

Lord Carnwath gives the ALBA Annual Lecture

From judicial outrage to sliding scales – where next for Wednesbury?

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“Above all, is it possible to extract a more principled approach to determining the legality of executive action than the rather pragmatic concept of Wednesbury unreasonableness?” (Lord Browne Wilkinson, 1992)¹

“It is over 60 years since Wednesbury, and over 250 years since the advent of some form of rationality review in the UK. The bottom line remains that we cannot produce a modern definition of rationality review which is legally authoritative and where the mode of application coheres with the legal test...”
(Paul Craig 2010)²

The first quotation formed the heading to a lecture I gave to ALBA 17 years ago, entitled “The reasonable limits of local authority powers”.³ The second comes from a 2010 article by Professor Paul Craig “Proportionality, Rationality and Review” part of a lively exchange on this topic in the NZLR. More recently he has written more fully on the topic of “reasonableness review” in Current Law Problems.⁴ We now have the splendid 7th Edition of

¹ Foreword to Supperstone and Goudie, *Judicial Review* (1992)

² Paul Craig *Proportionality, Rationality and Review* [2010] NZLR 265, 284 Under the heading “Goodbye to Wednesbury?”, *Wade and Forsyth* (10th Ed p 314) observe that notwithstanding the “apparent persuasiveness” of criticisms of the *Wednesbury* principle, “reports of its imminent demise are perhaps exaggerated”.

³ *The reasonable limits of local authority powers* [1996] PL 244

⁴ Paul Craig *The nature of reasonableness review* Current Legal Problems (2013) p 1, 31

De Smith, which has an illuminating discussion of “the *Wednesbury* formulation and its subsequent development”.⁵

In my 1996 article I suggested that the various attempts at reformulating the *Wednesbury* test tended to obscure the underlying issue which, at least for statutory authorities, was best seen as ultimately one of statutory interpretation in accordance with the *Padfield* principle: “of fixing the limits of the relevant statutory rule, by using the conventional tools which the courts use to ascertain the intention of Parliament”.⁶ That exercise was to be carried out against the background of certain “framework principles”: that is, “principles not found in the statute, but which the court presumes to have been in Parliament’s mind...”.⁷ That was an idea I drew from an important 1987 article by Jeffrey Jowell and Anthony Lester: *Beyond Wednesbury: Substantive principles of administrative law*.⁸

Many others, judges and academics, have had a go at this topic over the intervening years. As I approach the end of my judicial career, it is a little depressing how little the debate seems to have moved on. Volumes have been written on the subject, but as my colleague Lord Toulson reminded us in a recent judgment, “fine words butter no parsnips.”⁹ As I will suggest, the problem may be that we have been looking for the wrong thing.

Before I do so, let me first make a little digression in praise of the academics, and our need as judges and advocates to make better use of

⁵ *De Smith’s Judicial Review* 7th Ed (2013) para 11.018ff

⁶ *Ibid* p 258

⁷ *Ibid* p 259

⁸ [1987] PL 368

⁹ *R (Guardian News) v Westminster Magistrates Court* [2013] QB 618 para 1.

them. I have said so judicially on a number of occasions.¹⁰ At least we have got away from the old-fashioned idea that they have to be dead before we can look at them. But I was struck by a comment in a comparative study (European Tort Law) to which we were referred in a recent appeal from Mauritius (where we were reviewing conflicting cases from the Cour de Cassation). The author said:

“French doctrine plays an important role in analysing, explaining and interpreting the decisions of the Court de Cassation... French legal writers are, in fact, the high priests serving the legal mass, mediating between the highest judge and the people, their sermons teaching the congregation how to behave. This role explains why legal authors, mostly academics, generally stand in high esteem, not only in the legal world but also among the general public. This is comparable to the German situation, but somewhat different from the English approach where judges have descended from on high, have learned to speak in everyday language, and thus made academic legal mediation (seemingly) less necessary.”¹¹

Flattering as is the comment, I find it hard to agree. We need the academics just as much as the French.

