

LEGAL ESSAY

Proscription, national security, freedom of speech and the separation of powers

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Introduction

On 16 June 2026, the Court of Appeal overruled the decision of the High Court, delivered earlier in the year (*Ammori v Secretary of State for the Home Department* [2026] EWHC 292 (Admin)), that the Home Secretary had acted unlawfully in proscribing the action group Palestine Action under s.1 of the Terrorism Act 2000 (*Ammori v Secretary of State for the Home Department* [2026] EWCA Civ 721)). On 30 July 2026, the Supreme Court gave permission for Ammori, the co-founder of Palestine Action, to appeal that ruling. This will hopefully clarify the relationship between the government and the judiciary in the balancing of rights (particularly freedom of expression) and national security policy. It will be important for a variety of political and constitutional reasons – the standing of human rights in our constitution, and the level of deference that the courts must show to the executive when reviewing its decisions. Of course, it will be even more important for those who have been arrested and detained for ‘supporting’ Palestine Action by taking part in entirely peaceful protests.

The challenge to the proscription of Palestine Action

Palestine Action had been proscribed by the Home Secretary. under s.3 of the Terrorism Act 2000. Under ss.3(3) and (4), she may do that if she believes an organisation is concerned in terrorism. “Concerned in terrorism” is defined in s.3(5) – an organisation is concerned in terrorism if it – (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism. “Terrorism” is then defined in s. 1 as the “use or threat of action” when the use or threat is “designed to influence the government ... or to intimidate the public or a section of the public” and “is made for the purpose of advancing a political, religious, racial or ideological cause”. By s.1(2), ‘action’ must involve either “serious violence against a person” or “serious damage to property”.

Palestine Action (a group whose aim is to lend support to the Palestine cause in and against Israel) was proscribed in July 2025 by the Proscribed Organisations) (Amendment) Order 2025, which was approved by both Houses of Parliament. This was weeks after the group broke into an RAF base and spray-painted two military aircraft, resulting in £7m of damage. The consequence of proscription affected a number of demonstrations expressing support for a proscribed group (under s.13 of the 2000 Act), and many protestors who help up placards supporting the group were arrested under the Terrorism Act and were detained in prison, some still awaiting trial. The claimant brought an action challenging the proscription, claiming that the secretary had acted unlawfully and in breach of the rights to free speech and peaceful assembly under Articles 10 and 11 of the European Convention, as given effect by the Human Rights Act 1998.

The decision of the High Court

The High Court allowed the claim. It found that the secretary had acted disproportionately in breaching the rights under Articles 10 and 11 in deciding to proscribe. It applied the test laid down by the Supreme Court in *Bank Mellat v HM Treasury (No 2)* ([2013] UKSC 38): whether the objectives of the proscription decision were sufficiently important to justify the limitation of fundamental rights; whether the decision was rationally connected to those objectives; whether a

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less intrusive measure could have been used instead of the proscription decision; and whether, having regard to those matters and to the severity of the consequences of the proscription decision, a fair balance has been struck between the rights of the individual and the interests of the community.

In the Court's view, the secretary had adopted an appropriate approach of examining the nature and scale of Palestine Action's activities and had been entitled to attach significant weight to any act occurring in the UK that came within the s.1 definition. However a theme in the documents leading to the decision had been that proscription would be advantageous because it would mean that the offences at s.11, s.12 and s.13 could be used against persons supporting Palestine Action. That, in the court's view, was not a relevant consideration: the purpose of the policy was to limit use of the discretionary power to proscribe, and any "other factor" considered when applying the policy had to explain the particular need to proscribe the organisation above and beyond the belief that the organisation was concerned in terrorism.

