INCONSISTENCIES IN PROPORTIONALITY

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Modern Irish jurisprudence on the standard of review is relevant to a study of deference because different standards of review may reflect different choices about the appropriate level of deference in different cases. This essay argues that whereas such choices have been made, they have been inconsistent or unreasoned and more often than not, are not made with any reference to other seemingly relevant (but perhaps non-supportive) authority not unlike the “state” of the deference question during the early-days of the Constitution.

Early Shifts in Standards and Deference – From Cox to Tuohy

*Cox v Ireland*¹ is generally taken as being the beginning of the modern use of proportionality in Ireland.² That case, it may be said, is taken as “concretising” the *idea* that legislation may be reviewed on the basis that it is overbroad in pursuit of a legitimate purpose – i.e. the quasi-Paretian notion that if legislation trespasses onto constitutional ground it must do so as little as possible. In *Cox* itself the Supreme Court struck down provisions of the Offences Against the State Act, 1939 as being, essentially, a disproportionate violation on *inter alia*, the plaintiff’s property rights and right to earn a livelihood.³ However, it is not really possible to know whether the application of this kind of review was non-deferential or not. On the one hand, the decision seems to offer the view that the legislature must pursue its objectives with exactitude. On the other hand, perhaps the court may have believed that whereas the legislature should be entitled to a measure of discretion in choosing between alternatives, this particular choice was simply “irrational” or “unreasonable”. What is relevant, however, is that *Cox* may have put the *idea* of a potentially intrusive form of means-end scrutiny squarely on the table.

¹ [1992] 2 IR 503.
² See e.g. per Hamilton CJ in *Rock v Ireland* [1997] 3 IR 484, at 500 and per Costello P in *Heaney v Ireland* [1994] 3 IR 593, at 607 and in *McCann v Minister for Education* [1997] 1 ILRM 1, at 10-11. See also, Kelly, *The Irish Constitution*, (4 Ed., Dublin, Butterworths, 2003), at 1271. However, forms of similar means-end review existed in various forms for many years before *Cox*. See e.g. *Quinns Supermarket v The Attorney General* [1972] IR 1, *State (M) v Minister for Foreign Affairs* [1979] IR 73. Forms of it had been considered in relation to executive review in *Hand v Dublin Corporation* [1991] 1 IR 409 and *Fajujonu v Minister for Justice* [1990] 2 IR 151. It is perhaps for this reason that the editors of *The Irish Constitution* refer to *Cox* as an example of how “the hitherto inchoate doctrine of proportionality began to take on a more definite shape”.
³ To put it briefly, the provisions under challenge, provided that a conviction, in the Special Criminal Court of certain offences, brought with it a seven year “ban” from State employment and also involved the loss of all pension entitlements accrued before the date of conviction (Assuming of course, they were accrued from public sources.) The essence of the argument seems to have been that whereas the State is entitled to provide for onerous penalties to combat subversive crime, that the provisions under challenge could overreach that legitimate goal and attach the severe penalties for relatively trivial offences. For the sake of completeness, it should be noted that an Article 40.1 argument seems to have been made, but not considered by the Supreme Court.
Unsurprisingly then, counsel in *Re Article 26 and the Matrimonial Homes Bill, 1993* argued that “the court has power to strike down legislation which goes further than reasonably necessary to secure aims which may themselves be legitimate”. Whereas it was only in argument Finlay CJ replied that “[i]t is not for the Courts to take over the policy making powers of the Oireachtas”. So, counsel put the very idea of *Cox* means-end review before the Court, and Finlay CJ (if not the court) responded negatively by equating the idea of judicial review of legislative choice of means with an undue interference into the realm of policy.

More interesting, however, is that the Supreme Court in *Tuohy v Courtney* introduced a relatively deferential standard of review without any express mention of *Cox*.

The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to *reason and fairness* as to constitute an unjust attack on some individual’s constitutional rights.

In the context of the case, which concerned the constitutionality of aspects of the Statue of Limitations, 1957 Hamilton CJ went on to point out that:

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4 [1994] 1 IR 305.
5 [1994] 1 IR 305, at 308. So, whereas the common good may be served by policies aiming at equality within marriage, this “service” of the common good was “contradicted by the procedures [the bill] establish[ed]”, [1994] 1 IR 305, at 308-309.
6 [1994] 1 IR 305, at 309. A decision pursuant to an Article 26 reference must be a single decision and it must be a decision of the court. Finlay CJ made this remark only in argument which preceded judgment and which is abstracted in the report at 308-312.
7 The Court actually struck down the legislation under challenge as, in the words of Hogan & Whyte, “a disproportionate interference by the State with the rights of the married family”; Kelly, *The Irish Constitution*, (4th Ed., Dublin, Butterworths, 2003), at 1272.
8 This, it may be recalled, is precisely the kind of argument which Marshall JA relied on in *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* [2002] NJ No. 324. In that case, Marshall JA seemed to argue that a mode of constitutional review which implicates the policy choices of the legislature was contrary to the separation of powers. He even argued that least restrictive means test of *Oakes* was wholly unconstitutional. Marshall JA even argued that enquiring into the rationality of the connection between means and end was illegitimate as it involved the review of legislative policy decision. In a unanimous decision, the Supreme Court utterly rejected this approach. See *Newfoundland (Treasury Board) v Newfoundland Association of Public Employees* 2004 SCCDJ 3222. Costello J made something of a similar argument when counsel suggested that legislation under challenge in *The Attorney General v Paperlink*. [1984] ILRM 373 where it was contended that if the State monopoly on post delivery was organised differently then it would be less restrictive of the right to earn a livelihood but would still serve the objectives of its parent legislation. Whereas he held that the monopoly did in fact restrict the right to earn a livelihood Costello J would not allow the plaintiffs to argue that this restriction was illegitimate under what was effectively a proportionality test. He said that “this court is not the forum in which to decide whether a postal service organised on lines advocated by the defendants experts is one which meets the requirements of the common good. These are matters for the Oireachtas to determine.”
10 [1994] 3 IR 1, at 47 (emphasis added).
What this Court must do is to ascertain whether the extent and nature of such hardship is so undue and so unreasonable having regard to the proper objectives of the legislation as to make it constitutionally flawed.\textsuperscript{11}

Whereas the word “deference” is not mentioned, the \textit{Tuohy} decision became the standard by which later courts “water-down” the potential for non-deferential application of the proportionality test.\textsuperscript{12} That is to say that courts specifically cite \textit{Tuohy} as a reason to apply proportionality in a relatively deferential manner (which I will explain in a moment). Again, I am not saying that \textit{Cox} required one to reject deference. I am simply pointing out that read in a certain way it had the potential to limit legislative discretion in the choice of means in a very significant way. What is interesting, however, is just how, in such a short space of time, the Supreme Court in \textit{Cox} may formulate what seems to be a forerunner to the \textit{Heaney} proportionality test, but then, without explanation as to why, seemingly “pull back” to introduce a general standard of deference wherever legislation can be viewed as effecting a balance between rights and competing interests.

\textbf{Heaney and Onwards}

The modern formulation of the proportionality test can be found in Costello P’s judgment in \textit{Heaney v Ireland} \textsuperscript{13} where he adopted what is, effectively, the \textit{Oakes} test of Charter-compatibility.\textsuperscript{14}

The objective of the impugned provision must be of sufficient importance to warrant overriding a Constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
(b) impair the right as little as possible, and
(c) be such that their effects on rights are proportional to the objective\textsuperscript{15}

Of course, this test can be applied both deferentially and non-deferentially. However, what is particularly relevant is part (b) which we may refer to as the least restrictive alternative test which is an \textit{addition} to the rationality test of part (a). Thus, at the very least, the \textit{Heaney} test suggests that something \textit{more} than a rational connection between means and end is required and leaves open the possibility of arguing how deferentially the court should approach this question. Thus, a court must decide \textit{how} to apply the least restrictive alternative test. This can be relatively deferentially by allowing the legislature to choose between a range of reasonably alternative

\textsuperscript{11} [1994] 3 IR 1, at 48 (emphasis added).
\textsuperscript{12} Indeed, for an express judicial association between the \textit{Tuohy} standard and deference see the decision of Kearns J in \textit{King v Minister for the Environment} [2004] 3 IR 345.
\textsuperscript{13} [1994] 3 IR 593. It may be noted that the Supreme Court decision on appeal is reported at [1996] 1 IR 580 but whereas it spoke of a “proportionate” limitation on the right to silence, it did not cite or approve the more forensic test adopted by Costello P. That said, and whereas later cases do, on occasion, refer to the more general requirement of “proportionality” in the Supreme Court judgment, the dominant view is that Costello P’s is “the” appropriate test.
\textsuperscript{15} [1994] 3 IR 593, at 607.
measures, or very non-deferentially, through requiring the legislature to adopt what is actually the least restrictive means possible for limiting the right at hand.

My argument is that in the case-law which follows Heaney, the courts continue to shift between standards of review without really explaining why their choices (which, of course, reflect choices about deference) are justified or, in the worst cases, without recognising that different cases have made different choices. Of course, everything that follows depends on accepting one premise – that choosing between Tuohy and Heaney standards or cross-applying Tuohy into Heaney says something about how the court thinks about deference, but I think that is a reasonable premise.

Dominance of Tuohy over Heaney?

In cases decided after Heaney the Supreme Court continued to apply Tuohy as the relevant standard of review without considering (at least expressly) whether Heaney may have suggested “another way”. At the same time, however, it seems that lawyers were aware of the possibility of making proportionality-esque arguments and argued in both Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, 1995 and TF v Ireland that the legislature could have pursued the legislative objective in both cases through less restrictive means. The Court, however, preferred to deal in the language of Tuohy rather than “square up” to the question of alternative measures.