But back to *Wednesbury* or rather to Lord Diplock’s 1984 reformulation in *CCSU*. There are of course many things in that speech to admire. But, as I

¹⁰ See eg *CEL Group Ltd. v Nedlloyd Lines UK Ltd. & Anor* [2003] EWCA Civ 1716 [2004] 1 Lloyd’s Rep 381, paras 25-6 I had come recently from the Law Commission, where I had had the particular advantage of working closely with some leading academics on a range of legal reform projects.

¹¹ Cees van Dam *European Tort Law* 2nd Ed Oxford (2013) para 301-4 In Italy, curiously, the Civil Code forbids citation of legal authors in judgments: “in ogni caso deve essere omessa ogni citazione di autori giuridici” (art 118)

thought in 1996 and as I think now, his definition of “irrationality” made no sense at all. Let me remind you:

“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘*Wednesbury* unreasonableness’. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairston*¹² of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.”¹³

As I said in 1996, it is hard to see how “outrage” can ever be an appropriate or acceptable part of the judicial armoury?¹⁴ And why “logic”? The hallmark of a sound administrative decision, surely, is not so much logic, as informed judgment, which may take account of all sort of “illogical” factors such as political considerations and a democratic mandate? And how do “moral standards” come into this formulation? There may be many ways in which the conduct of public authorities can be morally objectionable -

¹² [1956] A.C. 14

¹³ *CCSU v Minister for Civil Service* [1985] AC 374, 410 (delivered Nov 1984)

¹⁴ Perhaps he had at the back of his mind the nearest thing to an explosion of judicial outrage in recent case-law at the time: Watkins LJ's withering condemnation of the action of the new GLC leader Ken Livingstone in the *Fares Fair* case in the Court of Appeal (*Bromley LBC v GLC* [1983] 768, 796) described as arising “out of a hasty, ill-considered, unlawful and arbitrary use of power”. He went on to quote Gladstone: “The true test of a man, the test of a class, the true test of a people is power. It is when power is given into their hands that the trial comes.” In the House of Lords, only Lord Brandon was able to decide the case on the basis of pure unreasonableness (“not a decision which the council directing themselves properly could reasonably have made”: *ibid* p 853). Lord Diplock's own reasoning, by contrast, turned on a painstaking analysis of the statute (p 820ff)

perhaps bribery, nepotism, even maintaining a public brothel? Such activities may be illegal, but not because they are “irrational”, still less because judges find them outrageous.

The only example Lord Diplock gave was *Edwards v Bairstow*, a famous case about the definition of “trade” for purposes of income tax. It is hard to see anything outrageous, in logic, let alone morals, about the Commissioners’ decision. It looks like a straightforward case of the Commissioners getting their law wrong.¹⁵ Nor was it an example of a high threshold of review. On the contrary Lord Radcliffe argued against the courts imposing “any exceptional restraints” on themselves when reviewing the commissioners’ decision on the facts:

“Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.”¹⁶

Finally what about irrationality “standing on its own feet”? As Professor Paul Craig points out, if one takes the Diplock test at face-value, there can be “no pretence of any meaningful substantive review and it is difficult to think of a single real case in which the facts meet this standard”¹⁷. Even Lord Greene’s famous example of the red-haired school teacher does not

¹⁵ It had little to with the subject matter of *Wednesbury*, which was case about use of discretionary powers. *Edwards v Bairstow* was a quite different issue – that of legal categorisation, and the difficult boundary between law and fact. In relation to which the law has developed in a different direction: see my judgment in *Jones v FTT* [2013] UKSC 19. See also my judgment in *OFT v IBA Health Ltd* [2004] 4 All ER 1103 for the variable approach to the principles of judicial review depending on the expertise of the court or tribunal.