With respect to the claim under the HRA, the Court measured the interference with the Convention rights by reference to the restrictions imposed by criminal offences consequent on proscription, and by the extent to which people would exercise self-restraint in conducting lawful activities. In its view, even discounting Palestine Action's non-peaceful activities, proscription resulted in a very significant interference with the right to freedom of speech and the right to freedom of assembly. Further, as the policy had not been properly applied, the interference with the right of freedom of speech and freedom of association did not meet the requirement that any interference with Convention rights by a public authority had to be prescribed by law (Article 10(2)). Then, applying a proportionality test, although it attached real weight to the fact that Palestine Action has undertaken activities amounting to terrorism under s.1(1), and to the opinion formed by the Home Secretary who has both political and practical responsibility to ensure public safety, the proscription of Palestine Action was disproportionate. Thus, a very small number of Palestine Action's activities amounted to acts of terrorism, and for these, and for Palestine Action's other criminal activities, the general criminal law remained available.

The decision of the Court of Appeal

On appeal, the Court of Appeal held that the Home Secretary had been entitled to exercise her discretion to proscribe the group, and that a fair balance had been struck between individual rights under Articles 10 and 11 and community rights of national security and the protection of the rights of others.

On the question of the secretary's policy, the Court of Appeal found that the purpose of the secretary's proscription policy was to render transparent some of the non-exhaustive factors that would be considered in a proscription decision. Thus, nothing in the wording indicated that its purpose was to constrain those factors, and the other factors that the secretary had been entitled to consider – including the operational benefits of proscription in a case that she was considering. The operational consequences concerned the efficacy of proscription, which was a highly material factor in the proportionality balance.

Moving to the balance of rights and state interests in addressing proportionality, it held that the Court of Appeal itself would undertake the *Bank Mellat* proportionality exercise afresh, rather than merely reviewing the High Court's decision. This was because the appeal was of such major public importance, that the public would expect the Court (which contained five Lord/Ladyships) to exercise its own judgment. The Court stressed that the secretary had special constitutional responsibilities regarding national security, and was, thus, better placed than the courts to adjudicate the balance engaged in the context of national security. Although the court was the ultimate arbiter, the secretary should be accorded a wide margin of appreciation regarding each stage of the *Bank Mellat* test. Applying the four-stage test, it ruled that the protection of the rights and freedoms of others, and the interests of national security, were sufficiently important objectives to justify the limitation of the rights, *in some circumstances*. It then found that the

proscription was rationally connected to those legitimate objectives, and that no less intrusive measures than proscription had been identified to achieve the objectives. The secretary could not have sought civil remedies such as injunctions, and she could not be expected to abrogate her proscription powers in the face of terrorist activity on the basis that she could instead promote civil self-help remedies. Further, prosecution for individuals' crimes would not directly disrupt the organisation and thus be an effective alternative action.

The Court then considered factors that weighed against proscription, including that it entailed a very significant interference with the right to free speech and freedom of association and assembly, and that law-abiding people could be deterred from assembling lawfully or making pro-Palestinian views public for fear of their actions being construed as support for Palestine Action. However, it noted that proscription would not prevent public expressions of support for the Palestinian cause. Also relevant was the limited number of the group's terrorist incidents compared to other activities. Thus, proscription might be regarded by some as heavy-handed, coupled with the fact that most proscribed organisations advocated violence against people, making it unusual to proscribe an organisation whose primary objective was property damage. However, it then considered factors in favour of proscription, including the nature of the group as a covert organisation whose main aim was to damage property belonging to the defence contractor and other companies trading lawfully. Further, the secretary's advisers had found a future threat of an escalating campaign from Palestine Action involving serious property damage. It also noted that the operational benefits of proscription in degrading the organisation also weighed in the balance.

Judicial review, proscription, human rights and judicial deference

Despite the different conclusions on the legality of the decision, the role of judicial deference is central to identifying the conflict between the two approaches on the question of proportionality. Deference and respect to the executive (and the legislature) is essential in maintaining the separation of powers in any constitution and legal system. It consists of both a *constitutional* and *political* deference to the other arms of government. Thus, courts display a *constitutional* respect to the legislature and executive in passing and executing law and policy, as well as a more practical, *institutional* deference, where the courts recognise the institutional expertise and knowledge of the decision-maker. This then limits the judiciary's power to interfere with the detail and consequences of policy decisions, whilst ensuring that the courts' constitutional duty to recognise and enforce basic human rights is not thwarted by historical restraints, which may now conflict with the development of international human rights law, and the United Kingdom's international obligations transposed into domestic law by the 1998 Act.