16 Or as Doyle puts it in a different context “the courts seldom advert to differences between the standard of review which they articulate and standards articulated in other cases”. Doyle, Constitutional Equality Law, (2004, Thompson Round Hall), at 105.
17 For express judicial support of this premise, see King v Minister for the Environment [2004] 3 IR 345.
18 For example, the Tuohy standard was applied in Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, 1995 [1995] 1 IR 1, at 45 to hold that Bill to be a reasonable attempt to balance the rights of the mother and unborn child. Similarly, the Supreme Court in TF v Ireland [1995] 1 IR 321, at 370, when considering the constitutionality of legislation providing for judicial separation expressly referred to the Tuohy standard. What is notable about these case is that counsel in both cases made arguments which seemed to rely, in part, on the suggestion that the legislature could have pursued their objective with less restrictive means – i.e. invoking the essence of the proportionality test. The Court however, preferred to deal in the language of Tuohy. Indeed, the Supreme Court specifically cited Kenny J’s dictum from Ryan v The Attorney General to further the suggestion that the court should be especially cautious when dealing with legislation which reflects choices in controversial areas of social, economic or medical policy.
21 Indeed, somewhat like in Re Article 26 and the Matrimonial Homes Bill, 1993, counsel argued that the rights of the unborn had not been restricted in the least possible manner. Counsel argued in respect of minors that a failure to require either parental consent or notification for the procurement of abortion information was not enough to vindicate the rights of the unborn. The court, however, was not willing to view this a ground of review – rather once the balance struck between rights could be viewed as “reasonable”, the legislation would stand. Indeed, just as in Re Article 26 and the Information (Termination of Pregnancies) Bill, 1995 it was argued that a method which was did less violence to the institution of marriage and family rights was available. It was said to make separation available on proof of particular circumstances lasting for twelve months was too short a period. It was contended that the same objective could be reached by a longer period which would encourage reconciliation. In the High Court Murphy J held that the evidence established that the period was justified – i.e. seemingly reaching an independent view on the legislature choice of method.
Perhaps the most striking example of Tuohy-dominance was in relation to part of the decision in *Re Article 26 and Employment Equality Bill, 1996*. The bill under review constituted a legislative attempt to combat discrimination in the workplace, but also provided a lawful basis for certain positive discriminatory measures designed to, *inter alia*, facilitate the re-introduction of persons over the age of 50 into the workforce. The Supreme Court followed Tuohy as the relevant standard for review of legislation and held as follows:

No doubt in this instance the age limit chosen does not correspond to any recognised threshold. Where, however, as here, the Oireachtas was dealing with a specific problem in ensuring that its legislative goal of equality of employment did not unnecessarily frustrate another objective of eliminating or reducing long-term unemployment, it was entitled, as a matter of social policy, to choose between fixing the relevant age at what was an appropriate level or employing another and more flexible, but it may be a less practicable, yardstick, such as the length of time an individual is registered as being one of the long-term unemployed. While it is possible to argue that the Oireachtas has made the wrong choice, that cannot amount to a finding that the classification for which they have adopted is irrelevant to the objective intended to be achieved or unfair or irrational.

Later in the judgment, however, the court cites the Canadian proportionality test (i.e. that which Heaney effectively replicates) as relevant to its review of other aspects of the Bill, but not, it seems in relation to the review of age-based classifications. Perhaps the Court has a sophisticated theory of equality which holds that deferential review is appropriate to age-based classifications. Indeed, one may point out that the Court seems to say that certain types of discrimination other than age-based discrimination are “presumptively invalid” and that it suggests therefore that the onus of proof may shift in such cases. Since an age-based classification is not a member of the “presumptively invalid” class, then deference should follow and hence Tuohy is followed with quite deferential results. The difficulty with this, however, is that it largely an *ex post facto* rationalisation which may, or may not, be what the Court had in mind. Indeed, one may reasonably point out that the talk of presumptively invalid classes of discrimination may simply only shift the onus of proof onto the legislature with the *standard* of proof remaining at the level of rationality. The simple point is that one cannot tell and that, it is submitted, is the problem.