¹⁶ [1956] AC at 39

¹⁷ Craig *The nature of reasonableness review* Current Legal Problems (2013) p 1, 31

need such a test, as he recognised. To dismiss a school teacher for having red-hair can be simply explained as a classic example of having regard to an irrelevant consideration. (That indeed was the context in which the example had been used originally by Lord Justice Warrington in a case in 1925.¹⁸)

Fortunately judicial outrage has not survived as a test of legality. The word “irrationality” itself has survived as a synonym for unreasonableness, but the rest of Lord Diplock’s definition never gained currency in the real world of administrative law.¹⁹ In the first cases in which the House returned to this subject-matter nothing was said of irrationality, let alone judicial outrage. In *Preston* (April 1985)²⁰, Lord Scarman and Lord Templeman resorted to the language of “unfairness” and abuse of power. In *Wheeler v Leicester CC* (July 1985) Lord Roskill gave the leading speech, having in *CCSU* commended Lord Diplock’s “new nomenclature” as having “the great advantage of making clear the differences between each ground”. However, he made no attempt to apply the irrationality test to the case before him.

The *Wheeler* case is interesting as one of the very few at the highest level where pure *Wednesbury* has been used directly as a ground of decision. On analysis, there are better explanations. The council had refused the use of its sports ground to the city’s rugby team club, unless it condemned the English team’s proposal to send a team to apartheid South Africa. That he

18. *Short v Poole Corporation* [1926] Ch 66 at 91: given as an example of “an act of a public body (which), though performed in good faith and without the taint of corruption, was so clearly founded on alien irrelevant grounds as to be outside the authority conferred on the body”.

¹⁹ But see the recent exchange between Lord Sumption and Lord Reed on the difference between rationality and reasonableness, in *Hayes v Willoughby* [2013] 1 WLR 935 paras 14 (“an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse”), 28

²⁰ [1985] AC 835, 851H (Lord Scarman) 866H (Lord Templeman)

considered was both “unreasonable in the *Wednesbury* sense” and procedurally unfair “within the third of the principles stated in *CCSU*”.²¹ In my 1996 article (p 255) I suggested that neither rationale was very convincing. The case was better explained by reference to the reasoning of Browne-Wilkinson LJ, dissenting in the Court of Appeal. He saw it as an issue of statutory construction. He held that the powers of the Open Spaces Act 1906 were not intended to be used to enforce particular political views (p 1065G). Once again it all came down to *Padfield*.

Let me now turn to another emotion-based phrase from the 1980s which has proved more resilient, this time from Lord Bridge: “anxious scrutiny”?²² This is said to be something the courts have to apply to cases involving threats to life, and by extension to other threats to human rights.

Given the care with which Lord Bridge’s judgments were constructed, I doubt if he intended such an imprecise term to acquire the status of a definition or legal principle. In the next important case on this theme, *Brind* (1991), Lord Bridge said nothing about “anxious scrutiny”, but spoke rather of the need, where “fundamental human rights” are at stake (in that case freedom of speech), to “start from the premise that any restriction requires to be justified”, and that “nothing less than an important competing public

²¹ *Wheeler v Leicester CC* [1985] AC 1054. In 1989. Lord Donaldson MR “eschew(ed) the synonym of ‘irrational’ because... it is widely misunderstood by politicians, local and national and even more by their constituents, as casting doubt on the mental capacity of the decision maker...”: *R. v Devon CC ex p. George* [1989] A.C. 573, 577F. Later in the same judgment he preferred the “more homely... my goodness, that is certainly wrong” (taken from May LJ in the analogous context of *Neale v Hereford and Worcester CC* [1986] ICR 471, 483). Compare Simon Brown LJ in *R v CIR ex P Unilever* 15.2.95, drawing the line between conduct which is “a bit rich”, and a decision which is “so outrageously unfair that it should not be allowed to stand...”

²² *R v Secretary of State ex p Bugdaycay* [1987] AC 514, 531E

interest will be sufficient to justify it”.²³ That in modern terms seems very like the language of proportionality, even if a majority of the House, including Lord Bridge, were unwilling to take that step explicitly.²⁴

It is worth stepping back a moment, and reminding ourselves of what was actually decided in *Bugdaycay*. As too often, a particular phrase has acquired a life of its own without regard to its context. It was relevant to only one of the cases, that of Mr Musisi as Ugandan citizen who had come to the UK from Kenya. It was accepted that he could not safely be returned to Uganda, but it was proposed to return him to Kenya. The issue, raised for the first time in the House of Lords, was whether the Secretary of State had reasonably satisfied himself that Kenya would not itself return him to Uganda, as on the applicant’s evidence had happened in previous cases. It was not enough for the Home Office’s affidavit to express confidence that Kenya would not knowingly act in breach of the Refugee Convention, without addressing the occasions when it had apparently done so.

