CHAPTER 11

SUBSTANTIVE REVIEW AND JUSTIFICATION

SCOPE

11–001 This chapter considers the following matters.

- The constitutional context in which the courts carry out judicial review of the substance of decisions.[1]
- The *Wednesbury* formulation of unreasonableness as a ground of review, and its subsequent development.[2]
- The use of unreasonable process or justification by public authorities (including failures properly to balance relevant considerations, flaws in logic and reasoning, and decisions which rest on inadequate evidence or a mistake of fact.[3]
- The violation of the constitutional principles of the rule of law or equality.[4]
- Decisions which are oppressive.[5]
- The use of proportionality as a ground of review—as a test of fair balance and in its more sophisticated form as a structured test of justifiability.[6]
- The intensity of substantive review by the court, which ranges from "correctness review" for abuse of power, to "structured proportionality", and a variable intensity of unreasonableness review.[7]
- Comparative perspectives.[8]

INTRODUCTION

11–002 We now turn to the ground of review normally referred to as "unreasonableness" or, under Lord Diplock's redefinition, as "irrationality".[9] This chapter is called "substantive review and justification" for a number

[1] See 11–012.
[2] See 11–018.
[3] See 11–032.
[4] See 11–057.
[5] See 11–070.
[6] See 11–073.
[7] See 11–086.
[8] See 11–103.
[9] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 410–411.

of reasons. First, both the terms "unreasonableness" and "irrationality" are notoriously imprecise. Secondly, the tautological formula of unreasonableness set by the famous *Wednesbury* case[10] ("so unreasonable that no reasonable decision-maker could come to it") has been substantially reformulated in recent years. Thirdly, the concept of "proportionality" has been adopted as the appropriate test for review of European Community law[11] and Convention rights (under the Human Rights Act 1998).[12] Fourthly, there is overlap between proportionality and unreasonableness. Finally, even in respect of purely domestic law, the deeper justification required of decision-makers under the test of proportionality has infiltrated all public decision-making.

11–003 The issue under this ground of review is not whether the decision-maker strayed outside the terms or authorised purposes of the governing statute (the test of "illegality").[13] It is whether the power under which the decision-maker acts, a power normally conferring a broad discretion, has been improperly exercised or insufficiently justified. The court therefore engages in the review of *the substance* of the decision or its *justification*.

11–004 The question of the appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment[14] (to use some of the terms variously employed) which the courts should grant the primary decision-maker under this head of review is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers. This is because there is often a fine line between assessment of the *merits* of the decision (evaluation of fact and policy) and the assessment of whether the principles of "just administrative action"[15] have been met. The former questions are normally matters for the primary decision-maker, but the latter are within the appropriate capacity of the courts to decide. As we shall see, however, this does not mean that the courts may not consider whether the facts or judgment of the authority are properly determined. As public law develops, we are increasingly adopting a "culture of justification"[16] in English public decision-making.

11–005 We shall shortly turn to a discussion of the "unreasonable" decision (used interchangeably, albeit imprecisely, with the term "irrationality" these days) and then consider the "disproportionate" decision. However, it

[10] *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 K.B. 223.
[11] See Ch.14.
[12] See Ch.13.
[13] Seee Ch.5.
[14] On intensity of review, see 11–086.
[15] The term used in s.33 of the Constitution of South Africa and includes the right to administrative action that is "lawful, reasonable and procedurally fair"; *cf.* Art.41 the Charter of Fundamental Rights of the European Union, which establishes a right to "good administration".
[16] The late Professor Etienne Mureinik wrote about the shift in South Africa after the end of apartheid in 1994 from "a culture of authority" to a "culture of justification": E. Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) S.A.J.H.R. 31, 32. See further D. Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 13 S.A.J.H.R. 11; M. Taggart, "Reinventing Administrative Law" in N. Bamforth and P. Leyland (ed.), *Public Law in a Multi-Layered Constitution* (2004), p.311.

should be noted that there are two senses in which both unreasonableness and proportionality are employed as follows.

Unreasonableness review

11–006 Various formulations of the test have been devised and applied by the courts over the years,[17] although the most common contemporary formulation asks whether the decision falls "within the range of reasonable responses open to the decision-maker".[18] Where broad discretionary power has been conferred on the decision-maker there is a presumption that the decision is within the range of that discretion and the burden is therefore on the claimant to demonstrate the contrary.

Anxious scrutiny unreasonableness review

11–007 Where human or fundamental rights are in issue,[19] the courts engage in deeper scrutiny of the decision, and the burden shifts towards the public authority to justify its decision to invade those rights.[20]

Proportionality as a test of fair balance

11–008 Here the court considers whether the public authority has struck a "fair balance" between competing considerations or between means and ends.[21] Courts will normally not interfere with the balance of relevant considerations or with the impact of a decision unless it is *manifestly* disproportionate, so here too the burden of argument of rests on the claimant.

Proportionality as a structured test of justification

11–009 This form of review is most developed in the context of the adjudication of the qualified Convention rights contained in Arts 8–11 ECHR, and in relation to European Community law rights.[22] Here the court assesses lawfulness by applying a structured set of questions relating to the balance, necessity and suitability of the public authority's action. Although the English courts have yet to embrace this form of review outside the fields of European Community law and Convention rights, there are signs that this approach is having a growing influence on the common law in purely domestic cases. The burden of argument falls squarely in these cases on the

[17] See 11–018.
[18] See 11–024.
[19] On rights recognised by common law, see 5–036.
[20] See 11–093.
[21] See 11–075.
[22] See 11–077 and 13–079.

authority to justify its decision to depart from a fundamental norm, although the degree of deference accorded the decision depends upon its context.

Overlap between unreasonableness and proportionality

11–010 To identify these different approaches to proportionality does not, however, mean that there is not overlap between them. Proportionality in the sense of achieving a "fair balance" has always been an aspect of unreasonableness. There are also aspects of the structured test of proportionality which are inherent in traditional notions of unreasonableness (such as the requirement that there be a "rational connection" between the means of a decision and its ends). There may also be aspects of proportionality it its sense of structured justification that could profitably be incorporated into the notion of an "unreasonable" decision (such as the requirement that the decision-maker take into account less restrictive means to achieve a given end). Indeed it may be in the interest of English law to collapse the distinction between unreasonableness and proportionality. Flexibility has its advantages, but different standards for different issues may not serve the needs of a coherent, accessible and comprehensible system of judicial review.

Abuse of power

11–011 To those four categories a further should be added: abuse of power.[23] There are some areas of substantive review where the courts do not accord the pubic authority any discretionary latitude. The term "abuse of power" was first employed in the context of a failure of a decision-maker to fulfil a substantive legitimate expectation derived from an express or implied promise.[24] Its use is intended less to break free from the uncertainties attached to the notion of unreasonableness (the notion of "abuse" is no less sure than that of "unreasonableness")[25] than to evade its connotation of extreme deference by the courts to the decision-maker. Another general term that is gaining currency is that of simple "unfairness".[26]

The Constitutional Context of Substantive Review

11–012 The courts have on occasion regarded it as relevant to the reasonableness of a decision of a Minister that the decision had by resolution been approved by one or both Houses of Parliament.[27] While these resolutions

[23] See 11–087.
[24] *R. v Inland Revenue Commissioners Ex p. Preston* [1985] A.C. 835 at 866–867 (and on legitimate expectations generally see see Ch.12).
[25] *R. (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [67]–[68]; *The Times*, December 14, 2005 (Laws L.J.).
[26] *R. (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982; [2005] Imm. A.R. 535; *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] Q.B. 1044.
[27] *R. v Secretary of State for the Environment Ex p. Nottinghamshire CC* [1986] A.C. 240 at 247 (Lord Scarman); *R. v Secretary of State for the Environment Ex p. Hammersmith & Fulham LBC* [1991] 1 A.C. 521 at 597 (Lord Bridge).

of course fall short of statutory authority, they may constitute strong evidence of the reasonableness of a decision. But such evidence should not be regarded by the courts as conclusive proof of unreasonableness.[28] The resolutions cannot make what is unreasonable, reasonable. The resolutions do not have the imprimatur of statutes and so do not excuse the courts from performing their proper role. Subordinate legislation has recently been held unreasonable despite the fact it was approved in Parliament and supported by ministerial statements. As Lord Phillips of Matravers M.R. put it,

> "the 'wider principle' of common law must accommodate the right and the duty of the Court to review the legality of subordinate legislation. The fact that, in the course of debate, the Secretary of State or others make statements of fact that support the legitimacy of the subordinate legislation, and that the House thereafter approves the subordinate legislation, cannot render it unconstitutional for the Court to review the material facts and form its own judgment, even if the result is discordant with statements made in parliamentary debate".[29]

11–013 In *Huang v Secretary of State for the Home Department*, the House of Lords found unpersuasive the submission of the Secretary of State that the decision-maker and the court should assume that the immigration rules adopted by the responsible Minister and laid before Parliament "had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community".[30] In other cases the courts have deferred to the judgement of public authorities on the ground that they were elected and are politically accountable for their actions.[31] However, political and legal authority should be distinguished, and the courts should not automatically defer to the legislature as they would thus be abdicating their own fundamental responsibility to determine whether the matter in question is lawful.[32]

[28] In *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 2 A.C. 696, the Home Secretary's directions were also approved by both Houses of Parliament. Yet the directives that were held partially invalid in *R. v Immigration Appeal Tribunal Ex p. Begum Manshoora* [1986] Imm. A.R. 385 had also been laid before Parliament.

[29] *R. (on the application of Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789; [2002] Q.B. 129 at [37] (holding a statutory instrument, approved by resolution of both Houses of Parliament, was unreasonable).

[30] *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 W.L.R. 581 at [17]; *cf. Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465, where such an assumption was made in relation to housing policy.

[31] *Secretary of State for Home Affairs v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153 at [62] (Lord Hoffmann); *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] Q.B. 728 at [27] (Laws L.J.).

[32] D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart (ed.), *The Province of Administrative Law* (1997); J. Jowell, "Judicial Deference and Human Rights: A Question of Competence" in P. Craig and R. Rawlings (ed.), *Law and Administration in Europe; Essays in Honour of Carol Harlow* (2003), p.67; J. Jowell, "Judicial

Constitutional and institutional limitations on the court's role

11–014 Asserting the constitutional capacity of the courts in these situations does not, however, mean that the courts should not recognise both their own constitutional and relative institutional limitations. As we have already discussed in relation to the question of "justiciability",[33] decisions involving "policy"—the utilitarian calculation of the public good—such as decisions about the levels of taxation or public expenditure are, constitutionally, in the realm of the legislature.[34] In respect of other decisions, the relative institutional capacity of courts and the legislature, executive and other bodies will be relevant to the extent and degree of judicial intervention. Decisions that are polycentric, involving the allocation of scarce resources[35] (for example, whether a hospital should provide very expensive treatments) are similarly not normally suited to decision by courts.[36]

Deference: Servility, Civility or Institutional Capacity?" [2003] P.L. 592; R. Clayton, "Judicial Deference and the Democratic Dialogue: The Legitimacy of Judicial Intervention Under the HRA 1998" [2004] P.L. 33.; R. Clayton, "Principles for Due Deference" [2006] J.R. 109; Lord Justice Dyson, "Some Thoughts on Judicial Deference" [2006] J.R. 103; R. Edwards, "Judicial Deference under the HRA" (2002) 65 M.L.R. 859; Lord Steyn, "Deference: a Tangled Story" [2005] P.L. 346 and "2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom" [2005] E.H.R.L.R. 349, 359; *et seq.* M. Hunt, "Why Public Law Needs 'Due Deference'", in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (2003), p.351; T.R.S. Allan, "Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] C.L.J. 671; A. Barak, *The Judge in a Democracy* (2006), pp.251–252.

[33] See 1–025–1–043; and see further on deference 5–124–5–134.

[34] *Wilson v First County Trust Ltd* [2003] UKHL 40; [2004] 1 A.C. 816 at [70] (Lord Nicholls: "The more the legislation concerns matters of broad social policy the less ready will be a court to intervene"); *R. (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813; [2003] 1 W.L.R. 2623 at [63]–[64] (Laws L.J.: "A very considerable margin of discretion must be accorded to the Secretary of State. Difficult questions of economic and social policy were involved, the resolution of which fell within the province of the executive and the legislature rather than the courts"; appeal allowed by the HL in *Hooper v Secretary of State for Work and Pensions* [2005] UKHL 29; [2005] 1 W.L.R. 1681).

[35] See 1–033 *et seq*; and see, e.g. *Michalak v Wandsworth LBC* [2002] EWCA Civ 271; [2003] 1 W.L.R. 617 at [41] (Brooke L.J.: "this is pre-eminently a field in which the courts should defer to the decisions taken by a democratically elected Parliament, which has determined the manner in which public resources should be allocated for local authority housing").

[36] This point has been made most forcefully by Lord Hoffmann, "Separation of Powers" [2002] J.R. 137 and his statement in *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc* (the Alconbury case) [2001] UKHL 23; [2003] 2 A.C. 295 at [75]–[76], where he distinguished "policy decisions" from a "determination of right". Policy decisions should be made not by the courts, he said, but, in a democracy by "democratically elected bodies or persons accountable to them". In *Grape Bay Ltd v Attorney General of Bermuda* [2000] 1 W.L.R. 574 at 585 (Lord Hoffmann, for the PCl, held that a restriction on the expansion of a US restaurant chain in Bermuda was a "pure question of policy, raising no issue of human rights or fundamental principle" and the matter was therefore "pre-eminently one for democratic decision by the elected branch of government").

Decisions taken by experts,[37] and those best able to calculate risk,[38] indicate some measure of institutional respect.

Courts' secondary function of testing quality of reasoning and justification

11–015 We do not have any carefully calibrated theory of institutional capacity, but even where the courts recognise their lack of relative capacity or expertise to make the primary decision, they should nevertheless not easily relinquish their secondary function of probing the quality of the reasoning and ensuring that assertions are properly justified.[39] And even policy decisions may contain within them a legal or constitutional principle (the decision of the hospital might, for example, engage a Convention right or fundamental right recognised by the common law) which is the court's to safeguard (for example, where the policy was applied in a discriminatory fashion or offended the right to life). As Lord Nicholls said in *Ghaidan v Godin-Mendoza*[40] in respect of national housing policy:

> "Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based upon grounds such as race or sex or sexual orientation the court will scrutinize with intensity any reasons said to constitute justification".

11–016 In addition, as was reflected in *Huang*,[41] there are some matters in which the determination of policy by the legislative or executive branch is deficient. Lord Bingham distinguished between a case which concerns established housing policy[42]—where the result represented "a considered democratic compromise", and where all parties were represented in the debate and where the issue involved the allocation of finite resources—and the situation in immigration policy where those elements were not present.

[37] See, e.g. *R. v Secretary of State for the Home Department Ex p. Swati* [1986] 1 W.L.R. 477; *R. v Chief Constable of the Merseyside Police Ex p. Calveley* [1986] 1 Q.B. 424; *Pulhofer v Hillingdon LBC* [1986] A.C. 484; *R. v Secretary of State for Social Services Ex p. Stitt* [1990] C.O.D. 288; *R. (on the application of W) v Thetford Youth Justices* [2002] EWHC 1252; (2002) 166 J.P. 453 at [40] (Sedley L.J.: "A youth court has expertise which a higher court lacks"); *R. (on the application of Legal Remedy UK Ltd) v Secretary of State for Health* [2007] EWHC 1252 (court wary of "donning the garb of policy maker" in challenge to restructuring of postgraduate medical training).

[38] See, e.g. *R. (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606; [2002] Q.B. 1391; *R. v Secretary of State for the Home Department Ex p. Turgut* [2001] 1 All E.R. 719 at 729 (Simon Brown L.J.: "The court is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it").

[39] Allan [2006] C.I.J. 671, 693.

[40] [2004] 2 A.C. 557 at [19].

[41] [2007] UKHL 11; [2007] 2 W.L.R. 581.

[42] As in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465.

In cases, therefore, where relevant interests have not been well represented, and where there are other reasons for confidence in the relative institutional capacity of the courts to decide the matter, courts can quite properly review the substance or justification of the matter in question.

Political mandate

11–017 Sometimes local authorities have asserted that their mandate from the electorate permits them to implement a policy without legal restraint. In *Bromley*[43] the Greater London Council justified a 25 per cent reduction in transport fares partly on the basis that the recent election had given them a "mandate" to lower the fares in the way the successful majority party had promised in its electoral manifesto. The House of Lords disagreed; those elected had to consider the interests of all the inhabitants of the area, in the light of their legal duties.[44] In the *Tameside* case[45] the local authority introduced a scheme, promised at a recent local election, to abolish certain recently established comprehensive schools and to reintroduce grammar schools by a process of selection, all in a period of four months. The Secretary of State sought to intervene under s.68 of the Education Act 1944 which permitted him to do so when "he was satisfied" that a local authority were acting "unreasonably". The House of Lords held that the Secretary of State did not in those circumstances have the power to intervene because the council had not acted unreasonably in the *Wednesbury* sense. This decision was considerably influenced by the fact that the local authority was recently elected, with a mandate to reintroduce grammar schools. While superficially contradictory, these two cases were decided on different grounds. The *Bromley* case was decided on the basis of the council exceeding the particular powers established in the governing statute. It is therefore authority for the correct proposition that no "mandate" from the electorate can serve as a justification for an illegal act.[46] In *Tameside*, although the scope of the governing statute was in issue, the case turned on the unreasonableness of the local authority's behaviour. A manifesto commitment may be relevant evidence of the unreasonableness

[43] *Bromley LBC v GLC* [1983] 1 A.C. 768.

[44] Cited with approval in *R. (on the application of Island Farm Developments Ltd) v Bridgend County BC* [2006] EWHC 2189; [2007] B.L.G.R. 60 at [23] (Collins J.); and *R. v Secretary of State for Employment Ex p. Begbie* [2001] 1 W.L.R. 1115 (pre-election promise does not create a legitimate expectation).

[45] *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014.

[46] In *Bromley*, Lord Denning, in the CA, [1982] 2 W.L.R. 62 said that a manifesto should "not be taken as gospel. . . When a party gets into power, it should consider any proposal or promise afresh, and on its merits. . .". And see his reservations about the doctrine of the mandate in The Changing Law (1953) where he wrote: "Some people vote for [a member] because they approve of some of the proposals in his party's manifesto, others because they approve of others of the proposals. Yet others because, while they do not really approve of the proposals, they disapprove still more of the counter-proposals of the rival party, and so forth. It is impossible to say therefore that the majority of the people approve of any particular proposal, let alone every proposal in the manifesto" (at 8–10).

of a decision which permits a range of lawful courses of action. It should never, however, be taken as conclusive proof of reasonableness, as other factors may be weighed against it.[47]

The Wednesbury Formulation and its Subsequent Development

11–018 Substantive review in English law has been dominated by the concept of unreasonableness closely identified with the famous formulation by Lord Greene M.R. in the *Wednesbury* case,[48] that the courts can only interfere if a decision "is so unreasonable that no reasonable authority could ever come to it".[49] That formulation attempts, albeit imperfectly, to convey the point that judges should not lightly interfere with official decisions on this ground. In exercising their powers of review, judges ought not to imagine themselves as being in the position of the competent authority when the decision was taken and then test the reasonableness of the decision against the decision they would have taken. To do that would involve the courts in a review of the merits of the decision, as if they were themselves the recipients of the power. For that reason Lord Greene in *Wednesbury*[50] thought that an unreasonable decision under his definition "would require something overwhelming" (such as a teacher being dismissed on the ground of her red hair).[51]

Wednesbury is tautological

11–019 One of the difficulties with the *Wednesbury* test is its tautological definition,[52] which fails to guide us with any degree of certitude.[53] Lord Greene did attempt to provide a list of administrative sins which he thought were

[47] See also *R. v Somerset CC Ex p. Fewings* [1995] 1 All E.R. 513 where (in relation to the council's ban on stag-hunting over its own land) Laws J. held that the fact that the council were an elected body would not influence the court to interpret "benevolently" whether the decision was within the permissible scope of the statute, "as may be the approach in the case of an assessment of the reasonableness of the exercise of a discretionary power".

[48] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223. For a history of that case see M. Taggart "Reinventing Administrative Law", in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (2004) at 312; for discussion of scope of *Wednesbury* review see: Lord Irvine, "Judges and Decision-Makers: the theory and practice of *Wednesbury* review" [1996] P.L. 59; P. Walker, "What's Wrong with Irrationality?" [1995] P.L. 556; A. Le Sueur, "The Rise and Ruin of Unreasonableness" [2005] J.R. 32.

[49] [1948] 1 K.B. 223 at 229–230.

[50] [1948] 1 K.B. 223.

[51] [1948] 1 K.B. 223 at 229. The illustration is from *Short v Poole Corp* [1926] Ch. 66. Previous editions of this work considered that cases in the 1960s had shorn the *Wednesbury* formula of its unnecessary reference to "overwhelming" proof.

[52] Because it defines the negative term unreasonableness by both a negative and positive reference to itself: an unreasonable decision is "so unreasonable that no reasonable body should so act".

[53] *R. v IRC Ex p. Taylor (No.2)* [1989] 3 All E.R. 353 at 357 (Glidewell L.J.: ". . .we still adhere to [the *Wednesbury* definition of unreasonableness] out of usage if not affection"); for a criticism of *Wednesbury* see J. Jowell and A. Lester, "Beyond Wednesbury: Towards Substantive Standards of Judicial Review" [1987] P.L. 368.

covered by his notion of unreasonableness, all of which he considered to "overlap to a very great extent" and "run into one another".[54] These included: bad faith, dishonesty, attention given to extraneous circumstances, disregard of public policy, wrong attention given to irrelevant considerations, and failure to take into account matters which are bound to be considered. Some of these instances, particularly those referring to the taking into account of irrelevant considerations (or failing to take them into account) we have seen in Chapter 5 are today more appropriately considered as instances of illegality rather than unreasonableness, because they are extraneous to the objects or purposes of the statute under which the power is being exercised, thus taking the decision outside the "four corners" of the governing statute.