**Interplay Between Tuohy and Heaney and the Least Restrictive Alternative**

26 A less charitable explanation is that the Court seems to rely quite strongly on American authority – *Massachusetts Board of Retirement et al v Murgia* (1976) 427 US 307 to support its standard of review for age-based classifications. As I have argued, deference is deemed legitimate in the United States in relation to, for example, age based classifications, because no fundamental rights are burdened. In Ireland, equality is a right in a sense greater (it seems) than that provided for in the 14th Amendment. The court may have a strong, but unexpressed theory about why deference is appropriate in relation to age. It may also have a theory about why deference is not appropriate in other cases. On the other hand, it may simply be misunderstanding the relevance of American authority on equal protection principles.
On occasion, courts have cited *Heaney* as the predominantly relevant standard, but then proceeded to use *Tuohy* to infuse a measure of deference into its application – “watering down” its potential particularly in respect of the least restrictive alternative test. Of course, the Canadian Supreme Court almost immediately began to dilute the potential of *Oakes* and thus the Irish courts are not alone in this regard.\(^{27}\) Our interest, however, is with precisely how the Irish courts went about this.

Take, for example, Keane J’s decision in *Iarnród Eireann v Ireland*\(^{28}\) which concerned the constitutionality of the scheme of joint and several liability under the Civil Liability Act, 1961. The plaintiff argued that less restrictive methods were available which would facilitate the objective of the Act, but at the same time do less violence to its property rights.\(^ {29}\) Whereas Keane J cites from *Heaney* he holds that

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\text{As between defendants, it is provided that there can be an apportionment of blame but if a deficiency has to be made up, in the payment of damages, it is better that it should be made up by someone in default than that a totally innocent party should suffer anew. For the Oireachtas so to provide is within its competence in what is truly an area of policy.}^{30}\]

In this case, therefore, the question of lesser restrictive alternatives is associated with policy-making, such that the court must defer to the legislative choice of means. Perhaps to galvanise this Keane J proceeds to cite *Tuohy* to support the idea of deference when approaching an area where the legislature as sought to balance conflicting interests.\(^{31}\) The difficulty, however, is that one may be left asking why? If the Court accepts *Heaney*, then shouldn’t it be prepared for the obvious result that it may be called upon to decide whether a less restrictive measure was available? If the court believes this to be a “wrong turn” in the jurisprudence, then why does it not say so? Of course, one may point out that it may have been the “policy” aspect of the case which led Keane J to overlay *Heaney* with *Tuohy*, but that simply leads one to query why a legislative “policy” decision is worthy of deference for that reason alone.

A similar “overlaying” of *Heaney* with *Tuohy* can be seen in *Rock v Ireland*\(^{32}\) which concerned a challenge to sections 18 and 19 of the Criminal Justice Act, 1984.\(^ {33}\) In upholding the legislation as a legitimate encroachment onto the right to silence, the Supreme Court first cited *Heaney* as the appropriate test stating that the “principle of proportionality is by now a well-established tenet of Irish constitutional law”.\(^ {34}\) Immediately afterwards, however, it cited *Tuohy* and presented its conclusion in the language of *Tuohy* emphasising the deferential standard appropriate to a case of legislative “balance” paying no close attention to what it just previously described as

\(^{29}\) It was suggested that a mechanism whereby the court could apportion the damages owing from each party as would be just and equitable was more suited.
\(^{32}\) [1997] 3 IR 484.
\(^{33}\) Both sections allowed a court to take inferences from an accused persons failure to answer various questions put to him or her by the Gardaí upon arrest.
\(^{34}\) [1997] 3 IR 484, at 500.
a “well-established tenet of Irish constitutional law”.\textsuperscript{35} Again, at the risk of frustrating the reader with repetition of this point, I do not mean either approach is right or wrong – I simply mean that the Courts citation and application of standards is confusing.\textsuperscript{36} To choose between the \textit{Heaney} standard and something which surely reads as less forensic and more accommodating of deference is a serious choice and one which an observer may expect to see reasoned and justified. In these cases, however, the impression that one may receive is that the Court either views these standards as interchangeable, or is making a conscious, but unexplained, attempt to inject \textit{Tuohy} deference into \textit{Heaney}.

Something similar can be said about the decision in \textit{Enright v Ireland}\textsuperscript{37} which concerned an argument that imposing registration requirements on sex offenders could only be done by allowing the offender a chance to make submissions on what was a “regulatory burden” on his liberty.\textsuperscript{38} Finlay Geoghegan J’s approach was slightly more sophisticated than that described above. She cited \textit{Tuohy}\textsuperscript{39} but \textit{expressly} pointed out that the \textit{Heaney} proportionality test “must be added” to it.\textsuperscript{40} The difficulty, however, is with understanding exactly what this joining achieved by way of the standard of review. In her conclusions, Finlay Geoghegan J clearly applied a proportionality test, but whereas she upheld a rational connection between objective and means, there was no express consideration of whether a less restrictive alternative was available. Rather, Finlay Geoghegan J prefers to point out that the registration requirements were “a minimal burden”.\textsuperscript{41} With respect, if one accepts that rights have been limited, \textit{Heaney} requires one to examine whether the least restrictive method has been used to effect this limitation. Whereas one may think the registration system was a minimal burden, if one accept that it limits the right to fair procedures, that does not dispose of the possibility that such limitation was achievable by less restrictive alternative measures. It is possible, but this is not expressly stated, that the deference

\textsuperscript{35} [1997] 3 IR 484, at 500 (“It is the opinion of this Court that, in enacting ss. 18 and 19 of the Act of 1984, the legislature was seeking to balance the individual’s right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens. In this situation, the function of the Court is not to decide whether a perfect balance has been achieved, but merely to decide whether, in restricting individual constitutional rights, the legislature have acted within the range of what is permissible. In this instance, this Court finds they have done so, and must accordingly uphold the constitutional validity of the impugned statutory provisions.”).