Lord Bridge concluded that the Secretary of State's decisions had been taken on the basis of a confidence in Kenya's performance of its obligations under the Convention “which is now shown to have been, at least to some extent, misplaced”. Since the fact of such breaches was very relevant to the assessment of the danger facing the appellant if returned to Kenya, and since the decisions of the Secretary of State “appear to have been made without taking that fact into account”, they could not stand. So the court was not applying some special, more intrusive test of rationality. The reference to “anxious scrutiny” seems to have been directed

²³ *R v Home Secretary ex p Brind* [1991] 1AC 696, 748H-749A It is noteworthy that, in the leading speech, Lord Ackner reverted to the language of *Wednesbury* and of “perversity”, rather than irrationality.

²⁴ *Ibid* p 758A

more to the procedural aspect, perhaps an excuse for giving such close attention to an argument which had been raised for the first time in the House of Lords. Substantively, the court was applying conventional *Wednesbury* principles, and asking whether the Secretary of State had taken account of all relevant factors.²⁵ As Lord Diplock had said in *Tameside*, that involves the decision-maker not just asking himself the right question but taking “reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly”²⁶. In that case the Secretary of State had acted unlawfully in interfering with an education decision of the local authority on inadequate information. The case had nothing to do with human rights, but I doubt if Lord Diplock would have regarded his scrutiny of the Secretary of State’s action in that case as any less rigorous or anxious than that of Lord Bridge in *Bugdaycay*.

However, anxious scrutiny, unlike “judicial outrage”, has survived, and acquired a special status. It proved very convenient to government in seeking to persuade Strasbourg of the effectiveness of judicial review as a remedy under article 13.²⁷ By 2002 it was being described by Lord Bingham as a “fundamental principle”²⁸. It quickly spread beyond cases where the right to life was at stake as in *Bugdaycay*, to human rights in general,²⁹ including for example the right not to be disturbed in one’s home by aircraft

²⁵ R (*Puga*) v LAT [2001] EWCA Civ 931, para 31 Laws L.J.: “[31] As is well known, in 1987 Lord Bridge said in the case of *Musisi* [1987] 1 AC 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...”

²⁶ *Secretary of State v Tameside* [1977] AC 1014, 1065B)

²⁷ *Vihvarajah v United Kingdom* [1991] 14 EHRR 248, 292, para 126

²⁸ R(*Thangarasa*) v *Secretary of State for the Home Department* [2002] UKHL 36 (17 October 2002) [2003] AC 920 para 9

²⁹ See eg R v *Secretary of State ex p Launder (No 2)* [1997] 1WLR 1839, 867 per Lord Hope

noise.³⁰ Where it applies, apparently, it is supposed to add some form of potency or rigour to the rationality test. Thus, in a case about the interests of vulnerable children, Dyson LJ spoke of the court having to “consider the issue of irrationality with anxious scrutiny”.³¹ Buxton LJ put it slightly differently: “a decision will be irrational if it is not taken on the basis of anxious scrutiny”.³²

It is probably too late to turn back the clock. But what does the phrase actually mean?³³ “Anxiety”, as I said in one case,³⁴ is descriptive of a state of mind, not of a legal principle. Is the anxious scrutiny appropriate to human rights cases to be contrasted with the more relaxed or superficial scrutiny that we give all our other cases? Professor Le Sueur has fairly observed: “It is a “mantra” so frequently invoked by counsel and the courts that there is a risk of forgetting, or never discovering, what it entails — or else end up paying only lip service to it.”³⁵

By the end of the 1990s there were moves to a simpler, less emotion-based test. In *ex p Smith* (1996), in David Pannick QC’s attractive formulation (distilled, so it was said, from *Bugdaycay* and *Brind*, and adopted as such by

³⁰ *R v Secretary of State for Transport ex p Richmond LBC (No 4)* [1996] 1 WLR 1460, 1480-1 per Brooke LJ

³¹ *R(Hillingdon LBC) v Lord Chancellor* [2008] EWCA Civ 2683 para 67 per Dyson LJ.

