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Intensity of Review
How do judges decide?

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Lord Mance's surprise

Kennedy v Charity Commission

“The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle ... The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich in [*ex parte Bugdaycay*] ... where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, “*the court must ... be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines*”.

A brief history of ... scrutiny (1)

Short v Poole Corporation

- Warrington LJ *“I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void”*

Associated Provincial Picture Houses v Wednesbury Corporation

- Lord Greene MR. No decision *“so unreasonable that no reasonable authority could ever come up with it”*

CCSU v Minister for the Civil Service

- Lord Diplock. *“... a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question ... could have arrived at it ...”*

A brief history of ...scrutiny (2)

Kelsall v DEFRA

- Stanley Burnton J “... *the farmers' income arose from breeding mink ... to state the obvious, breeding requires both male and female animals ... The justification is irrational. It also ignores the fact that male breeding mink are more valuable than female.*”

Bugdaycay v Home Secretary

- Lord Bridge. *Within [the limits of the Court's power of review] ... the court must ... be entitled to subject an administrative decision to ... more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life ... the basis of the decision must surely call for the most anxious scrutiny.*

A brief history of ... scrutiny (3)

R v Home Secretary ex parte Brind

- Lord Bridge. *“In exercising the power of judicial review we ... are ... perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.”*

Hayes v Willoughby

- Lord Sumption. *“A test of rationality ... applies a minimum objective standard ... It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.”*

The full common law package ...

Not just *Wednesbury* rationality, but also ...

- Obligation to act for a proper purpose
- Have regard to relevant matters; disregard irrelevant ones
- Fairness
- Review for mistake of fact, *E v Secretary of State*

What is the underlying principle – abuse of power?
Begbie v Education Secretary; and *Nadarajah v Home Secretary*.

E v Secretary of State

Review for mistake of fact

A principle of review based on “*the principle of fairness*” which will operate on the basis of the following criteria:

- A mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter.
- The fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable.
- The claimant (or his advisers) must not have been responsible for the mistake.
- The mistake must have played a material (not necessarily decisive) part in the reasoning.

Begbie and Nadarajah

Review for abuse of power?

“Abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law. It may be said to be the rationale of the doctrines enshrined in Wednesbury and Padfield, of illegality as a ground of challenge, of the requirement of proportionality, and of the court’s insistence on procedural fairness.”

This describes the conclusion; it may capture the moral impetus; but what principles are in play?

- Good administration (e.g. purpose and relevance)
- Straight-forward and consistent dealing (especially in legitimate expectation cases)
- Some notion of fair balance between general interests and specific adverse impacts
- Reasoned outcomes

How do these principles affect the standard of review?

Standard of scrutiny, measured in specifics. Subject matter of the decision

Less intrusive review

- Decisions depending on social, political or economic choices/assessment (use of finite resources, etc.)
- Especially where the assessment is specific to particular facts
- Decisions on matters of specific expertise on matters outside the experience of the court
- Regulatory judgements
- Institutional competence
- Exceptions prove the rule – e.g. *Bank Mellat v HM Treasury* (foreign policy: targeted impact vs. discrimination)

Standard of scrutiny, measured in specifics. Rights-based decisions

More intrusive review

- What are the fundamental common law rights?
- Fairness; access to justice
- *R(UNISON) v Lord Chancellor*. The SC assessed affordability for itself.
- Per Lord Reed. *“the Fees Order will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice ... the fundamental problem is the assumption that the right of access to courts and tribunals can lawfully be made subject to impositions which low to middle income households can only meet by sacrificing ordinary and reasonable expenditure for substantial periods of time”*
- Rights weighed in the balance, only against compelling competing public interests

Procedural failings and substantive review

The division between substance and process is not as clear as you think. Poor process invites closer scrutiny

- Poor record of decision-making (what was taken into account; what was disregarded)
- Poorly evidenced decisions. Bland statements, mere assertion, not enough
- Poorly reasoned decisions. Flawed logic; lack of rational connection between action and objective.
- Failure to address the “difficult issue”.

Poor process = closer scrutiny

R(Quila) v Home Secretary per Lord Wilson

“I would ... acknowledge that the amendment [to the Immigration Rules] is rationally connected to the objective of deterring forced marriages. ... But the number of forced marriages which it deters is highly debatable. What seems clear is that the number of unforced marriages which it obstructs from their intended development for up to three years vastly exceeds the number of forced marriages which it deters. Neither in the material which she published prior to the introduction of the amendment in 2008 nor in her evidence in these proceedings has the Secretary of State addressed this imbalance – still less sought to identify the scale of it. Even had it been correct to say that the scale of the imbalance was a matter of judgment for the Secretary of State rather than for the courts, it is not a judgment which, on the evidence before the court, she has ever made.”

Common law vs. proportionality

A different standard of review?

HRA proportionality

“... an exacting analysis of the factual case advanced in defence of the measure in order to determine ...” (per Lord Sumption in *Bank Mellat*)

1. Is the objective sufficiently important to justify the limitation of a fundamental right
2. Is the measure rationally connected to the objective
3. Could a less intrusive measure have been used
4. Has a fair balance been struck between the individual's rights and the interests of the community (taking account of the consequences of the measure for the individual).

HRA proportionality is different. The four-stage test falls down at stage 1 because common law review does not depend on whether a fundamental right is in play (and such rights may rarely be in play). Under the HRA the importance attached to the right, informs, and often governs, the standard of scrutiny.

Common law vs. proportionality

A different standard of review?

EU proportionality

- Strong affinity between EU proportionality and common law standards
- Two basic questions: (1) is the measure suitable to achieve the objective pursued; (2) could it be obtained by a less onerous method? See *Lumsdon v Legal Services Board*
- The overall concern under EU law is for balance between private interests and the public interest that the measure under challenge is meant to promote. Intensity of review is variable: no schematic approach; scrutiny appropriate to context.
- If the decision depends on matters of sensitive political, social or economic choice, the level of scrutiny is “*manifestly [=obviously] inappropriate*”. The “less onerous method” test almost vanishes for all practical purposes.
- The EU notion of “sound administration” embraces common law principles of relevance, fairness and proper purpose

EU law (again)

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Cases references

Kennedy v Charity Commission [2015] AC 455
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11KBW is renowned for the outstanding quality of its advice, advocacy and client service.

Jonathan Swift QC is a highly experienced public lawyer. He was First Treasury Counsel from 2007 - 2014. Chambers and Partners 2017 recommends him in the Human Rights and Civil Liberties, Public law and Administrative law, EU law, and Data Protection categories.

"An absolutely first-class lawyer. One of the cleverest people I've ever worked with ... He knows his stuff and has a very good courtroom presence."

"He is brilliant; fantastically clever and very persuasive. He gets to the point, tells them the answer and presses it home."

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