\textsuperscript{36} See also \textit{Meagher v Leary} [1998] 4 IR 33 where it was argued that permitting a district court judge to impose consecutive sentences of up an aggregate of two years duration pursuant to s.5 of the Criminal Justice Act, 1951 (as amended by s.12(1) of the Criminal Justice Act, 1984) on the basis that it took the offence out of the non-minor category and outside the jurisdiction of the district court as a court of summary jurisdiction under Article 38.2. Moriarty J dealt with the constitutional question in the High Court. He cited \textit{Tuohy} as the relevant standard of review again, suggesting that a measure of deference is required when considering a case of “balance”. However, he then proceeds to point out, without further elaboration, that a proper proportionality had been effected between the conflicting rights and interests under review. The lack of forensic review may be due to his citation of the Supreme Court in \textit{Heaney} rather than the more detailed High Court test. Citing the Supreme Court can attract some criticism here, for by this point, it was clearly Costello P’s more detailed test which had attracted judicial attention.

\textsuperscript{37} [2003] 2 IR 321.

\textsuperscript{38} The specific basis for this claim was the right to fair procedures under Article 40.3 and due course of law under Article 38.1.

\textsuperscript{39} [2003] 2 IR 321, at 341-342.

\textsuperscript{40} [2003] 2 IR 321, at 342.

\textsuperscript{41} [2003] 2 IR 321, at 343.
in *Tuohy* has been read into *Heaney* so as to avoid an application of the least restrictive alternative test.

Something of a more reasoned approach, however, can be seen with Kearns J’s decision in *King v Minister for the Environment*.  

In his judgment, Kearns J was relatively (indeed, unusually) express about the connection between *Tuohy* and deference. Indeed, he noted that the whole point of the *Tuohy* standard was to press the need for “deference and restraint”.

When such a test is applied, along with the presumption of constitutionality, the consequence must be that a clear burden of proof is imposed upon a plaintiff and, secondly, to achieve a finding of unconstitutionality, the plaintiff must go so far as to show that the impugned legislation is “so contrary to reason and fairness as to constitute an unjust attack on some individual’s constitutional rights”.

Kearns J also cites *Heaney*, but expressly points out that a court may not engage in a non-deferential application of the least restrictive alternative test. The effect of this, of course, is to overlay the *Heaney* test with the afore-mentioned “deference and restraint”. The difference here, however, is that Kearns J is being relatively clear about what he is doing.

At the same time, however, it is not clear if Kearns J’s means to say review should always be this deferential. This case concerned a question over the constitutionality of legislative measures designed to regulate candidature at Dáil elections, such regulation which Kearns J held was specifically and textually empowered by Article 16.1.1. Because the constitution allocated this power to the Oireachtas, he seemed to reason that judicial deference to its operation of the power was necessary. The difficulty, however, is knowing whether this creates an initial position which, for the purposes of Article 16 review, bleeds into the proportionality test, or whether the need for “deference and restraint” in the application of proportionality is a general requirement.

Kearns J’s consideration of the Article 40.1 aspect of the claim in *King* may lend some assistance here. In a previous case – *Redmond v Minister for the Environment* – candidature regulations requiring a monetary deposit were held unconstitutional on the basis that the discrimination effected between those who could afford it and those who could not could have been avoided by choosing a less restrictive alternative. In this case, Kearns J does not seem to defer to the “new” method of regulating candidature (which had been enacted in response to the decision in *Redmond*) for the purposes of Article 40.1, but positively approves it as being “as good as can

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42 [2004] 3 IR 345.
43 [2004] 3 IR 345, at 375.
44 [2004] 3 IR 345, at 376.
45 [2004] 3 IR 345, at 377. In this regard he cited *Colgan v IRTC* [2000] 2 IR 490 (discussed later) as authority for a deferential application of the least restrictive alternative test. See also [2004] 3 IR 345, at 375 “The court is under an obligation to afford to the legislature appropriate deference in the manner in which it decides to exercise its discretion as to the appropriate mechanisms by which its objectives are to be realised”.
46 [2004] 3 IR 345, at 375.
47 [2004] 3 IR 345, at 375.
realistically be hoped for”. At the same time, he does conclude by commenting that the “Article 40 argument must also be seen in the context of what other Articles provide in this context” referring, it seems, back to his view on deference in the Article 16 analysis which may have informed his decision on the Article 40 point.

