Brind* and the implementation of the Human Rights Act, a number of judicial techniques were developed which demonstrated greater sensitivity to rights. Where the decision-maker claimed to have considered the Convention, the courts would examine whether he or she had done so correctly.[4] The *Wednesbury* test was modified by the requirement that courts subject administrative decisions with human rights implications to 'anxious scrutiny' or 'most rigorous examination'.[5] Later decisions, notably the litigation in which gay and lesbian service personnel challenged the reasonableness of their discharge from the armed forces, have confirmed that the greater the human rights dimensions of a case the closer the attention the courts will give to the legality of the official decision[6] – described in places as 'substantial objective justification'.[7] Hence, by the time the Human Rights Act came into force, *Wednesbury* had become in effect a variable standard: the more fundamental the right interfered with, the greater the need for justification.

Despite that, as *Smith* shows, before the Human Rights Act the judges regarded themselves (if reluctantly) to be restricted to secondary review of administrative discretion. Even in the period immediately prior to the Act entering into force, there was a continuing reticence to develop administrative law doctrine. In *Kebilene*, the High Court declined to follow the lead of the Australian courts[8] and develop the doctrine of legitimate expectations so as to impose on a prosecutor a duty to exercise the discretion to bring a prosecution in a prospective defendant's favour where a violation of Convention rights might result if there was a conviction.[9]

[4] *R.* v. *Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839, 867, *per* Lord Hope of Craighead.

[5] *R.* v. *Home Secretary, ex parte Bugdaycay* [1987] 1 All ER 940, 952; and see Lord Templeman (at 956), referring to 'a special responsibility' on the court.

[6] *Smith* v. *Ministry of Defence* [1996] QB 517, 554, 563, 564–5; *R.* v. *Secretary of State for Home Department, ex parte Leech* [1994] QB 198.

[7] *Smith*, above n. 6, p. 554; *R.* v. *Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855, 1866–7; and *Launder*, above n. 4, p. 867.

[8] *Minister for Immigration and Ethnic Affairs* v. *Teoh* (1995) 128 ALR 353, 365.

[9] *R.* v. *DPP, ex parte Kebilene* [1999] 4 All ER 801, 811, *per* Lord Bingham CJ; the legitimate expectation point was dropped on appeal.

In terms of the European Convention, the pressure to expand judicial review has come from two distinct sources. The first is concern over whether judicial review is an effective domestic remedy for the purpose of Article 13 of the Convention. This is a question that, strictly, arises irrespective of the Human Rights Act. The decision in *Smith and Grady* v. *UK* (the sequel to the domestic litigation in *Smith*) that judicial review had failed to amount to an effective remedy had already demonstrated the need for domestic courts to make review more intensive. As is well known, the European Court found that the domestic courts had set the irrationality threshold so high

> that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued.[10]

The Court's ruling stood in contrast to some of its earlier judgments that domestic judicial review satisfied Article 13.[11] Together with the (then imminent) implementation of the Human Rights Act, the judgment prompted a domestic reappraisal of whether even 'anxious scrutiny' went far enough. Even if there had been no HRA, however, the ruling in *Smith and Grady* that judicial review was deficient would still have required the domestic courts to develop the grounds of review to satisfy Article 13 in human rights cases.

The second expansionary pressure arises from Article 6, the right to a fair hearing before an independent and impartial tribunal in determination of criminal charges or civil rights or obligations. Here, the picture has been mixed. In some areas of domestic administrative law, the influence of Article 6 has been to require a reconsideration of long-established standards, for example a reworking of the 'real danger' test in bias into one of 'real possibility'.[12] It strengthens the trend towards an emerging duty to give reasons for decisions,[13] although the courts have yet to find that the effect of the Human Rights Act is to create a general

[10] *Smith and Grady* v. *UK* (2000) 29 EHRR 413, para. 138.
[11] Notably *Soering* v. *UK* 11 (1989) EHRR 439 and *Vilvarajah* v. *UK* (1991) 14 EHRR 248.
[12] See *Porter* v. *Magill* [2002] AC 357.
[13] *Stefan* v. *General Medical Council* [1999] 1 WLR 1293, 1301, *per* Lord Clyde. In a number of cases after implementation of the HRA, Article 6 has been cited in support of the duty to give reasons: *R.* v. *Crown Court at Canterbury, ex parte Howson-Ball* [2001] Env LR 36; *Anya* v. *University of Oxford* [2001] EWCA Civ 405; [2001] ELR 711, para. 12.

duty,[14] and the common law will already require reasons in situations where the Strasbourg Court would not consider there was a civil right or obligation.[15] However, in other fields, arguments based on Article 6 have yet to reach their full potential, for example the Court of Appeal has found no apparent bias or violation of Article 6 where a member of a Mental Health Review Tribunal was employed by the same Health Trust that ran the hospital where the applicant was detained.[16]

Article 6 has implications for the remedies available in judicial review. In *Kingsley* v. *UK*,[17] the Strasbourg Court held that Article 6 had been violated by the process under which the Gaming Board had denied the applicant a licence, when the High Court had quashed an initial determination by the Board and remitted it to the Board to redetermine. This aspect of the procedure is a routine feature of administrative law and follows from the fact that the court is a forum for review not of appeal. Nevertheless, the European Court held that Kingsley was denied a fair hearing by an impartial tribunal since the body to which his case was returned was identical in composition to the one which had already found against him. *Kingsley* has yet to make any discernible impact on domestic law and has been cited only occasionally by domestic courts and then in support of the proposition that where a court is able to quash a flawed decision and remit it back to an unbiased decision-maker Article 6 is satisfied.

More attention has been paid, however, to the issue of whether judicial review is capable of correcting deficiencies in administrative processes for determining a person's 'civil rights' that lack the necessary quality of independence and impartiality required under Article 6. The Strasbourg Court has stated in *Albert and Le Compte* v. *Belgium* that trial by an independent and impartial tribunal requires:

> either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1).[18]

[14] *Gupta* v. *General Medical Council* [2001] UKPC 61; [2002] 1 WLR 1691; *Moran* v. *DPP* [2002] EWHC Admin 89.
[15] *R. (Wooler)* v. *Fegetter* [2002] EWCA Civ 554; [2003] QB 219, *per* Sedley LJ, para. 46.
[16] *R. (PD)* v. *West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311.
[17] *Kingsley* v. *UK* (2000) 29 EHRR 493; see I. Leigh, 'Bias, Necessity and the Convention' [2002] PL 407–14.
[18] (1983) 5 EHRR 533, para. 29.

In a series of cases, but especially two prominent House of Lords decisions,[19] the issue has been whether domestic courts have 'full jurisdiction' and whether the scope of judicial review is adequate to meet this standard.

Spanning these concerns, the central issue in debate concerning the standard of review after the Human Rights Act has been how to reconcile the more demanding standards of the ECHR where the proportionality test applies with the tradition in English administrative law of deference to the executive. Proportionality had, of course, been mooted as an emerging standard of judicial review as far back as the GCHQ decision.[20] However, Lord Lowry identified the dangers in *Brind* when he stated that to adopt proportionality would leave very little space between conventional judicial review doctrine, emphasising the supervisory nature of the court's task, and the forbidden approach of appellate review.

As we shall see, this conundrum has largely framed the post-Human Rights Act debate over the standard of review among academics and in the courts themselves. Before we turn to it, however, it is worth emphasising that the attention devoted to this question has caused four other important issues to be somewhat neglected. These are: what the Human Right Act itself has to say about the standard of review; the question of the standard of review in *unqualified* rights cases (i.e. where the proportionality test is not part of the Convention standard); the impact of Article 6 on administrative procedure more generally; and the attitude of the Strasbourg Court to English judicial review.

The remainder of this chapter is devoted to considering the patterns of argument used by the courts since the Human Rights Act. We will consider first 'expansionary arguments': those that tend to extending or intensifying the standard of review. Attention will then move to 'limiting arguments': those which tend to maintaining continuity with the standard of review pre-dating the HRA or at least restraining any development of the law. An examination will be made of a recent judicial attempt to reconcile a number of these conflicts. The conclusion evaluates the overall direction of these trends and puts them in the context of further developments at Strasbourg.