11–020 In contrast, in 1898 a relatively specific account of unreasonableness in the context of a review of local authority byelaws was provided in the case of *Kruse v Johnson*.[55] Lord Russell of Killowen C.J. expressed the view there that byelaws should be benevolently interpreted by the courts, but could be struck down for unreasonableness: "If, for instance, they were found to be partial and unequal in their operation between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them such as could find no justification in the minds of reasonable men".

11–021 Although this formulation includes the indeterminate notion of "manifest injustice", it has the advantage of specifying aspects of unreasonableness such as unequal treatment, bad faith and decisions which constitute an unjustified interference with rights. Over the years some decisions which unduly curtail rights have been held unreasonable, although the specification of the right has not always been articulated. In more recent years, as we shall shortly see,[56] the courts have identified human rights as deserving of particularly anxious scrutiny. Since the HRA 1998 has incorporated into domestic law most of the rights specified in the ECHR, infringement of these statutory rights falls under the ground of review of illegality rather than unreasonableness.[57] Nevertheless, it is still open to the courts to identify fundamental rights inherent in the common law,[58] and the methods of reasoning adopted by the courts in deciding whether a breach of a right is justifiable is still informed by some of the approaches learned through unreasonableness review about the appropriate role of courts and other branches of government.

[54] *Wednesbury* [1948] 1 K.B. 223 at 229.
[55] [1889] 2 Q.B. 291.
[56] See 11–086.
[57] See Ch.13.
[58] See 5–036; 1–015.

Wednesbury associated with extreme behaviour

11–022 Apart from its vagueness, the *Wednesbury* formulation has been challenged in recent years for the reason that it depicts "unreasonableness" as particularly extreme behaviour, such as acting in bad faith, or a decision which is "perverse",[59] or "absurd"—implying that the decision-maker has "taken leave of his senses".[60] In the *GCHQ* case,[61] in the famous passage where he formulated the "grounds" of judicial review, Lord Diplock preferred to use the term "irrational", which he described as applying to "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[62] This definition is at least candid in its acknowledgement that courts can employ both logic and accepted moral standards as criteria by which to assess official decisions, but it does not assist in elucidating any more specific categories of legally unacceptable substantive decisions. In addition, as has been pointed out, the term irrationality has the drawback that it casts doubt on the mental capacity of the decision-maker,[63] whereas many decisions which fall foul of this ground of review have been coldly rational. In addition, Lord Diplock's precondition of decisions which are "outrageous" denotes a very low level of judicial scrutiny.[64] Lord Bingham has noted that the threshold of irrationality is "notoriously high", and that a claimant making a challenge under that head has "a mountain to climb".[65] Lord Cooke opined that *Wednesbury* was "an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation".[66]

[59] *Pulhofer v Hillingdon LBC* [1986] A.C. 484 at 518 (Lord Brightman).
[60] *R. v Secretary of State for the Environment Ex p. Notts CC* [1986] A.C. 240 at 247–248 (Lord Scarman).
[61] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.
[62] [1985] A.C. 374 at 410; *cf. Luby v Newcastle-under-Lyme Corp* [1964] 2 Q.B. 64 at 72.
[63] *R. v Devon CC Ex p. George* [1988] 3 W.L.R. 49 at 51 (Lord Donaldson M.R.: "I eschew the synonym of 'irrational', because, although it is attractive as being shorter than Wednesbury unreasonable, and has the imprimatur of Lord Diplock . . . it is widely misunderstood by politicians, both local and national, and even more by their constituents, as casting doubt on the mental capacity of the decision-maker, a matter which in practice is seldom, if ever, in issue"); reversed in HL [1989] A.C. 573.
[64] Lord Diplock's other attempts at definitions of unreasonableness were based on the notion of "justifiabity": *Bromley LBC v Greater London Council* [1983] A.C. 768 at 821 ("decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them"); *Luby v Newcastle-under-Lyme Corp* [1964] 2 Q.B. 64 at 72 (whether the decision was "exercised in a manner which no reasonable man could consider justifiable"). Under the 1994 Interim Constitution of South Africa where "just administrative action" was enshrined as a fundamental right, it was provided that every person shall have the right to "administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened". Compare s.33 of the current South African Constitution.
[65] *R. v Lord Chancellor Ex p. Maxwell* [1997] 1 W.L.R. 104 at 109.
[66] *R. v Secretary of State for the Home Department Ex p. Daly* [2001] UKHL 26; [2001] 2 A.C. 532 at [32].

Attempts to reformulate Wednesbury

11–023 For that reason, there have been various attempts to reformulate the *Wednesbury* test, such as: "a decision so unreasonable that no person acting reasonably could have come to it",[67] or a decision which elicits the exclamation: "My goodness, that is certainly wrong!"[68]

11–024 These tests perhaps help to give an indication of the flavour of the conduct which qualifies as being within the concept of unreasonableness, but are no more helpful as guides to its precise parameters. Lord Cooke regretted the fact that the *Wednesbury* formula had become "established incantations in the courts of the United Kingdom and beyond".[69] He thought that judges had no need for "admonitory circumlocutions", and preferred the simple test of "whether the decision in question was one which a reasonable authority could reach".[70] He considered that such an "unexaggerated" criterion would "give the administrator ample and rightful rein, consistently with the constitutional separation of powers".[71] Under criticisms such as these, the test is being increasingly rephrased to a decision which is "within the range of reasonable responses".[72] We shall consider below whether this formulation accords more appropriately with the respective roles of judges and administrators.

Statutory unreasonableness

11–025 What standard is implied when a statute requires a public authority not to act "unreasonably"? In *Tameside*[73] the Secretary of State had the power, under the Education Act 1944, to issue directions to the local authority "if he is satisfied" that the local authority is "acting unreasonably". Despite this seemingly subjective formulation, the House of Lords read the term "unreasonably" as expressing the *Wednesbury* formulation. The Secretary of State could therefore issue directions only where the local authority were acting so unreasonably that no reasonable authority could so act.[74]

[67] *Champion v Chief Constable of the Gwent Constabulary* [1990] 1 W.L.R. 1 at 16 (Lord Lowry).
[68] *Neale v Hereford & Worcester CC* [1986] I.C.R. 471 at 483 (May L.J., not in the context of judicial review, but employed by the Lord Donaldson M.R. in *R. v Devon CC Ex p. George* [1998] 3 W.L.R. 49 and in *Piggott Brothers & Co Ltd v Jackson* [1992] I.C.R. 85.
[69] *R. v Chief Constable of Sussex Ex p. International Trader's Ferry Ltd* [1999] 2 A.C. 418.
[70] *cf. Boddington v British Transport Police* [1999] 2 A.C. 143 at 175 (Lord Steyn, asking whether the decision is "within the range of reasonable decisions open to the decision maker").
[71] *International Trader's Ferry* [1999] 2 A.C. 418 at 452.
[72] See, e.g. *Ala v Secretary of State for the Home Department* [2003] EWHC 521 at [44]–[45] (Moses J.); *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716; [2003] 1 W.L.R. 2979 at [20] (Simon Brown L.J.); *R. (on the application of Razgar) v Secretary of State for the Home Department (No.2)* [2003] EWCA Civ 840; [2003] Imm. A.R. 529 at [40]–[41](Dyson L.J.); *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105 (Laws L.J.).
[73] *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 (for a critical account, see D. Bull, "Tameside Revisited: Prospectively 'Reasonable'; Retrospective 'Maladministration'" (1987) 50 M.L.R. 307).
[74] A second aspect of *Tameside* was the possible mistake of material fact: see 11–041–11–057.

11–026 Should the extreme reserve of *Wednesbury*, which was devised to inhibit the powers of *courts* to intervene in the merits of an administrative decision, apply so as similarly to inhibit the actions of a *Minister*, whose constitutional position is entirely different? The matter surely depends upon the administrative scheme established by a particular statute. It could be argued that the Education Act 1944 pursued the purpose the placing of education policy primarily with the local authority, with the Minister having power to intervene only in extreme cases. In the case of other administrative schemes, however, the statute may pose the Minister with fewer obstacles to intervention.[75] For example, s.9 of the Education Act 1981 placed a local authority under a duty to comply with a request from a parent for an assessment of their child's special needs unless the request is in the opinion of the authority "unreasonable". It was held that the "public law test" of reasonableness which was "intended to protect the local authority . . . against interference by the Secretary of State" was not applicable to s.9, which required a "straightforward factual test" of unreasonableness, "based on all the material before the authority".[76] This clearly implies that the *Wednesbury* formulation may be appropriately applied in cases such as that of *Tameside*, but is not appropriate to all statutes where the term unreasonable is employed.[77] Similarly, it was held that a statutory provision of "reasonableness" in relation to the Secretary of State's reviewing of harbour licences should be interpreted in accordance with "common sense" and not technically.[78]

11–027 A similar approach must be taken to any reviewing body. For example, in *Huang* it was held that the task of the immigration appellate authority, on an appeal on a Convention right ground against a decision of the primary decision-maker refusing leave to enter or remain in this country, is to decide itself whether the matter is compatible with a Convention right. It was not a secondary, reviewing function confined to the grounds of judicial review, including unreasonableness.[79] The term "unreasonable", in

[75] Sometimes by permitting the Minister to exercise default powers even in the absence of unreasonable behaviour on the part of a local authority, e.g. the formulation under the Housing Act 1980 which empowered the Secretary of State to intervene to exercise the local authority's powers to sell council housing "where it appears to the Secretary of State that tenants . . . have or may have difficulty in exercising their right to buy effectively and expeditiously": *R. v Secretary of State for the Environment Ex p. Norwich CC* [1982] Q.B. 808.

[76] *R. v Hampshire CC Ex p. W*, *The Times*, June 9, 1994 (Sedley J.).

[77] For example, the wide discretion of a legal aid committee to refuse legal aid "if it appears unreasonable in the particular circumstances of the case": *R. v Legal Aid Committee No.1 (London) Ex p. Rondel* [1967] 2 Q.B. 482.

[78] *R. (on the application of Dart Harbour and Navigation Authority) v Secretary of State for Transport, Local Government and the Regions* [2003] EWHC 1494; [2003] 2 Lloyd's Rep. 607; *R. v Secretary of State for the Environment Ex p. North Norfolk DC* [1994] 2 P.L.R. 78; *R. v Hampshire County Council ex p. W*, *The Times*, June 9, 1995; *R. v Devon CC Ex p. S* [1995] C.O.D. 181.

[79] *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 W.L.R. 581 at [11] affirming the CA [2005] EWCA Civ 105; [2006] Q.B. 1, and overruling *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716; [2003] 1 W.L.R. 2979 and *M (Croatia) v Secretary of State for the Home Department* [2004] UKIAT 24; [2004] Imm. A.R. 211.

its *Wednesbury* or any other sense, is no magic formula; everything must depend upon the context.

Categories of unreasonableness

11–028 The great many cases held unlawful on the ground of unreasonableness may be divided into the following broad categories (recognising of course that there will always be decisions which do not easily fall into any of them, or that overlap between them).

Unreasonable process

11–029 First, is the case where there has been material a defect in the decision-making *process.*[80] The assessment here focuses upon the quality of reasoning underlying or supporting the decision; upon the weight placed upon the factors taken into account on the way to reaching the decision; upon the way the decision is justified. We shall examine here: (a) decisions based on considerations which have been accorded manifestly inappropriate weight; and (b) strictly "irrational" decisions, namely, decisions which are apparently illogical or arbitrary (c) uncertain decisions, (d) decisions supported by inadequate or incomprehensible reasons or (e) by inadequate evidence or which are made on the basis of a mistake of fact.

Violations of common law or constitutional principles

11–030 Secondly, there are situations in which it is alleged that decisions taken violate common law or constitutional principles governing the exercise of official power.[81] These principles include: (a) the rule of law (under which a number of different values are protected, such as access to justice); and (b) equality, which requires decisions to be consistently applied and prohibits measures which make unjustifiable or unfair distinctions between individuals. Another value underlying the rule of law, that of legal certainty, which requires the protection of a person's legitimate expectations, is considered in the next chapter (only because it has developed so many different facets over the past few years, and thus merits separate treatment).[82]

Oppressive decisions

11–031 A third category contains what might be called oppressive decisions.[83] The focus here is upon the end-product of the decision; upon its affect on individuals (and not upon the process by which the decision was reached). Decisions may be impugned under this head because of the unnecessarily

[80] See 11–032–11–056.
[81] See 11–057–11–069.
[82] See Ch.12.
[83] See 11–070–11–072.

onerous impact they have on the rights or interest of persons affected by them. While this category is more pragmatically grounded, it too is not unaffected by constitutional principle, which requires a person's liberties not to be unreasonably infringed.

We examine each of these categories in turn.

Unreasonable Process

11–032 The first category of decision to be considered involves some defect in the process of arriving at the decision; in the way the decision was reached or in the manner by which it has been justified. The focus here is thus upon the factors taken into account by the decision-maker on the way to making the decision; the evidence by which the decision was influenced or the quality of it justification. We shall first look at decisions where the considerations taken into account are wrongly balanced, and then at strictly "irrational" decisions, for instance those that are based upon the lack of ostensible logic or inadequate evidence.

Balance of relevant considerations

11–033 Up to now, the English courts—where no European Community law or Convention rights are in issue—have approached allegations of misbalance as a question of unreasonableness, i.e. a decision is unreasonable, and therefore unlawful, because manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.[84] As we shall see below, English law stands at the brink of a development that would allow a more direct question to be asked, namely whether a decision is unlawful because it is disproportionate (without needing to have regard to the concept of unreasonableness).[85]

Planning cases

11–034 The law reports contain countless examples of the unreasonableness approach to balance. In the context of town and country planning, for instance, a local authority, or the Secretary of State on appeal, may, in considering whether to grant a permission for the change of use of a building, have regard not only to the proposed new use but also to the existing use of the building and weigh the one against the other. The courts are concerned normally to leave the balancing of these considerations to the planning authority.[86] However, where the refusal of planning permis-

[84] This passage was approved by Silber J. in *Secretary of State for Trade and Industry Ex p. BT3G Ltd* [2001] Eu.L.R. 325 at [187] (see subsequently [2001] EWCA Civ 1448).
[85] See 11–077–11–083.
[86] *Tesco Stores v Secretary of State for the Environment* [1995] 1 W.L.R. 759, HL.

sion is based on the preference for the preservation of the building's existing use, the refusal may be struck down in the extreme case where there is in practice "no reasonable prospect" of that use being preserved.[87] In effect, in such a case the courts are holding that the existing use is being accorded excessive weight in the balancing exercise involved. Although planning authorities are required, in deciding whether to grant or refuse planning permission, to have regard to government circulars, or to development plans,[88] a "slavish" adherence to those (relevant and material) considerations may render a decision invalid.[89] The courts have also interfered with the balancing of "material" planning considerations, by holding that excessive weight had been accorded to a planning permission that had long since expired.[90] Although these are all matters of "planning judgment" which is normally for the authority to decide, courts are not "shy in an appropriate case of concluding that it would have been irrational of a decision-maker to have had regard to an alternative proposal as a material consideration or that, even if possibly he should have done so, to have given it any or any sufficient weight".[91]

Other cases

11–035 In licensing cases it has also been held that too much weight had been placed by an authority upon recent precedent refusing refreshment licences and too little on the 50–year previous enjoyment of the licence by the claimant.[92] Similarly, an adjudicator on an asylum appeal, who had reversed the Secretary of State's decision to deport an asylum seeker who had served a prison sentence in the United Kingdom, had placed excessive weight upon the risk of the appellant re-offending, and insufficient weight upon the character of the offence.[93] And where the police, in the face of disruptive demonstrations by animal welfare groups, withdrew protection

[87] *London Residuary Body v Lambeth LBC* [1990] 1 W.L.R. 744; *Westminster City Council v British Waterways Board* [1985] A.C. 676 at 683 (Bridge L.J.: "In a contest between the planning merits of two competing uses, to justify refusal of permission for use B on the sole ground that use A ought to be preserved, it must, in my view, be necessary at least to show a balance of probability that, if permission is refused for use B, the land in dispute will be effectively put to use A"); *Nottinghamshire CC v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 293; [2002] 1 P. & C.R. 30.
[88] See 5–073–5–074.
[89] *Simpson v Edinburgh Corp* 1960 S.C. 313; *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 35 P. & C.R. 259; *R. v Derbyshire CC Ex p. Woods* [1997] J.P.L. 958.
[90] *South Oxfordshire DC v Secretary of State for the Environment* [1981] 1 W.L.R. 1092.
[91] *R. (on the application of Mount Cook Land Ltd) v Westminster CC* [2003] EWCA Civ 1346; [2004] C.P. Rep. 12 at [33] (Auld L.J.).
[92] *R. v Flintshire County Licensing Committee Ex p. Barrett* [1957] 1 Q.B. 350.
[93] *R. (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094; *The Times*, September 13, 2004 (May and Judge L.JJ., Sedley L.J. dissenting); also *R. (on the application of Harris) v Secretary of State for the Home Department* [2001] EWHC Admin 225; [2001] I.N.L.R. 584 (unreasonable to refuse leave to re-enter the UK to a person who had made a brief visit to a dying relative abroad, on the ground of a previous conviction which itself would not have been a ground for deportation).

from the exporters of animals for certain days of the week, it was held by the House of Lords that the considerations taken into account (e.g. pressures on police protection elsewhere in the county) had been fairly balanced against the danger to the rule of law that the withdrawal of protection would entail.[94]

Rationality: logic and reasoning

11–036 Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness.[95] A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion, perhaps "by spinning a coin or consulting an astrologer",[96] or where the decision simply fails to "add up—in which, in other words, there is an error of reasoning which robs the decision of logic".[97]

11–037 "Absurd" or "perverse" decisions may be presumed to have been decided in that fashion, as may decisions where the given reasons are simply unintelligible. Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision, or where there is absence of evidence in support of the decision. Mistake of material fact may also, according to recent cases, render a decision unlawful.

11–038 We have seen that the absence of reasons for a decision may constitute a breach of a fair hearing.[98] Irrationality may also sometimes be inferred from the absence of reasons.[99] When reasons are required, either by statute or by the growing common law requirements, or where they are provided,

[94] *R. v Chief Constable of Sussex Ex p. International Trader's Ferry Ltd* [1999] 2 A.C. 418; Lord Hoffmann, "A Sense of Proportion" (1997) *The Irish Jurist* 49. But substantial withdrawal of police protection was held to be unlawful and a violation of the rule of law: *R. v Coventry City Council Ex p. Phoenix Aviation* [1995] 3 All E.R. 37.

[95] *R. v Secretary of State for the Home Department Ex p. Omibiyo* [1996] 2 All E.R. 901 at 912 (Sir Thomas Bingham M.R.: "I would accordingly incline to accept the Secretary of State's argument on this point, while observing that decisions reached by him are susceptible to challenge on any Wednesbury ground, of which irrationality is only one").

[96] *R. v Deputy Industrial Injuries Commissioner Ex p. Moore* [1965] 1 Q.B. 456 at 488 (Diplock L.J.); *R. v Lambeth LBC Ex p. Ashley* (1997) 29 H.L.R. 385 (points scheme for the allocation of housing was plainly "illogical and irrational"); *R. v Islington LBC Ex p. Hassan* (1995) 27 H.L.R. 485 (finding of intentional homelessness illogical).

[97] *R. v Parliamentary Commissioner for Administration Ex p. Balchin* [1998] 1 P.L.R. 1, 13, cited in *R. (on the application of Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd* [2002] EWHC 2379; [2003] 1 All E.R. (Comm) 65 at [59].

[98] See Ch.7.