The courts' reluctance, or willingness, to interfere in cases such as the present is not only affected by the court's views on constitutional or institutional deference, but also by the extent of their acceptance of the fundamental nature and extent of the human rights raised in the proceedings. Domestic courts now have the power, granted by Parliament, to employ concepts such as necessity and proportionality in balancing laws and policy with the recognition and enforcement of human rights. Thus, they have the final say on whether a measure is proportionate, albeit tempered by the margin of appreciation offered to states by the European Court of Human Rights. This margin reflects and can justify judicial deference in the domestic courts, but deference at both levels must not destroy the aims of the Convention, or the essence of the rights protected under it, as articulated by the relevant case law of the European Court of Human Rights. Yet, in addition to deference and the domestic courts' application of the margin of appreciation, what is equally important is their legal and constitutional views on proscription and the extent to which it impinges on the fundamental rights of free speech and freedom of peaceful assembly. Hence, proscription which criminalises acts of peaceful assembly and free speech can be seen, on one view, as a gross and arbitrary encroachment on democratic free speech, or, on another view, a marginal and thus justifiable interference with the (conditional) right of free speech; leaving speakers free to air their views in ways not covered by the relevant legislative restriction.

The nature of proscription

Proscription is a preventative measure taken by the state to deal with extraordinary and unacceptable threats caused by a group's existence and its previous and present activities. Thus, instead of, or in addition to, waiting for a group or its supporters to commit a breach of the regular law (trespass, criminal damage, obstruction of the highway, etc.), proscription will result in the automatic application of anti-terrorism law to that group, its members, and those 'supporting' its views, rendering membership and support illegal irrespective of the harm caused by a particular activity.

As with other forms of prior restraint, proscription thus has a 'chilling effect' on the right of association, peaceful assembly and freedom of expression: those who are affected by the proscription will desist from becoming members or lending support to its views. Further, if people are willing to disobey the proscription order, they will face severe penalties under the 2000 Act, often for an activity that would not be a breach of general public order laws. For example, thousands of people have been arrested, and some charged under the 2000 Act, for holding up signs declaring support for Palestine Action. Such actions are, generally, entirely peaceful, and are not likely to be in breach of even the lowest level of public order offences (s.5 of the Public Order Act 1986). Yet, if that group is proscribed, that activity is in breach of the 2000 Act, and the police do not have to show that the activity has caused any further harm beyond unlawfully supporting the group. Nevertheless, proscription is seen by the state as the most effective, and convenient, way of outlawing certain views and behaviour, as the group's activities become unlawful despite them not breaching the regular law. It can also lend public and political support to the state in its efforts to maintain security and safety. Although this form of restraint is not automatically in breach of human rights law, exceptionally strong and convincing evidence should be presented, *by the state*, to justify it.

The courts' role in reviewing the minister's decision is now clearly focused on judging its compatibility with the rights in the European Convention on Human Rights, and its powers of review under the Human Rights Act 1998. Assuming that the wording of the 2000 Act was clear, the domestic courts are now allowed to ask the following questions: was the use of that statutory power proportionate and necessary in a democratic society to achieve the aims of the Act itself and the reasons the Minister gave in using the legislation? In addressing those questions the court is allowed, under s.2 of the 1998 Act, to employ the jurisprudence of the European Court in this area, and to consider the fundamental importance of the right in question, together with the constitutional and democratic dangers involved in applying proscription. Thus, it begs the question whether any subsequent appeal to the European Court would be successful (perhaps causing an international conflict between the government and the Council of Europe)? Article 11 of the European Convention on Human Rights provides for the right of association, and restrictions (including proscription) are allowed under Article 11(2), provided they are prescribed by law and necessary in a democratic society for the purpose of achieving (in this context) national security, public safety and the prevention of disorder and crime. The European Court would normally require that the group incites violence or infringes the rules of democracy (*Socialist Party v Turkey* (1998) 27 EHRR 51), or that the purpose of the group is inconsistent with the basic values of the Convention. The Court has also insisted that the term 'membership' is applied clearly and fairly and does not include those who may have taken part in support of its ideas, perhaps at a demonstration (*Isikirik v Turkey* ((App. No 41226/09)). These authorities will be presented to the Supreme Court in an attempt to sway its findings.