[19] *R. (Alconbury Developments Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389; *Begum (Runa)* v. *Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 WLR 388.

[20] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374, 410, *per* Lord Diplock.

Expansionary arguments

A discussion of these techniques should be prefaced by pointing out that the courts have manifestly *not* treated the Human Rights Act as a constitutional springboard from which to launch into 'merits review'. That remains the 'forbidden' appellate or substitutionary method.[21]

It is worth asking what constrains the judiciary. Arguably, it is *not* the text of the Act itself. The wording of s.6 is enigmatic:

> (1) It is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights.
> (2) Subsection (1) does not apply to an act if—
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

A court that wished to resort to 'hard-edged' review has several arguments to hand from these provisions.[22] It could emphasise the surprisingly strong wording of s.6(1) and treat it as a duty on public authorities not to breach a person's Convention rights, unless compelled to do so by primary legislation. Such an approach would treat the Act as differentiating sharply between deference to Parliament (which is explicitly maintained by s.6(2)) in contrast to the treatment of the executive. The Act would be treated as a legislative mandate to abandon judicial deference to the executive, which could only then be maintained so far as the Convention itself permitted limitations to rights under the proportionality doctrine in the case of qualified rights.[23] Support for this viewpoint comes from the text of s.6 itself, which makes it *unlawful* for a public authority to *act* in contravention of a person's Convention

[21] *R.* v. *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 767, *per* Lord Lowry, referring to the 'forbidden appellate approach'.

[22] See further I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' [2002] PL 265–87.

[23] M. Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990', in University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998), p. 85, at p. 92; I. Leigh and L. Lustgarten, 'Making Rights Real: The Courts, Remedies, and the Human Rights Act' (1999) 58 CLJ 509, 517–19.

rights. Elsewhere, Lord Bingham has remarked that the Human Rights Act 'gives the courts a very specific, wholly democratic, mandate'.[24] Further support comes from the architecture of the Act, which applies the same provision (s.6(1)) to both courts and the executive as different types of 'public authority', without making any differentiation in the standard to be applied. This can be seen to call into question the distinction between appeal and review. Since there would be no question of 'deference' to a lower court that acted contrary to s.6,[25] it can be argued that an equally rigorous approach should be applied when the actions of other public bodies are under review under s.6.

This argument has drawn only occasional support from the judiciary in the first five years' operation of the Act. As we shall see, isolated *dicta* can be cited in which judges treat the Act as expanding review for error of law or refer to proportionality as a question of law. Remarkably – and in an almost exact reprise of the Parliamentary debates – when the courts have scrutinised s.6(1), it has been to consider the definition of a public authority.[26] With one exception, they have shown a studied disinterest in the remainder of the wording. In practice, the s.6(1) standard has been treated as requiring no elucidation and few judgments engage in any analysis of whether the text of the Act has any bearing on the standard of review.

A rare exception occurs in the dissenting speech of Lord Hope in *Attorney-General's Reference No. 2 of 2001*.[27] There he points to the differences between the Scotland Act 1998 – which makes violation of Convention rights by members of the executive (including prosecutors) a *vires* question – and the Human Rights Act – which uses the term

[24] *A* v. *Secretary of State for the Home Department* [2005] AC 68, para. 42.

[25] *Attorney-General's Reference No. 2 of 2001* [2003] UKHL 68: 'I cannot accept that it can ever be proper for a court . . . to act in a manner which a statute (here, section 6 of the Human Rights Act) declares to be unlawful', *per* Lord Bingham of Cornhill, para. 30.

[26] We are not concerned here with the definition of what constitutes a 'public authority' under s.6 HRA: *Poplar Housing* v. *Donoghue* [2001] 4 All ER 604; [2001] 3 WLR 183; *R. (on the Application of Heather)* v. *Leonard Cheshire Foundation* [2002] 2 All ER 936 (CA); *Aston Cantlow* v. *Parochial Church Council Wallbank* [2001] 3 WLR 393; *R. (on the Application of Hammer Trout Farm)* v. *Hampshire Farmers Markets* [2003] EWCA Civ 1055. See also the report of the Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act' (2003–2004), HL 39/HC 382.

[27] [2003] UKHL 68, paras. 73–9. I am grateful to Aidan O'Neill QC for drawing this to my attention. See, however, Lord Bingham of Cornhill, para. 30.

'unlawful'.[28] The crucial difference in his Lordship's view is two-fold. First, under s.6, 'the act is unlawful only against the victim' and not 'all the world'. Secondly, there is no *entitlement* to a remedy – under s.8(1) the court may grant such relief or remedy within its powers as it considers just and appropriate. 'Unless the act (or proposed act) is "unlawful" the court has no jurisdiction under the Act to provide a remedy',[29] but there is no automatic remedy for each unlawful act. This reasoning makes a good deal of sense in relation to central government, where the powers are not in total derived from statute in the same way as the Scottish executive. However, other public authorities – notably local authorities – are fully creatures of statute. It is doubtful whether the discretionary nature of public law remedies[30] generally dilutes the standard of review in their case[31] and, if not, it begs the question why unlawfulness under the Human Rights Act should be regarded as exceptional.

Lord Hope's comments apart, the judicial silence on this issue is curious. It is perhaps indicative of a strong judicial consensus that the Act was not intended to usher in 'merits review'. The White Paper and the parliamentary debates shed no light on this issue so the best that one can say is that there was no intention by the government or awareness in Parliament that the drafting could lead to merits review.

Turning from the wording of s.6 to the cases, three distinct, though overlapping, strategies can be identified by which it has been argued that judicial review should be expanded. These are: distinguishing proportionality from *Wednesbury*; the need for a decision-maker to show 'substantial evidence' and for factual inquiry by the courts; and the treatment of proportionality as a question of law.

[28] [2003] UKHL 68, para. 58; and see his speech in *Dyer* v. *Watson* [2002] 3 WLR 1488, 1523, para. 111. Section 57(2) of the Scotland Act 1998 provides that a member of the Scottish Executive has 'no power' to act in a way that is incompatible with a Convention right. In *Attorney-General's Reference No. 2 of 2001*, above n. 27, Lord Bingham took a contrary view: 'I cannot accept that "compatible" bears a different meaning in section 6 of the Human Rights Act and section 57(2) of the Scotland Act, even though the statutory consequence is unlawfulness in the one instance and lack of power in the other. In each case the act is one that may not lawfully be done.' *Ibid.*, para. 30.

[29] [2003] UKHL 68, para. 54.

[30] Remedies are also discretionary under s.31(1) Supreme Court Act 1981.

[31] I. Leigh, *Law, Politics and Local Democracy* (Oxford: Oxford University Press, 2000), Chapter 2.

Distinguishing proportionality from Wednesbury

Of central importance is Lord Steyn's speech in *ex parte Daly*.[32] There, the House of Lords was concerned with the applicability of proportionality in assessing the legality of the policy for searching prisoners' cells. This required staff to examine the prisoner's possessions, including legally privileged correspondence (which was not, however, normally to be read) in his or her absence. Applying the common law of fundamental rights, their Lordships found the policy to be unlawful. However, they also concluded that the same result would also be reached under the HRA applying the Convention.

Lord Steyn was careful to distinguish proportionality from the modified *Wednesbury* approach and therefore sought to clarify the 'material difference' between the two.[33] The criteria for proportionality were, he argued, 'more precise and more sophisticated'[34] in three respects. It required 'the reviewing court to assess the balance which the decision maker has struck, not merely whether it was within the range of rational or reasonable decisions' and 'may require attention to be directed to the relative weight accorded to interests and considerations'. The third difference concerned the process of reasoning. Taking Article 8 as an example, this required the court to engage with 'the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued',[35] rather than the threshold question for 'anxious scrutiny'. Although using either approach the outcomes would often be the same, sometimes a different conclusion would follow under proportionality, and it was 'therefore important that cases involving Convention rights must be analysed in the correct way'.[36]

While there is no doubt that these comments of Lord Steyn have emerged as the dominant approach to post-HRA judicial review, there is considerable uncertainty over what they require in any particular context. It is no exaggeration to say that proportionality has attracted widespread support as a legal test largely *because* it can be used with equal force by those wishing to maintain the tradition of deference to the executive *and* by advocates of more intensive review.