Perhaps the best that can be said is that Kearns J’s judgment is a welcome example of expressly associating choices of standards with deference. Moreover, and whereas I will argue against the “textual” association of the State’s regulatory powers and deference later, it is at least significant to see some justification being offered for deference. That said, whereas his reading of Tuohy would suggested that it is, it is unclear whether deference in the Heaney test is a general requirement in judicial review, or limited to cases which have a connection to Article 16. If, indeed, it is a general requirement, then the Article 16 justification (assuming it is valid) could not explain a general practice of deference.

The Deferential Application of Heaney Itself

The previous section examined cases where Heaney has been “watered down” through cross-reference with Tuohy. In this section we will examine cases where it seems that Heaney itself has been applied in a more-or-less deferential sense without reference to Tuohy. We can begin with Murphy v The Independent Radio and Television Commission where it was argued that legislation which prevented the broadcasting of any advertisement directed towards, inter alia, a religious end was unconstitutional. In the High Court it was argued that if the objective of the ban was to prevent offence, then it was overbroad because it caught those religious advertisements which were not offensive. Geoghegan J rejects this:-

It is the fact that the advertisement is directed towards a religious end and not some particular aspect of a religious end which might be potentially offensive to the public.

It is important to note that Geoghegan J here rejects the very idea that there may be more-and-less offensive types of religious advertising. Rather, religious advertising is offensive per se. The Supreme Court, however, did not accept that all religious advertisements may be offensive. This, it would seem, opens the door the argument that the ban was overbroad in its application. It is, however, at this point which the Supreme Court defers:

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50 [2004] 3 IR 345, at 383.
52 In following their statutory duty Under s.10(3) of the Radio and Television Act, 1988 the Independent Television and Radio Commission refused to allow a Dublin radio station to broadcast an advertisement for a presentation about the evidence of the resurrection of Christ. The advertisement read as follows: “What think ye of Christ? Would you, like Peter, boldly say he is the Son of the living God, have you ever exposed yourself to the historical facts about Christ, the Irish Faith Centre are presenting for Easter Week an hour long video by Dr Gene Scott, PhD on the evidence for the resurrection from Monday, 10 to Saturday, 15 April every night at 8.30 and Easter Sunday at 11.30 am and also live by satellite at 7.30 pm, The Irish Faith Centre, 360A North Circular Road, Phibsboro”. It may be noted that Dr Scott was “Gene Scott” in the High Court and “Jean Scott” in the Supreme Court.
53 [1997] 2 ILRM 467, at 480.
[The Oireachtas may well have decided that it would be inappropriate to involve agents of the State in deciding which advertisements, in this sensitive area would be likely to cause offence and which not. In any event, once the Statute is broadly within the area of the competence of the Oireachtas and the Oireachtas has respected the principle of proportionality, it is not for this Court to interfere simply because it might have made a different decision.]

In short, the whole question of the offensiveness of expression is for the legislature. Indeed, the court specifically hints that a better tailoring may have been possible, but still defers to the legislative choice.

In the somewhat similar case of Colgan v The Independent Radio and Television O’Sullivan J seemed to follow the essence of this approach, holding that limitations on the freedom of expression may be sustained where rational, but where they may be wider than strictly necessary.

It appears that the correct approach of this court when considering whether the infringement of a constitutionally protective right impairs that right as little as possible is to refrain from condemning a wider infringement such as a blanket ban notwithstanding that a more selective alternative is admittedly available, if a rational explanation for the wider infringement is available to the Court...Some degree of judicial restraint, appears appropriate, therefore, when the court in the context of applying the proportionality test, is considering whether a statutory infringement of a constitutional right does or does not ‘impair the right as little as possible’. This appears to me the ratio of the Supreme Court judgment in Murphy. This judicial restraint may itself be an application of the presumption of constitutionality in favour of the statutory provision attacked.

A similar decision was reached by the Supreme Court in Re Article 26 and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill, 1999. This Bill required that challenges by way of judicial review to deportation decisions had to be made within 14 days of the decision to deport. The Supreme Court expressly stated that the bill would not fall by reason that a longer extended period would allow the same policy objectives to be attained.

A Different Application of Heaney?