[99] *Padfield v Minister of Agriculture Fisheries and Food* [1968] A.C. 997 at 1932 1049 1053, 1054, 1061–1062; *Lonrho Plc v Secretary of State for Trade and Industry* [1989] 1 W.L.R. 525 at 539; *R. v Civil Service Appeal Board Ex p. Cunningham* [1991] 4 All E.R. 310. But it may not be possible for the court to infer unreasonableness from the lack of reasons, see e.g. *R. v Secretary of State for the Home Department Ex p. Adams* [1995] E.C.R. 177 (Steyn L.J. and Kay J.).

even though not strictly required, those reasons must be both "adequate and intelligible".[100] They must therefore both rationally relate to the evidence in the case,[101] and be comprehensible in themselves.[102] The reasons for a decision must not be "self contradictory".[103]

11–039 As we shall see, one of the ingredients of proportionality as applied under European Community law, and under the HRA when applying Convention rights, is that the objectives of a decision or policy must bear a "rational connection" to the measures designed to further the objectives.[104] A similar approach is taken to the notion of unreasonableness or irrationality in domestic law, as shown in a recent case where a non-statutory scheme was introduced to provide compensation for British civilians interned during World War II by the Japanese. The scheme excluded individuals whose parents or grandparents were not born in the United Kingdom. The Court of Appeal examined carefully whether the exclusion bore a rational connection to the "foundation" and "essential character" of the scheme, but held in the circumstances that the scheme did not fail the *Wednesbury* test.[105] The House of Lords had adopted a similar approach in a case where, under an *ex-gratia* compensation scheme, British soldiers injured in Bosnia were accorded treatment different from those injured in Northern Ireland.[106]

Uncertainty

11–040 Substantial doubt over what is intended may result in a decision being held invalid for uncertainty. A byelaw or statutory instrument may be pronounced invalid for uncertainty where it fails to indicate adequately what it

[100] See Ch.7.
[101] *Re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467 at 478 (Megaw J., speaking of the duty to give reasons imposed by the Tribunals and Inquiries Act 1958 s.12 said that the required reasons "must be read as meaning that proper adequate reasons must be given . . . which deal with the substantial points that have been raised").
[102] In *R. v Hammersmith and Fulham LBC Ex p. Earls Court Ltd*, *The Times*, September 7, 1993, it was held that a condition imposed upon an entertainment licence which was so obscure that it necessitated the issue of a construction summons was "unreasonable in the Wednesbury sense" (Kennedy L.J.).
[103] *Mahon v Air New Zealand Ltd* [1984] A.C. 808 at 835 PC (Lord Diplock required the finding to be based on some material that tends logically to show the existence of facts consistent with the finding).
[104] See 11–080 for the test propounded in *De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 A.C. 69, 80 (Lord Clyde), applied by Lord Steyn in *R. (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532 at [27].
[105] *R. (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] Q.B. 1397 at [40].
[106] *R. v Ministry of Defence Ex p. Walker* [2000] 1 W.L.R. 806 at 812 (Lord Slynn: "It is not for the courts to consider whether the scheme . . . is a good scheme or a bad scheme, unless it can be said that the exclusion is irrational or unreasonable that no reasonable Minister could have adopted it"); Lord Hoffmann considered the distinction to be "fine" but not irrational: "That is too high a hurdle to surmount".

is prohibiting.[107] However, a byelaw will be treated as valid unless it was so uncertain in its language as to have no ascertainable meaning or was so unclear in its effect as to be incapable of certain application.[108] Mere "ambiguity" would not suffice.[109] Uncertainty is a ground for invalidating conditions annexed to grants of planning permission and site licences. Such conditions may be void for uncertainty if they can be given no meaning at all, or no sensible or ascertainable meaning.[110] An uncertain decision could also be described as arbitrary, in the sense that "it is incapable of providing any meaningful answer",[111] or indeed as failing to comply with the rule of law.[112]

Inadequate Evidence and Mistake of Fact

Since courts in judicial review are concerned with the law and not the merits of a case, they will not normally interfere with a public authority's assessment of the evidence or the facts.[113] Sometimes there is a double limitation on review for fact, for the courts may be reviewing the decision of an appeal tribunal which itself had jurisdiction only to review the **11–041**

[107] *Staden v Tarjanyi* (1980) 78 L.G.R. 614 at 623 at 624; D. Williams, "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness", in P. Smith (ed.), *Criminal Law: Essays in Honour of J.C. Smith* (1987), p.170. In *McEldowney v Forde* [1971] A.C. 632, the majority of their Lordships assumed that the test of uncertainty applied to statutory instruments as well as byelaws.
[108] *Percy v Hall* [1997] Q.B. 924 at 941 (Simon Brown L.J.).
[109] *cf. Kruse v Johnson* [1898] 2 Q.B. 473.
[110] *cf. Fawcett Properties Ltd v Buckingham CC* [1961] A.C. 636; *Hall v Shoreham-by-Sea UDC* [1964] 1 W.L.R. 240; *Mixnam's Properties Ltd v Chertsey UDC* [1964] 1 Q.B. 214; [1965] A.C. 735; *David Lowe and Sons Ltd v Musselburgh Corp* 1974 S.L.T. 5 (condition incapable of any certain or intelligible interpretation); *Bizony v Secretary of State for the Environment* (1976) 239 E.G. 281 at 284 (test of uncertainty applied to a planning condition was limited to linguistic ambiguity or uncertainty in meaning: mere difficulty in determining whether the condition had been breached on particular facts was not enough); *Shanley M.J. Ltd (In liquidation) v Secretary of State for the Environment* [1982] J.P.L. 380 (condition favouring local people was void for uncertainty); *cf. Alderson v Secretary of State for the Environment* [1984] J.P.L. 429, CA (condition limiting occupation of premises to persons "employed locally in agriculture" was not uncertain); *Bromsgrove DC v Secretary of State for the Environment* [1988] J.P.L. 257 (difficulty of enforcement does not invalidate for uncertainty); *R. v Barnett LBC Ex p. Johnson* [1989] C.O.D. 538 (conditions attached to grant-aid for a community festival prohibiting "political activity" were held "meaningless").
[111] *R. v Bradford Metropolitan Council Ex p. Sikander Ali* [1994] E.L.R. 299 at 308.
[112] *R. v Hammersmith and Fulham LBC Ex p. Earls Court Ltd*, *The Times*, July 15, 1993; *R. (on the application of Z L) v Secretary of State for the Home Department* [2003] EWCA 25 at [17].
[113] See generally: I. Yeats, "Findings of Fact: The Role of the Courts", in G. Richardson and H. Genn (eds), *Administrative Law and Government Action* (1994), Ch.6; T. Jones, "Mistake of Fact in Administrative Law" [1990] P.L. 507; M. Kent, "Widening the Scope of Review for Error of Fact" [1999] J.R. 239; M. Demetriou and S. Houseman, "Review for Error of Fact: a Brief Guide [1997] J.R. 27 (comparison of mistake of fact with the notion of "manifest error" as applied by the ECJ).

primary decision for errors of "law".[114] The complexity intensifies in the light of the notorious difficulty of making a clear distinction between law and fact.[115] These days the prohibition on the court's assessment of fact is being blurred by the requirement that the decision-maker justify all aspects of a decision—be it law, fact, judgement or policy. Authorities acting on behalf of the public ought to be accountable for the overall quality of the decision-making process. Nevertheless, in general courts in judicial review, which is not appeal, should leave assessment of evidence and fact to the primary decision-maker, who is in any event often in a better position than the court accurately to evaluate the facts of a case and to decide their merits. We should therefore briefly consider the difference between law and fact and then go on to consider under what circumstances the courts may interfere on the ground of inadequate evidence or mistake of fact.

Fact and law distinguished

11–042 There is often no difficulty in distinguishing a question of law from one of fact. A finding of fact may be defined as an assertion that a phenomenon exists, has existed or will exist, independently of any assertion as to its legal effect.[116] The meaning that a lawyer should attribute to the terms of a policy of insurance is a question of law; the question whether the holder of a policy has renewed the policy before its expiry is one of fact.

11–043 Perplexing problems may, however, arise in analysing the nature of the process by which a public authority determines whether a factual situation falls within or without the limits of standard prescribed by a statute or other legal instrument. Every finding by a public authority postulates a process of abstraction and inference. At what point does an inference drawn from facts become an inference or law? Scrutton L.J. suggested that if a judge agrees with a decision of the primary decision-maker he calls it one of fact, but "if he disagrees with them then that is one of law, in order that he may express his own opinion the opposite way".[117] Although this statement may appear cynical, it expresses the view that the purpose of

[114] See, e.g. Tribunals, Courts and Enforcement Act 2007 s.11 (right of appeal "on any point of law" from First-tier Tribunal to Upper Tribunal); an appeal on point of law lies from decisions of housing authorities to the county courts.

[115] *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 W.L.R. 1929 at [22] (test set out in the Social Security Contributions and Benefits Act 1972 s.72 is a notional test to be construed in a general sense, and a person's ability to cook a meal is not to be assessed on a day-to-day basis but rather with regard to a whole period). In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 W.L.R. 781 at [4]–[7] (Lord Hope: question of whether a person was biased was a question of law); on bias, see Ch.10.

[116] The 5th edition of this work contained a fuller account of the distinction between law and fact in Ch.5 ("Jurisdiction, Law and Fact"), most of which was written by de Smith.

[117] *Currie v Commissioners of Inland Revenue* [1921] 2 K.B. 332 at 339.

distinguishing law and fact is to delineate a limit on the autonomy of the primary decision-maker.[118]

Matters of degree

11–044 What has been called a question of a matter of degree, is a matter of fact but one on which reasonable persons may arrive at different conclusions on the evidence before them.[119] Examples of such questions are: whether a house is "unfit for human habitation" or whether a "substantial part" of premises is to be reconstructed;[120] whether a house has changed its character because of structural alteration;[121] whether operations on land involve a "material change of use" constituting development for which planning permission is required.[122]

Questions of "mixed law and fact"

11–045 A further concept is that questions of "mixed law and fact". Thus, whether the facts in issue are capable of falling within a category prescribed by statute may be treated as a question of law, since it entails a determination of the legal ambit of that category; whether they do fall within that category may be treated as a question of fact.[123] But the latter question can also be treated as a question of law; the factual part of a question of "mixed law and fact" is then confined to the ascertainment of the primary facts and perhaps the drawing of certain inferences from the facts.[124]

Distinction between fact, judgment and policy

11–046 Finally, mention might be made of the distinction between fact, judgment and policy. In English planning law there is a distinction between facts (which are suitable for rigorous examination at public inquiries—such as

[118] T. Endicott, "Questions of Law" (1998) 114 L.Q.R. 292 (in a subtle analysis, Endicott employs the example of *Couzens v Brutus* [1973] A.C. 854 on disruption of Wimbledon tennis court held not to be "insulting" behaviour, and supports the approach of *Edwards (Inspector of Taxes) v Bairstow* [1956] A.C. 14, concluding that a question of application of fact to law is a question of law when the law requires one answer to the question of application).

[119] W. Wilson, "Questions of Degree" (1969) 32 M.L.R. 361. Endicott (1998) 114 L.Q.R. 292 does not approve of this distinction.

[120] *Re Bowman* [1932] 2 K.B. 621; *Daly v Elstree RDC* [1949] 2 All E.R. 13; *Hall v Manchester Corp* (1915) 84 L.J.Ch. 732; *Atkinson v Bettinson* [1955] 1 W.L.R. 1127; *Bewlay (Tobacconists) Ltd v British Bata Shoe Co* [1959] 1 W.L.R. 45; and *Scurlock v Secretary of State for Wales* (1977) 33 P. & C.R. 202 (whether a building is a "dwelling-house" is a question of fact).

[121] *Mitchell v Barnes* [1950] 1 K.B. 448; *Solle v Butcher* [1950] 1 K.B. 671; *cf. Pearlman v Keepers and Governors of Harrow School* [1979] Q.B. 56.

[122] Town and Country Planning Act, 1990 s.70.

[123] See, e.g. *White v St Marylebone BC* [1915] 3 K.B. 249; *Re Butler* [1939] 1 K.B. 570 at 579; *R. v Supplementary Benefits Commission Ex p. Singer* [1973] 1 W.L.R. 713; *Brooks and Burton Ltd v Secretary of State for the Environment* [1977] 1 W.L.R. 1294; *Clarks of Hove Ltd v Bakers' Union* [1978] 1 W.L.R. 1207 at 1217; *Bocking v Roberts* [1974] Q.B. 307; *Burton v Field & Sons Ltd* [1977] I.C.R. 106; *R. v West London Supplementary Benefits Appeal Tribunal Ex p. Wyatt* [1978] 1 W.L.R. 240.

[124] See, e.g. *Felix v General Dental Council* [1960] A.C. 704 at 717; *Bhattacharya v General Medical Council* [1967] 2 A.C. 259 at 265; *Faridian v General Medical Council* [1971] A.C. 995.

whether a building will obscure a particular view), planning judgment (the question whether the tall building will nevertheless overall improve the environment) and policy (the question whether buildings over a certain height should be allowed at all).[125]

Situations where review of fact permitted

11–047 Despite dicta attempting to restrict judicial review on questions of fact to situations where the public authority is acting "perversely",[126] review of fact has been permitted in the following situations: (a) where the existence of a set of facts is a condition precedent to the exercise of a power—a matter dealt with in Chapter 4;[127] (b) where there has been a misdirection or mistake of material fact; and (c) where the decision is unsupported by substantial evidence

Misdirection or mistake of material fact

11–048 Lord Denning contended on at least three occasions that a misdirection in fact or law could form the basis of review.[128] In the *Tameside* case,[129] judgments in both the Court of Appeal[130] and the House of Lords made similar suggestions. In particular, Lord Wilberforce said:

> "In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact."

[125] See in particular Lord Diplock's attempt to draw that distinction in *Bushell v Secretary of State for the Environment* [1981] A.C. 75 (Lord Edmund-Davies dissenting); *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc* (the Alconbury case) [2001] UKHL 23; [2003] 2 A.C. 295 (distinction made between "policy decisions" and "determinations of rights").
[126] *Pulhofer v Hillingdon LBC* [1986] A.C. 484 at 518 (Lord Brightman: "it is the duty of the court to leave the decision [of the existence or non-existence] of a fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely").
[127] See 4–047 *et seq*; see, e.g. *R. v Secretary of State for the Home Department Ex p. Khawajah* [1984] A.C. 74.
[128] *Secretary of State for Employment v ASLEF (No.2)* [1972] 2 Q.B. 455 at 493; *Laker Airways v Department of Trade* [1977] 1 Q.B. 643 at 705–706; *Smith v Inner London Education Authority* [1978] 1 All E.R. 411 at 415 ("It is clear that, if the education authority or the Secretary of State have exceeded their powers or misused them, the courts can say: 'Stop'. Likewise, if they have misdirected themselves in fact or in law. I go further. If they have exercised their discretion wrongly, or for no good reason, then too the courts can interfere").
[129] *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014.
[130] See, e.g. *Tameside* [1977] A.C. 1014 at 1047 (Lord Scarman: "misunderstanding or ignorance of an established and relevant fact" was within the "scope of judicial review").

11–049 A number of English planning decisions have assumed that a material mistake of fact is a proper ground for the courts to quash the decision of a planning inspector.[131] Where the decision-maker has taken into account as a fact something which is wrong or where he has misunderstood the facts upon which the decision depends, such a decision is clearly an affront to justice on the ground, we would argue, that it is strictly "irrational". However, the courts have been slow to recognise mistake of material fact as a ground of judicial review, because it appears to involve the judges in assessing the merits of a decision. However, there have been instances where the courts have intervened on that basis.[132]

11–050 In *R. v Criminal Injuries Compensation Board Ex p. A* Lord Slynn considered that a decision could be quashed on the basis of a mistake (in relation to material which was or ought to have been within the knowledge of the decision-maker).[133] In *Alconbury* Lord Slynn again confirmed that view, in support of the view that the jurisdiction of the courts in the United Kingdom meet the requirements of the ECHR[134] in that respect.[135] Lord Nolan considered that the matter was settled in *Edwards v Bairstow*,[136] where the House of Lords had upheld the right and duty of an appellate court to reverse a finding which had "no justifiable basis".[137] Lord Clyde held that a reviewing court could penetrate the factual areas of a decision which "are irrelevant or even mistaken".[138]

[131] See, e.g. *Mason v Secretary of State for the Environment and Bromsgrove* DC [1984] J.P.L. 332 (inspector based decision on miscalculation of distance between two properties; but not material); *Jagendorf v Secretary of State* [1985] J.P.L. 771 (material error that extension would not obstruct premises when clearly would do so); *Hollis v Secretary of State for the Environment* (1984) 47 P. & C.R. 351 (Glidewell J. assumes incorrect conclusion by inspector that land never had green belt status a ground for quashing the decision); and T. Jones, "Mistake of fact in Administrative Law" [1990] P.L. 507. *cf. R. v Independent Television Commission Ex p. TSW Broadcasting Ltd* [1996] E.M.L.R. 291, HL (Lord Templeman: "Judicial review does not issue merely because a decision-maker has made a mistake").

[132] See, e.g. *Hollis v Secretary of State for the Environment* (1984) 47 P. & C.R. 351 (incorrect conclusion by inspector that land never had green belt status a ground for quashing the decision); *Simplex GE Holdings Ltd v Secretary of State for the Environment* (1989) 57 P. & C.R. 306 (decision quashed because the Minister mistaken in a "material" or "significant" fact—that council had carried out a study); *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 at 1030 (Lord Scarman: "misunderstanding of ignorance of an established and relevant fact" could ground a claim in judicial review), 1047 (Lord Wilberforce: need for "proper self-direction on the facts"); *Pulhofer v Hillingdon LBC* [1986] AC 484 at 518 (Lord Brightman: duty of a court to leave the decision as to the existence of a fact "to the public body to whom Parliament has entrusted the decision-making power, save in a case were it is obvious that the public body, consciously or unconsciously, are acting perversely"); *Wandsworth LBC v A* [2000] 1 W.L.R. 1246; *R. v Legal Aid Committee No.10 (E. Midlands) Ex p. McKenna* (1990) 2 Admin. L.R. 585 (refusal of legal aid quashed where the decision was based upon a "demonstrably mistaken view of the facts").

[133] [1999] 2 A.C. 330 at 344–445 (citing in support of that proposition the 5th edition of this work, at p.288 and H.W.R. Wade and C. Forsyth, *Administrative Law*, 7th edn (1994), pp.316–318).

[134] Art.6(1) ECHR.

[135] *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [54].

[136] [1956] A.C. 14.

[137] [1956] A.C. 14 at [61].

[138] [1956] A.C. 14 at [62].

11–051 The matter of mistake or ignorance of fact was considered by the Court of Appeal in *E v Secretary of State for the Home Department*.[139] The issue concerned two asylum seekers, both of whom resisted deportation on the ground that they would risk persecution in the country to which they would be deported. The Home Secretary based his decision to deport them on the ground they would not be subject to persecution, in ignorance of other "objective evidence" to the contrary. On appeal, the Immigration Appeal Tribunal acknowledged the mistake, but refused to reopen the matter in the interest of finality. Faced with conflicting authority as to whether "misunderstanding or ignorance of an established and relevant fact"[140] could be a cause of legal invalidity, Carnwath L.J., for the Court, held that mistake of fact "giving rise to unfairness" was indeed a ground on which to quash a decision on judicial review, provided that, first, there was a mistake as to an existing fact (including as to the availability of evidence on the matter). Secondly, the fact must be "established" (and thus "objective" and not "contentious"). Thirdly, the applicant or his advisers must not have been responsible for the mistake and fourthly, the mistake must have played a material (although not necessarily a decisive) part in the decision-maker's reasoning.[141] In so deciding, the Court of Appeal held that mistake of fact under those circumstances could not be absorbed into the traditional grounds of review but that it was a separate and new such ground.[142]

Decisions unsupported by substantial evidence

11–052 This encompasses situations where there is "no evidence" for a finding upon which a decision depends[143] or where the evidence, taken as a whole, is not reasonably capable of supporting a finding of fact. Such decisions may be

[139] [2004] EWCA Civ 49; [2004] Q.B. 1044 (discussed by P. Craig, "Judicial Review, Appeal and Factual Error" [2004] P.L. 788).
[140] The words used by Lord Scarman in *Tameside* [1977] A.C. 1014.
[141] The reasoning in the E case has been endorsed in *R. (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982; [2005] Imm. A.R. 535; and *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808 at [112].
[142] At [62], [63] and [66]. Thus siding with Wade and Forsyth, n.133 above, and not with Lord Slynn who in *R. v Criminal Injuries Compensation Board Ex p. A* [2007] 1 W.L.R. 977 rooted mistake of fact in a breach of natural justice. Carnwath L.J. also disagreed with the 5th edition of this work (at p.288) that mistake of fact could be absorbed into other traditional grounds of review, such as taking into account an irrelevant consideration.
[143] *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 W.L.R. 1320; *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 W.L.R. 433; *Archer and Thompson v Secretary of State for the Environment and Penwith DC* [1991] J.P.L. 1027; *Hertsmere BC v Secretary of State for the Environment and Percy* [1991] J.P.L. 552; *R. v Secretary of State for Home Affairs ex p. Zakrocki* [1996] C.O.D. 304; *R. v Newbury DC Ex p. Blackwell* [1988] C.O.D. 155 (planning committee's failure to obtain evidence of likely increase in road use on safety "unreasonable in the *Wednesbury* sense").

impugned[144] as "irrational"[145] or "perverse", providing that this was a finding as to a material matter.[146] Should we now go further and adopt a general rule empowering the courts to set aside findings of fact by public authorities if "unsupported by substantial evidence"?[147] If such a rule were to become meaningful, it would require bodies which at present conduct their proceedings informally to have verbatim transcripts or to keep detailed notes of evidence.[148] In some contexts the substantive evidence rule has much to commend it; and, as we have noted, some judges have already asserted jurisdiction to set aside decisions based on clearly erroneous inferences of fact either by classifying this type of error as an error of law or merely by proceeding on the assumption that manifest error of fact makes a decision unlawful.

[144] See, e.g. *Allinson v General Council of Medical Education and Registration* [1894] 1 Q.B. 750 at 760, 763; *American Thread Co v Joyce* (1913) 108 L.T. 353; *Smith v General Motor Cab Co* [1911] A.C. 188; *Doggett v Waterloo Taxi Cab Co* [1910] 2 K.B. 336; *Jones v Minister of Health* (1950) 84 Ll. L.Rep. 416; *Cababe v Walton-on-Thames UDC* [1914] A.C. 102 at 114; *Rowell v Minister of Pensions* [1946] 1 All E.R. 664 at 666; *Davies v Price* [1958] 1 W.L.R. 434 at 441–442; *R. v Birmingham Compensation Appeal Tribunal Ex p. Road Haulage Executive* [1952] 2 All E.R. 100; *Maradana Mosque Trustees v Mahmud* [1967] 1 A.C. 13; *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 Q.B. 139 at 155. In India it has been held that facts may be reviewed in judicial review: *Bombay Dying v Bombay Environment Action Group* 2006 (3) S.C.C. 434 at 490 (Sinha J.).

[145] Decisions unsupported by evidence have been held to be unreasonable in: *Osgood v Nelson* (1872) L.R. 5 H.L. 636; *R. v Attorney General Ex p. Imperial Chemical Industries Plc* (1986) 60 Tax Cas. 1; *R. v Birmingham City Council Ex p. Sheptonhurst Ltd* [1990] 1 All E.R. 1026 (no evidence in licensing decision on sex establishment "irrational"); *R. v Housing Benefit Review Board of Sutton LBC Ex p. Keegan* (1995) 27 H.L.R. 92 (lack of evidence of failure to pay rent rendered decision "unreasonable"); *Piggott Bros and Co Ltd v Jackson* [1992] I.C.R. 85 (Lord Donaldson M.R., in the context of employment law, held that, to find a decision "perverse", the appeal tribunal had to be able to identify a finding of fact unsupported by any evidence); *Peak Park Joint Planning Board v Secretary of State for the Environment* [1991] J.P.L. 744 (a conclusion which "flew in the face of the evidence" and was "based on a view of the facts which could not reasonably be entertained" was held to be "perverse"). Sometimes such decisions have been held to involve excess of jurisdiction, e.g. *Ashbridge Investments* [1965] 1 W.L.R. 1320. Lord Diplock occasionally held that the principles of natural justice required a decision to be based on "evidential material of probative value", e.g. *Attorney General v Ryan* [19801 A.C. 718; *R. v Deputy Industrial Injuries Commissioner Ex p. Moore* [1965] 1 Q.B. 456 (reached a verdict that "no reasonable coroner could have reached").