On the one hand, Lord Steyn was at pains to point out that proportionality did not equate to merits review. This was in keeping with an

[32] *R. (Daly)* v. *Secretary of State for the Home Department* [2001] 2 WLR 1622.
[33] *Ibid.*, paras. 26ff. [34] *Ibid.*, para. 27. [35] *Ibid.*, para. 27. [36] *Ibid.*, para. 28.

emerging academic and professional consensus that the HRA would maintain broad continuity with the tradition of deference. The tasks of judges and administrators would remain distinct. On the other hand, however, his Lordship cited an article by Professor Jeffrey Jowell, which argued that, while the Act would not bring about merits review as such, it nevertheless (together with common law decisions on fundamental rights) pointed towards the development of 'constitutional review' requiring judges to justify their decisions in terms of the necessary qualities of a democratic society.[37]

Among those favouring more intensive review in *Daly*, was Lord Cooke of Thorndon who described *Smith and Grady* as having 'given the quietus'[38] to the argument that *Wednesbury* could be equated with the Convention approach. In practice, proportionality has not wholly supplanted *Wednesbury*. In non-HRA cases, the courts continue to use *Wednesbury*,[39] and the Court of Appeal has held that, although it had difficulty in seeing the justification for retaining the test, only the House of Lords can pronounce it dead.[40] Moreover, as we shall see later, very similar arguments have reappeared even in HRA cases, albeit under different labels.

The need for 'substantial evidence' and factual inquiry by the courts

Traditionally, the courts have seen their role within judicial review as secondary, with the consequence that evidential or factual questions are for the 'primary decision-maker' (the public body subject to review) and not for them. In *Daly*, however, Lord Bingham noted the new approach required under the HRA:

> Now ... domestic courts must *themselves* form a judgment whether a convention right has been breached (*conducting such inquiry as is necessary to form that judgment*) and, so far as permissible under the Act, grant an effective remedy.[41]

[37] J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, 682.
[38] *Daly*, above n. 32, para. 32.
[39] See, e.g. *R. (Jones)* v. *Mansfield DC* [2003] EWCA Civ 1408.
[40] *Association of British Civilian Internees Far Eastern Region* v. *Secretary of State for Defence* [2003] EWCA Civ 473; [2003] 3 WLR 80, para. 34, *per* Dyson LJ.
[41] *R. (Daly)* v. *Secretary of State for the Home Department* [2001] 2 WLR 1622, para. 23 (emphasis added).

This passage may imply that this new exercise for the courts requires corresponding changes in *how* they evaluate the effects of the policies and actions of public authorities.[42]

The process can be seen at work in the asylum case of *ex parte Javed* in which Turner J concluded that the minister must have fallen into error in deciding that Pakistan was generally a safe country to which to return asylum seekers.[43] Despite the historical reluctance to do so in judicial review cases, he argued that an effective remedy under the HRA required reconsideration of the evidence before the minister. The judge's scrutiny established that women and religious minorities were liable to face persecution in Pakistani society, and that the Secretary of State's decision to include Pakistan in a designated list of safe countries approved by Parliamentary order could only have been reached on an erroneous view of law or the facts, or both. The Home Secretary was 'plainly wrong', he concluded. Accordingly, he issued a declaration that the minister had erred in law. The Court of Appeal upheld the decision on the more conventional grounds that the Secretary of State's determination was irrational on the available facts, especially concerning persecution of women in Pakistan.[44]

Turner J applied a similar approach at first instance in *Farrakhan*[45] in holding that the Home Secretary had failed to demonstrate objective justification for excluding the controversial Nation of Islam leader, Louis Farrakhan, from the United Kingdom under powers given by the Immigration Rules and the Immigration and Asylum Act 1999, s.60(9) (a). He conducted his own rigorous review of the material before the Secretary of State including the history, teachings and record of the Nation of Islam and the projected speaking programme of Farrakhan. He pointed to the lack of evidence before the court of racial, religious or ethnic tensions between the Muslim and Jewish communities in the UK, and concluded that it was not made out that the community relations would be endangered by Farrakhan's presence in the UK. Accordingly, he quashed the Secretary of State's decision. When this decision was (successfully) appealed by the Secretary of State, the Court of Appeal

[42] For discussion of possible procedural changes that may be required, see Leigh and Lustgarten, 'Making Rights Real', above n. 23, pp. 523–6.

[43] *R.* v. *Secretary of State for the Home Department, ex parte Javed and Others*, *The Times*, 9 February 2000.

[44] *R. (Javed)* v. *Secretary of State for the Home Department and Another* [2001] 3 WLR 323 (CA).

[45] [2001] EWHC Admin 781.

stressed, however, that in law the decision was a personal one for the Home Secretary, that he was better placed than the court to weigh the competing factors, and was democratically accountable for his actions.[46]

'Substantial justification' can also be seen in operation in another deportation decision, *Mahmood*,[47] where Lord Phillips MR held that the test required adaptation in the new environment: interference with human rights could only now be justified to the extent permitted by the Convention itself.[48] Laws LJ argued, however, that the HRA did not authorise the court to stand in the shoes of the decision-maker: there had to be a 'principled distance' between the court's adjudication and the Secretary of State's decision based on his analysis of the case.[49] In the event, both approaches led on the facts to the same outcome, namely, a refusal to interfere with the deportation order.

The clearest instances of this approach are likely to be where the Convention rights are unqualified.[50] In these instances, it would be expected that the courts would ask themselves the undiluted question whether the public authority has contravened the applicant's Convention rights in fact.[51] Although some commentators have sought to minimise the difference between the unqualified and qualified Convention rights in this regard,[52] the courts can be seen, post-HRA, to be sensitive to the different role that they play in cases of unqualified rights.

The strongest statements to date come in decisions concerning the need for forcible medical treatment of a medical patient. In *R. (on the Application of Wilkinson)* v. *Broadmoor Special Hospital Authority and Others*,[53] the Court of Appeal held that it was entitled to reach its own view as to the merits of the medical decision and whether it infringed the patient's human rights.[54] As Simon Brown LJ stated, 'the court must

[46] *R. (Farrakhan)* v. *Secretary of State for the Home Department* [2002] QB 1391, paras. 72–4, *per* Lord Phillips MR.

[47] *R. (Mahmood)* v. *Secretary of State for the Home Department* [2001] 1 WLR 840 (CA).

[48] *Ibid.*, p. 857. [49] *Ibid.*, p. 855.

[50] See Lord Hope in *R* v. *DPP, ex parte Kebilene* [2000] 2 AC 326, para. 80, referring to the discretionary area of judgment.

[51] See Leigh, 'Taking Rights Proportionately', above n. 22, pp. 282ff.; P. Craig, *Administrative Law* (4th edn, London: Sweet & Maxwell, 1999), p. 561, arguing that 'primary responsibility' lies with the courts, entailing 'substitution of judgment' over the content of Convention rights and where rights are unqualified.

[52] S. Atkill, 'Keeping the Executive in the Picture: a reply to Professor Leigh' [2003] PL 41.

[53] [2002] 1 WLR 419 (CA).