Equally important is the question whether the measure of proscription is damaging to *our own* constitutional values and feelings of justice? The domestic courts are supposedly the guardians of our fundamental rights, and in the past have ruled as unlawful detention without trial (even at a time of national emergency), and the acceptance of torture evidence in deportation proceedings; the government failing to provide convincing evidence for such measures. Domestic courts are no strangers to protecting human rights and legal justice – witness their enforcement of the basic rules of natural justice and the duty to act fairly, and their insistence that everyone, including

prisoners, should have access to the courts and legal representation. Such judicial powers have been buttressed by the European Court's rulings, and the passing of the Human Rights Act 1998, but have always been part and parcel of the domestic judiciary's belief in freedom and justice.

The appropriate role of the courts in reviewing executive security powers

The decisions of both courts in the present cases not only differ in terms of the final judgment but display a fundamentally different approach with respect to the role of the domestic courts in controlling executive security powers and in interpreting and applying domestic human rights law. The High Court adopts a robust and liberal approach to reviewing wide-ranging executive powers that interfere with fundamental rights. In contrast, the Court of Appeal apply a more traditional and conservative approach, reluctant to gainsay the judgment of the executive beyond ruling on the bare legality of the administrative policy and its execution.

This poses the classical dilemma affecting the relationship between the courts and the executive. A judiciary that interferes with policy decisions too freely risks stepping outside its constitutional and legal boundaries, producing decisions based on the merits and wisdom of the policy, rather than its compliance with the law. This is particularly so in the United Kingdom, where the executive and the legislature are fused, leading to further risks of the courts breaching the sovereignty of Parliament, as such decisions lack democratic legitimacy. On the other hand, failure by the courts to interfere with policies that encroach on fundamental rights, and which breach the basic rules of substantive and procedural justice (at common law or under statute), exposes a gap in effective enforcement of the separation of powers, and the courts' role in controlling the 'arbitrary' powers of the executive. This problem is complicated by the passing of the Human Rights Act 1998, where the courts have been given the power, by Parliament, to strike down administrative decisions that are incompatible with Convention rights, but where such judicial powers are limited by the provisions of the Act, which seek to retain parliamentary sovereignty and, in appropriate cases, executive autonomy. Thus, the Act does not rid us of the need for the courts to show due deference to the administration, or to Parliament, when considering the legality of administrative policy, and the compatibility of primary legislation with Convention rights.

As a result, when exercising their powers under the 1998 Act, the courts not only have to take on its role of adjudicating on rights' disputes but must do so in the context and limitations of its traditional constitutional role. The concern that the courts are departing from its conventional boundaries has been fuelled recently by political and judicial opinion, suggesting that the Act has forced judges to become involved in politics, and that the United Kingdom should consider withdrawing from the Convention and reforming the 1998 Act. (See Policy Exchange: Richard Edkins and John Larkin QC, 'How and Why to amend the Human Rights Act 1998' 11 December 2020.)

What is the limit of judicial review?

The solution to this dilemma was traditionally resolved by accepting that the court's role in judicial review was concerned with the *legality* of the body's decision, and not its *merits*. The courts' role was to ask whether the executive (or other bodies) acted within their legal powers: did Parliament or the common law allow for such powers (the *vires* question); did the executive take into account all relevant factors (and disregard all irrelevant factors); did it follow its own policies and published promises; and did it abide by the basic rules of procedural fairness and natural justice? Many of these grounds were relevant to the Home Secretary's decision to proscribe Palestine Action, and of the courts' review powers, yet the decisions of both courts are fundamentally different. This shows that a court can take a flexible approach in applying such factors, and that the final decision can be affected by different judicial policy (as opposed to the politics of the judge). Hence, in this case, the Court of Appeal expressed disagreement with the High Court's findings on many of grounds of challenge, such as whether the secretary could

consider the operational benefits of proscription, or whether she was allowed to digress from her own policy (and whether she had done so on the facts). Thus, even where the courts reserve their enquiry to the pure legality of the decision, judges will be affected by their different political and constitutional beliefs. The question whether a secretary *has* a legal right to carry out a particular act, might now become a question of whether the secretary *should* have such a power, or *should* be able to resile from their policies. Hence, the judicial answer to those questions will differ, not because of a judge's private or personal beliefs, but because of their jurisprudential understanding of what the executive should be allowed to do, and when the courts should be allowed to interfere.

