

Rationally or proportionately – how will UK decision making bodies be required to act in the future?



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A briefing on a recent UK Supreme Court judgment that could have significant consequences for how decision making bodies conduct their affairs.

In *Youssef v Secretary of State for Foreign and Commonwealth Affairs*, the UK Supreme Court suggested that there may be an imminent change to how courts review the legality of decisions made by public bodies (and in Scotland even some private bodies, for example golf or sports clubs).

Background

Traditionally, UK courts have only set aside an action by a decision maker (usually a state official or public body) that was:

- Irrational – the decision maker has made such an unreasonable decision that no reasonable person in their place, looking at the same facts, would have come to that decision.
- Illegal – the decision maker has misunderstood or misapplied the relevant law, for example by doing something that he or she has no legal power to do.
- Procedurally improper – the decision maker made the decision in an unfair manner, contrary to the principles of natural justice and fairness (for example, allowing a bias or conflicted person or body to take the decision).

The higher standard of **proportionality**, meaning that a decision must be suitable to achieve its stated aim and, if that is the case, must be the least intrusive means of achieving that aim, has generally only applied in cases with a human rights or EU law element. *Youssef* suggests that the Supreme Court will shortly consider whether this more intense review of public decisions will

apply across the board in all judicial review cases.

The Youssef case

In *Youssef*, the Supreme Court was asked to review the legality of a decision by the Foreign Secretary to place an individual with a history of supporting Al-Qaeda on a UN sanctions list, a decision which, in effect, froze that individual's assets.

One of the key issues considered by the court was what level of review should apply to decisions that the court was asked to examine. The lower court that had considered the case had applied the traditional 'irrationality' standard. The individual placed on the UN sanctions list argued that the decision of the Foreign Secretary had led to such an extreme interference with his fundamental rights that, at the very least, the more intrusive proportionality standard should govern whether the Foreign Secretary's decision was lawful.

Lord Carnwath, who gave the court's only judgment, found that there was already strong precedent to suggest that decisions which interfered with fundamental rights should be assessed with reference to proportionality. However, the judgment went on to note that in many cases (particularly those dealing with national security) the application of the proportionality test was unlikely to lead to a different result from the traditional grounds for judicial review.



The *Youssef* case is even more noteworthy, though, due to Lord Carnwath's suggestion that the court hoped for an opportunity, in the near future, to undertake an authoritative review of whether proportionality should replace the traditional grounds of judicial review.

Comment

Youssef makes clear that proportionality already plays a significant role in UK administrative law. In cases related to breaches of EU or human rights law, and now interference with other fundamental rights, the courts already have scope to apply this more intense level of review to the actions of decision makers. Now, the Supreme Court has held open the door to this test being applied universally and, possibly, replacing the traditional grounds of judicial review.

This development is particularly interesting given the Court of Justice of the European Union's recent ruling in the Scotch Whisky Association case. As Gordon Downie, one of our partners who specialises in public law, has recently commented, the CJEU appears to suggest that when ruling on the proportionality of a decision a court should review all the relevant material in respect of the decision at issue, even if the decision maker did not rely

on such material as part of his or her original decision making process and/or that material was discovered or produced after the original decision had been made.

Such an approach emphasises the potentially deeply interventionist nature of a proportionality review. If the UK Supreme Court takes a similar view in its post-*Youssef* review of the role that proportionality should play in UK judicial review, this may significantly expand the scope for courts to overturn administrative decisions in many areas.

That being said, as the Supreme Court notes in *Youssef*, given the wide margin of appreciation afforded to decision makers in sensitive areas such as national security or foreign policy, a proportionality review may not lead to a different outcome from the application of the traditional judicial review grounds in all cases.

Please contact Gordon Downie, Natasha Durkin or Liam Maclean in our Regulation and Markets team, or your usual Shepherd and Wedderburn contact, for further updates or to discuss any issues that you need assistance with.