[54] Note that in *Bloggs 61* Keene LJ (at para. 81) regarded *R.* v. *Lord Saville, ex parte B (No. 2)* [2000] 1 WLR 1855, as an instance in which the Court of Appeal itself considered directly the various factors relevant to the degree of risk to which the soldiers in

inevitably now reach its own view' both of whether the patient was capable of consenting and of whether the proposed treatment would violate Convention rights under Articles 2 or 3, or in so far as Article 8 was relevant whether it would be a necessary and proportionate restriction.[55] The judgment also demonstrates the need for a new procedural approach. The hospital authority failed in its argument that cross-examination was not permitted because the action had been brought by judicial review. To order that appropriate medical witnesses attend and be cross-examined would also satisfy Article 6 of the Convention. Hale LJ took the view:

> Super-*Wednesbury* is not enough. The appellant is entitled to a proper hearing, *on the merits*, of whether the statutory grounds for imposing this treatment upon him against his will are made out.[56]

Wilkinson was applied, but in some respects restricted, in a later Court of Appeal decision on forcible medical treatment, *R. (N)* v. *Dr M.*[57] There, the court pointed out that judges were free when appropriate to determine the facts for themselves in such cases without oral evidence (which 'should not often be necessary'), and added that 'it should not be overlooked that the court's role is essentially one of review'.[58]

It is apparent, however, that there is judicial reluctance to treat review of alleged breaches of unqualified rights as merits review in fact where no deference is appropriate.[59] In *Bloggs 61*, a prisoner whom the Prison Service had decided to transfer from protected witness accommodation back to the general prison population unsuccessfully argued that to do so would breach his right to life under Article 2 because of the danger of reprisals from his former associates.[60] The Court of Appeal held, in the words of Auld LJ, that:

> despite the fundamental and unqualified nature of the right to life, it is still appropriate to show *some* deference to and/or to recognise the special competence of the Prison Service in making a decision going to the safety of an inmate's life.[61]

He continued:

> the degree of deference to, and/or of recognition of the special competence of, the decision-maker is less and, correspondingly, the intensity of the Court's review is greater – perhaps greatest in an Article 2 case – than for those human rights where the Convention requires a balance to be struck.[62]

The Prison Service's 'special competence' comprised its 'experience of prison conditions, options and the relative efficacy of different protective regimes and measures'.[63]

Keene LJ, while emphasising the difference to the court's task in the case of a qualified right, agreed:

> I can see that . . . it could be argued that it is for the court to make its own judgment as to whether there would be an interference with the right to life under Article 2, rather than making a judgment as to the reasonableness of the decision made by the Prison Service. The court is a public authority . . . and cannot therefore act in a way which is incompatible with a Convention right . . .
>
> Even were it to be the case that it is for the court to make that primary judgment . . . the court would have to attach considerable weight to the assessment of risk made by those with professional involvement in the areas with which the case was concerned . . . It may therefore in most cases make little difference whether one describes the court's approach as one of deference or simply as one of attaching weight to the judgment reached by such bodies: the end result would be the same.[64]

There does seem to be a difference in approach between differently constituted benches in the Court of Appeal here. Applying the *Bloggs 61* approach in *Wilkinson* would have required the court to 'attach considerable weight' to the medical opinion, rather than ordering cross-examination. To have adopted the *Wilkinson* approach in *Bloggs*, however, would have taken the court into evaluating for itself the risk to the prisoner by way of evidence. It is noteworthy perhaps that the European Court of Human Rights in *HL* v. *UK*[65] has cited *Wilkinson* as evidence that the UK courts now engage in stricter scrutiny than prior

[55] [2002] 1 WLR 419 (CA), paras. 26 and 24–5.
[56] *Ibid.*, para. 83 (emphasis added).
[57] [2002] EWCA Civ 1789; [2003] 1 WLR 562.
[58] Dyson LJ, para. 39. See also *CF* v. *Secretary of State for the Home Department* [2004] EWHC Fam 111; [2004] 1 FCR 577, paras. 217–18.
[59] Andrew Le Sueur, 'The Rise and Ruin of Unreasonableness' [2005] *Judicial Review* 32, cites (at n. 18) the comments of Munby J in *R. (IR)* v. *Shetty* [2003] EWHC 3022; and *Claire F* v. *Secretary of State for the Home Department* [2004] EWHC 111.
[60] *R. (Bloggs 61)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 686.
[61] *Ibid.*, para. 65. [62] *Ibid.*, para. 66. [63] *Ibid.*
[64] *Ibid.*, paras. 79–81. See also Keene LJ's comments at Chapter 8 below.
[65] *HL* v. *United Kingdom*, App. No. 45508/99, 5 October 2004, para. 139 (concerning the lawfulness of the detention of a mental health patient under Article 5(4)).

to the Act. If it turns out not to be the dominant approach after all, the result is likely to be further excursions to Strasbourg invoking Article 13.

Treating proportionality as a question of law

Section 6 of the Human Rights Act supports an alternative to the line of argument that a court should assess for itself whether the decision of the public authority breaches a person's Convention rights. The language suggests that every statutory and common law discretion of a public authority must now be read subject to a limitation – that the authority cannot, in the absence of clear legislation compelling it to do so, act in contravention of a person's 'Convention rights'. Section 6(1) therefore could be said to create a new form of over-arching *illegality*[66] – in the sense that Lord Diplock used that term in GCHQ: 'the decision-maker must correctly understand the law that regulates his decision-making power and give effect to it'.[67] This approach has received support from Lord Phillips MR in *R. (on the Application of Q)* v. *Secretary of State for the Home Department*,[68] in which he stated:

> courts of judicial review have been competent since the decision in *Anisminic* [1969] 2 AC 147 to correct any error of law whether or not it goes to jurisdiction: *and since the coming into effect of the Human Rights Act 1998, errors of law have included failures by the state to act compatibly with the Convention.*[69]

The implication would be to treat Convention challenges as 'hard-edged' questions on review. Whereas, prior to the Human Rights Act, proportionality had fallen to be considered as an adjunct to the common law grounds for review of discretion, now it could be said to be standing on its own feet. That was the approach taken in an early case. In *B* v. *Secretary of State for the Home Department*,[70] the Court of Appeal quashed the decision to deport an Italian national, following his convictions for gross indecency and indecent assault and the service of a five-year term of imprisonment. It held that the Secretary of State's power to deport on grounds of public policy had to be balanced against B's right of free movement as an EU national and his right to family life under Article 8, and had to be a proportionate remedy. The fact

[66] Cf. Craig, *Administrative Law*, above n. 51, pp. 546 and 556–7.
[67] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374, 410–11.
[68] [2003] 2 All ER 903. [69] Para. 112 (emphasis added). [70] [2000] Imm AR 478.

that B had lived for most of his life in the UK was sufficient to outweigh public policy considerations and to render deportation a disproportionate punishment.

Simon Brown LJ stated:

> This task is, of course, both different from and more onerous than that undertaken by the court when applying the conventional *Wednesbury* approach. It would not be proper for us to say that we disagree with the IAT's conclusion on proportionality but that, since there is clearly room for two views and their view cannot be stigmatised as irrational, we cannot interfere. Rather, if our view differs from the IAT's, then we are bound to say so and to allow the appeal, substituting our decision for theirs.[71]

However, B had proceeded on the concession that proportionality was a question of law. Later judgments applied a different approach,[72] and the same judge had second thoughts in a later deportation case decided under the revised statutory framework,[73] stating that, in view of the intervening decisions, it would now be 'unhelpful' to characterise the question of proportionality as one of law.

The story would not be complete, however, without reference to what is perhaps the most significant decision of all decided under the Human Rights Act. To long-term students of national security jurisprudence,[74] the Belmarsh decision came as a welcome surprise. As is well known, in *A* v. *Secretary of State for the Home Department*, a majority of the House of Lords found that the measures providing for detention without trial of foreign nationals under the Anti-Terrorism, Crime and Security Act 2001 violated the Convention.[75] Hence, the derogation entered under Article 15 of the Convention and by an order under the Human Rights Act were not operative. With that hurdle removed, there was a clear

[71] Para. 47.
[72] *R. (Mahmood)* v. *Secretary of State for the Home Department* [2001] 1 WLR 840; *R. (Isiko)* v. *Secretary of State for the Home Department* (C/2000/2939); and *Samaroo and Sezek* v. *Secretary of State for the Home Department* [2001] UKHRR 1150.
[73] *Blessing Edore* v. *Secretary of State for the Home Department* [2003] EWCA Civ 716.
[74] See L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Oxford: Oxford University Press, 1994), Chapter 12, for a survey of earlier decisions from several jurisdictions.
[75] *A (FC) and Others (FC)* v. *Secretary of State for the Home Department* [2004] UKHL 56, Lord Walker of Gestinthorpe dissenting. Lord Hoffmann allowed the appeal on the different ground that there was no public emergency threatening the life of the nation: *ibid.*, paras. 95–7. On which also see the chapter by Aaron Baker in this volume, pp. 366–9.

violation of Article 5, since the detention was prior to neither deportation nor to trial – rather, it was as an alternative to both. The House of Lords issued a quashing order in respect of the Human Rights Act 1998 (Designated Derogation) Order 2001 and a declaration of incompatibility, finding s.23 of the 2001 Act incompatible with Articles 5 and 14 insofar as it was disproportionate and discriminated on grounds of nationality.[76] Was the unexpectedly sceptical attitude on the part of the judiciary attributable to the Human Rights Act? It would appear so.