The boundary of legitimate review then becomes more subjective and complex when grounds such as irrationality, and later proportionality, are used to challenge executive decisions. In these cases, we are asking the judge to make a value judgment about the secretary's decision – in this case, whether the secretary acted rationally and proportionally in deciding to proscribe the group, being aware of the consequences of such on the rights of others and the principles of democracy. The doctrine of irrationality – whereby a decision became reviewable if it defied any logic or rationality – led to concerns that the courts could now rule on the merits of a decision but was regulated by the courts' acceptance that they could not interfere simply because they disagreed with the policy or the final decision. This reservation is particularly important in retaining the traditional role of the courts when challenging executive decisions that have been bestowed on them by a supreme Parliament. However, the main conflict behind the courts' control of executive powers, arises when the policy and its enforcement conflicts with fundamental rights – either at common law (in the absence of a formal Bill of Rights) in the UK constitution, or ones established by the sovereign Parliament.

As noted above, the Human Rights Act 1998 expanded the courts' review powers in this respect, the Act giving further effect to rights contained in the European Convention on Human Rights and allowing the courts to employ principles of rights' adjudication used by the European Court of Human Rights in its case law. However, the Act did not allow the courts to disregard the basic principles of the UK Constitution, and in addition to the Act expressly preserving Parliamentary sovereignty, the doctrine of the separation of powers and judicial deference still play a major role in judicial review; concepts which the European Court will recognise through the doctrine of the margin of appreciation. This has posed a dilemma for the domestic courts in the post-Act era. Are the courts now the final arbiters on the legality and proportionality of measures that engage and impact on Convention rights, or are they still bound, as before, to respect the judgments of the administration, and, in appropriate cases, the political and policy judgment of Parliament itself? The answer to those questions depends not only on the importance of the right at issue (in this case freedom of expression) but also the reasons for imposing the measure (national security and safety). Further, in addressing those questions, the domestic courts will not simply take an abstract approach to the quality of the right and the importance of the restriction but will be guided by the specific constitutional development of such rights and restrictions and the history of judicial interference in such cases.

Judicial balancing of free speech with security and public safety – the devaluation of free speech

As the preservation of national security and public safety is viewed as fundamental to effective government, when there is some evidence that they are capable of being damaged, the fear is that a court is likely to attach little weight to freedom of expression in the balancing exercise, and, thus, side with the state and the public interest in maintaining safety and security. This means that the role of the courts in protecting free speech from arbitrary or unreasonable interference is compromised. Let us take the Supreme Court's decision in *R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60 as an example. Although *Carlile* involved a more specific right of free speech and parliamentary democracy, rather than individual or group speech and assembly, the Supreme Court's approach and reasoning in that case provides clear evidence of judicial deference when national security

and safety is under threat from freedom of speech. As we have seen, this deference was also employed by the Court of Appeal in *Ammori*, and which might be exercised by the Supreme Court on appeal.

In that case, Maryam Rajavi, a dissident Iranian politician, had been excluded from the UK on the basis of her involvement with an Iranian opposition organisation that had formerly been proscribed as a terrorist organisation. Members of both Houses of Parliament wanted her to address meetings in Westminster about policy issues relating to Iran and asked the Home Secretary to lift the exclusion. The Secretary refused, considering that Iran would see any lifting of the exclusion as a political move against it, and would be likely to engage in reprisals that would put British interests and British nationals at risk. The members sought judicial review, claiming that the decision violated their right to freedom of expression.

