

W201 The Individual and the State

Study notes on irrationality in judicial review

Irrationality

The words irrational and unreasonable are used interchangeably in this context.

A definition

Unreasonable was first defined in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** 1948 Lords by Lord Greene as:

“so unreasonable no reasonable body could have come to the decision”.

Irrationality was defined in the **GCHQ** case 1985 Lords by Lord Diplock as:

“so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question could have arrived at it”.

Examples

An example is **Wheeler v Leicester City Council** 1985 Lords (Council banned rugby club from using its ground over failure to support the Council’s anti-apartheid policy. Held -the decision was irrational - the court also found that the decision was procedurally unfair and there was an improper purpose.)

Another example where it might be invoked would be where a public body makes a decision based on no evidence at all **Coleen Properties Ltd v Minister of Housing and Local Government** 1971 CA (a decision of the Court of Appeal including Lord Denning where Buckley LJ said “the Minister had no sufficient material on which to reach the decision which he did reach, it follows that he acted ultra vires”).

Generally the courts are reluctant to rely on this ground. If they do they are effectively substituting their own judgment for that of the decision maker.

An example of how reluctant courts have traditionally been to rely on this ground can be seen in the development of a very high threshold for intervention requiring bad faith or misconduct (and not just unreasonableness). This test arose in cases in the 1980s involving ministers’ decisions about central and local government finance. It has been described as a “super-Wednesbury” test. In **Nottinghamshire CC v Sec of State for the Environment** 1986 Lords (followed in **R v Sec of State for the Environment ex parte Hammersmith and Fulham LBC** 1990 Lords), Lord Scarman refused to intervene (quoting the separation of powers). He said:

“Judicial review is a great weapon in the hands of the judges but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of

this beneficent power”.

It was he said:

“a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister”.

Summary

The value of this ground is partly as a long stop. It tends to be used to challenge outrageous behaviour by a public authority that does not fit neatly into any other ground.

Human Rights

Before the Human Rights Act 1998 irrationality was relied on in cases where litigants wished to assert human rights. This was because before the Convention was incorporated into English law the decisions or actions of a public body which breached a convention right were not per se illegal. The only ground of challenge was irrationality. The courts said that “the more substantial the interference with human rights the more the court will require by way of justification before it is satisfied that the decision is reasonable” Sir Thomas Bingham in **R v Ministry of Defence ex parte Smith** 1996 C A (Challenge to discharge of homosexuals from the armed forces based on Article 8 - right to privacy).

Since October 2000 when the Human Rights Act came into force challenges for breach of Convention rights can be based on illegality although there is nothing to stop an applicant arguing his case on the grounds of both illegality and irrationality.

In addition where the Human Rights Act is relied on by an applicant, a public authority will usually need to show that one of the limitations on the Convention rights applies and its reliance on the limitation was ‘proportionate’ (ie in **Smith** national security was the limitation on the right to privacy). In cases not involving the Human Rights Act or EU law, for the time being, the test for the acts or decisions of a public body is still - was it irrational? and not - was it proportionate?

Is ‘proportionality becoming a new ground for judicial review?’

“Proportionality” is a public law concept which originated in some European countries and is now established in EU law and in the European Convention on Human Rights. In so far as a case before an English court involves EU law or a Convention point proportionality has therefore become part of English law too.

“Proportionality” is a method judges use of assessing a decision or action of a public body. It must be proportionate in the sense that (as Lord Ackner in **Brind** put it) a sledgehammer must not be used to crack a nut.

It is a similar test to irrationality or unreasonableness in English law but it imposes a lower threshold before a court can intervene. It allows a court to balance conflicting interests. For example in a Convention context, if a public body (or the state) wishes to

restrict a human right that restriction must be proportionate or no greater than is necessary (in the words of the Convention it must be “necessary in a democratic society” and answer a “pressing social need”).

Lord Bingham in **A v Sec of State for the Home Dep’t** 2004 Lords (foreign citizens suspected of terrorism detained pending deportation) described this development by contrasting the traditional Wednesbury approach to judicial review (irrationality) with proportionality. He said “the intensity of review is somewhat greater under the proportionality approach”. One reason for this is because under proportionality the court considers not just the behaviour complained of in isolation (as with irrationality) but instead can look at alternatives. If it can be shown that another way of proceeding would not limit a convention right (at all or to the same extent) then the behaviour may not be proportionate. Wider assessments of this nature tend to involve judges in the merits and not just the processes - areas which were formerly left to politicians and which can be controversial.

This difference between traditional judicial review and the new proportionality test was spelled out in the House of Lords in **R (Begum) v Denbigh High School** 2006 Lords (school ban on the wearing of a particular form of religious dress was upheld) by Lord Hoffman who said:

“In domestic judicial review the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But Article 9 is concerned with substance not procedure. It confers no right to have a decision made in a particular way. What matters is the result.” Lord Hoffman has also repeated this view in **Belfast City Council v Miss Behavin’ Ltd** 2007 Lords.

Lawyers acting for citizens bringing judicial review cases naturally push for the adoption of “proportionality” as a ground for judicial review in **all** cases (whether or not involving EU law or the Convention) as it gives a court a greater scope for reviewing the merits of decisions and substituting the court’s own judgment.

As long ago as 1985 Lord Diplock said in the **GCHQ** case that he did not rule out further development of the three grounds for judicial review on a case by case basis. He said:

“I have in mind particularly the possible adoption in the future of the principle of proportionality which is recognised in the administrative law of several of our fellow members of the EEC”.

However in **R v Home Secretary ex parte Brind** 1991 the House of Lords refused to accept proportionality as a separate and distinct head of judicial review.

The arguments for taking this step have gained momentum with the advent of the Human Rights Act and the increasing use of proportionality by senior English judges. In **R v Chief Constable of Sussex ex parte ITF Ltd** 1999 Lords, Lord Cooke suggested that the test - is the authority’s action reasonable? and - is it proportionate? may produce the same

result. This point was taken up by Lord Slynn in **R (Alconbury Developments Ltd and others) v Secretary of State for the Environment** 2001 Lords when he said:

“ Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing”.

The question this has thrown up is – has the time has come to simplify the law by using just one test (proportionality) in all judicial review cases rather than proportionality in EU and ECHR cases and irrationality in the rest?

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In some cases like the **Alconbury** case and **R (Daly) v Sec of State for the Home Dep’t** 2001 Lords (where Lord Cooke described Wednesbury as an unfortunately retrogressive decision in English law) senior judges seem almost ready to take this step. However in other cases the House of Lords has had the opportunity but has declined to do so. As a result the Court of Appeal in **R (Association of British Civilian Internees Far Eastern Region) v The Secretary of State for Defence** C A 2003 has said that proportionality does not yet exist as a separate ground of judicial review in domestic law in a case which does not concern either EU law or the ECHR. In such a case the Wednesbury test of unreasonableness remains the correct test. Clearly the law is developing here and there may come a day soon when a court will recognise proportionality in place of irrationality as a ground which applies in all contexts – but not yet!