[146] *Miftari v Secretary of State for the Home Department* [2005] EWCA Civ 481.

[147] As in the federal administrative law of the USA (Administrative Procedure Act of 1946 s.10(e)) and Canada (Federal Court Act 1970 s.28)).

[148] See, e.g. *Savoury v Secretary of State for Wales* (1976) 31 P. & C.R. 344 (challenge to a clearance order failed in because of the difficulty in establishing upon what evidence, if any, the local authority decided that there was "suitable accommodation available" for those displaced); *cf. Sabey (H) & Co Ltd v Secretary of State for the Environment* [1978] 1 All E.R. 586 (written evidence admissible to show that there was no evidence upon which the inspector or the Minister could base a finding of fact). For more recent cases where new evidence has been submitted: *R. v Secretary of State for the Home Department Ex p. Turgut* [2001] 1 All E.R. 719; *A v Secretary of State for the Home Department* [2003] EWCA Civ 175; [2003] I.N.L.R. 249; *Khan v Secretary of State for the Home Department* [2003] EWCA Civ 530; *Polat v Secretary of State for the Home Department* [2003] EWCA Civ 1059.

Evidence not before the decision-maker

11–053 One of the difficulties for the courts in permitting mistake of fact in judicial review proceedings is the extent to which they should permit evidence to be submitted which was not before the primary decision-maker. The principles for new evidence were set out clearly by Denning L.J. in *Ladd v Marshall*[149] as follows: (a) when the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing); (b) the new evidence should probably have had an important (thought not necessarily decisive) influence on the result of the case;, and (c) the new evidence was apparently credible although it need not be incontrovertible.

11–054 In the *E* case, Carnwath L.J. said that the admission of new evidence in a case where mistake of material fact was pleaded was subject to the *Marshall* principles, which might be departed from "in exceptional circumstances where the interests of justice required".[150] It should not, however, be assumed that in the English legal system the failure of a party to adduce evidence will lead the court necessarily to infer that the silence should be converted into proof against that party. As was said by Lord Lowry, "if the silent party's failure to give evidence . . . can be explained . . . the effect of his silence in favour of the other party may be either reduced or nullified".[151]

11–055 The wrongful rejection of evidence by a decision-maker may also amount either to a failure to take into account a relevant consideration and thus render the decision unlawful[152] or to a failure to afford procedural propriety.[153]

General principles summarised

11–056 Our view is that mistake of fact in and of itself renders a decision irrational or unreasonable. In general it is right that courts do leave the assessment of fact to public authorities which are primarily suited to gathering and

[149] [1954] 1 W.L.R. 1489 at 1491.
[150] [2004] EWCA Civ 49 at [91]; *Iran* [2005] EWCH Civ 982; [2005] Imm. A.R. 535 (Brooke L.J. carefully considers under what circumstances new evidence may be admitted by the reviewing court where there has been a change of circumstances since the original decision).
[151] *R. v Inland Revenue Commissioners Ex p. TC Coombs and Co* [1991] 2 A.C. 283 at 300; and *Gouriet v Union of Post Office Workers* [1978] A.C. 435 at 486 (Lord Dilhorne). Expert evidence may be rejected without evidence to contradict it where the matter is within the professional experience of a planning inspector: see *Kentucky Fried Chicken (GB) Ltd v Secretary of State for the Environment* (1978) 245 E.G. 839; *Ainley v Secretary of State for the Environment* [1987] J.P.L. 33. Lack of reasons may, however, permit an interference of irrationality: see the cases cited at n.99 above.
[152] See 5–110–5–134.
[153] See Ch.7. See e.g. *R. v Wood* (1855) 5 E. & B. 49 (conviction after refusal to hear submission that byelaw contravened was ultra vires); *GMC v Spackman* [1943] A.C. 627 (doctor struck off register after GMC had refused to receive evidence by him to disprove adultery with patient); *R. v Kingston-upon-Hull Rent Tribunal Ex p. Black* (1949) 65 T.L.R. 209 (tribunal reduced rent after failing to give landlady opportunity to be heard on the substantial issue); *R. v Birkenhead Justices Ex p. Fisher* [1962] 1 W.L.R. 1410; *Bond v Bond* [1967] P. 39.

assessing the evidence. Review must not become appeal. On the other hand it should be presumed that Parliament intended public authorities rationally to relate the evidence and their reasoning to the decision which they are charged with making. The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration; or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision upon any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention. Since *E*, however, the circumstances in which a decision of the primary decision-maker may be impugned on fact has been somewhat curtailed. In *Shaheen v Secretary of State for the Home Department*,[154] Brooke L.J., for the Court of Appeal, was unwilling to reopen the decision of the primary decision-maker taken on a mistaken belief that there was no evidence to refute a material fact. He suggested the following possible summary of the situation to date:

> "(i) Proof or admission that the tribunal of fact misapprehended a potentially decisive element of the evidence before it discloses an error of law (as held in the *E case*)[155]
> (ii) Proof or admission of a subsequently discovered fact permits an appellate court to set aside a decision for fraud, provided that it was potentially decisive and it can be shown that the defendant was responsible for its concealment.
> (iii) The emergence of any other class of new fact, whether contested or not, has either to be processed (within the Immigration Rules in that case) or simply lived with, as Lord Wilberforce explained in the *Ampthill Peerage* case[156]. . . In any other case, finality prevails".

Violation of Constitutional Principle

11–057 We have seen in a number of situations how the scope of an official power cannot be interpreted in isolation from general principles governing the exercise of power in a constitutional democracy.[157] The English courts have relatively recently explicitly referred to the notion of constitutional rights and principles, even in the absence of any written constitution. In the mid-1990s, even before the Human Rights Act 1998 incorporated Convention rights into domestic law, the courts adopted an approach which, instead of seeking to apply the ungrounded unreasonableness standard, based their assessment upon the rule of law and other necessary condition of a

[154] [2005] EWCA Civ 1294; [2006] Imm. A.R. 57; and *Verde v Secretary of State for the Home Department* [2004] EWCA Civ 1726.
[155] [2004] EWCH Civ 49; [2004] Q.B. 1044.
[156] [1977] A.C. 547 at 569.
[157] See 1–015; 5–036.

constitutional democracy. Thus the absence of a prisoner's access to a lawyer,[158] or to the press[159] was struck down not on the ground of unreasonableness (however strictly scrutinised), but on the ground that a fundamental constitutional principle (access to justice and free expression respectively) had been infringed. These principles were implied from the fact that public officials ought to maintain the standards of a modern European democracy.[160] An orthogonal principle of "legality" provided that the courts would apply the rule of law and any other constitutional principles (such as free expression) unless Parliament expressly and clearly excluded them. Ambiguity was not enough to exclude those principles. In practice, any departure from these "home grown" constitutional principles was assessed under the structured proportionality test that we shall consider below[161] under which these rights may be curtailed only to the extent necessary to meet the ends which justify their curtailment.

11–058 In Chapter 5 we considered how a number of rights of the individual have been recognised in the common law.[162] To these we may add the *principles* of respect for the rule of law and equality.[163] The courts presume that these principles apply to the exercise of all public functions. Even where the decision-maker is invested with wide discretion, that discretion is to be exercised in accordance with those principles. However, as long as parliamentary sovereignty endures as the prime constitutional principle (subject to European Community law), other constitutional principles will ultimately give way to Parliament's clear expression of intent to override them.

The rule of law

11–059 The rule of law has proved itself to be elastic enough to be able, particularly in recent years, to act as a significant constraint upon the exercise of administrative discretion in different circumstances. It received statutory recognition in s.1 of the Constitutional Reform Act 2005.[164] The rule of law has been a resilient and effective force behind the general development of judicial review.[165] Dicey's view of the rule of law[166] has been contested,[167] but as a general principle it has provided the major justification for constraining the exercise of official power, promoting the core institutional

[158] *R. v Secretary of State for the Home Department Ex p. Leech (No.2)* [1994] Q.B. 198.
[159] *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115.
[160] *R. v Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539.
[161] See 11–077–11–083.
[162] See 5–036–5–040.
[163] See 1–015–1–021.
[164] "This Act does not adversely affect—(a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle".
[165] J. Jowell, "The Rule of Law Today" Ch.1 in J. Jowell and D. Oliver (eds), *The Changing Constitution*, 6th edn (2007); Lord Bingham, "The Rule of Law" [2007] C.L.J. 67; P. Craig, Appendix 6 to the House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* HL Paper No.151 (Session 2006/07).
[166] A.V. Dicey, *The Law of the Constitution*, 10th edn. (1959).
[167] See, e.g. Sir Ivor Jennings, *The Law and the Constitution* (1933).

values of legality, certainty, consistency, due process and access to justice. Being a principle and not a clear rule, the precise content of the rule of law has been articulated on a case-by-case basis, particularly in recent years.

11–060 In practice, many of the decisions held unreasonable are so held because they offend the values of the rule of law. The concept of "unreasonableness", or "irrationality" in itself imputes the arbitrariness that Dicey considered was the antithesis of the rule of law. A local authority which withdrew the licence of a rugby club whose members had visited South Africa during the apartheid regime fell foul of the rule of law on the ground that there should be no punishment where there was no law (since sporting contacts with South Africa were not then prohibited).[168] A Minister's rules allowing a prison governor to prevent a prisoner corresponding with his lawyer, even when no litigation was contemplated, was held to violate the prisoner's "constitutional right" of access to justice.[169] Access to Justice as a value of the rule of law was again held to have been violated by the imposition of court fees which an impecunious litigant was unable to afford.[170] The courts will not lightly sanction the withdrawal of policing in the face of protesters if do so offends the rule of law.[171]

11–061 The richness of the rule of law's underlying values was demonstrated when a decision had not been communicated to the person affected.[172] The appellant could not easily invoke the normal requirements of the rule of law in her favour as the decision did not take effect retrospectively; ignorance of the law does not normally excuse its application, and the doctrine of prior notice normally applies only to permit the appellant to make representations on the case to the primary decision-maker (here the Home Secretary). Nevertheless, the House of Lords, by majority, held that the decision violated "the constitutional principle requiring the rule of law to be observed".[173] Lord Steyn, with whom the majority of their Lordships concurred, based his argument both upon legal certainty ("surprise is the enemy of justice") and upon accountability: the individual must be informed of the outcome of her case so "she can decide what to do" and "be in a position to challenge the decision in the courts" (this being an aspect of the principle of the right of access to justice).[174] Similarly, the Court of Appeal

[168] *Wheeler v Leicester City Council* [1985] A.C. 1054.
[169] *Ex p. Leech (No.2)* [1994] Q.B. 198.
[170] *R. v Lord Chancellor Ex p. Witham* [1997] 1 W.L.R. 104.
[171] *R v Coventry City Council Ex p. Phoenix Aviation Ltd* [1995] 3 All E.R. 37; *cf. R. v Chief Constable of Sussex Ex p. International Trader's Ferry Ltd* [1999] 2 A.C. 418.
[172] *R. (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 A.C. 604 (legislation permitted asylum-seekers' right to income support to be terminated once their application for asylum had been refused by a "determination" of the Home Secretary. The refusal in this case was recorded only in an internal file note in the Home Office and communicated to the Benefits Agency, which promptly denied the appellant future income support. The determination was not, however, communicated to the appellant).
[173] Lord Steyn at [28].
[174] Lord Steyn at [26]–[38] (who had no truck with the notion that the Home Secretary's determination had formally and strictly been made. This was "legalism and conceptualism run riot", which is reminiscent of the state described by Kafka "where the rights of an individual are overridden by hole in the corner decisions or knocks on the doors in the early hours").

held that the Home Secretary could not follow unpublished guidelines on detention of asylum seekers, and that in the case of interference with the liberty of the subject, publication of the policy was necessary to afford it legality.[175]

The principle of equality

11–062 Baroness Hale has observed that

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being."[176]

There are two senses of equality: formal equality and substantive equality.

Formal equality (consistency)

11–063 Formal equality requires officials to apply or enforce the law consistently and even-handedly, without bias. Dicey considered this to be fundamental to his notion of the rule of law: "With us, every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification".[177] This kind of consistency was fundamental to Dicey primarily because of its value in furthering the central feature for him of the rule of law, namely, legal certainty and predictability.[178] Consistent application of the law also, however, possesses another value in its own right—that of ensuring that all persons similarly situated will be treated equally by those who apply the law. It is this notion of the equal (rather than the certain or predictable) application of the law which is the central aim of formal equality.

11–064 A number of cases have considered the question as to whether selective enforcement or selective concessions (e.g. concessions to individuals or groups of taxpayers by the HM Revenue and Customs) violates equal treatment, or whether to cease a previously unfair practice is unfair to those who were previously unfairly treated. In general, selective enforcement of the law has been held not to breach the principle of equal treatment in view

[175] *R. (on the application of Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768; [2004] I.N.L.R. 139 at [68]; and *R. v North West Lancashire Health Authority Ex p. A* [2000] 1 W.L.R. 977 (suggested that it might be irrational for a health authority not to draft a policy for the allocation of different medical treatments); on legitimate expectations, see Ch.12; on the principle of consistency, see 11–00.
[176] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 at [132].
[177] A.V. Dicey, *The Law of the Constitution*, 10th edn (1959), p.193.
[178] This aim is connected with Dicey's view that discretionary power inevitably leads to its arbitrary exercise. Equal application of the law also formed the basis of Dicey's dubious claim that, unlike what he saw as the French position, in "England" officials were subject to the same law as ordinary individuals.

of the limited resources available to the prosecuting officials and the legitimacy of exemplary prosecutions.[179] However, the principle of consistency has been applied in a number of cases.[180] In holding that the test of whether an applicant for a student grant was "ordinarily resident in the United Kingdom" should be consistently applied, the Master of the Rolls said that "it is a cardinal principle of good public administration that all persons in a similar position should be treated similarly".[181] Where mushroom pickers were excluded from a reduced minimum wage for harvesters, the decision was held to be unreasonable and unlawful.[182] It is well established that planning permission may be refused on the ground that a grant of permission would create a precedent from which, as a practical matter, it would be difficult for the authority to depart without creating an impression of unfairness,[183] thus upholding the notion of consistency and equality of treatment as a "material consideration" in planning. And it is material to the grant of planning permission that permission was granted in other similarly situated cases.[184]

11–065 Although in the past the decisions of planning inspectors were not considered "material considerations" which should be followed in like cases, they have now been accorded the status of precedent in the interest of consistency and equality of treatment.[185] Where a London council devolved its powers to allocate housing to the homeless to seven neighbourhoods, and where this arrangement resulted in the application of variable standards for letting housing to the homeless, this was held to be "unfair and irrational".[186] The preferential allocation of council housing to a councillor, in

[179] On prosecutorial discretion, see 5–071 and Y. Dotan, "Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the Law in England and Israel" [1997] P.L. 513; e.g. *Vestey v IRC* [1980] A.C. 1148; *R. v IRC Ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617; *R. v IRC Ex p. Mead* [1993] 1 All E.R. 772; *Woods v Secretary of State for Scotland* 1991 S.L.T. 197; cf. dicta indicating equality of treatment may be applied in the tax field: *J Rothschild Holdings v IRC* [1988] S.T.C. 435; *R. v IRC Ex p. Warburg* [1994] S.T.C. 518 at 541.

[180] K. Steyn, "Consistency—A Principle of Public Law?" [1997] J.R. 22; *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 A.C. 148 at [122] (Lord Brown of Eaton-under-Heywood: requirement of the ECtHR that the "quality of the law"—in the context of the expression "in accordance with the law"—requires compatibility with the rule of law (*Hewitt v UK* (1992) 14 E.H.R.R. 657) and regarded the "quality of the law" "to encompass notions of transparency, accessibility, predictability and consistency, features of a legal regime designed to guard against the arbitrary use of power and to afford sufficient legal protection to those at risk of its abuse").

[181] *R. v Hertfordshire CC Ex p. Cheung*, *The Times*, April 4, 1986 (Lord Donaldson M.R.).

[182] *R. (on the application of Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC (Admin) 1635 at [74] (citing the 5th edition of this work with approval).

[183] See, e.g. *Collis Radio v Secretary of State for the Environment* (1975) P. & C.R. 390; *Tempo Discount v Secretary of State for the Environment* [1979] J.P.L. 97; *Poundstretcher Ltd v Secretary of State for the Environment & Liverpool Council* [1989] J.P.L. 90. *Rumsey v Secretary of State for the Environment, Transport and the Regions* (2001) 81 P.& C.R. 32.

[184] *Ynys Mon Isle of Anglesey BC v Secretary of State for Wales and Parry Bros* [1984] J.P.L. 646.

[185] *North Wiltshire DC v Secretary of State for the Environment* [1992] J.P.L. 955, CA; *Aylesbury Vale DC v Secretary of State for the Environment and Woodruff* [1995] J.P.L. 26.

[186] *R. v Tower Hamlets LBC Ex p. Ali* (1992) 25 H.L.R. 158 at 314.

order to put her in a better position to fight a local election in her own constituency, was held to be an "abuse of power" because it was unfair to others on the housing list.[187] It has been held that a decision to renew a licence should not disregard the fact that licences were recently granted in other like cases.[188] The Home Secretary was bound to apply an existing policy to the claimant (where no good reason had been advanced for not doing so) in the interest of consistency and fairness.[189]

11–066 The principle of consistency is linked to other aspects of the rule of law, such as that law should be predictable and known in advance so that people are not in ignorance of the way that the law is applied. For that reason, in cases where a policy is insufficiently specified, there may be a legal obligation to provide precise rules to affected parties so that they can be reasonably certain how to plan their actions.[190] An "overbroad" policy may also be held incompatible with the requirement in a number of Convention rights that interference with a right, to be lawful, must be "prescribed by law" (Arts 10 and 11 ECHR) or "in accordance with the law" (Art.8 ECHR). In *R. (on the application of S) v Secretary of State for the Home Department*[191] it was held that a policy document conferring very wide discretion on a Minister to depart from its terms was incompatible with the Convention requirements because it failed to "give any protection against arbitrary interference by Ministers" and because its open-ended nature was not "foreseeable".[192]

Substantive equality

11–067 The second type of equality, substantive equality, does not refer to the enforcement of law but to its content. It seeks equal laws—laws which themselves do not discriminate between individuals on invidious grounds. There are a number of different philosophical theories of substantive

[187] *R. v Port Talbot BC Ex p. Jones* [1988] 2 All E.R. 207, QBD.
[188] *R. v Birmingham City Council Ex p. Steptonhurst Ltd* [1990] 1 All E.R. 1026.
[189] *R (on the application of Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744; [2005] Imm. A.R. 608 at [34] (Pill L.J.). See N. Blake, "Judicial Interpretation of Policies Promulgated by the Executive" [2006] J.R. 298; R. Clayton, "Legitimate Expectations, Policy and the Principle of Consistency" [2003] C.L.J. 93 (emphasising that the rationale of the case was not legitimate expectation but the free-standing principle of consistency); M. Elliott, "Legitimate Expectations, Consistency and Abuse of Power: The Rashid case" [2005] J.R. 281. *R. (on the application of O'Brien) v Independent Assessor* [2007] UKHL 10; [2007] 2 W.L.R. 544 at [30] (concerning the calculation of compensation for miscarriages of justice, "It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed").
[190] See, e.g. *R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2001] EWHC 1174; [2002] EWCA Civ 1409 (applicants for valuable fishing licence entitled to be in no doubt about circumstances in which it would be granted); cf. rule against fettering of discretion discussed in Ch.9.
[191] [2006] EWCA Civ 1157; [2006] I.N.L.R. 575.
[192] At [113].

equality[193] which obviously have not formed the basis for any judicial application of the principle in English law. However, a particular restricted formulation of substantive equality is applied as a "general principle of law" in European Community law[194] and in the law relating to the ECHR, in particular in relation to Art.14.[195] Principles of substantive equality are given effect in several provisions of domestic legislation.[196]

11–068 This formulation has also justified a number of decisions in English administrative law sometimes expressly, but mostly under the guise of unreasonableness. We have already seen that in the 19th century Lord Russell considered that byelaws could be held unreasonable because of "partial and unequal treatment in their operation as between different classes".[197] Although subsequent cases did not articulate the principle with equivalent clarity, unequal treatment has justified a number of instances where the courts have struck down a decision or provision which infringes equality in either its formal or its substantive sense. English common law has traditionally placed ancient duties, requiring equality of treatment, upon common carriers, inn-keepers and some monopoly enterprises such as ports and harbours, obliging them to accept all travellers.[198] In addition the courts have occasionally invoked notions of "public policy" to strike down discriminatory provisions. In *Nagle v Fielden*[199] the Jockey Club's refusal of a horse trainer's licence to a woman was held to be against public policy, and in *Edwards v SOGAT*,[200] a case involving a challenge to the withdrawal of collective bargaining rights, Lord Denning said that our courts "will not allow a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules or in the enforcement of them" (a statement which addresses itself to both substantive and formal equality). In *Ghaidan v Godin Mendoza* (a case under the HRA), holding that unmarried same sex partners were entitled to same inheritance rights to

[193] J. Jowell, "Is Equality a Constitutional Principle?" (1994) C.L.P Pt 2, 1; R. Singh, "Equality: The Neglected Virtue" [2004] E.H.R.L.R. 141; D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn. (2002), Ch.3; T.R.S. Allan, *Law, Liberty and Justice* (1993); C. McCrudden, "Equality and Non-Discrimination", Ch.11 in D. Feldman (ed.), *English Public Law* (2004); Baroness Hale of Richmond, "The Quest for Equality and Non-Discrimination" [2005] P.L. 571; S. Fredman, "From Deference to Democracy: the Role of Equality under the Human Rights Act 1998" (2006) 112 L.Q.R. 53.

[194] See Ch.14.

[195] See Ch.13.

[196] See, e.g. Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660); Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661); Employment Equality (Age) Regulations 2006 (SI 2006/1031).

[197] *Kruse v Johnson* [1889] 2 Q.B. 291.

[198] *Rothfield v NB Railway* 1920 S.C. 805 ("and others who are in a reasonable fit condition to be received"); *Pidgeon v Legge* (1857) 21 J.P 743. Similar principles have applied to the providers of some utilities, e.g. *South of Scotland Electricity Board v British Oxygen Ltd* [1959] 1 W.L.R. 587.