The majority of the Supreme Court (Lord Kerr dissenting) held that when considering decisions of the executive, the courts would traditionally not usurp the function of the decision-maker, although it accepted that the Human Rights Act 1998 had made justiciable any arguable allegation that a person's Convention rights had been infringed. The court's role, therefore, was to test the adequacy of the factual basis of the decision, consider whether the objective was necessary, and review the rationality of the supposed connection between the objective and the means. Showing institutionalised deference, the Supreme Court stressed that it was entitled to attach special weight to the judgement of a decision-maker with special institutional competence. With respect to Article 10, as there had been no challenge to the facts or to the Secretary of State's bona fides, the court could only quash her decision if: she had underestimated the importance of freedom of expression; if the advice overstated the risks; or if her objective could reasonably have been achieved by some lesser measure. In the present case, the Secretary had not underestimated the importance of freedom of expression; no one had been denied the right to express their views, and parliamentarians had not been denied the right to receive them.

As much of the evidence for regulating free speech is based on the *likely* effects that such speech would have, national security and safety cases thus pose a particular problem for judicial review of the executive. As the courts are reined in by judicial deference and lack of institutional expertise, it may not be appropriate for the courts to substitute its view for that of the executive on these matters, unless the evidence to justify the restriction is flawed. Review by the courts is then made more difficult where judges devalue the inherent qualities of free speech and the impact any restriction has on it. In *Carlile*, Lord Sumption made the following statement on the level of interference and its relationship to the risks of allowing the visit:

'Putting the matter at its highest, the Secretary of State's decision deprives them of the use of one method and one location for their exchanges. It may be that the decision rules out the best method and the best venue for the purpose. For that reason, it would be wrong to suggest that such a restriction is trivial. It is not. Nor did the Secretary of State say that it was. The restriction is fairly described in her reasons as "limited." But the force of the point does not lie in the choice of adjectives. It lies *in the Secretary of State's* view that the particular restrictions of freedom of expression involved in her decision, in whatever language described, were outweighed by the risk to the safety of British persons and property and Embassy staff. That was a question to which she plainly did address herself (*italics added*).'

Lord Sumption then considered the court's role in challenging that evidence and the Home Secretary's decision:

'We are not in point of law bound to accept the factual assessment of the Foreign Office about the impact on our relations with Iran of admitting Mrs Rajavi to the United Kingdom. But if we reject it, we must have a proper basis for doing so. In this case, there is none. There is no challenge to the primary facts. We have absolutely no evidential basis and no expertise with which to substitute our assessment of the risks to national security, public safety and the rights of others for that of the Foreign

Office. We have only the material and the expertise to assess whether the Home Secretary has set about her task rationally, by reference to relevant matters and on the correct legal principle. Beyond that, in a case like this one, we would be substituting our own decision for that of the constitutional decision-maker without any proper ground for rejecting what she had done.’

Thus, following Lord Sumption’s dicta, the court’s role in cases such as this one and *Ammori* is limited, firstly by the fact that there is nothing placed before the Court *by the claimant* to refute the executive’s assessment of any relevant risk, and secondly, that in any case the courts might still be reluctant, by reason of constitutional and institutional deference, to gainsay the judgment of the executive.

In contrast, dissenting on the rationality and necessity of the Home Secretary’s refusal to allow the visit, Lord Kerr stressed that the courts have been given momentous obligations by the Human Rights Act, none more so than the duty to decide whether interferences with Convention rights are justified. In his view, convincing reasons for the interference *must be provided* (italics added), convincing, that is, to the court that is required to examine and assess them. In his view, it was unclear what specific consequences would flow from a decision to allow Rajavi to come to the United Kingdom, commenting that it was revealing that most of what is feared was already happening or has occurred in the past.

In contrast to this speculation, and Lord Sumption’s view, Lord Kerr then identified that the interference with the appellants’ Article 10 rights was direct and immediate; stressing that although such rights are, in any context, of especial significance, the critical importance of free speech in this case should not be underestimated:

“Our Parliament is the sovereign part of our constitution. Its laws prevail over everything else. The courts accord greater deference to the decisions of Parliament than to those of any other body. *When a distinguished group of parliamentarians wishes, in the interests of democracy, to conduct a face-to-face exchange with someone whose views they consider to be of critical importance*, only evidence of the most compelling kind will be sufficient to deny them their right to do so... the instant court had a bounden duty to uphold that right unless convinced of the inescapable need to interfere with it; and that he had not been brought to that point of conviction (italics added).