Two features of the government's stance were fatal to justifying these powers. First, that they did not apply to those UK citizens (on the government's estimate, around a thousand) who had engaged in comparable behaviour to the target group of foreign nationals, for example by attending training in jihaddist camps. Its failure to take any measures against this group of British citizens cast doubt on the necessity of acting against non-UK citizens and was, moreover, discriminatory (contrary to Article 14). Secondly, the foreigners were in a prison with three walls only – if they could find another state prepared to accept them, they could leave the United Kingdom at any time. The fact that the UK government was prepared to allow them to regain their liberty and freedom of action in this way again cast doubt on the seriousness of threat assessment in the judges' minds.

In the case of at least some of their Lordships' speeches, the decision can be seen as a prominent example of treating proportionality (here, the issue of whether measures were *strictly required* by the exigencies of the situation) as a question of law. This is clear from Lord Bingham's rejection of the Attorney-General's argument that this was a constitutional 'no-go zone' for the courts:

> the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised ... It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic ... The 1998 Act gives the courts a very specific, wholly democratic, mandate.[77]

[76] Para. 73.

At a later point, criticising the Court of Appeal's refusal to intervene because of reluctance to upset the first instance determination (by SIAC), his Lordship argued:

> The European Court does not approach questions of proportionality as questions of pure fact ... Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review. So would excessive deference, in a field involving indefinite detention without charge or trial, to ministerial decision. In my opinion, SIAC erred *in law* and the Court of Appeal erred in failing to correct its error.[78]

Some caution is necessary, however. This was not the sole basis used to justify the decision: Lord Nicholls and Lord Hope in particular seemed to approach the proportionality question as requiring close scrutiny but as a soft-edged issue nonetheless.[79]

Having reviewed three 'expansionary arguments', we turn now to the arguments that have been made for restraining development of judicial review.

Limiting arguments

The list of potential 'limiting arguments' is rather longer. Identifiable strategies that will be discussed include the following: use of the policy/fact-finding distinction in relation to Article 6; 'indirect deference' to Parliament; use of the different stages of proportionality analysis; and reverting to *Wednesbury*.

Use of the policy/fact-finding distinction under Article 6

As we saw earlier, the Strasbourg case-law allows that deficiencies in administrative process affecting a person's civil rights and obligations under Article 6 can be corrected if there is access to a court of 'full

[77] Para. 42.
[78] Para. 44 (emphasis added). And cf. Lord Hope, para. 131; Lord Rodger paras. 173–4.
[79] Paras. 80–1 and 108, respectively.

jurisdiction'. Manipulation of this category gives considerable scope to the courts for widening or narrowing the application of judicial review. In practice, 'full jurisdiction' has been interpreted by the domestic courts primarily to resist efforts at widening judicial review.

In the *Alconbury* litigation,[80] the question was whether the availability of judicial review was a sufficient safeguard to rescue the planning, highways and compulsory purchase processes from an apparent lack of independence for the purpose of Article 6. The House of Lords applied the 'full jurisdiction' test and found, in contrast to the Divisional Court, that overall the procedures under the legislation were compatible with Article 6.[81] The House's own understanding was based on a close reading of the development of the Article 6 jurisprudence in general[82] and a group of cases in which the UK planning regime had been challenged in particular.[83]

Lord Slynn's conclusion was:

> The judgments . . . do not require that this should constitute a rehearing on an application by an appeal on the merits. It would be surprising if it had required this in view of the difference of function between the minister exercising his statutory powers, for the policy of which he is answerable to the legislature and ultimately to the electorate, and the court. What is required on the part of the latter is that there should be a sufficient review of the legality of the decisions and of the procedures followed.[84]

Lord Hoffmann agreed:

> the European court . . . has never attempted to undermine the principle that policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts.[85]

[80] *R. (Alconbury Developments Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.
[81] Lord Slynn, para. 54; Lord Nolan, para. 58; Lord Hoffmann, para. 136; Lord Clyde, para. 160; Lord Hutton, paras. 196 and 197.
[82] See particularly the speeches of Lord Hoffmann at paras. 84ff. and Lord Clyde at para. 154.
[83] *ISKCON* v. *United Kingdom* App. No. 20490/92, 8 March 1994; *Bryan* v. *United Kingdom* (1995) 21 EHRR 342; *Varey* v. *United Kingdom*, App. No. 26662/95, 27 October 1999; *Chapman* v. *United Kingdom*, App. No. 27238/95, unreported, 18 January; 2001 (Grand Chamber of the European Court of Human Rights).
[84] Para. 49. [85] Para. 84.

And again:

> Such a requirement would . . . also be profoundly undemocratic. The HRA 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers.[86]

Both Lord Hoffmann and Lord Nolan[87] saw a delicate interplay between electoral accountability for matters of policy and issues of legality. This not only underlay domestic judicial review but was also reflected in the Article 6 jurisprudence.

This approach was further applied in *Begum (Runa)* v. *Tower Hamlets LBC*,[88] where the issues before the House of Lords were whether a reviewing officer (who was an officer of the housing authority responsible for the decision being reviewed under the Housing Act 1996) constituted an independent and impartial tribunal and, if not, whether the county court, to which an appeal lay on a question of law, possessed 'full jurisdiction' so as to comply with Article 6(1). Assuming for the purpose of argument that a civil right within Article 6 was at issue, Lord Hoffmann found that the same considerations which must be considered in applying the rule of law – 'democratic accountability, efficient administration and the sovereignty of Parliament' – were recognised in the Strasbourg jurisprudence so that 'an English lawyer can view with equanimity the extension of the scope of art. 6'.[89] Recognition of efficient administration and the sovereignty of Parliament led to the conclusion that:

> Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal disputes.[90]

In *Begum*, therefore, the House of Lords accepted that, provided the overall procedure was lawful and fair, it was open to Parliament to deal with resolving disputes through an adjudicating officer who was not independent, subject to the safeguard of review by the county court.

'Indirect' deference to Parliament

In a well-known passage in his dissenting judgment in *Roth*,[91] Laws LJ gave perhaps the most sophisticated account to date of the application of

[86] Para. 129. [87] Para. 61. [88] [2003] UKHL 5; [2003] 2 WLR 388.
[89] Para. 35. [90] Para. 46.
[91] *International Transport Roth GmbH and Others* v. *Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728.

judicial deference, setting out four principles.[92] It is the first of these that is especially relevant here:

> greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure . . . Where the decision-maker is not Parliament, but a minister or other public or governmental authority exercising power conferred by Parliament, a degree of deference will be due on democratic grounds – the decision-maker is Parliament's delegate.

Deference is usually referred to in the context of respect for Parliament, and deference to primary legislation is both in-built in the scheme of the Human Rights Act and in continuity with the tradition of Parliamentary sovereignty.[93] We could call this 'direct deference'. This, however, is quite different to deference to *the executive*. In the quotation above, Laws LJ speaks of ministers or other public or governmental authorities exercising power conferred by Parliament and acting as 'Parliament's delegate'.[94] This can be termed 'indirect deference'.

Indirect deference is difficult to justify from the plain wording of s.6 of the HRA, despite the well-known *dicta* that the courts should defer to democratically elected bodies.[95] As we have seen, the wording of s.6(2) requires deference only where a public authority is *compelled* to act in contravention of a person's Convention rights by primary legislation or secondary legislation required to be in that form because of an obligation in primary legislation. This suggests that the courts would be more likely to defer where an executive policy decision has an explicit legislative basis, as opposed to where a broad discretion is granted by

[92] On which see further David Keene's comments at pp. 206–12 below.