[199] [1966] 2 Q.B. 633.

[200] [1971] Ch. 354. The reach of public policy was not sufficient to prohibit certain forms of discrimination which were thus made unlawful through legislation first passed in the 1960s and now consolidated in the Equality Act 2006.

tenancies as unmarried heterosexual partners, Baroness Hale of Richmond said that unequal treatment

> "is the reverse of the rational behaviour we now expect from government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions."[201]

Illustrations of application of substantive inequality principle in common law

11–069 Independently of European Community law and the ECHR, equality of treatment has shown itself to be a principle of lawful administration in English law.

- *Religion*. In *Board of Education v Rice*, a case noted for its application of natural justice, the substantive issue was the authority's power to fund church schools less favourably than other schools. Lord Halsbury, who felt that the differential treatment was based upon hostility to the church schools said: "it is clear that the local education authority ought to be as impartial as the rate collector who demands the rate without reference to the peculiar views of the ratepayer".[202]
- *Age*. In *Prescott v Birmingham Corp*[203] the corporation, which had power to charge "such fares as they may think fit" on their public transport services introduced a scheme for free bus travel for the elderly. The decision was declared to be an improper exercise of discretion because it conferred out of rates "a special benefit on some particular class of inhabitants [and] would amount simply to the making of a gift or present in money's worth to a particular section of the local community at the expense of the general body of ratepayers".[204] The House of Lords has held (in advance of statutory or European Community law requirements on the matter) that the adoption by a local authority of the statutory criterion of pensionable age (65 for men and 60 for women) as the qualification for free admittance to a leisure centre is a breach of the statutory prohibition against sex discrimination.[205]

[201] [2004] UKHL 30; [2004] 2 A.C. 557, [132].
[202] [1911] A.C. 179, 186.
[203] [1955] 1 Ch. 210.
[204] Clearly the notion of equality applied in *Prescott* would not suit all theories of equality. Local authorities were given power ultimately to allow certain classes of free travel by the Travel Concessions Act 1964. In *Roberts v Hopwood* [1925] A.C. 578 the HL confirmed the view of the district auditor that the attempt of Poplar BC to raise the level of wages of both men and women employees to an equal level was unlawful. Lord Atkinson considered that the council was guided by "eccentric principles of socialistic philanthropy, or feminist ambition to secure the equality of the sexes". Despite its headnote, the case was not decided on unreasonableness but on the ground of illegality, there being no "rational proportion" between the rates paid to women employees and the going market rate; *Pickwell v Camden LBC* [1993] Q.B. 962 at 999–1000 (Ormrod L.J.).
[205] *James v Eastleigh BC* [1990] 2 A.C. 751.

- *Location-related factors*. Conditions in planning policies that favour "locals only" in the allocation of housing or office space have been held unlawful, although if the provision is placed in a development plan, it may thus be considered a material consideration.[206] Questions of place of residence have also arisen in relation to the admissions criteria for schools.[207] The courts have held that admissions policies must treat children both within and outside a local authority boundary in the same way,[208] though proximity to a school may be a valid consideration in determining a school admissions policy,[209] as may religious affiliation even where the school in question was not a church school.[210] The Court of Appeal considered whether the policy to exclude from compensation to former internees (of British nationality) by the Japanese in the Second World War those whose parents or grandparents were not born in the United Kingdom offended the principle of equality. While subscribing to the general acceptance of equality as a constitutional principle, Dyson L.J. held that the birth-related criteria in that case were "not unreasonable in the *Wednesbury* sense".[211] A similar conclusion was reached by the House of Lords in rejecting an argument that differential treatment under an ex gratia compensation scheme of British soldiers injured in Bosnia as compared with those injured in Northern Ireland should be regarded as an irrational distinction.[212]

- *Financial circumstances*. Regulations which restricted the admission of dependent relatives to those having a standard of living "substantially below [their] own country", which would benefit immigrants from affluent countries, were held to be "manifestly unjust and unreasonable".[213] But the court refused to intervene in arrangements under

[206] *Slough Industrial Estates Ltd v Secretary of State for the Environment* [1987] J.P.L. 353; *Kember v Secretary of State for the Environment* [1982] J.P.L. 383. Such conditions may be void for uncertainty, see 11–040. For unreasonably discriminatory taxi licence conditions (giving advantages to Hackney cabs) see *R. v Blackpool BC Ex p. Red Cab Taxis*, *The Times*, May 13, 1995.

[207] See now Department for Education and Skills, *School Admissions Code* (2007).

[208] *R. v Greenwich LBC Ex p. Governors of the John Ball Primary School* (1989) 88 L.G.R. 589; *R. v Kingston-on-Thames LBC Ex p. Kingwell* [1992] 1 F.L.R. 182; *R. v Bromley LBC Ex p. C* [1992] 1 F.L.R. 174; *R. v Rochdale MBC Ex p. Schemet* (1993) 91 L.G.R. 425; *R. v Devon CC Ex p. George* [1989] A.C. 573.

[209] *R. v Rotherham MBC Ex p. LT* [2000] B.L.G.R. 338, CA.

[210] *R. v Governors of Bishop Challoner Roman Catholic School Ex p. Choudhury* [1992] 2 A.C. 182.

[211] *R. (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] Q.B. 1397.

[212] *R. v Ministry of Defence Ex p. Walker* [2000] 1 W.L.R. 806 at 812 (Lord Slynn: "It is not for the courts to consider whether the scheme with its exclusion is a good scheme or a bad scheme, unless it can be said that the exclusion is irrational or so unreasonable that no reasonable Minister could have adopted it").

[213] *R. v Immigration Appeal Tribunal Ex p. Manshoora Bugum* [1986] Imm.A.R. 385 (the offending provision was severed from the rest of the regulations).

which prisoners, granted legal aid for legal representation, could represent themselves in civil proceedings or judicial review claims only if able to meet the costs of travel and a security escort, or make a formal request to the Home Secretary for a direction (which the claimant in this case refused to do).[214]

- *Sexual orientation*. Prior to the HRA, the Court of Appeal accepted the principle of equality as being applicable to the question of the exclusion of homosexual men and women from the armed forces; the policy was not, however, held to be irrational.[215]

- *Nationality*. Rules excluding from employment at GCHQ people whose parents were foreign nationals were held to be made in the interests of national security and non-justiciable.[216]

- *Language*. In a Privy Council appeal, where a challenge was made to a new policy which added Oriental languages to the list of subjects be taken as part of the school-leaving curriculum, the appellants claimed that the policy favoured children from homes where those languages were spoken. Lord Hoffmann did not doubt that equality before the law was a principle which is "one of the building blocks of democracy and necessarily permeates any democratic constitution", as well as "a general axiom of rational behaviour".[217] However, he also acknowledged that the reason for different treatment may involve "questions of social policy, on which views may differ".

Oppressive Decisions

11–070 Official decisions may be held unreasonable when they are unduly oppressive because they subject the complainant to an excessive hardship or an unnecessarily onerous infringement of his rights or interests. As we shall see, the principle of proportionality directs itself to the evaluation of the permitted degree of infringement of rights or interests.[218] However,

[214] *R. v Secretary of State for the Home Department Ex p. Wynne* [1993] 1 W.L.R. 115, HL.
[215] *R. v Ministry of Defence Ex p. Smith* [1996] Q.B. 517, CA: *Smith and Grady v UK* (1999) 29 E.H.R.R. 493 (ECtHR held that the exclusion offended Convention rights under Arts 8 and 13, but did not base their decision upon equality).
[216] *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. Manelfi* [1996] 12 C.L. 65.
[217] *Matadeen v Pointu* [1999] A.C. 98 at 109, citing paras 13–036 to 13–045 of the 5th edn of this work with approval. In *Matadeen*, the appellants failed in their claim that the new policy offended the limited prohibition of unequal treatment under the constitution of Mauritius.
[218] See 11–073 *et seq*.

whether or not proportionality is expressly applied, this aspect of substantive review is well known to English law. As Laws L.J. has said:

> "Clearly a public body may choose to deploy powers it enjoys under statute in so draconian a fashion that the hardship suffered by affected individuals in consequence will justify the court in condemning the exercise as irrational and perverse".[219]

11–071 The focus of attention in these cases will be principally the *impact* of the decision upon the affected person. The outcome or end-product of the decision-making process will thus be assessed, rather than the way the decision was reached (although the factors taken into account in reaching the decision may also be—or may be assumed to be—incorrectly weighed). Since the claim is essentially abuse of power, in the sense of excessive use of power, each case must be considered in the context of the nature of the decision, the function of the particular power and the nature of the interests or rights affected.

Illustrations of oppressive decisions

11–072
- *Imposing an uneven burden*. A very early case involved the Commissioner of Sewers imposing on one landowner alone charges for repairs to a river bank from which other riparian owners had also benefited. This decision was held to be contrary to the law and reason.[220] The actions of a local authority were held *Wednesbury* unreasonable when, in order to avoid raising rents generally as required by legislation, they charged the whole of required rent increases upon a single unoccupied and unfit property.[221]
- *When implementation is impossible*. A byelaw requiring the annual cleaning of lodging houses when access was not always possible.[222]
- Where delegated legislation deviates materially from the general law of the land in imposing "burdensome prohibitions".[223]

[219] *R. (on the application of Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] Q.B. 37 at [41] (neither oppressive, perverse or disproportionate for the council to require an claimant who had not viewed an offered property to accept it on pain of his existing accommodation being cancelled if he did not).
[220] *Rooke's case* (1598) 5 Co.Rep. 99b.
[221] *Backhouse v Lambeth LBC*, *The Times*, October 14, 1972.
[222] *Arlidge v Mayor etc. of Islington* [1909] 2 K.B. 127. Cf. *Dr Bonham's case* (1610) 8 Co.Rep. 107(a) (Coke C.J. said that an Act of Parliament could be controlled by the common law if the Act "is against common right or reason, or repugnant, or impossible to be performed"); in Germany a provision which is impossible of implementation falls foul of the principle of proportionality.
[223] See, e.g. *London Passenger Transport Board v Sumner* (1935) 154 L.T. 108; *Powell v May* [1946] K.B. 330; *R. v Brighton Corp. Ex p. Tilling (Thomas) Ltd* (1916) 85 L.J.K.B. 1552; *R. v Customs and Excise Commissioners Ex p. Hedges & Butler* Ltd [1986] 2 All E.R. 164 (regulation unlawful because it gave power to officials to inspect all the records of a business, and not only those records pertaining to dutiable goods).

- Regulations have been held unreasonable where their effect is to prevent access to the courts.[224]
- Town and country planning provides countless examples where planning conditions have been held unreasonable because of their unnecessarily onerous impact. Although the legislation permits the local authority, or the Secretary of State on appeal, to attach conditions to planning permissions as they "think fit",[225] conditions have been held unreasonable which, in effect, require the developer to dedicate part of his land for public use[226] or otherwise require the developer to provide the off-site physical infrastructure necessary to unlock the development.[227] Similarly, a planning condition was held unreasonable which, in effect, required the developer to construct housing to local authority standards and rents, and to take tenants from the council's waiting list.[228] Conditions attached to similar broad powers to license caravan sites were held by the House of Lords to be unreasonable because they were "a gratuitous interference with the rights of the occupier".[229] A condition attached to the reopening of a public inquiry by the Secretary of State was held to be unreasonable because it resulted in "considerable expense, inconvenience and risk to the applicant".[230] The Secretary of State's refusal to renew a temporary planning permission was struck down because it would be "unreasonably burdensome" on the applicant.[231]
- The exercise of compulsory purchase powers has similarly been held unreasonable when the authority already possessed, or was able to

[224] *Commissioner of Customs and Excise v Cure and Deeley Ltd* [1962] 1 Q.B. 340; *R. v Secretary of State for the Home Department Ex p. Leech (No.2)* [1994] Q.B. 198.
[225] Town & Country Planning Act 1990 s.70(1).
[226] *Hall & Co. Ltd v Shoreham-by-Sea UDC* [1964] 1 W.L.R. 240. The purpose of the condition was to ensure safe access to the site—a purpose well within the "four corners" of the legislation.
[227] *City of Bradford MC v Secretary of State for the Environment* [1986] J.P.L. 598. But such a condition may survive if framed in negative terms: Grampian RC v Aberdeen CC 1984 S.C. (H.L.) 58. A negative condition may survive even if there is no "reasonable prospect" of the development being carried out: *British Railways Board v Secretary of State for the Environment* [1993] 3 P.L.R. 125, HL.
[228] *R. v Hillingdon LBC Ex p. Royco Homes Ltd* [1974] 1 Q.B. 720. For an older case holding it unlawful to seek developers' contributions, see *R. v Bowman* [1898] 1 Q.B. 663. But where these contributions are provided by means of what are now called "planning obligations" (and used to be called planning agreements or "planning gain") under s.106 of the Town and Country Planning Act 1990, developers' contributions may be upheld.
[229] *Mixnam's Properties Ltd v Chertsey UDC* [1965] A.C. 735 (the conditions provided, inter alia, for security of tenure, no premium charged, and no restrictions on commercial or political activity); *R. v North Hertfordshire DC Ex p. Cobbold* [1985] 3 All E.R. 486 (oppressive condition attached to licence for pop concert); *R. v Barnett LBC Johnson* (1989) 89 L.G.R. 581 (condition prohibiting political parties and activities at community festival held unreasonable).
[230] *R. v Secretary of State for the Environment Ex p. Fielder Estates (Canvey) Ltd* (1989) 57 P. & C.R. 424; *Niarchos (London) Ltd v Secretary of State for the Environment* (1980) 79 L.G.R. 264.
[231] *Niarchos Ltd v Secretary of State for the Environment* (1977) 35 P. & C.R. 259.

acquire voluntarily, other equally suitable land.[232] Where a local authority acquired land for one purpose (such as a wall to protect the coast), it was held unreasonable for it to acquire more land than it needed.[233]

- *Delay*: A long delay before the Home Secretary's review of a life prisoner's sentence (a power now abolished) was held to be unreasonable and "excessive beyond belief".[234] Excessive delay in giving notice of pending police disciplinary proceedings has invalidated those proceedings[235] and the courts ordered an end to delay in admitting a British "patrial" into the country.[236] When the primary decision-maker seeks to excuse delay on the ground of indadequate resources in the past the courts have not readily intervened, as has been discussed in previous chapters.[237] However, it should be noted that the ECHR now requires a "speedy" trial under Art.5(4)[238] and a hearing within a "reasonable time" under Art.6(1).[239] In *Noorkoiv*[240] the Court of Appeal considered the parole board's decision to

[232] *Brown v Secretary of State for the Environment* (1978) 40 P. & C.R. 285; *Prest v Secretary of State for Wales* (1982) 81 L.G.R. 193; cf. *R. v Secretary of State for Transport Ex p. de Rothschild* [1989] 1 All E.R. 933; *R. v Rochdale MBC Ex p. Tew* [1999] 3 P.L.R. 74; *R. v Bristol City Council Ex p. Anderson* (1999) 79 P. & C.R. 358.

[233] *Webb v Minister of Housing and Local Government* [1965] 1 W.L.R. 755. See also *Gard v Commissioners of Sewers of City of London* (1885) 28 Ch.D. 486; *Leader v Moxon* (1773) 3 Wils.K.B. 461 (Paving Commissioners empowered to execute street works in such a manner "as they shall think fit". Held, action for trespass lay where they had exercised their discretion "oppressively"); and cases where byelaws were invalidated for imposing burdensome prohibitions: *Munro v Watson* (1887) 57 L.T. 366; *Johnson v Croydon Corp* (1886) 16 Q.B.D. 708 (prohibition of musical instruments). But see *R. v Powell* (1884) 51 L.T. 92; *Slee v Meadows* (1911) 75 J.P. 246; *cf.* Williams, "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness"; (n.107 above) *London Passenger Transport Board v Summer* (1935) 154 L.T. 108; *R. v Brighton Corp Ex p. Tilling (Thomas)* Ltd (1916) 85 L.J.K.B. 1552 at 1555 (Sankey J.).

[234] *R. v Secretary of State for the Home Department Ex p. Handscombe* (1987) 86 Cr.App.R. 59; *Doody v Secretary of State for the Home Department* [1994] 1 A.C. 531 (Lord Mustill). The Home Secretary no longer has a role in setting tariffs for life prisoners. *R. v Secretary of State for the Home Department Ex p. Zulfikar* [1996] C.O.D. 256 (policy of strip-searching prisoners not unreasonable).

[235] *R. v Merseyside Chief Constable Ex p. Calvaley* [1986] Q.B. 424.

[236] *R. v Home Secretary Ex p. Phansopokar* [1976] Q.B. 606; citing the Magna Carta 1215, c.29: "to no one will we delay right or justice." See also *Re Preston* [1985] A.C. 835 at 870 (Lord Templeman); *R. v Glamorgan CC Ex p. Gheissary*, *The Times*, December 18, 1985 (decisions to refuse student grants irrational when the delay in the students' applications was caused by misleading advice from the authority's officials); *R. (on the application of M) v Criminal Injuries Compensation Authority* [2002] EWHC 2646; (2003) 100(2) L.S.G. 31 (delay in dealing with compensation claim held unreasonable); *R. v Secretary of State for the Home Department Ex p. Mersin* [2000] Imm. A.R. 645 (unreasonable delay in granting refugee status following asylum claim); *R. (on the application of J) v Newham LBC* [2001] EWHC Admin 992; (2002) 5 C.C.L. Rep. 302 (irrational to postpone assessments under Children Act).

[237] On justiciability, see 1–025; on implementation of duties, see 5–064.

[238] See 13–070.

[239] See 7–125.

[240] *R. (on the application of Noorkoiv) v Secretary of State for the Home Department (No.2)* [2002] EWCA Civ 770; [2002] 1 W.L.R. 3284.

postpone the claimant's review at the end of the quarter following the end of his tariff period. It was held that the delays were unacceptable because they treated every case alike, and Burnton J. held that if the delay is inconsistent with a speedy hearing then the onus was on the authority to justify its excuse of lack of resources and the court would assess carefully whether it had taken sufficient measures to rectify the problem.[241]

- It was perverse for magistrates to have imposed the same sanction on a poll tax defaulter who could not afford to pay because destitute as one who simply refused to pay.[242] The award of excessively low compensation was held, in the absence of justifying reasons, to be irrational,[243] as had been the award to a retiring civil servant of a derisory gratuity.[244] The initiation of an investigation by the Commission for Racial Equality has also been struck down as being oppressive.[245]
- In the 1980s, some local authorities were held unlawfully to have imposed excessive penalties on bodies with associations with South Africa during the apartheid regime. In *Wheeler v Leicester City Council*[246] the council withdrew the licence of a local rugby club to use the council-owned recreation ground. The reason was that the club had refused sufficiently to press four of its members, who had been selected for the English rugby footballers' tour of South Africa, to withdraw from that tour. Although it was not unlawful for the members to travel to South Africa, the council acted under its broad statutory power (to grant licences on their own land) and also in pursuance of its general statutory duty under the Race Relations Act 1976 s.61 to "promote good relations between persons of different racial or ethnic groups". The House of Lords held the council's action unlawful, Lord Templeman considering it to be a "misuse of power", "punishing the club where it had done no wrong". Lord Roskill referred to the "unfair manner in which the council set about attaining its objective".[247] The reasoning in *Wheeler* was supported

[241] At [47]; and *R. (on the application of C) v Mental Health Review Tribunal* [2001] EWCA Civ 1110; [2002] 1 W.L.R. 176; *R. (on the application of Murray) v Parole Board* [2003] EWCA Civ 1561; (2004) 101(1) L.S.G. 21; S. Lambert and A. Strugo, "Delay as a Ground of Review" [2005] J.R. 253.
[242] *R. v Mid-Hertfordshire Justices Ex p. Cox* (1996) Admin. L.R. 409.
[243] *R. v Civil Service Appeal Board Ex p. Cunningham* [1991] 4 All E.R. 310, CA; cf. *R. v Investors Compensation Scheme Ltd Ex p. Bowden* [1996] 1 A.C. 261, HL (refusal to provide full compensation not unreasonable).
[244] *Williams v Giddy* [1911] A.C. 381.
[245] *R. v Commission for Racial Equality Ex p. Hillingdon LBC* [1982] Q.B. 276; *R. v Hackney LBC Ex p. Evenbray Ltd* (1987) 19 H.L.R. 557 (unreasonable for authority to seek to invoke statutory powers or to complain about standards in hotels in which the authority had housed homeless families as an interim measure.)
[246] [1985] 1 A.C. 1054.
[247] None of their Lordships expressly considered the ban unreasonable, although Lord Roskill would have been prepared so to hold, but instead, unusually, used the term "procedural impropriety" to describe the lack of relation between the penalty and the council's legitimate objectives.

by reference to the earlier case of *Congreve v Home Office*,[248] where the Home Secretary's decision to withdraw television licences from those who had failed to pay a higher fee (but were nevertheless within their rights so to do) was held by the Court of Appeal to be unlawful because it imposed a punishment which related to no wrong. In both cases, the courts refused to countenance the achievement of a legitimate end (the raising of revenue in C*ongreve a*nd the promotion of good race relations in *Wheeler)* by means which were excessive (punishing, in each case, where the individual had done no legal wrong).[249]

- Similar reasoning was employed in a case where some London local authorities decided to withdraw their subscriptions to all publications in their public libraries published by the Times Newspapers group. Following an acrimonious labour dispute, the action was taken in an attempt to impose sanctions on the newspaper proprietors. This consideration was held to be extraneous to the statutory duty of providing a comprehensive and efficient library service''.[250] The imposition of the sanctions was also held to be unreasonable and an abuse of the councils' powers.[251]
- When the Secretary of State for Social Security made a regulation which sought to discourage asylum claims by economic migrants by effectively excluded a large class of such migrants from income support, the Court of Appeal invalidated the regulations on the ground that they were so draconian that they rendered the rights of the migrants to remain in the country nugatory. Simon Brown L.J.

[248] [1976] 1 Q.B. 629.