54 [1999] 1 IR 12, at 27.
55 In this regard see the comments of O’Hanlon J in in M.M. v Drury [1994] 2 IR 8, at 13 that “it seems desirable that it should be left to the legislature, and not to the courts to ‘stake out the exceptions to the freedom of speech’” (citing Lord Denning in Re X (A Minor) (Wardship: Jurisdiction) [1975] Fam 47).  
56 [1999] 1 IR 12, at 27, “Counsel for the applicant, argued that it would have been possible to have had - instead of a blanket ban on religious advertising - a more selective administrative system whereby inoffensive religious advertisements would be permitted, and religious advertisements likely to cause offence, banned. No doubt this is true...”.
57 [2000] 2 IR 490.  
58 It is notable that O’Sullivan J here believed that the Supreme Court in Murphy had held the ban was premised on the legitimate view that all religious and political advertisements were offensive. This, however, is what the High, but not the Supreme Court held.  
59 [2000] 2 IR 490, at 512 (emphasis added).  
60 [2000] 2 IR 260.  
61 It should be noted, however, that an application could be made to extend time.  
62 The reasoning of the Court, however, is relatively difficult to understand. It seemed to place reliance on the legislative power under Article 36 to regulate the practice and procedure of the courts which, in the courts view, tended to suggest that such “regulation” had to be approached deferentially. One may point out, however, that regulation of the practice of the procedure of the courts is one thing, but regulating the right of access to the courts is another.
So far we have considered cases where the *Heaney* test has been applied in a relatively deferential manner. This section examines cases which appear different – i.e. where similar express inclusions of deference or rationality are not obvious. However, one has to be quite careful here, a point we may illustrate with *Daly v Revenue Commissioners*[^63] which concerned the constitutionality of a taxation law which, on the facts in *Daly*, effected a “double tax” on the plaintiff. Costello J in the High Court held as follows:

> The section was designed to deal with a transitional situation (namely a windfall gain arising in one year from the change in the basis on which the self-employed were taxed) but in doing so it has imposed a permanent measure which involves a permanently unfair method of collecting tax. And this effect is borne not only by established taxpayers who might have enjoyed the windfall gain if the amendment was not enacted but also by new entrants to the regime who would have obtained no benefits in 1991.[^64]

On the one hand, one may get the impression that the court here is effectively saying that the “transitional situation” could have been dealt with in a less restrictive manner. On the other hand, one may suggest that this was a case where the legislative intrusion was believed to be so unreasonable that even a rationality infused application of the least restrictive alternative test would have resulted in its fall.[^65] The point is simply that an absence of language which would suggest an especially deferential approach does not necessarily mean that a court is acting any non-deferentially.[^66] On the other hand, one may legitimately ask if the court intends to apply a deferential standard of review, why is the kind of language used in cases like *Colgan, King*, or *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* missing?

[^64]: [1995] 3 IR 1. at 7-8.
[^65]: Indeed, Costello J in the High Court specifically holds that he had “neither the jurisdiction nor the competence to say whether or not the taxpayers should have been allowed to enjoy a windfall gain in 1991 or how the objective envisaged by s. 26 could best be achieved.” [1995] 3 IR 1, at 13. This would seem to indicate, a now familiar discomfort with the notion of the minimum restriction test.
[^66]: Something similar can be said about *Re Article 26 and Employment Equality Bill, 1996* [1997] 2 IR 321. For the most part, the Court stated that their review jurisdiction is founded on *Tuohy*. Proporionality, however, is cited from Canadian authority (but not *Heaney*) in respect of the courts consideration of aspects of the Bill dealing with criminal liability. The Bill provided in certain prosecutions arising out of failing to co-operate with an equality investigation, that a certificate stating particular facts relating to the extent of un-cooperative behaviour was prima facie evidence in court. The Court held that the certification procedure failed the rationality aspect of proportionality test, as there was no rational connection between equality in employment and proof of an offence in this manner. This is a more express example of the *Daly* situation – proportionality cannot be said to be applied deferentially, because the legislation fell on the rationality limb of the test and thus the court never reached the least restrictive alternative examination. On the other hand however, the Bill also provided that vicarious liability would attach to employers for various discriminatory acts of employees. The Court decides that this is disproportionate (but it does not say whether this is by reason of an irrational connection between means and end) without an express consideration of the various limbs of the *Heaney* test. If, however, the court felt that there was no rational connection between means and end in respect of this part of the Bill, then on the basis of how it examined the certification issue, would have no difficulty in saying so. The inference may be that rationality was not enough to find this provision unconstitutional and perhaps, what we see, in fact, is an application of the least restrictive alternative or general proportionality aspects of *Heaney* without tempering those with rationality.
We can develop this point in the context of *Dunnes Stores Ireland Company v Ryan*\(^{67}\) which formed the constitutional leg of a relatively protracted resistance to the appointment of an “authorised officer” to inspect the books of the plaintiff company. As far as is relevant, the legislation under challenge provided that a failure to answer questions put by the authorised officer or to co-operate with his investigation were to be treated as criminal offences.\(^{68}\) It was argued, in the classic sense of proportionality that the objective of ensuring proper corporate governance could be met by a measure less destructive of the right to silence. It is perhaps interesting that the State argued that a rational connection between means and end would suffice and specifically submitted that the Supreme Court decision in *Heaney* had not expressly adopted the more “forensic” test offered by Costello P.\(^{69}\) The drift of these submissions seems obvious – the State was attempting to downplay the least restrictive alternative test which was the main limb of the applicants argument and indeed, had been the reason why similar legislation had been held unconstitutional in South Africa.\(^{70}\)

Kearns J, however, proceeded to offer what seemed like a relatively strong application of the least restrictive alternative test in acceding to the plaintiffs arguments.\(^{71}\) So, taking into account the State’s arguments, Kearns J nevertheless seemed to view the least restrictive alternative test as having an existence independent to rationality analysis, and moreover, did not cite any previous authority which may have supported the deferential application of that test.