[93] See generally R. Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859; J. Jowell, 'Judicial Deference and Human Rights: A Question of Competence', in P. Craig and R. Rawlings (eds.), *Law and Administration in Europe* (Oxford: Oxford University Press, 2003); J. Jowell, 'Judicial Deference, Servility, Civility or Institutional Capacity' [2003] PL 592; R. Clayton, 'Judicial Deference and Democratic Dialogue: The Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] PL 33; K. D. Ewing, 'The Futility of the Human Rights Act' [2004] PL 829; Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346; F. Klug, 'Judicial Deference under the Human Rights Act' [2003] EHRLR 125.

[94] Note, however, the alternative approach of Lord Walker of Gestingthorpe who in *ProLife Alliance* (at para. 137) described responsibility for the alleged infringement of human rights as shared between Parliament and the executive decision-maker (citing Andrew Geddis, [2002] PL 615, 620–3).

[95] *Kebilene* v. *DPP* [2000] 2 AC 326, 381, *per* Lord Hope; *Brown* v. *Stott* [2001] 2 WLR 817, 834–5 and 842.

Parliament. This would also be consistent with common law presumptions about fundamental rights, which are to be overridden only by the clearest of words.[96]

Despite these powerful objections, one judicial strategy has been to justify deference by reference to Parliamentary sovereignty, even where the power granted by Parliament to the executive is *discretionary*. Two examples of 'indirect deference' in operation can be given.

In *Farrakhan*,[97] the Court of Appeal declined to intervene in the Home Secretary's refusal of entry. Giving the judgment of the court, Lord Phillips MR referred to the exclusion of a right of appeal against the Secretary of State's decision to exclude a person on the grounds that it was conducive to the public good (s.60(9) Immigration and Asylum Act 1999). Far from that leading to the need for added judicial scrutiny of the power, 'the effect of the legislative scheme is legitimately to require the court to confer a wide margin of discretion upon the minister'.[98]

Perhaps the most striking example of 'indirect deference' in operation, however, concerns another public authority rather than an elected organ of government – the House of Lords' judgment in *ProLife Alliance*.[99] That decision – and especially the difference between it and the Court of Appeal's approach – is revealing. The BBC is an unelected body and so no question of direct deference arose. The Court of Appeal found that the BBC's decision to refuse to screen an election broadcast showing film footage of the destruction of foetuses on grounds of taste and decency violated Article 10. The House of Lords, on the other hand, found that the Court of Appeal had addressed the wrong question, and so carried out its own balancing exercise, when Parliament had already decided that the balance lay in favour of restrictions.[100]

To finesse the issue as a question of the broadcasters' *duty* in this way is, frankly, unpersuasive. This is because, despite the apparently strong mandatory words used in the statute, the determination of what is contrary to good taste and decency is largely a matter of judgment in the hands of broadcasters, and this must vary according to context. What *ProLife Alliance* demonstrates, then, is the ease with which a discretionary judgment can be presented as a matter of duty, where Parliament is taken to

[96] *R.* v. *Lord Chancellor, ex parte Witham* [1998] QB 565; *R.* v. *Secretary of State for the Home Department, ex parte Simms* [2000] AC 115.

[97] N. 46 above. [98] [2002] QB 1391, para. 74.

[99] *R. (ProLife Alliance)* v. *BBC* [2002] 3 WLR 1080.

[100] See especially Lord Nicholls, at para. 12, and Lord Hoffmann, at para. 77.

have foreclosed the options open to the decision-maker. This strategy raises the stakes – the issue is not the judgment of the BBC but of Parliament – and invokes Laws LJ's Parliamentary 'delegate' argument.

Whether the 'indirect deference' approach is itself compatible with the Convention is questionable. Although the European Court of Human Rights has treated democracy as one of the foundation stones of the Convention system, it by no means follows that routine deference is due either to legislative or to elected executive bodies. The commitment to democracy has to be considered in the context of the counter-majoritarian nature of Convention rights. It cannot be sufficient to override Convention rights merely to appeal to electoral accountability. Otherwise, the status of unqualified and non-derogable rights would be fatally undermined and the careful restrictions on limitations of qualified rights would be by-passed.

Differential stages to proportionality: prisoners/deportation cases

Another way in which the courts have ruled that some issues are in effect not open to scrutiny is in applying the structure of the proportionality test. In cases involving prisoners and deportees, certain restrictions on rights have been said to *flow axiomatically* from deportation or imprisonment. The courts see themselves as debarred from interfering with these aspects since to do so would fundamentally change the nature of the punishment. Effectively, this rules out one limb of proportionality analysis – whether the infringement of the right is no more than necessary in order to achieve a legitimate aim. While claiming to apply the first limb, the courts appear to be easily satisfied that it has been met. The failure to explore this issue is disappointing: by contrast, Canadian courts applying s.1 of the Charter routinely consider the practice in other countries at this point, rather than merely accepting that to interfere would be to alter the nature of the deliberate and considered choice of the executive.[101] Moreover, deference re-enters in even this slimmed-down proportionality analysis at the second stage.

The approach can be seen in operation in *Samaroo*,[102] in which the claimant challenged the decision to deport him following his conviction

[101] See e.g. *Dagenais* v. *CBC* [1994] 3 SCR 835; *RJR-MacDonald* v. *Canada Attorney-General* [1995] 3 SCR 199.

[102] *R. (Samaroo)* v. *Secretary of State for the Home Department* [2001] EWCA Civ 1139; [2001] UKHRR 1622.

for serious drugs offences on the ground that it would interfere with his right to family life under Article 8, since it was likely to result in separation from his wife and children by two marriages. The Court of Appeal accepted the Secretary of State's submission that, although the claimant's rights under Article 8 would be infringed, it was justifiable to prevent disorder and crime and in the operation of a firm but fair immigration policy. Dyson LJ, with whose judgment Butler-Sloss LJ and Thorpe LJ agreed, set out the relevant approach:

> At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?
>
> ...
>
> At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons?
>
> ... The issue in such a case is not whether there is a less restrictive alternative to deportation as a means to achieve the objective. The sole question is whether deportation has a disproportionate effect on Mr Samaroo's rights under Article 8.[103]

Elias J followed this two-stage approach in *R. (on the Application of Hirst)* v. *Secretary of State for the Home Department*,[104] where a serving prisoner who campaigned for prisoners' rights challenged the Prison Service policy to deny prisoners permission to call the media except in exceptional circumstances. The prisoner argued that under Article 10 he had a right to contact members of the media by telephone to discuss matters of legitimate public interest pertaining to prisons and prisoners. The application was granted in part. Although the policy decision was one that the Prison Service was entitled to make, the policy was insufficiently flexible and, therefore, unlawful. In a democratic society, prisoners' concerns as to the monitoring and control of what would be published as a result of prisoners speaking to journalists did not justify imposing a total ban on media interviews. Elias J distinguished carefully between the deference to be shown at different stages of the inquiry. So far as the first stage was concerned:

> where the right is removed as the deliberate and considered response to the need to provide an effective penal policy, there is in truth no room for

[103] Paras. 19–20. [104] [2002] 1 WLR 2929.

> the court to apply the principle of minimum response . . . [T]he issue is not whether restricting freedom of speech as part of the penalty is the minimum required to achieve the particular objective sought; that is inherent in what is considered to be the necessary objective. Rather it is whether even if it is the minimum compatible with achieving the desired and legitimate objective, it nevertheless impacts disproportionately on the Convention rights.[105]

However, at the second stage, proportionality applied in a different way:

> There is not simply a general striking of a balance between individual rights and the public interest with deference being shown to the views of the state authorities . . . The authority must demonstrate a proper basis for interfering with . . . [the Convention right], and show that nothing short of the particular interference will achieve the avowed objective.[106]

The 'inherent restriction' approach is perhaps more easily defensible where Parliament has expressly decreed in legislation that imprisonment shall operate to deprive inmates of certain rights, for example the right to vote, as in *Pearson*.[107] In such cases, there can be said to be a clear and democratic choice (although, as the European Court of Human Rights has noted, that is no guarantee that it is a *considered* choice[108]). However, in other cases, the challenge is to a discretionary decision of the executive which impacts upon the applicant's Convention rights and which is not required by primary legislation, for example, to restrict prisoners' access to journalists or not to make available IVF treatment.[109] In these instances, the finding that the restriction is 'inherent' seems more questionable.