[249] There may be different explanations of the grounds on which both Congreve and Wheeler were decided. One ground may be the infringement of the principle of legal certainty (see 11–040). Another may be that the decisions were ''illegal'' in that both the council in Wheeler and the Home Secretary in Congreve acted for an improper purpose (namely, the imposition of a punishment): see Ch.5; *cf.* Browne-Wilkinson L.J. in his dissenting judgment in the CA (see n.246) at 1064–1065, where he raised the conflict between ''two basic principles of a democratic society'', one that allowed a ''democratically elected body to conduct its affairs in accordance with its own views'' and the other ''the right to freedom of speech and conscience enjoyed by each individual''. Basing his decision on illegality rather than on unreasonableness (the council having taken a ''legally irrelevant factor'' into account), he came close to deciding the matter on the ground of the council's acting inconsistently with ''fundamental freedoms of speech and conscience''. *R. v Lewisham LBC Ex p. Shell UK Ltd* [1988] 1 All E.R. 938 (boycott of the products of the Shell company in order to bring pressure on one of its subsidiary companies to withdraw its (lawful) business from South Africa held illegal).

[250] Public Libraries and Museums Act 1964 s.7(1).

[251] *R. v Ealing LBC Ex p. Times Newspapers* (1986) 85 L.G.R. 316 (not explicitly stated that the decision amounted to an excessive and unnecessary infringement on freedom of expression). The case raises interesting questions as to the reasonableness of decisions to cease subscriptions to, or remove books from the library of ''politically incorrect'' material. In *R. v Liverpool CC Ex p. Secretary of State for Employment* (1988) 154 L.G.R. 118, the council sought to boycott the Government's Employment Training Scheme, despite the fact that it was voluntary. The council did this outside of any statutory framework, by imposing a standard condition on all grant aid that the organisation to be aided took no part in the scheme. The purpose, punishment of the organisations, was held to be unlawful.

held that the regulations contemplated for some migrants "a life so destitute that, to my mind no civilisation can tolerate it".[252]

DISPROPORTIONATE DECISIONS

11–073 Proportionality was suggested by Lord Diplock in the *GCHQ* case in the mid-1980sas a possible fourth ground of judicial review in English law.[253] Yet it has been said that the adoption of proportionality into domestic law would lower the threshold of judicial intervention and involve the courts in considering the merits and facts of administrative decisions.[254] Originating in Prussia[255] in the 19th century, proportionality has assumed a specific form under the case law of the European Court of Justice, where it is regarded as a "general principle of law"[256] and it is similarly employed by the European Court of Human Rights as a standard by which to assess a State's compliance with aspects of the ECHR.[257] British courts now explicitly apply proportionality in respect of directly effective European Community law[258] and, under the HRA 1998, as a structured test to evaluate compatibility with Convention rights, particularly the qualified rights under Arts 8–11.[259] Proportionality is also applied in the domestic

[252] *R. v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275, 292 (Simon Brown L.J., duty to maintain foreigners was held to emanate from the common law, citing Lord Ellenborough C.J. in *R v Eastbourne (Inhabitants)* 1803 4 (East) 103 at 107, who said "As to there being no obligation for maintaining poor foreigners . . . the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving"); *R. v Secretary of State for Social Security Ex p. Tamenene* [1997] C.O.D. 480 (judicial response to legislation that sought to reinstate provisions held unlawful in the *JCWI* case).

[253] *Council for Civil Service Unions v Minister of State for the Civil Service* [1985]1 A.C. 374, 410.

[254] *R. v Secretary of State for the Home Department Ex p. Brind* [1991] A.C. 696 at 766–767 (Lord Lowry), 762 (Lord Ackner)—argument on proportionality. See also S. Boyron, "Proportionality in English Administrative Law: A Faulty Translation?" (1992) 12 O.J.L.S. 237; R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000), pp.77 ff; G. Wong, "Towards the Nutcracker Principle: reconsidering the Objections to Proportionality" [2000] P.L. 92.

[255] The principle of Verhaltnismassigkeit was invoked by the Prussian Supreme Administrative Court to check the discretionary powers of police authorities. See M. Singh, *German Administrative Law: A Common Lawyer's View* (1985), pp.88–101; J. Jowell and A. Lester, "Proportionality: Neither Novel nor Dangerous" in J. Jowell and D. Oliver (eds), *New Directions in Judicial Review* (1989), p.5; J. Schwartze, *European Administrative Law* (revised edn. 2006), Ch.5.

[256] See 14–089.

[257] See 13–083. See D. Feldman, "Proportionality and the Human Rights Act 1998" in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999); P. Craig, *Administrative Law*, 5th edn. (2003), pp.617 ff.; P. Sales and B. Hooper, "Proportionality and the Form of Law" (2003) 119 L.Q.R. 426; M. Fordham and T. de la Mare, "Proportionality and the Margin of Appreciation" in J. Jowell and J. Cooper (eds), *Understanding Human Rights Principles* (2000).

[258] See 11–058.

[259] See 11–059. I. Leigh, "Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg" [2002] P.L.265; R. Clayton and H. Tomlinson, *The Law of Human Rights* (2000), para.6–78.

law of some European countries, and was recommended for adoption in all the Contracting States of the Council of Europe by its Committee of Ministers.[260] It was defined there as requiring an administrative authority, when exercising a discretionary power, to "maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues".

11–074 English law is faced with the decision whether proportionality should now become a separate ground of review, or whether it should supplant unreasonableness as a ground of review. In *British Civilian Internees* Dyson L.J. said that "the result that follows will often be the same whether the test that is applied is proportionality or *Wednesbury* unreasonableness". However, he felt that he was unable, without the sanction of the House of Lords, yet "to perform its [unreasonableness'] burial rights". [261] As we have set out above, there are in fact two different ways in which proportionality is applied: (a) a test of fair balance; and (b) a structured test to examine whether interference by a public authority with a fundamental norm can be justified.

Proportionality as a test of fair balance

11–075 Insofar as the general concept of proportionality is a test requiring the decision-maker to achieve a fair balance, it provides an implicit explanation for some of the existing judicial interventions on the ground of unreasonableness, particularly under two of the categories of unreasonableness we have identified above, namely, those held invalid because they manifestly failed to balance one or more (relevant) consideration,[262] and those where the decision was held to be unreasonably onerous or oppressive.[263] Under the first of these, the courts evaluate whether manifestly disproportionate *weight* has been attached to one or other considerations relevant to the decision. Under the second, the courts consider whether there has been a disproportionate *interference* with the claimant's rights or interests. There will of course always be an examination of rationality in its narrow sense of logical connection between ends and means. In both of these instances, it makes little difference whether the term employed to describe the administrative wrong is "unreasonable" or "disproportionate" although the latter describes more accurately why the decision is unacceptable. The principal difference between this kind of proportionality and the structured

[260] Adopted March 11, 1980.
[261] *R. (on the application of the Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] Q.B. 1397 at [33]–[35]; *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc* (the Alconbury case) [2001] UKHL 23; [2003] 2 A.C. 295 at [50]–[51] (Lord Slynn); *R. (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532 at [32] (Lord Cooke).
[262] See 11–033—11–036.
[263] See 11–070—11–072.

test is that the burden of asserting the disproportion is on the claimant rather than the decision-maker.

11–076 As a mere test of "fair balance", proportionality is not therefore alien to English law. Article 20 of Magna Carta provides that "For a trivial offence, a free man will be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood". Proportionality therefore fits well within the ambit of unreasonableness as fair balance and, although recent dicta almost suggests that proportionality might found the basis of all judicial review,[264] its name has sometimes been explicitly invoked. For example, Lord Denning would have struck down a decision suspending a stallholder's licence on the ground that "the punishment is altogether excessive and out of proportion to the occasion".[265] A resolution of a local authority banning a member of the public from local authority property was held to be "out of proportion to what the applicant had done",[266] and proportionality was expressly used to test the government's suspension of the permits of Romanian pilots.[267] Laws J. held that when justices were determining what sentence to impose upon a person who had failed to pay his non-domestic rates, sufficient regard should be had to the principle of proportionality".[268] He also refused to prohibit the publication of a report critical of the claimant by the Advertising Standards Authority pending a judicial review unless there was a "pressing ground (in the language of the ECtHR, a "pressing social need") to restrain the public body from carrying out its functions in the ordinary way".[269]

Proportionality as a structured test of justifiability

11–077 A more sophisticated version of proportionality provides a structured test—a series of questions for the court to address in assessing whether the impugned decision is justifiable.

[264] *R. v Secretary of State for Education and Employment Ex p.* Begbie [2001] 1 W.L.R. 1115 at [68]; *Nadarajah and Abdi v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *The Times*, December 14, 2005, [68]–[69] (Laws L.J.).

[265] *R. v Barnsley MBC Ex p. Hook* [1976] 1 W.L.R. 1052 at 1057 (offence was urinating in the street and using offensive language; CA struck down the suspension on the ground of the lack of a fair hearing); *R. v Secretary of State for the Home Department Ex p. Benwell* [1984] I.C.R. 723 at 736 (Hodson J.: "in an extreme case an administrative or quasi-administrative penalty can be attacked on the ground that it was so disproportionate to the offence as to be perverse"); J. Beatson, "Proportionality" (1988) 104 L.Q.R. 180.

[266] *R. v Brent LBC Ex p. Assegai* (1987) 151 L.G.R. 891 (reason for the ban was the claimant's unruly behaviour at previous meetings).

[267] *R. v Secretary of State for Transport Pegasus Holidays (London) Ltd and Airbro (UK) Ltd* [1988] 1 W.L.R. 990.

[268] *R. v Highbury Corner Justices Ex p. Uchendu* [1994] R.A. 51; *Commissioner of Customs and Excise v Peninsular & Oriental Steam Navigation Company* [1994] S.T.C. 259 (in relation to a penalty imposed for a serious misdeclaration of VAT, only in the most limited circumstances will the doctrine of proportionality be applied to penalties provided for by national law).

[269] *R. v Advertising Standards Authority Ltd Ex p. Vernon Organisation* [1992] 1 W.L.R. 1289.

Structured proportionality in European Community Law

11–078 Proportionality is applied by the European Court of Justice and the Court of First Instance to test the lawfulness of Community action or the action of Member States where Community law applies.[270] It applies in domestic courts where European Community law is engaged.[271] Here the courts ask first whether the measure which is being challenged is suitable to attaining the identified ends (the test of *suitability)*. Suitability here includes the notion of 'rational connection' between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of *necessity*, requiring *minimum impairment* of the right or interest in question). If the measure passes both tests the court may then go on to ask whether it attains a *fair balance* of means and ends.[272] It is important to note here that the burden of justification in such cases falls on the public authority which has apparently infringed the rights of the claimant or offended a norm of European Community law.

Structured proportionality in Convention rights

11–079 Although the ECHR does not specify proportionality as a standard of review, proportionality is employed in a similar way to European Community law as a structured test, in particular to assess the conformity of a measure with one of the rights which may be limited—the "qualified rights" under Arts 8–12.[273] Here too the burden is on the public authority to justify the departure from the right in question. The authority will normally be required to demonstrate that the measures are "prescribed by the law"; that they pursue a legitimate end or an end specified in the relevant Article (ends such as national security or public safety); that they are rationally connected to that end; that no less restrictive alternative could have been adopted, and that they are necessary (and not merely desirable). Some of the Articles specify the concept of necessity as being "necessary in a democratic society". This requirement engages the courts in an exercise of constitutional review. This is because it seeks not merely a 'fair balance' between the measure and the social end, but because it requires the court to assess the measures by the standards of a constitutional democracy.[274] This point is well illustrated by the difference of

[270] See 14–089; proportionality is now expressly recognised in Art.5 of the EC Treaty and fundamental rights recognised in Art.6 of the Treaty on European Union; P. Craig, *EU Administrative Law* (2006), Chs 17 and 18; J. Schwartze, *European Administrative Law* (2006), Pt II.

[271] See 11–058.

[272] Referred to by Craig as "proportionality strictu senso" (2006), p.657.

[273] See 13–023; I. Leigh, "Taking Rights Proportionately: Judicial Review, the Human Rights Act and Judicial Review" [2002] P.L. 265; P. Craig, "The Courts, the Human Rights Act and Judicial Review" (2001) 117 L.Q.R. 589; M.Elliott, "The HRA 1998 and the Standard of Substantive Review" (2001) 60 C.L.J. 301.

[274] J. Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] P.L. 671.

approach between the Court of Appeal and the ECtHR in *Smith*,[275] where, despite applying the test of "anxious scrutiny",[276] the Court of Appeal upheld the ban on homosexuals in the armed forces. The ECtHR not only required more convincing justification for the ban, but also tested it by the democratic requirements of "pluralism, tolerance and broadmindedness".[277]

Structured proportionality in English law

11–080 In *Daly*,[278] a case which came to be decided before the HRA came into force, the House of Lords adopted the test of proportionality adopted by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing*.[279] Drawing on South African, Canadian and Zimbabwean authority, it was said that:

> "When determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".

11–081 Clearly this test is, as Lord Steyn said in *Daly*, "more sophisticated than the traditional (i.e. unreasonableness) ground of judicial review".[280] It is much more than the "fair balance" test.[281] It requires the court to seek first whether the action pursues a legitimate aim (i.e. one of the designated reasons to depart from a Convention right, such as national security). It then asks whether the measure employed is capable of achieving that aim, namely, whether there is a "rational connection" between the measures and the aim. Thirdly it asks whether a less restrictive alternative could have been employed. Even if these three hurdles are achieved, however (and the tripartite *de Frietas* test ignores this) there is a fourth step which the decision-maker has to climb, namely, to demonstrate that the measure must be "necessary" which requires the courts to insist that the measure genuinely addresses a "pressing social need", and is not just desirable or reasonable, by the standards of a democratic society.[282] In *Huang*, Lord

[275] *R. v Ministry of Defence Ex p. Smith* [1996] Q.B. 517.
[276] See 11–086 *et seq*.
[277] *Smith and Grady v United Kingdom* (1999) 29 E.H.R.R. 493, paras 138–139.
[278] *R. v Secretary of State for the Home Department Ex p. Daly* [2001] UKHL 26; [2001] 2 A.C. 532.
[279] [1999] 1 A.C. 69, 80 (Lord Clyde).
[280] At [27].
[281] *Brown v Stott* [2003] 1 A.C. 681, 728 (Lord Hope alluded to it as a "fair balance" test).
[282] *Sunday Times v UK* (1979) 2 E.H.R.R. 245 at 275, 277–278; *R. v Secretary of State for the Home Department Ex p. Daly* [2001] UKHL 26; [2001] 2 A.C. 532 at [28] (a point elaborated by Lord Steyn in *Daly* when dealing with the intensity of review, which he said was determined by "the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued").

Bingham acknowledged that that fourth step, which featured in the judgment of Dickson C.J. in the Canadian case *R. v Oakes*,[283] "should never be overlooked or discounted" and the failure to consider that final step "should be made good".[284]

11–082 Proportionality was pleaded in *Brind*, and, although not there applied, future application was not ruled out.[285] However, in *Attorney General v Guardian Newspapers Ltd (No.2)*, Lord Goff had said that "It is established in the jurisprudence of the European Court of Human Rights that . . . interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusion".[286]

11–083 The reserve expressed towards proportionality in *Brind* was not shared in *Leech*, in which the Court of Appeal upheld the constitutional right of a prisoner to access to the courts.[287] The question was whether the interference with a prisoner's mail permitted by the regulations was broad enough to infringe that right. The test adopted by Steyn L.J. to decide that question was whether there was a "self-evident and pressing need" for such a power.[288] None was demonstrated. The language of proportionality was thus explicit and the Court of Appeal even went so far as to consider the case law of ECtHR on the matter which, although not directly applicable in this pre-HRA case, "reinforces a conclusion that we have arrived at in the light of the principles of our domestic jurisprudence".[289] In *Daly*,[290] although Lord Steyn held that proportionality is "applicable in respect of review where Convention rights are at stake",[291] Lord Bingham made it clear that proportionality was also the test under common law constitutional rights. He said that

[283] [1986] 1 S.C.R. 103 at 139.
[284] *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 W.L.R. 581 at [19]—as it had been overlooked in *R. (on the application of Razgar) v Secretary of State for the Home Department (No.2)* [2004] UKHL 27; [2004] 2 A.C. 368 at [20]. Lord Bingham described the *Oakes* test as requiring "the striking of a fair balance between the rights of the individual and the interests of the community". This is indeed described in *Oakes* as a general objective of the proportionality test, however the actual words used in Oakes require a proportionality between "the effects of a measure [responsible for limiting the Canadian Charter's rights]" and the "objective which has been identified as of 'sufficient importance'". This in effect imports the 'necessity' test in the context of the Canadian Charter of Rights and Freedoms, s.1 which requires the rights and freedoms set out in it to be subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
[285] [1991] 1 A.C. 696 (Lords Bridge, Roskill and Templeman); *R. v Independent Television Commission TSW Broadcasting Ltd* [1996] E.M.L.R. 291 (Lord Templeman was willing to apply proportionality if appropriate, which it was not).
[286] [1990] 1 A.C. 109 at 283; Lord Griffiths at 273.
[287] *R. v Secretary of State for the Home Department Ex p. Leech* [1994] Q.B. 198.
[288] At 211; also referred to as "objective need" (at 212) or "demonstrable need" (at 213).
[289] At 212 (Steyn L.J); the case referred to was *Campbell v UK* (1993) 15 E.H.R.R. 137.
[290] [2001] UKHL 26; [2001] 2 A.C. 532 (where the approach in *Leech* ([1994] Q.B. 198)) was confirmed.
[291] At [24].

"the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners".[292]

The overlap between proportionality and unreasonableness

11–084 We have seen that the standards of proportionality—in both its senses—and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced, and when it forbids unduly oppressive decisions. The notion of "rational connection" between means and ends is another. As we have noted above, such a test was applied, for example in a recent case where a non-statutory scheme was introduced to provide compensation for British civilians interned during World War II by the Japanese. The scheme excluded individuals whose parents or grandparents were not born in the United Kingdom. The Court of Appeal examined carefully whether the exclusion bore a rational connection to the "foundation" and "essential character" of the scheme, but held in the circumstances that the scheme did not fail the *Wednesbury* test.[293] The House of Lords had adopted a similar approach in a case where, under an *ex gratia* compensation scheme, British soldiers injured in Bosnia were accorded treatment different from those injured in Northern Ireland.[294] The Canadian Supreme Court defined the notion of "rational connection" under their test of structured proportionality in terms which show strikingly how the notion of reasonableness lies deep within proportionality: "The measures must be carefully designed to meet the objective in question. They must not be arbitrary, unfair or based on irrational considerations".[295]

11–085 In addition, the notion in proportionality of "minimal impairment" (that a less restrictive alternative be pursued) has been applied in a number of cases based overtly on unreasonableness. As we have seen, planning conditions have been struck down because a less restrictive or less onerous alternative could be provided—such as would permit compensation to be paid to the owner of the land.[296] Compulsory purchase of land has been invalidated because the authority was able voluntarily to acquire other

[292] At [21].
[293] *R. (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] Q.B. 1397 at [40].
[294] *R. v Ministry of Defence Ex p. Walker* [2000] 1 W.L.R . 806 at 812 (Lord Slynn: "It is not for the courts to consider whether the scheme . . . is a good scheme or a bad scheme, unless it can be said that the exclusion is so irrational or unreasonable that no reasonable Minister could have adopted it"), 816 (Lord Hoffmann: the distinction was "fine" but not irrational: "That is too high a hurdle to surmount").
[295] *R. v Chaulk* [1990] 3 S.C.R. 1303 at 1335–1336 (Lamer C.J.). The test was first established in *R. v Oakes* [1988] 1 S,C.R. 103 at 137–138.
[296] *Hall and Co v Shoreham-by-Sea UDC* [1964] 1 W.L.R. 240.

equally suitable land.[297] It has been held that the decision to delist a company, as opposed to "lesser measures" (such as the continuation of the suspension of the shares) was, in the circumstances, and having taken into account the interests of the shareholders, "not disproportionate to the damage which it was designed to prevent either at common law or under Community law".[298]

Intensity of Review

11–086 Whether a court carries out substantive review of a decision by reference to the concept of unreasonableness or proportionality, two questions arise: To what extent should the courts allow a degree of latitude or leeway to the decision-maker?[299] And to what extent should it be uniform?[300] The answers to these questions depend in large part on the respective constitutional roles of the court and the primary decision-maker (the impugned public authority),[301] but also on practical considerations. The willingness of the courts to invalidate a decision on the ground that it is unreasonable or disproportionate will be influenced in part by the administrative scheme under review; the subject matter of the decision; the importance of the countervailing rights or interests and the extent of the interference with the right or interest. Indeed the intensity of review will differ, for the reason that "in public law, context is all".[302] The threshold of intervention is particularly influenced by the respective institutional competence of the decision-maker and the court.

[297] *Brown v Secretary of State for the Environment* (1978) 40 P.& C.R. 285.

[298] R. v International Stock Exchange of the United Kingdom and the *Republic of Ireland Ex p. Else (1982) Ltd* [1993] Q.B. 534 (proportionality was applied here as an aspect of rationality); *R. v Tamworth Justices Ex p. Walsh* [1994] C.O.D. 277 (Justices acted unreasonably in committing to custody a solicitor who criticised the listing system in court. Three alternative measures were available: ordering his removal; reporting him to the Law Society, or adjourning the matter. They had used "a sledgehammer to crack a nut"); *R. v Camden LBC Ex p. Cran* [1995] R.T.R. 346 (consultation with residents about car-parking scheme deficient because "there had been no recognition of the possibility let alone the fact that a number of the beneficial results of introducing full controls might have been well achieved by other means").