Thus, while the majority were prepared to accept this evidence – presumably on the basis that the risk to diplomatic relations was still real (on the evidence presented by the government), despite the lack of Iran’s democratic credentials, Lord Kerr refuses to surrender the democratic values of free speech on the basis of such risks. His dissent, therefore, is not based solely on his view of the proper constitutional role of the courts in challenging executive action and policy; it is founded in the proper role of free speech and other democratic values in our constitution, and its protection from anti-democratic and arbitrary interference.

Whichever is the correct constitutional and institutional approach to be taken by the courts in these cases, including *Ammori*, both the executive and the judiciary have often paid too little attention to the democratic arguments of upholding free speech, concentrating rather on the danger of upholding it and the undesirability of allowing a particular speaker from exercising that right. One would expect this deference to be particularly strong in national security and safety cases, although its application in cases where freedom of expression has been compromised has been more intense than in other cases, where, for example, the right to a fair trial and liberty of the person has been at issue. For example, the House of Lords’ judgment in *A v Secretary of State for the Home Department* ([2005] 2 AC 68), concerning the necessity and proportionality of measures allowing detention without trial of foreign terrorist suspects, shows a lack of judicial deference when liberty and due process are at risk. In that case Lord Bingham justified the House of Lord’s decision that the primary legislation of detention without trial was incompatible with

the right to liberty contained in Article 5 of the Convention and not permitted by the right of derogation in times of emergency:

‘... I accept that where government was threatened by terrorism, difficult choices had to be made.... Although judges were not elected, the function of the independent judge, charged with interpreting and applying the law, was a cardinal feature of the modern democratic state and a cornerstone of the rule of law. It would thus be wrong to stigmatise judicial decision-making as in some way undemocratic.’

In that case the courts were challenging primary legislation, whereas in the present dispute it was the Home Secretary’s executive decision to implement powers under primary legislation which was at issue. Judicial review in *Ammori* was not a threat as such to parliamentary sovereignty, which, it could be claimed, was the case in *A*. Yet, the majority of the House of Lords were prepared to declare the law and the emergency derogation as incompatible with the government’s obligations under the Convention and the Human Rights Act 1998, defending their approach by relying on their constitutional right and duty to interpret and apply the law. This was enhanced by the 1998 Act, which allowed them to question the law and administrative action to ensure legality and proportionality. It should also be noted that the majority of the House of Lords refused to gainsay the government’s view that there was a public emergency, a decision which was almost entirely political.

The reluctance to favour freedom of expression over national security was prevalent before the passing of the Human Rights Act 1998, where the courts were not permitted to have direct reference to Article 10 of the Convention, or the doctrine of proportionality. Thus, in *R v Secretary of State for the Home Department, ex parte Brind* ([1991] AC 696), the House of Lords refused to consider either in reviewing the Home Secretary’s policy of restricting the media’s broadcasting of words issues by terrorist organisations in Northern Ireland. Although the case was decided before the passing of the Act, the judicial balancing of free speech with national security indicated the courts’ reluctance to gainsay executive judgment on that balance. Thus, given that the Home Secretary had received parliamentary approval for imposing such restrictions, the question for their Lordships was whether *a reasonable Home Secretary*, being aware of the importance of free speech and broadcasting, would have imposed that restriction. Equally, in *Brind*, Lord Lowry failed to see that this ‘modest invasion of liberties’ would fail to satisfy any of the established grounds of review at that time, or indeed those of proportionality and necessity allowed under Convention law and jurisprudence. The dicta in the above case represents the Court of Appeal’s approach in the *Ammori* case, not only with respect to the question of deference, but also to the importance of freedom of expression and protest in a democratic state. It represents, thus, both a derogation of judicial duty to ensure proportionality, and a devaluation of free speech norms and a lack of appreciation of the impact restrictions have on its fundamental values.

