

P45 Classifying grounds. Inapt for rigid categorisation, grounds fit broadly within unlawfulness, unreasonableness and unfairness.

- 45.1 The conventional threefold division
- 45.2 Root concepts and unifying themes
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45.1 The conventional threefold division. The most popular classification of grounds for judicial review is a threefold division into illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness). These groupings are neither exhaustive nor mutually exclusive. The classification is valuable, resting on two important distinctions: one between substance (unlawfulness and unreasonableness) and procedure (procedural unfairness); the other between hard-edged questions (unlawfulness and unfairness) and soft questions (unreasonableness).

45.1.1 The GCHQ threefold division. *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No.2)* [2008] UKHL 61 [2009] 1 AC 453 at [35] (Lord Hoffmann, referring to “review on ordinary principles of legality, rationality and procedural impropriety”); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410D-411B (Lord Diplock: “one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’”), 414E-H (Lord Roskill), 415B-C (importance of “making clear the differences between each ground”); *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 [2004] QB 36 at [112] (Lord Phillips (for the CA): “Starting from the received checklist of justiciable errors set out by Lord Diplock in the *CCSU* case [1985] AC 374, the courts (as Lord Diplock himself anticipated they would) have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function”); *Wheeler v Leicester City Council* [1985] AC 1054, 1078B-C (Lord Roskill: “Those three heads are not exhaustive, and as Lord Diplock pointed out, further grounds may hereafter require to be added. Nor are they necessarily mutually exclusive”); *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240, 249D-E (a “valuable ... but certainly not exhaustive analysis”); *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 750D (applying the “triple categorisation”); *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839, 856G.

45.1.2 Important not to fetter the developing law. *R v Panel on Take-overs and Mergers, ex p Guinness Plc* [1990] 1 QB 146, 160A-C (Lord Donaldson MR, referring to Lord Diplock in *GCHQ* as having “formulated the currently accepted categorisations in an attempt to rid the courts of shackles bred of the technicalities surrounding the old prerogative writs. But he added ... that further development on a case by case basis might add further grounds. In the context of the present appeal he might have considered an innominate ground formed of an amalgam of his own grounds with perhaps added elements ... for he would surely have joined in deploring any use of his own categorisation as a fetter on the continuous development of the new ‘public law court’”); *R v Secretary of State for the Environment, ex p Greater London Council* 3rd April 1985 unrep. (Mustill LJ, speaking against “the assumption that unless a particular case can be forced into one of the categories on the list, there is no power to give [a remedy], thus stunting the free growth of this developing area of law”).

45.1.3 Other broad summaries. <45.2.1>, <45.4.2> (ultra vires as a single head); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 [2009] 1 AC 756 at [32] (Lord Bingham: “the Director ... must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must

act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice"; *R v Inland Revenue Commissioners, ex p Preston* [1985] AC 835, 862C ("Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers"); *R v Hillingdon London Borough Council, ex p Puhlhofer* [1986] AC 484, 518C-D (council "susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely"); *Engineers & Managers Association v Advisory Conciliation & Arbitration Service* [1980] 1 WLR 302, 318F (whether shown to have "misdirected itself in law, or to have failed to observe the requirements of natural justice, or to have failed to consider relevant matters; or to have conducted the reference in a way in which no reasonable advisory conciliation or arbitration service, paying due regard to the statute, could have conducted it").

45.1.4 Codified formulations.

(A) EU TREATY ART 230. *R (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23 [2003] 2 AC 295 at [50] (suggesting that domestic grounds for judicial review reflected in article 230, by which CJEU has jurisdiction to review the legality of acts of the EU institutions "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers").

(B) COE:COM R(80)2. *R v Secretary of State for Transport, ex p Pegasus Holdings (London) Ltd* [1988] 1 WLR 990, 1001E-F <58.1.4>, describing Recommendation No.R(80)2 of the Committee of Ministers of the Council of Europe 11th March 1980 ("Basic principles" requiring that an "administrative authority, when exercising a discretionary power: (1) does not pursue a purpose other than that for which the power has been conferred; (2) observes objectivity and impartiality, taking into account only the factors relevant to the particular case; (3) observes the principle of equality before the law by avoiding unfair discrimination; (4) maintains 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; (5) takes its decision within a time which is reasonable having regard to the matter at stake; (6) applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case; ... (7) Any general administrative guidelines which govern the exercise of a discretionary power are: (i) made public; or (ii) communicated in an appropriate manner and to the extent that is necessary to the person concerned, at his request, be it before or after the taking of the act concerning him; (8) Where an administrative authority, in exercising a discretionary power, departs from a general administrative guideline in such a manner as to affect adversely the rights, liberties or interests of a person concerned, the latter is informed of the reasons for this decision. This is done either by stating the reasons in the act or by communicating them, at his request, to the person concerned in writing within a reasonable time; ... (11) A court or other independent body which controls the exercise of a discretionary power has such powers of obtaining information as are necessary for the exercise of its function").

(C) OTHER. *C.O. Williams Construction v Donald George Blackman* [1995] 1 WLR 102, 105D-F, describing the Barbados Administrative Justice Act s.4 (grounds "include the following: (a) that an administrative act or omission was in any way unauthorised or contrary to law; (b) excess of jurisdiction; (c) failure to satisfy or observe conditions or procedures required by law; (d) breach of the principles of natural justice; (e) unreasonable or irregular or improper exercise of discretion; (f) abuse of power; (g) fraud, bad faith, improper purposes or irrelevant considerations; (h) acting on instructions from an unauthorised person; (i) conflict with the policy of an Act of Parliament; (j) error of law, whether or not apparent on the face of the record; (k) absence of evidence on which a finding or assumption of fact could reasonably be based; and (l) breach of or omission to perform a duty"); Australia: Administrative Decisions (Judicial Review) Act 1977 s.5.