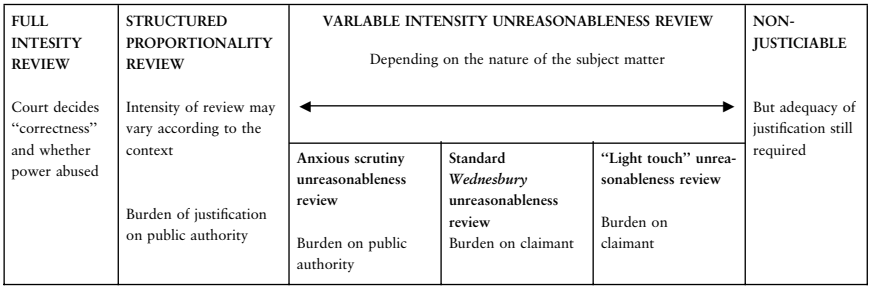
[299] On the "discretionary area of judgement", see D. Pannick, "Principles of Interpretation of Convention Rights Under the HRA and the Discretionary Area of Judgment" [1998] P.L. 545; A. Lester and D. Pannick, *Human Rights Law and Practice*, 2nd edn (2004), paras 3.18–3.21.

[300] J. Rivers, "Proportionality and variable intensity of review" [2006] C.L.J. 174; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2000); M. Elliott, "The Human Rights Act and the Standard of Substantive Review" [2001] C.L.J. 301; A. Le Sueur, "The Rise and Ruin of Unreasonableness" [2005] J.R.32.

[301] See 11–014.

[302] *Daly* [2001] UKHL 26; [2001] 2 A.C. 532 at [28] (Lord Steyn).

Figure 1



Full intensity "correctness" review for abuse of power

11–087 There are situations in which there is no constitutional reason, or reason based upon institutional capacity,[303] for the court to allow any margin of discretion to the public authority. The court is in as good a position as the primary decision-maker to assess the relevant factors and may indeed have a duty to do so. When the court intervenes in this way it sometimes refers to the ground of review as "abuse of power" rather than unreasonableness or proportionality. Three main fields may be identified.

- First, as we have seen above there are cases where no evidence for the decision exists, or where a decision is taken in ignorance of an established or relevant fact.[304]
- Secondly, are decisions offending against consistency.[304a]
- Thirdly, are some (but not all) decisions where the decision-maker seeks to disappoint a legitimate expectation, which will be discussed in Chapter 12.

11–088 In many cases of legitimate expectation the courts will show deference to the decision-maker who wishes to alter his policy in the public interest, but when the class of promisee is limited and the promise is in the "nature of a contract", the court itself will determine whether the breach of promise is unlawful.

Structured proportionality review

11–089 As we have seen, structured proportionality requires the public authority to justify its actions by satisfying the court that it fulfils a series of stepped standards. It is more searching than unreasonableness review because the

[303] See 11–014.
[304] See 11–041.
[304a] See 11–059.

burden is on the public authority to justify a departure from a fundamental norm. This involves a more sophisticated scrutiny than mere unreasonableness review because it erects more barriers for the decision-maker to hurdle (some of which overlap with ordinary unreasonableness review, such as those which require a "rational connection" and "fair balance" between ends and means). As Lord Hope said in *R. v Shayler*, proportionality (under the HRA) requires "a close and penetrating examination of the factual justification of the restriction"[305] and Lord Bingham said the "the court will now conduct a much more rigorous review than was once thought to be permissible".[306] The requirement under proportionality of "minimum impairment" of rights, requires decision-makers to consider less onerous means to achieve their ends. Although, as we have seen,[307] the English courts have sometimes required the decision-maker to have considered less onerous alternatives, they have not generally gone that far.[308] This process of justification will therefore require more attention from the courts to the process of reasoning of the decision-maker, and the relationship between the facts and the inferences drawn from them, than the default position of unreasonableness review normally concedes. In *Tweed v Parades Commission for Northern Ireland* it was held that "the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts"[309] and therefore in order to assess the issues of proportionality the court should have access to documents from which the Commission received information and advice.

11–090 However, structured proportionality does not herald the end of deference. In European Community law, even in the context of structured proportionality, the ECJ requires "manifest" disproportionality before interfering with certain decisions.[310] Varying levels of the intensity of review will be appropriate in different categories of case. For example, in respect of measures involving the European Commission in "complex economic assessment", such as in the implementation of anti-dumping

[305] [2003] 1 A.C. 247 at [61].
[306] At [33].
[307] See 11–070—11–072.
[308] Indeed it is not clear that the English courts are pursuing this requirement even in respect of Convention rights as much as they might. T. Hickman, "Proportionality: Comparative Law Lessons" [2007] J.R. 31. Minimum impairment has been applied in Israeli law: I. Zamir and Z. Zysblat, Public Law in Israel (1996), Pts 2, 3 and 11, see e.g. *Laor v Board of Censorship for Films and Plays* (1987) 41(1) P.D. 421 (total ban on a film causing "near certainty of substantial damage" to public order was held disproportionate where less restrictive measures, such as the cutting out of certain scenes, could have dealt with the problem); I. Zamir, "Unreasonableness, Balance of Interests and Proportionality" (1993) *Tel-Aviv Studies in Law* 131; A. Barak, *The Judge in a Democracy* (2006), pp.254–260. For an application of the least restrictive alternative approach (under a test of unreasonableness) in Hong Kong, see *Society for the Protection of the Harbour Ltd v Town Planning Board* (Ct of First Instance No.19 of 2003, Chu J. (upheld for different reasons by the Court of Final Appeal of the Hong Kong Special Administrative Region No.14 of 2003 (Civil)).
[309] [2006] UKHL 53; [2007] 1 A.C. 650 at 655 (Lord Bingham).
[310] See Ch.14; e.g. *R. v Ministry of Agriculture, Fisheries and Food Ex p. Astonquest* [2000] Eu L.R. 371 (Robert Walker L.J.) using the test of "manifest inappropriateness".

measures, the ECJ will display "extreme self restraint"[311] and only substitute its own discretion for that of the Commission if it can be shown that the conclusions of the Commission were "manifestly" or "patently" wrong.[312]

11–091 Similarly, in relation to Convention rights, the courts tend to defer to the legislature or administration in decisions involving "broad social policy"[313] or the allocation of finite financial resources[314] (although, as we shall consider below,[315] these categories do not wholly relieve the authority from judicial scrutiny, particularly in order to determine whether the decision was otherwise properly justified).[316]

Variable intensity unreasonableness review

11–092 The broadest spectrum of intensity of review consists of those cases in which the court acknowledges that the public authority is to be allowed a degree of latitude. It has been suggested in a number of cases that we now have a "sliding scale of review".[317] Over the past 20 years or so, the courts carrying out substantive review under the head of unreasonableness have sought to develop a series of categories to explain the intensity or lack of intensity of review that should be used in particular contexts.

Heightened scrutiny unreasonableness review

11–093 There was a growing realisation that the traditional *Wednesbury* standard was inappropriate where a decision interfered with a fundamental right or important interest. Such decisions should be subject to the "most anxious

[311] A. Egger, "'The Principle of Proportionality in Community Anti-dumping Law" (1993) 18 E.L. Rev. 367.

[312] See 14–00; Case 57/72 *Westzucker v EVS Zucher* [1973] E.C.R. 321; Case 136/77 *Rache v HZA Mainz* [1978] E.C.R. 1245.

[313] This point has been made most forcefully by Lord Hoffmann: "Separation of Powers" [2002] J.R. 137 and his statement in *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc* (the Alconbury case) [2001] UKHL 23; [2003] 2 A.C. 295 at [75]–[76], where he distinguished a "policy decisions" from a "determination of right". Policy decisions should be made not by the courts, he said, but, in a democracy by "democratically elected bodies or persons accountable to them". Wilson v Secretary of State for Trade and Industry [2003] UKHL 40; [2004] 1 A.C. 816 at [70] (Lord Nicholls: "The more the legislation concerns matters of broad social policy the less ready will be a court to intervene"); *Hooper v Secretary of State for Work and Pensions* [2003] EWCA Civ 813; [2003] 1 W.L.R. 2623 at [63]–[64] (Laws L.J.: "A very considerable margin of discretion must be accorded to the Secretary of State. Difficult questions of economic and social policy were involved, the resolution of which fell within the province of the executive and the legislature rather than the courts"); *R. v Secretary of State for Education and Employment Ex p. Begbie* [2000] 1 W.L.R. 1115 at 1131 (Laws L.J.: less intrusive judicial review should apply to decisions in the "macro-political field").

[314] *Michaelek v Wandsworth LBC* [2002] EWCA Civ 271; [2003] 1 W.L.R. 617 at [41] (Brooke L.J.: "this is pre-eminently a field in which the courts should defer to the decisions taken by a democratically elected Parliament, which has determined the manner in which public resources should be allocated for local authority housing").

[315] See 11–098—11–102.

[316] A point well made by T.R.S. Allan, "Human Rights and Judicial Review: A Critique of Due Deference" [2006] C.L.J. 671.

[317] *Begbie* [2000] 1 W.L.R. 1115 at 1130.

scrutiny of the courts".[318] In *Brind*, the majority indicated that a decision-maker who exercises broad discretion must show that an infringement of the right to expression can only be justified by an "important competing public interest".[319] Perhaps the clearest indication of this approach is to be found in the Court of Appeal's decision in *R. v Ministry of Defence Ex p. Smith*. In this challenge to the exclusion of homosexuals from the armed forces, Sir Thomas Bingham M.R. accepted that "the more substantial the interference with human rights, the more the court will require by justification before it is satisfied that the decision is reasonable"[320]—a formulation which goes some way towards asking not the claimant to demonstrate unreasonableness, but the decision-maker to justify that the decision was "reasonable".[321] In *Saville*, the Court of Appeal said that "it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification".[322]

11–094 This notion of "anxious" or "heightened" scrutiny is difficult to define with any precision, but it does indicate that the full rigour of *Wednesbury* is softened. Two fundamentals govern the court's role. First, the court's function remains one of review for error of law.[323] The court is not a fact-finder (though, as we have seen,[324] it may evaluate the fact-finding process of the primary decision-maker).[325] Secondly, the burden of argument shifts from the claimant to the defendant public authority, which needs to produce a justification for the decision. The court will be less inclined to accept ex post facto justifications from the public authority, compared to traditional unreasonableness review.[326]

[318] *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514 at 531 (Lord Bridge, speaking of the right to life in a deportation case); and *National and Local Government Officers Association v Secretary of State for the Environment* (1993) Admin. L.R. 785 (applying the test to the restriction on the political activities on local government officers); In *Prest v Secretary of State for Wales* (1982) 81 L.G.R. 193 (Watkins L.J. said that compulsory purchase decisions must be "carefully scrutinised", and Lord Denning M.R. said the Secretary of State must in such cases show that the public interest "decisively demands" the compulsory purchase order); *R. v Secretary of State for the Home Department Ex p. Launder* [1997] 1 W.L.R. 839 (it was normally open to the court to review the exercise of the Home Secretary's discretion under the Extradition Act 1989 s.12. The fact that a decision was taken on policy grounds of an important or sensitive nature and involving delicate relations between foreign states did not affect the court's duty to ensure the claimant was afforded proper protection, although the court would be mindful of both the limitations of its constitutional role and the need in such a case for "anxious scrutiny").

[319] *R. v Secretary of State for the Home Department Ex p. Brind* [1991] A.C. 696 at 749–751.

[320] A similar approach has been taken in India towards interference with fundamental rights: *Om Kumar v Union of India* 2001 (2) S.C.C. 386 at 399, 405 (Rao J.).

[321] [1996] Q.B. 517.

[322] *R v Lord Saville of Newdigate Ex p. A* [2000] 1 W.L.R. 1855 at [37].

[323] *R. (on the application of Davila-Puga) v Immigration Appeal Tribunal* [2001] EWCA Civ 931 at [31] (Laws L.J.: "As is well known, in 1987 Lord Bridge said in the case of Musisi [1987] 1 A.C. 514 that these cases need to be approached with anxious scrutiny, given what may be involved. And so they must. But as a reading of his Lordship's speech in that case readily demonstrates, the court's role remains one of review for error of law. There is no error of law here").

[324] See 11–042.

[325] See 11–041.

[326] *R. (on the application of Leung) v Imperial College of Science, Technology and Medicine* [2002] EWHC 1358; [2002] E.L.R. 653.

11–095 That is not to say that there should be no deference. Heightened scrutiny is not merits or "correctness" review[327] any more than is structured proportionality and the courts have urged a "common sense" approach. Anxious scrutiny "does not mean that the court should strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none".[328] Moreover, "the concern of the court ought to be substance not semantics", so it is inappropriate to focus "on particular sentences" in a decision-maker's determination "and to subject them to the kind of legalistic scrutiny that might perhaps be appropriate in the case of a statutory instrument, charter party or trust deed".[329] But while it would be wrong to interpret the decision of a decision maker "in a minute textual fashion . . . it must be right in every case to see whether substantial and proper reasons are given".[330]

11–096 The scope for application of anxious scrutiny approaches to unreasonableness has changed since the coming into force of the HRA. Many of the leading statements explaining the need for anxious scrutiny were made before English courts could directly apply Convention rights. Today, assessment of the lawfulness of decisions in many of these cases would fall to be determined by the structured proportionality test.

Wednesbury, light-touch review and non-justiciability[331]

11–097 The default position is still, at the time of writing, that of the *Wednesbury* formulation,[332] although it has been reformulated to a standard that requires the decision-maker to act within the "range of reasonable responses".[333] Beyond that, however, recent cases, even those where human rights are engaged, have sometimes reverted to what we have called light-touch review, allowing considerable latitude to public authorities and interfering only when the decision is "outrageous",[334] or "arbitrary".[335] Beyond that there may be cases which are not easily amenable to judicial review (sometimes called non-justiciable decisions). These decisions include those in which the court is constitutionally disabled from entering on

[327] *Daly* [2001] UKHL 26; [2001] 2 A.C. 532 at [27]–[28] (Lord Slynn).
[328] *R. (on the application of Sarkisian) v Immigration Appeal Tribunal* [2001] EWHC Admin 486 (Mumby J.).
[329] *R. (on the application of Puspalatha) v Immigration Appeal Tribunal [2001] EWHC Admin 333, [43] (Sullivan J.).*
[330] *R. (on the application of Kurecaj) v Secretary of State for the Home Department* [2002] EWHC 1199 (Gibbs J.).
[331] On justiciability, see 1–025—1–043.
[332] See T. Hickman, "The Reasonableness Princple" [2004] C.L.J. 166.
[333] See 11–023—11–024.
[334] CCSU v Minister for the Civil Service [1985] AC 374 at 410 (Lord Diplock).
[335] See, e.g. *Pro-Life Alliance v BBC* [2003] UKHL 23; [2004] 1 A.C. 185, where the HL held that the prohibition of the showing of aborted foetuses in a party election broadcast could not be interfered with unless the decision was "arbitrary". Lord Scott, dissenting, held that since free expression was engaged a structured proportionality test ought to be employed. See E. Barendt, "Free Speech and Abortion" [2003] P.L. 580; J. Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] P.L. 592.

review, because the matter concerns policy—such as setting the level of taxation or to undertake a space programme.[336] Other decisions are not justiciable, or require due deference from the court because of their lack of relative institutional capacity to enter into a review of the decision. This issue is discussed in Chapter 1[337] and need not be repeated now.

A culture of justification

11–098 A sensitive appreciation of relative institutional capacity must however be qualified in two respects. First, as has been discussed above,[338] institutional deference does not mean constitutional deference. The courts ought not automatically to kowtow to Parliament (when legislation is being reviewed under the Human Rights Act or European Community law) or to the executive or other officials, on the ground that they are accountable to the electorate and the courts are not.

11–099 Secondly, the acceptance of institutional imperfection on the part of the courts, or of a superior institutional capacity on the part of the primary decision-maker (for example, on the ground that he had access to "special sources of knowledge and advice")[339] should not inevitably signal a low level of scrutiny of the decision. As was said in *Huang*,[340] although the public authority may be better placed to investigate the facts and test the evidence, the court cannot abdicate its responsibility of ensuring that the facts are properly "explored and summarized in the decision, with care".[341] Even where the courts recognise their lack of relative capacity or expertise to make the primary decision, they should nevertheless not easily relinquish their secondary function of probing the quality of the reasoning and ensuring that assertions are properly justified. The proper approach to this issue was taken by O'Regan J. in *Bato Star Fishing Ltd v The Chief Director: Marine and Coastal Management*[342] that a decision on the allocation of fishing quotas and requiring "an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with special expertise in that area must be shown respect by the Courts". Nevertheless, she said that:

> "this does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts, or is not reasonable in the light of the reasons given for it, a Court may not review that decision . . . a court

[336] See 1–026; *R. (on the application of Gentle) v Prime Minister* [2006] EWCA Civ 1690 (invasion of Iraq); *R. (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3; [2002] Eu. L.R. 225 (national defence policy).
[337] See 1–025; 5–00; 11–014.
[338] See 11–014.
[339] *Huang* [2007] UKHL 11; [2007] 2 W.L.R. 581.
[340] [2007] UKHL 11; [2007] 2 W.L.R. 581 at [16].
[341] [2007] UKHL 11; [2007] 2 W.L.R. 581 at [15].
[342] (2004) (4) S.A. 490 at para.48, CC.

should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker".

11–100 The Chief Justice of Canada made a similar point when she warned against judicial deference "simply on the basis that the problem is serious and the solution difficult".[343]

11–101 Although it is too early to pronounce the demise of unreasonableness, the increased use of structured proportionality has changed our expectations of how decision-makers ought to behave. It has introduced what has been called a "culture of justification",[344] which requires decision-makers not only to act in accordance with bare rationality, but also to consider carefully the relationship between the means of a decision and its ends, to insist upon the consideration of less oppressive alternatives in appropriate cases and to ask for more cogent justification than bare *Wednesbury* permits when decisions interfere with established rights and significant interests.

11–102 If these expectations are confirmed in the case law of the future, the abandonment of the test of unreasonableness will not have breached the line between judicial review and appeal. We shall still not have adopted merits review. The courts will simply require more fulsome justification of a decision, the merits of which still lie within the scope of the primary decision-maker. However, instead of getting away with simply stating that he has carried out a proper balancing exercise, decision-makers will be required positively to "identify the factors he has weighed and explain why he has given weight to some factors and not to others".[345] The function of the courts in ensuring adequate justification of decisions is always within their institutional capacity and is indeed the task they are best qualified to perform.[346]

Comparative Perspectives[347]

Australia

11–103 Unlike England and Wales and New Zealand, in Australia judicial review remains firmly based upon a traditional ultra vires view of jurisdiction. It is not influenced by more substantive rights-based principles such as rule of

[343] *RJR-MacDonald v Canada (Attorney General)* [1995] 3 S.C.R. 119 (McLauglan C.J.). The former President of Israel's Supreme Court, Aharon Barak, considers that the term "deference" does not serve a useful purpose because if a court does not invalidate a decision as unreasonable it is lawful and if it exceeds the zone of unreasonableness then it must be invalidated and there is no room for deference: The Judge in a Democracy (2006), pp.251–252.

[344] See the works of Mureinik cited in n.16, above.

[345] *R. (on the application of X) v Chief Constable of the West Midlands* [2004] EWCA Civ 1068; [2005] 1 W.L.R. 65 at [101].

[346] Account will also have to be taken of the possible need to engage in a more intensive fact-finding review following the decision of the ECtHR in *Tsfayo v United Kingdom* [2007] B.L.G.R. 1.

[347] See also T. Hickman, "Proportionality: Comparative Law Lessons" [2007] J.R. 31.

law, consistency, equality, rationality and mistake of fact. The unreasonableness ground of review in Australia is applied cautiously, which is explained because of the close relationship between unreasonableness and merits review.[348] The English practice of adopting a lower standard of unreasonableness in cases involving fundamental human rights has been rejected by the Federal Court.[349]

11–104 The strict dichotomy between judicial and merits review is normally justified by the principle of the separation of powers provided for in the Constitution.[350] In *Minister for Immigration and Multicultural Affairs v Eshetu*[351] for example, there was a substantial narrowing of the application of the test. Gleeson and McHugh JJ. held that if there was no more than strong disagreement with the decision maker's process of reasoning on an issue of fact this is not sufficient to make out the ground for review.[352] The extent of justification required for a decision and the court's duty to inquire in relation to obtaining information relevant to a decision as a factor in determining unreasonableness has been recently considered and any duty to check facts and to make inquiries as to further information appears to be very limited.[353] Insofar as it applies it is considered as part of unreasonableness or the duty to take into account all relevant considerations.[354]

11–105 At the federal level in Australia there is no equivalent to the HRA. As such, there is no statutory procedural requirement to "justify" legislative measures that contravene fundamental rights and freedoms.[355] However, in both the Australian Capital Territory and Victoria human rights legislation has been introduced, based predominantly on the model of the HRA and requires the production of statements of compatibility with the chartered rights for all bills introduced to Parliament.[356] In Queensland, there is a

[348] *Minister for Aboriginal Affairs v Peko-Wallsend* (1985) 162 C.L.R. 24 at 42; E. Carroll, "Scope of Wednesbury Unreasonableness: In Need of Reform?" (2007) 14 *Australian Journal of Administrative Law* 86, pp.91–92.

[349] *STKB v Minister for Immigration and Multicultural and Indigenous* Affairs [2004] F.C.A. 546 at [8]–[10] (Selway J.), affirmed on appeal *STKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 251 at [19]. Although note the conflicting comments of Kirby and Hayne JJ. in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002*.

[350] B. Selway, "The Principle Behind Common Law Judicial Review of Administrative Action—the Search Continues" (2002) 30 *Federal Law Review* 217; S. Kneebone, "What is the Basis of Judicial Review" (2001) 12 *Public Law Review* 95.

[351] (1999) 197 C.L.R. 611.

[352] *Minister for Immigration and Multicultural and Indigenous Affairs v Eshetu* (1999) 197 C.L.R. 611 at 626.

[353] *Foster v Minister for Customs and Justice* (2000) 200 C.L.R. 442; *Abebe v Commonwealth* (1999) 197 C.L.R. 510 at 578; *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 C.L.R. 273 although note the criticism in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 C.L.R. 1; see further Ch.12.

[354] M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action*, 3rd edn. (2004), p.268 referring to *Re Minister for Immigration and Multicultural Affairs; Ex p. Application S20/2002* (2003) 198 A.L.R. 59.