Concluding remarks

We are still left uncertain as to which of both courts’ approaches in the *Ammori* case was correct. The High Court, in its efforts to nullify the Home Secretary’s decision, may have committed some legal errors on the question of what factors the secretary could and could not consider, and whether she should have followed her own guidance on proscribing such groups. In that sense, the Court of Appeal was probably right in correcting the errors of a perhaps over enthusiastic High Court. But that leaves us with the essential question: assuming that the secretary has not misinterpreted her *legal* powers, should a court gainsay the judgment of the Secretary in deciding to proscribe *this* group in *those* circumstances, being aware of the consequences of such a decision on the democratic rights of free speech and peaceful protest? That will be the essential question for the Supreme Court to address, and the answer will, of course, depend on the approach that the Supreme Court take with respect to its role in challenging executive action that threatens basic human rights; in this case, the essential qualities of freedom of expression on a matter of great public interest.

One approach, adopted by the Supreme Court in cases such as *Carlile*, is to refuse to allow the passing of the Human Rights Act 1998 to disturb the traditional principles of the constitutional and institutional respect that judges should show to the executive. In other words, although judges might disagree (as do many of us) with the logic or fairness of the effects of proscription in this case, it is not their role to gainsay a judgment made by a Minister charged with securing safety and security. On the other hand, as was stressed in *A*, the courts were given these extended powers of review by Parliament itself. Those powers go beyond determining the legality and procedural fairness of executive action and include the duty to ensure that the decision is necessary in a democratic society and proportionate in the circumstances. That does not allow the courts to ignore the deference they should offer to the executive in appropriate cases, but it reminds them of their increased legal and constitutional duties to safeguard human rights from arbitrary interference. A positive decision by the Supreme Court would be welcomed by those who support free speech and the right of peaceful protest. But that would require a robust approach by the Court, not only on the necessity of interfering with executive policy and decision making, but on the real value of free speech where it conflicts with public safety and national security. The domestic court's approach in that area has, thus far, been very deferential, and dismissive of the true value of free speech, compared to its more robust approach in protecting liberty and the right to a fair trial from such threats.

The decision of the Court of Appeal in *Ammori* will, no doubt, reignite support from those who advocate the reform of the Human Rights Act and the withdrawal of the UK from the Council of Europe – the retreat from European human rights law. It will also be welcomed by others, such as Lord Sumption, who feel that the courts have overstepped their constitutional role when examining the legality and reasonableness of government policy. For them, once the legality of the proscription policy is confirmed, as it was by the Court of Appeal, then its proportionality with respect to the balance between the aims of the proscription and its impact on freedom of expression and peaceful assembly is largely down to the executive and not the courts. Thus, despite the courts' duty under the 1998 Act to examine executive decisions through the principles of necessity and proportionality, the courts are still bound to respect the doctrine of judicial deference (or the margin of appreciation as it has been subsumed into domestic jurisprudence), and to refuse to gainsay executive judgments, especially when that concern national security and public safety.

Although the Court of Appeal was right to correct the High Court on some of the findings related to the legality of the secretary's policy, and whether she had misinterpreted or misapplied that policy, it is more questionable as to whether the High Court came to an impermissible finding on the question of proportionality, and the weight it attached to the free speech rights of those who supported Palestine Action and its fight for the rights of Palestinians in Israel. Proscription is an extreme measure, and the fact that it has been imposed (largely) because of the danger of property damage, rather than protecting others from physical harm, places a strong onus on the government to justify the proscription and its impact on freedom of expression. The Court of Appeal stressed that protestors are still allowed to state their opinions in this area, without supporting Palestine Action. That, in your author's view, is irrelevant and ignores the democratic harm caused by the proscription and its impact on protestors and democratic dissent. The measure interferes with a vital method of voicing opinion on a matter of great public interests; a such it is an important restriction on free speech. Further, most of those who have supported Palestine Action do not wish to join the group and certainly do not want to take part in its illegal activities. Instead, they choose to support Palestine Action because the group head the public's protest of Israel's actions and have been instrumental in informing the public about the situation. Let us hope that the Supreme Court consider that point seriously in coming to its opinion.