The Supreme Court offered something of a similar approach to proportionality in *DK v Crowley*\(^{72}\) where it was claimed that provisions of the Domestic Violence Act, 1996 were unconstitutional as they permitted a court to grant a perpetual barring order on an *ex parte* application thus not permitting the effected person a right to be heard in his defence. Whereas the Supreme Court, per Keane CJ, expressly noted that the legislation struck a balance between competing rights and interests, notable absent is any reliance on *Tuohy*.\(^{73}\) Rather, the court specifically points out that in striking such a balance, the legislature may go no further than necessary.\(^{74}\) The contrast with *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* or *Colgan* could hardly be greater. Thus, the court held that the objective of spousal protection could legitimately be served by provision for a temporary order, pending a full hearing on

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\(^{67}\) [2002] 2 IR 60.

\(^{68}\) The legislation under challenge was s.19(5) and s.19(6) of the Companies Act 1990.

\(^{69}\) [2002] 2 IR 60, at 112 reciting counsel’s argument (“There was a rational connection between the means chosen and the objective sought to be attained. The Supreme Court in [*Heaney*] had not specifically adopted the four criteria set out by Costello J. in the High Court in that case. Proportionality was the critical consideration governing the Supreme Court's conclusion.”).

\(^{70}\) See *Ferreira v Levin N.O.* (1996) 1 BCLR 1, where the Constitutional Court of South Africa struck down comparable provisions on what was, essentially, the argument put forward by the applicant in *Dunnes Stores*.

\(^{71}\) On the other hand a somewhat different approach is taken towards s.19(5) which contained the power itself for the authorised officer to demand books. Kearns J seemed to uphold this power on the basis of its legitimate objective and held that any infringement of Article 40 was not enough to out-balance the public interest in this practice. However, it does seem that counsel did not argue in this context that a less restrictive method was in fact available. Those arguments seem to have been directed towards s.19(6).

\(^{72}\) [2002] 2 IR 744.

\(^{73}\) [2002] 2 IR 744, at 757-758.

\(^{74}\) [2002] 2 IR 744, at 757.
notice to the respondent. There was, therefore a method that was less restrictive of the respondents rights to be heard which the legislature had not chosen.75

To conclude on this point the decision in Redmond v The Minister for the Environment76 is striking for a failure to refer to any of the authorities which would support or require a deferential application of Heaney. In this case, Herbert J struck down as contrary to Article 40.1 provisions of electoral legislation which require prospective candidates to provide a monetary deposit as part of the conditions of candidature.77 Whereas he does not cite Heaney by name, it is relatively clear that the provisions fell on the basis that less restrictive measures (namely the use of signature system) were available to serve the legislative objective of reducing the risk of frivolous, vexatious or “crank” candidates. Now, it is not unreasonable to think that a rational connection exists between this legislative objective and the deposit system. If rationality alone was the test, it is possible that the legislation would stand. However, it was the relatively strong application of the least restrictive alternative test (with no stated deference, as in cases like Colgan) which resulted in a finding of unconstitutionality. There was, it seems, no comfort zone of discretion allowed for the legislature in its choice of measures.

The relevance of these cases is simply this. Other decisions have been quite express about why deference is appropriate in the application of proportionality. The decisions just examined, however, are not. Indeed, the decision in DK (whether this was intended or not) reads like a specific rebuke of the previous use of Tuohy or the notion of “balance” to mitigate the least restrictive alternative test. If these decisions are really stronger applications of the proportionality test, then one may reasonably ask why the courts did not see fit to discuss other cases which seemed to call for quite different results. The courts may have very good reason for distancing itself from the application of deference in the Heaney test – the problem is simply that such reasons do not “come out” in the decisions. Rather, as Doyle has observed in a different context, the choice of standards seems relatively inarticulate.78

75 It is notable the Court drew attention to s.17 of the Child Care Act 1991 as a “model” for this kind of alternative. 76 [2001] 4 IR 61. 77 Section 13 of the European Parliament Elections Act, 1997 required a £1,000 deposit for European elections. Section of the Electoral Act, 1992 imposed a similar, but less expensive, requirement for Dáil elections. 78 Doyle, Constitutional Equality Law, (Dublin, Thomson Round Hall, 2004), at 105.