[355] M. Aronson, B Dyer and M. Groves, *Judicial Review of Administrative Action* (2004) p.359.

[356] Gleeson C.J. and McHugh J. at 626; Charter of Human Rights and Responsibilities Act 2006 (Vic) and Human Rights Act 2004 (ACT).

statutory regime that requires justification for newly introduced bills that infringe upon individual rights and liberties.[357] Similarly in New South Wales, a Legislative Review Committee reports to Parliament on all bills that trespass on personal rights and liberties.[358]

Review of fact

11–106 In relation to review for mistake of fact, the High Court of Australia has not yet ruled as to whether a "material error of fact" is reviewable,[359] However, it is generally accepted that review does not lie for error of fact except in two circumstances, first, where an error as to a jurisdictional fact has been made.[360] Secondly, *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002*[361] confirmed that review is available where the decision is irrational, illogical and not based upon findings or inferences of fact supported by logical grounds.

Canada

11–107 As has been discussed above, the Supreme Court of Canada has pioneered the principle of proportionality as a tool for assessing Charter rights.[362]

11–108 The Supreme Court of Canada has held that, in the absence of statutory specification of the standard of review, for every case of substantive (though not procedural) review and appeal from statutory authorities, including challenges for abuse of discretion, the first step is to establish a standard of review by reference to various "pragmatic and functional" factors.[363] The Court has also accepted that there are three and no more possible such standards of review:[364] correctness, unreasonableness, and patent unreasonableness. In practice, in the face of mounting criticism of the difficulty in articulating the differences between the latter two standards,[365] the Court may be moving in the direction of combining them.[366]

11–109 At present, the most deferential standard of review (patent unreasonableness) is most clearly indicated in the case of expert adjudicative tribunals, decisions of which are protected by a strong privative clause, and also in the case of broad discretion with polycentric dimensions typically involving a Cabinet Minister or specialised administrative agencies. In contrast,

[357] Legislative Standards Act 1992 (Qld).
[358] Legislative Review Committee Act 1987 (NSW).
[359] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 C.L.R. 441 at [35]–[42].
[360] M. Aronson, "The Resurgence of Jurisdictional Facts" (2001) 12 *Public Law Review* 17.
[361] (2003) 198 A.L.R. 59.
[362] D. Beattie, *The Ultimate Rule of Law* (2003), Ch.5.
[363] See, e.g. *Dr Q v College of Physicians and Surgeons of British Columbia* [2003] 1 S.C.R. 226.
[364] *Law Society of New Brunswick v Ryan* [2003] 1 S.C.R. 247.
[365] *Toronto (City) v CUPE, Local 79* [2003] 3 S.C.R. 77, concurring judgment of Le Bel J. (Deschamps J. concurring).
[366] *Council of Canadians with Disabilities v Via Rail Canada* 2007 S.C.C. 17.

correctness is most clearly indicated in the case of a tribunal or other statutory authority without the protection of a privative clause and perhaps subject to a right of appeal when deciding questions of law that are collateral to their mandate or otherwise involve issues of general law on which the regular courts will have as much, if not greater expertise as the agency itself.

11–110 Despite the admonition that a standard of review analysis is always a necessary prelude to the exercise of the judicial review function, the Supreme Court itself has carved out one overly broad exception: when a statutory or prerogative authority is determining questions of Constitutional Law in the exercise of its authority (including questions pertaining to the Canadian Charter of Rights and Freedoms), the standard of review is automatically that of correctness.[367] The Court has also, by reference to traditional conceptions of ultra vires suggested that there are certain situations (such as the validity of municipal byelaws or action taken under byelaws) where there is little or no need for a pragmatic and functional analysis; correctness will almost inevitably be the standard of review.[368]

11–111 In an effort to forestall litigation over the standard of review and perhaps as an implicit criticism of the courts' standard of review jurisprudence, British Columbia in its 2005 Administrative Tribunals Act (SBC) 2004 has attempted both to specify the standard of review applicable to tribunals coming within the reach of that Act and to define what each of the standards embraces. While there is legislation in other jurisdictions, such as the Federal Courts Act, specifying the grounds of judicial review, British Columbia is the only jurisdiction to attempt a partial legislative codification of the actual standards of review.

11–112 In Canada, the common law grounds of judicial review and much of the legislative codification of the grounds of review and conferral of a right of appeal continue to be expressed in terms of the traditional common law grounds: jurisdiction, error of law (though not requiring the error to appear on the face of the record), a decision based on a complete lack of evidence, and the usual abuse of discretion grounds: bad faith, taking account of irrelevant factors, failure to take account of relevant factors, acting for an improper purpose, unlawful fettering of discretion, acting under dictation, and, occasionally, *Wednesbury* unreasonableness. However, the standard of review jurisprudence has had some impact on the grounds of review. Error of fact review is now more commonly considered in terms of whether there has been a "patently unreasonable finding of fact".[369] Similarly, *Wednesbury* unreasonableness has been subsumed by the term patent unreasonableness when that is the chosen standard of review. Also, in cases where the chosen standard is that of unreasonableness, exercises of discretionary power may now be subject to a

[367] *Multani v Marguerite-Bourgeoys (Commission Scolaire)* [2006] 1 S.C.R. 256.
[368] See, e.g. *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)* [2004] 1 S.C.R. 425.
[369] See, e.g. *Toronto (City) Board of Education v OSSTF, Local 15* [1997] 1 S.C.R. 487.

more searching review than was the case under *Wednesbury*. It is, however, the case that the courts have yet to come to terms with the detail of the impact of applying a standard of review to abuse of discretion challenges not only in this context but also in relation to the discrete grounds of abuse of discretion. Thus, for example, in *Baker*,[370] the Court seemed to suggest that unreasonableness review might appropriately involve judicial reweighing of the various considerations that the decision-maker took into account. However, the Court retreated from that in *Suresh*.[371]

11–113 To this point, the Supreme Court has shown no disposition to move with the courts of England and Wales and to adopt or adapt other grounds of review such as proportionality, substantive legitimate expectation, and inconsistency. Indeed, the Court has explicitly rejected a doctrine of legitimate expectation with substantive consequences and review for inconsistency.[372] However, substantive review does from time to time involves the courts bringing to bear underlying "constitutional principles" as a supplement or context to the review exercise.

New Zealand

Proportionality and unreasonableness

11–114 Proportionality is a central element in deciding the reasonable limits of right under the New Zealand Bill of Rights Act 1990 (BORA). The doctrine requires that the legislative measures designed to give effect to certain objectives must be rationally connected to those objectives and impair rights no more than is necessary to accomplish the objectives. In New Zealand proportionality is known as the *Oakes* test,[373] it having been having imported from Canada[374] and modified subsequently.[375] It is assumed that any challenge to the exercise of administrative power on the ground that it unreasonably limits rights in the BORA will go through the three or four steps in this proportionality analysis.[376]

Intensity of review

11–115 In the last decade the New Zealand Courts, following UK developments, overtly have adopted a variable approach to the intensity of review: that is, the graver the impact of the decision upon the individual affected by it, the

[370] *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 S.C.R. 817.
[371] *Suresh v Canada (Minister of Citizenship & Immigration)* [2002] 1 S.C.R. 3. But see *Singh Multani v Commissioner Scolaire* 2006, S.C.C. 6.
[372] *Domtar Inc v Québec (Commission d'appel en matière de lesions professionnelles)* [1993] 2 S.C.R. 756; *National Steel Car Ltd v United Steelworkers of America, Local 7135* (2006) 218 O.A.C. 207 (CA).
[373] See 11–00.
[374] *Ministry of Transport v Noort* [1992] 3 N.Z.L.R. 260 at 283, CA (Richardson J.).
[375] *Moonen v Film & Literature Board of Review* [2000] 2 N.Z.L.R. 9 CA.
[376] P. Rishworth, G. Huscroft, S. Optican and R. Mahoney, *The New Zealand Bill of Rights* (2003), pp.176–186.

more substantial the justification that will be required to assure the court of its legality. The emphasis on justification is all-important, and it is not coincidental that the common law is increasingly requiring reasons and putting great emphasis on transparency. It is now generally recognised that judicial review of discretionary decision-making involves a sliding scale, with non-justiciability at one end and close scrutiny at the other.[377] This recognition of the need to intensify review when fundamental human rights and interests are threatened is of a piece with the principle of legality.

11–116 Outside the "human rights" arena of administrative law (either affirmed in BORA or fundamental common law rights), New Zealand has yet to embrace the doctrine of proportionality and so far have stuck with *Wednesbury* unreasonableness (albeit of variable intensity). New Zealand courts remain wary of a stand-alone doctrine of proportionality in the "non-rights" part of administrative law.[378] This was confirmed more recently in *Wolf v Minister of Immigration*,[379] where Wild J. refused to accept proportionality as a stand-alone principle in the absence of any infringement of BORA rights, and opted instead to apply *Wednesbury* unreasonableness. Wild J. accepted, however, the view that *Wednesbury* was not a monolithic test and that the intensity of review varied depending on the context, and that the most important factor pointing in the direction of the most intense scrutiny was the presence of human or fundamental rights. He applied a more intensive or searching scrutiny in that case because the decision "involve[d] the deportation of the appellant, and the consequent break up of a New Zealand family unit" and implicated New Zealand's international obligations under the ICCPR and the Convention on the Rights of the Child (although the rights of the child or the right to family life do not find expression in the BORA, but the BORA only affirms existing rights, and is not intended to affect other existing but unenumerated rights).[380] Wild J. was wary of the "Europeanisation" of UK public law which rendered its importation in New

[377] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] N.Z.A.R. 58 at 66, CA; *Ports of Auckland Ltd v Auckland City Council* [1999] 1 N.Z.L.R. 601, HC; *Wolf v Minister of Immigration* [2004] N.Z.A.R. 414, HC; *Progressive Enterprises Ltd v North Shore City Council* [2006] N.Z.R.M.A. 72, HC; *Hamilton City Council v Fairweather* [2002] N.Z.A.R. 477 at [45], HC.

[378] In 2002, the CA held a professional disciplinary sanction "altogether excessive and out of proportion" and quashed the orders made: *The Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 N.Z.L.R.154. This is the principle described by Tipping J. as "[a] sledgehammer should not be used to crack a nut" (*Moonen v Film & Literature Board of Review* [2000] 2 N.Z.L.R.9 16). The CA in *Bevan's* case stressed that it was not entering into the "broader question. . . whether proportionality is a distinct head of review", noting that the disproportionate penalty case it was following (*R. v Barnsley MBC Ex p. Hook* [1976] 1 W.L.R. 1052 were accepted by commentators as well established (at [55]). That left the law as laid down by Tipping J. in *Isaac v Minister of Consumer Affairs* [1990] 2 N.Z.L.R.606 at 636, HC that disproportionality goes to Wednesbury unreasonableness. See also *Waitakere City Council v Lovelock* [1997] 2 N.Z.L.R. 385 at 408, CA (Thomas J.).

[379] [2004] N.Z.A.R. 414 at [32], HC.

[380] BORA s.28.

Zealand inapt. He held that proportionality should remain within the traditional fold of (*Wednesbury*) unreasonableness, and not stand-alone.

11–117 New Zealand's constitutional and administrative law is evolving in ways quite different to that of the United Kingdom.[381] The Supreme Court has made it clear recently in *Hansen v The Queen*[382] that parliamentary sovereignty holds greater sway in New Zealand than amongst many of the higher judiciary in the United Kingdom. Now that appeal to the Privy Council has been abandoned, New Zealand courts can chart an indigenous course. There are voices advocating adoption of proportionality in New Zealand.[383] However, where BORA rights are engaged, proportionality applies; in all other case variable intensity (*Wednesbury*) unreasonableness applies, with the possibility of a grey area of fundamental common law rights or interests somewhere in the middle.

11–118 However, it is becoming common for New Zealand judges on review to invoke the American terminology of "hard look" to describe a more intensive scrutiny of the reasonableness of administrative action. In the Court of Appeal in *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* it was said "in some cases, such as those involving human rights, a less restricted approach, even perhaps, to use the expression commonly adopted in the United States, a "hard look" may be required".[384] In *Thompson v Treaty of Waitangi Fisheries Commission*,[385] one of the prime judicial movers behind the introduction of this terminology—Hammond J.—attempted to rebadge the "hard look" doctrine as an "adequate consideration doctrine". This doctrine, he said, would go further than taking into account, or failing to take into account, relevant considerations. Presumably it would go further, too, than reasonableness review for giving manifestly too much or too little weigh to relevant factors.[386] The notion of adequate consideration, said Hammond J., would "check poor public administration and inadequate, cursory and ill-considered decisions". Professor Taggart has argued that in the New Zealand context "hard look" is an unnecessary transplant and should be rejected[387] as it is no more precise than unreasonableness and does not tell a judge how hard to look in any particular case.[388]

[381] G. Beresford, "The Processes of Constitutionalism in New Zealand and the UK" (2005) 2 *New Zealand Postgraduate Law e-Journal*.
[382] [2007] N.Z.S.C. 7 (February 20, 2007).
[383] J. Varuhas, "Keeping Things in Proportion: The Judiciary, Executive Action and Human Rights" (2006) 22 N.Z.U.L.R. 300.
[384] [1998] N.Z.A.R. 58 at 66; and see, e.g. Dame Sian Elias, "'Hard Look' and the Judicial Function" (1996) 4 *Waikato Law Review* 1; P. Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edn. (2001), p.831.
[385] [2005] 2 N.Z.L.R. 9 at [214]–[219], CA.
[386] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 N.Z.L.R. 546 at 552,CA (Cooke P.); and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 A.L.R. 229 at 309–310, HCA (Mason J.).
[387] M. Taggart, "Review of Developments in Administrative Law" [2006] New Zealand Law Rev. 75, 85–87.
[388] *New Zealand Public Service Association Inc v Hamilton City Council* [1997] 1 N.Z.L.R. 30 at 34–35 HC.

Consistency

11–119 The New Zealand courts have yet to firmly establish this as a ground of review for essentially the same reasons they are hesitant about substantive legitimate expectations (indeed expectations based on past practice or decisions often support the claim of inconsistency): it may unduly fetter discretion and hence be contrary to the public interest. The strongest statement in New Zealand law for review for inconsistency is in the dissenting judgment of Thomas J. in *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd*.[389] where he was of the view that the agency "failed to act even-handedly between two companies in direct competition".[390]

Review for mistake of fact

11–120 It was in a New Zealand appeal to the Privy Council[391] that gave Lord Diplock (as he had by then become) the opportunity to confirm at the highest Commonwealth level what he had said as a puisne judge 20 years earlier in *R v Deputy Industrial Injuries Commissioner, ex p. Moore*;[392] namely, it is a breach of natural justice to base a finding of fact upon material which does not logically support it. Despite the binding nature of Privy Council decisions in New Zealand law (until 2003) this procedural approach to "no evidence" review has not really taken hold. The courts have preferred to see error of fact as an error going to substance or outcome. In a series of dicta, emanating in the beginning from Sir Robin Cooke when on the New Zealand Court of Appeal and for some time not decided by other members of the court, review was permitted if decision-makers proceeded upon an incorrect basis of fact or misunderstood an established and relevant fact or decided on no evidence.[393] In *S & D v M & Board of Trustees of Auckland Grammar School*,[394] Smellie J. noted the continuing division of view at the Court of Appeal level but pointed out that there are "numerous [High Court] decisions where mistake of fact has been held to be a ground of review", naming nine High Court judges who had done so between 1987–97. Smellie J. went on to invalidate a school's

[389] [1998] N.Z.A.R. 58, CA.
[390] Citing the 5th edition of this work at pp.576–582, Thomas J. invoked the principles of equality, and of equal and consistent treatment (at 72). The majority decision was upheld on further appeal to the Privy Council: *Roussel UCLAF Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [2001] N.Z.A.R. 476 for substantially the reasons given by the majority below.
[391] *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] N.Z.L.R. 662 at 671.
[392] [1965] 1 Q.B. 456 at 488.
[393] *Daganayasi v Minister of Immigration* [1980] 2 N.Z.L.R. 130 at 145–148 (note reservations of other judges, [1980] 2 N.Z.L.R. 130 at 132, 149); *New Zealand Fisheries Association Inc v Minister of Agriculture & Fisheries* [1988] 1 N.Z.L.R. 544 at 552 CA (Cooke P.) (note reservation of Richardson J., [1988] 1 N.Z.L.R. 544 at 564); *Devonport v Local Government Commission* [1989] 2 N.Z.L.R. 203 at 208 CA; *Auckland City Council v Minister of Transport* [1990] 1 N.Z.L.R.264 at 293, CA (Cooke P.); *Southern Ocean Trawlers v Director-General of Agriculture & Fisheries* [1993] 2 N.Z.L.R. 53 61, CA (Cooke P.).
[394] High Court, Auckland, M. 477/97, June 11, 1998.

suspension of a student as based on a "significantly incorrect factual basis". By the mid-1990s, mistake of fact had became accepted as a ground of review at High Court level and is now orthodoxy in New Zealand administrative law. To succeed on this ground, however, the "fact" must be clearly established or "an established and recognised opinion" and "it cannot be said to be a mistake to adopt one of two different points of view of the facts, each of which may be reasonably held".[395]

South Africa

11–121 The South African Constitution 1996 s.33 enshrines the notion of "just administrative action", which is defined as administrative action which is "lawful, reasonable and procedurally fair". It required a statute to fill in the detail of those requirements, and in 2000 Parliament enacted the Promotion of Administrative Justice Act (PAJA). In *Pharmaceutical Manufacturers Association of South Africa*[396] the Constitutional Court held that exercise of public power, and therefore its regulation by the courts, is always a constitutional matter, and exercises of public power are rooted in and gain their force from the Constitution.[397] The rule of law, Chaskalson P. concluded, requires exercises of public power to be rational:

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."[398]

Standard of review

11–122 The Constitution thus envisages two standards of review, or two standards of judicial scrutiny of exercises of public power. First, "administrative action" must be lawful, reasonable and procedurally fair. Secondly, all acts must be lawful and non-arbitrary. The Constitutional Court has on a number of occasions since *Pharmaceutical Manufacturers* used this second,

[395] *New Zealand Fisheries Association Inc v Minister of Agriculture & Fisheries*. 1988] 1 N.Z.L.R. 544 at 552, CA (Cooke P.).
[396] 2000 (2) S.A. 674, CC.
[397] 2000 (2) S.A. 674 at [33].
[398] 2000 (2) S.A. 674 at [85] (footnotes, including to the 5th edition of this work, excluded).

broader and less exacting standard of scrutiny to review decisions.[399] However, where a decision infringes a right held by a member of the public, that decision would expose the decision to the higher standards of scrutiny imposed by the Promotion of Administrative Justice Act s.33.

Statutory unreasonableness

11–123 The PAJA sets out a comprehensive list of grounds of judicial review, one of which is the *Wednesbury* formulation. PAJA s.6(2)(h) reads:

> "A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function".

11–124 As has been discussed above,[400] in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*, O'Regan J. held for a unanimous Constitutional Court that this formulation was not consistent with the right enshrined in the South African Constitution to administrative action which is "reasonable". Reading the PAJA provision down, she held:[401]

> "Even if it may be thought that the language of s.6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach".

[399] See, e.g. *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2006 (11) B.C.L.R. 1255, CC; *Affordable Medicines Trust v Minister of Health* 2006 (3) S.A. 247, CC; *Dawood v Minister of Home Affairs* 2000 (3) S.A. 936, CC; *Janse van Rensburg NO v Minister of Trade and Industry* 2001 (1) S.A. 29, CC. The lower courts have also reviewed actions against the standards of the doctrine of legality, see e.g. *Nala Local Municipality v Lejweleputswa District Municipality* [2005] 3 All S.A. 571 (O); *Van Zyl v Government of RSA* [2005] 4 All S.A. 96 (T); *Mgoqi v City of Cape Town* 2006 (4) S.A. 355 (C). In a number of similar decisions courts have held that it is unnecessary to decide if the action or decision complained against amounts to administrative action, since the action or decision fails to discharge the requirements of the doctrine of legality and falls to be set aside on that basis alone: *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] 4 All S.A. 487, SCA; *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro* 2006 (2) S.A. 52 (C), *Reed v Master of the High Court of SA* [2005] 2 All S.A. 429 (E).

[400] See Ch.11.

[401] 2004 (4) S.A. 490, CC, paras 42–45 (footnotes omitted). The reference to Lord Cooke is to *R. v Chief Constable of Sussex Ex parte International Trader's Ferry Ltd* [1999] 2 A.C. 418.

11–125 As to the substance of reasonableness review, the Court in *Bato Star* adopted an approach based on "reasonable equilibrium". Where an administrator is enjoined by legislation to have regard to a range of considerations in making a decision, and has to strike a balance between often-competing considerations, the court's role "is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances". This is consistent with the view of one of the leading works, where Hoexter suggests that reasonableness as a standard of review connotes "an area of "legitimate diversity", a space within which "various reasonable decisions may be made".[402] O'Regan J. therefore set out a range of factors that courts must consider when investigating whether the administrative action concerned is reasonable or not. These include:

> "the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected".

11–126 O'Regan J. also considered the notion of deference, and although willing to concede to the expertise of the primary decision-maker in a complex case of resource allocation, was not willing to "rubber stamp" such a decision. She was anxious to emphasise that

> "The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself".[403]

Mistake of fact

11–127 In respect of mistake of fact, if such mistake leads to an unreasonable decision it will be reviewable on that ground. A court of review would clearly not engage with an administrator's findings of facts, since to do so would be to engage in the merits in a manner that *Bato Star* does not allow. The only facts that are relevant to review courts are "jurisdictional facts": facts that must exist in order to ground an administrator's authority to make a decision in the first place. The PAJA recognises review on this basis in s.6(2)(b), which allows review if "a mandatory and material procedure or condition prescribed by an empowering provision was not complied with".

[402] C. Hoexter, *Administrative Law in South Africa* (2007), p.313; see also "The Future of Judicial review in South African Administrative Law" (2000) 117 S.A.L.J. 484, 509–510.
[403] *Bato Star* (2004) (4) S.A. 490 at para.46.