The fair balance approach: reverting to Wednesbury *in effect*

In contrast to Lord Steyn's speech in *Daly*[110] which emphasised the differences between *Wednesbury* and proportionality, there are other

[105] Para. 33. [106] Para. 40.
[107] *R. (Pearson)* v. *Secretary of State for the Home Department* [2001] EWCA Admin 239, finding no violation of Convention rights on grounds of deference.
[108] The European Court of Human Rights held that the disenfranchisement of convicted prisoners violated Article 3 of Protocol No. 1. The Court found no evidence that Parliament had ever sought to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners: *Hirst* v. *United Kingdom (No. 2)*, App. No. 74025/01, 30 March 2004, para. 51; affirmed by the European Court of Human Rights (Grand Chamber), 6 October 2005.
[109] *R. (Mellor)* v. *Secretary of State for the Home Department* [2001] 3 WLR 533.
[110] Notes 32 above et seq.

techniques that can be adopted to maintain continuity by pointing to similarities.

In *Samaroo*,[111] Dyson LJ applied the 'fair balance' test deciding that deportation would not violate Article 8:

> the Court must decide whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[112]

This is a markedly less probing standard than *Daly*, and, in an earlier article, it was submitted that it carried the risk of allowing *Wednesbury* to re-enter by the back door.[113] The judgment of Moses J in *Ismet Ala* v. *Secretary of State for the Home Department*[114] illustrates the point by treating the 'fair balance' test in a way virtually indistinguishable from *Wednesbury*. In *Ismet Ala*, an ethnic Albanian from Kosovo, who had illegally entered the country in 1997 but subsequently married a British citizen, applied for judicial review of the Secretary of State's certification that his human rights claim was manifestly unfounded. He contended that his removal would be disproportionate and an infringement of his rights under Article 8, arguing that no reasonable decision-maker would have concluded that his appeal was bound to fail, and that delay had frustrated his chances of being granted refugee status under the policies prevailing at that time. The application was granted. On appeal, Moses J concluded that the adjudicator's task was to decide whether the Secretary of State had 'struck a fair balance between the need for effective immigration control and the claimant's rights under Article 8' or whether the minister's decision was 'outwith the range of reasonable responses'.[115] The language was highly reminiscent of *Wednesbury*:

> A decision-maker may fairly reach one of two opposite conclusions, one in favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly . . . [T]he mere fact that an alternative but favourable decision could reasonably have been reached will not lead to the conclusion that the decision maker has acted in breach of the claimant's human rights. Such a breach will only occur where the decision is outwith the range of reasonable responses to

[111] *R. (Samaroo)* v. *Secretary of State for the Home Department* [2001] EWCA Civ 1149; [2001] UKHRR 1622. The leading judgment was given by Dyson LJ.
[112] Taken from *Sporring* v. *Sweden* (1982) 5 EHRR 35, para. 69.
[113] Leigh, 'Taking Rights Proportionately', above n. 22, pp. 276–7.
[114] [2003] EWHC 521. [115] Para. 47.

> the question as to where a fair balance lies between the conflicting interests.[116]

He continued:

> the decision of the Secretary of State in relation to Article 8 cannot be said to have infringed the claimant's rights merely because a different view as to where the balance should fairly be struck might have been reached.[117]

Integrating the approaches: *Huang* v. *Secretary of State*

Having discussed expansionary and limiting modes of reasoning, it is worth examining a recent judicial attempt to reconcile some of the inconsistencies. In *Huang* v. *Secretary of State*,[118] the Court of Appeal had to consider the nature of an appeal to an immigration adjudicator against a decision of the Home Secretary to remove or deport under s.65(1) Immigration and Asylum Act 1999. It found that the adjudicator could allow the appeal because of the effect on Article 8 rights only in exceptional circumstances where 'the imperative of proportionality' required such an outcome notwithstanding that the appellant could not succeed under the Immigration Rules.[119] Laws LJ explicitly rejected the approach adopted in the similar case of *M* v. *Croatia* where Ouseley J had said the test was whether 'the disproportion is so great that no reasonable Secretary of State could remove in those circumstances' and the Secretary of State's own practice should be examined to determine the range of reasonable responses.[120] Laws LJ found this test could not stand with *Daly* and amounted to impermissibly reverting to *Wednesbury*. In the end, however, the difference is unlikely to amount to much in cases like this, since, as Laws LJ himself recognised, cases where the adjudicator could favour an appellant outside the Immigration Rules would be 'truly exceptional'.[121]

Huang is also notable for Laws LJ's comments on deference. It was acknowledged that the balance struck by the Immigration Rules was to be accorded respect as made by democratic decision-makers. However, it was argued that the adjudicator was not required in a case like this to pass judgment on policy given by the Rules since he was concerned with

[116] Para. 44. [117] Para. 45.
[118] [2005] EWCA Civ 105; [2005] 3 WLR 488 (appeal pending to the House of Lords).
[119] Para. 59. [120] [2004] INLR 327.
[121] *Huang*, above n. 118, para. 60.

the relative importance of immigration control and the individual's right. Rather:

> The adjudicator's decision of the question whether the case is truly exceptional is entirely his own. He *does* defer to the Rules; for this approach recognises that the balance struck by the Rules will generally dispose of proportionality issues arising under Article 8; but they are not exhaustive of all cases. There will be a residue of truly exceptional instances.[122]

The argument involves a variant on the two-stage approach to proportionality, since it distinguishes between the adjudicator's and the court's roles in relation to 'policy' decisions (in effect falling within the routine category here) and those where there is a role for autonomous adjudication. Within the policy realm the courts should recognise that 'principle and practicality alike militate in favour of an approach in which the court's role is closer to review than appeal'.[123] However, even in the policy realm more is now required than the *Wednesbury* approach – the government must provide 'substantial reasoned justification'. Moreover:

> *Wednesbury* review consigned the relative weight to be given to any relevant factor to the discretion of the decision maker. In the new world, *the decision maker* is obliged to accord decisive weight to the requirements of pressing social need and proportionality.[124]

Failure to do so could invite judicial scrutiny, as in *Daly* itself. For cases not involving policy, however, the principle of respect for the democratic powers of the state simply did not apply.

Although inevitably there will be difficulties in delineating what constitutes 'policy' (in *Huang*, it seems to have referred to the need for immigration control), Laws LJ's judgment is a skilful and significant reworking of a number of themes examined in this chapter. If this approach is endorsed by the House of Lords, it will go a long way to establishing a more coherent framework for judicial review in Convention rights cases. It acknowledges frankly that Lord Steyn's twin concerns in *Daly* of setting out a more intensive test than *Wednesbury* (commending 'something close to an autonomous merits decision') but abjuring merits review are in tension.[125] What the judgment does is to make clear that in proportionality analysis that 'first stage' or 'policy' review is intended to be more probing than the conventional *Wednesbury* approach. To underline the point, *Daly* itself is

[122] Para. 60. [123] Para. 53. [124] Para. 54 (emphasis added). [125] Para. 49.

classified as concerned with a policy decision. Some of the judicial techniques described above as 'expansionary' find their place in the autonomous decision-making by the adjudicator or the court in non-policy cases.

Conclusion

Murray Hunt has written perceptively that public law's 'big task for the next few years' will be to give practical effect to the difference between proportionality and 'full merits review' without forfeiting the insight that proportionality requires a new and highly structured approach to adjudication which subjects justification for decisions to rigorous scrutiny to determine their legality.[126]

The discussion here has attempted to catalogue some of the techniques at the front line of this battle. To recap, the expansionary arguments are: attempts to distinguish *Wednesbury* and to supplant it with proportionality; the need for a decision-maker to show 'substantial evidence' and for factual inquiry by the courts; and the treatment of proportionality as a question of law. Limiting arguments, on the other hand, include: the use of the fact-finding/policy distinction in relation to Article 6; 'indirect deference' to Parliament; use of the different stages of proportionality analysis; and reverting to *Wednesbury*.

Some of the conflicts of technique surrounding the HRA may in time be settled authoritatively at a doctrinal level – for example, if the House of Lords were to declare *Wednesbury* dead or to adopt the approach of Laws LJ in *Huang* to integrating the tests. Others are likely to persist, perhaps for many years. Several senior judges have indicated their belief that the law is likely to remain in flux for some time as the battle over these approaches continues, and that the present position may simply be a staging post.[127]

Nevertheless, it is already clear that one impact of the Human Rights Act upon administrative law has been to accelerate a pre-existing tendency to treat review as context-specific. Lord Steyn's enigmatic comment in *Daly* that 'in law context is everything' is emblematic.[128] Consequently, the standard of review now appears as a spectrum of different standards

[126] M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"', in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003), p. 342.

[127] See Lord Walker in *ProLife Alliance*, at para. 138: 'this is an area in which our jurisprudence is still developing'; Auld LJ and Keene LJ in *Bloggs 61*.

[128] *R.* v. *Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532, para. 28.

applicable to different questions. In this respect, domestic review in the UK has moved significantly towards a conscious recognition of a range of standards as has occurred in other countries. In Canada, for example, applying what is termed a 'pragmatic and functional' approach, review ranges from 'correctness' to 'patent unreasonableness'.[129] Four factors especially are considered in determining the appropriate standard of review in a given context: the presence or absence of privative clauses, whether the question is within the expertise of the respondent, the purpose of the Act and the provision in question and whether a question of law or of fact is involved.[130] In the UK's case, the scale has not been articulated so clearly by the courts. There is at this point much complexity (some points on the range of options have scales within them also) and there is still some dispute over where particular issues are to be placed on the range. Nevertheless, the scale can be discerned in outline.

Prior to the HRA, it was commonplace to talk of 'hard-edged' and 'soft-edged' review. In the former category, the archetype was 'precedent fact' and questions of law. In the exercise of discretion, *Wednesbury* was the archetypical soft-edged question. 'Anxious scrutiny' occupied the middle ground and discretionary decisions involving allocation of public resources or socio-economic policy were softest of all. It is clear that, after the HRA, the hard-edged/soft-edged metaphor is insufficiently nuanced, although judges and commentators have struggled to find an accurate alternative vocabulary that does not have misleading connotations.[131] All metaphors – whether of territory or jurisdiction, competence, deference – tend to break down, and one is hesitant to offer another. Since intensity of scrutiny is what is at stake, possibly an optical analogy is most appropriate, in which case scrutiny might be said to vary from the long-range survey (aided by a telescope) in which the judiciary checks cursorily for obvious odd features in a decision, to external inspection (where the court, as it were, walks around the outside of the decision (cf. inspecting a house, car or horse), to internal inspection, and to microscopic analysis.

On any measure, the Human Rights Act has clearly moved the consideration of human rights questions towards the more intense or detailed end of the range. However, plainly not all rights are alike, and the situations in

[129] *Pushpanathan* v. *Minister of Citizenship and Immigration* [1998] 1 SCR 982; *Baker* v. *Canada* [1999] 2 SCR 817; *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3. See further D. Dyzenhaus (ed.), *The Unity of Public Law* (Oxford: Hart, 2004).

[130] *Pushpanathan*, above n. 129, paras. 29–38.

[131] The debate about 'deference' being in point.

which they might be limited vary enormously. Unqualified rights attract more intense scrutiny than qualified rights. It could be expected also that some potential limitations on qualified rights (for example, protection of national security) would be treated much more generously than others (for example, prevention or detection of crime) according to the perceived familiarity or competence of the courts.

Finally, what is striking about the present position are two missing pieces of the jigsaw. First, there is the question of what Strasbourg will ultimately make of judicial review post-HRA. There the post-*Smith and Grady* picture is mixed. Five judgments can be cited in which the issue has arisen. In two, one involving removal of an illegal immigrant[132] and another involving refusal of asylum,[133] the domestic proceedings were taken to be adequate. *Smith and Grady* was treated by the European Court as turning on the limited nature of domestic proceedings where national security was involved.

In a further two cases, the European Court has found a violation of Article 13. In *Hatton* v. *United Kingdom*,[134] the defect was the inability of the national courts to consider whether an alleged increase in night flights at Heathrow was a justified limitation under Article 8. In *HL* v. *UK*, the Strasbourg Court held that 'anxious scrutiny' was inadequate in that it did not allow the court to reach its own determination of the lawfulness of the detention of mentally ill persons, in violation of Article 5(4).[135] The domestic proceedings in each ante-dated the HRA but the European Court accepted that the HRA had intensified judicial review.[136] In *HL*, the Court referred to the *Wilkinson* decision to buttress its conclusion that the 'super-Wednesbury' test applicable at the time did not satisfy Article 5(4).[137]

Fifthly, there is *Peck* v. *UK*.[138] The relevant issue so far as Article 13 was concerned was that Peck had unsuccessfully argued in judicial review proceedings that a local authority's decision to disclose footage of him taken from CCTV which had then been broadcast on television was irrational. In terms identical to *Smith and Grady*, the European Court found that Article 13 had been breached. The government had cited *Alconbury*, especially Lord Slynn's comments about proportionality.

[132] *Bensaid* v. *United Kingdom* (2001) 33 EHRR 10, esp. paras. 53–8.
[133] *Hilal* v. *United Kingdom* (2001) 33 EHRR 2, esp. paras. 75–9.
[134] *Hatton* v. *United Kingdom* (2003) 37 EHRR 28, paras. 131–42.
[135] *HL* v. *UK*, App. No. 45508/9, 5 October 2004. The domestic proceedings were *R.* v. *Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] AC 458 (HL).
[136] Para. 141. [137] *HL* v. *UK*, paras. 138–40.
[138] *Peck* v. *United Kingdom* (2003) 36 EHRR 41.

The Strasbourg Court pointed out that *Alconbury* post-dated the coming into force of the HRA (whereas the domestic proceedings pre-dated it) and that the government had accepted that Lord Slynn's comments were *obiter*. It continued:

> In any event, the Government does not suggest that this comment is demonstrative of the full application by domestic courts of the proportionality principle in considering, in the judicial review context, cases such as the present.[139]

Taken in the context of a breach of Article 13, this can be regarded as a hint that domestic courts could go further. However, neither *HL* nor *Peck* is conclusive and it seems that we will have to wait for a case in which the domestic proceedings occurred after the commencement of the HRA[140] to be certain whether judicial review has now gone far enough for Strasbourg.

The second missing piece is the failure of the courts over more than five years to engage with the text of s.6(1). This is puzzling. While counsel and judges have repeatedly succumbed to the fascination of exploring what constitutes a 'public authority', they have shown a remarkable lack of curiosity over the remaining words in the provision. The issue has been systematically ignored, perhaps because of a strong consensus that the Act was not intended to introduce merits review. Nevertheless, within a system which supposedly defers to Parliamentary sovereignty, the wholesale failure to explore the parameters of the words with which Parliament has chosen to express itself in an admittedly constitutional measure[141] is remarkable and suggests a very high degree of collegial thinking.[142]

[139] Para. 106.
[140] The *Alconbury* case itself went to the European Court of Human Rights but resulted only in an admissibility decision: *Holding and Barnes plc* v. *United Kingdom*, App. No. 2352/02, 12 March 2002 (declared inadmissible).
[141] *McCartan Turkington Breen* v. *Times Newspapers Ltd* [2001] 2 AC 277, 297, *per* Lord Steyn; *Thoburn* v. *Sunderland City Council* [2002] EWHC Admin 195; [2003] QB 151, paras. 62–4, *per* Laws LJ.
[142] After completion of this chapter, the House of Lords handed down its decision in *Huang (FC)* v. *Secretary of State for the Home Department* [2007] UKHL 11 (on appeal from the decision discussed at nn. 118 et seq. above). The Appellate Committee agreed with Laws LJ in rejecting the *M* v. *Croatia* approach (see *ibid.*, para. 13). It emphasised, however, that appellate immigration authorities were engaged in appeal, not review; perhaps, for that reason, the opinion does not discuss Laws LJ's comments on deference.