³² *WM(DRC) v Secretary of State* [2000] EWCA Civ 1495 para 10

³³ A comprehensive list of citations can be found in Fordham *Judicial Review Handbook* 6th Ed, para 32.3ff.

As he puts it: “Under the principle of anxious scrutiny a defendant public body is required to demonstrate proper justification and high standards of fairness”.

³⁴ *R(AS(Sri Lanka)) v Secretary of State* [2009] EWHC 1762 (Admin), paras 39-41; *R(YH) v Secretary of State* [2010] EWCA Civ 116 paras 22-4

³⁵ Professor Andrew Le Sueur *The rise and ruin of unreasonableness?* (2004) p 11:

<http://www.adminlaw.org.uk/docs/ALBA-A%20Le%20Sueur%20paper>. He suggests certain “principles” which can be extracted from the cases, the most significant perhaps being that the “burden of argument” shifts to the defendant public authority: “The claimant no longer has to demonstrate unreasonableness, but rather the defendant needs to produce a justification for the decision that satisfies the court that it was properly made (with the court according the public authority appropriate ‘deference’).”

the Court of Appeal) *Wednesbury* unreasonableness and irrationality were transmuted into “beyond the range of responses open to a reasonable decision-maker”; but with a significant qualification in the human rights context, of a variable standard of review: “the more substantial the interference with human rights, the more the court would require by way of justification under the reasonableness test”.³⁶

David Pannick’s formula was no doubt an ingenious way of bridging the gap between *Wednesbury* and Strasbourg, in that awkward period after the influence of the Convention had begun to be felt in domestic law but before the Human Rights Act had provided an appropriate statutory framework. But it did not really do the trick even in that context. Mr Smith failed in the UK courts but succeeded in Strasbourg. As Paul Craig points out, the difference was not so much in the test which was applied but in “the evidence regarded as pertinent to the inquiry and the weight accorded to it”.³⁷

Once we had the Human Rights Act, it might have been thought, the Pannick formulation was no longer needed. In the human rights context at least, we could have moved to a simple proportionality test in accordance with Strasbourg law. But by this time the Pannick “variable standard” had grown deeper roots. It had apparently become a rule of general application, not confined to the human rights context.

Thus Laws LJ in *Begbie* (2000), rather than jettison the *Wednesbury* principle altogether, redefined it as “a sliding scale of review more or less intrusive according to the nature and gravity of what is at stake”.³⁸ Or as he put it in

³⁶ *R v Ministry of Defence ex p Smith* [1996] QB 517.

³⁷ Craig *op cit* p 19

³⁸ *R v Department of Education ex p Begbie* [2000] 1 WLR 111, 1130 per Laws LJ. Some years before (extra-judicially) he had criticised the irrationality test as unacceptably “monolithic”, equating it with “a crude

Mahmood (2001) it was now a “settled principle of the common law”, independent of the Human Rights Act, that “the intensity of review in a public law case will depend on the subject-matter in hand”.³⁹ Professor Le Sueur in 2004 broke it down into “four main categories controlling judicial review”: “non-justiciable”, “super-Wednesbury”, “basic Wednesbury”; and “anxious scrutiny” (otherwise “enhanced level scrutiny”, rigorous examination”).⁴⁰ Lord Phillips MR (2003) described this process as the development by the courts of -

“...an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity.”

While they would not retake decisions on the facts, in “appropriate classes of case” they would “look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them.”⁴¹

If that is how the law has developed, it is clear that we have come a long way from judicial outrage. But it is less clear where we have ended up. Sliding scales only work if one has measurable standards to which they can be applied; otherwise is a matter less of sliding scales than of “slithering about in grey areas” (to quote Professor le Sueur) .⁴²

duty not to emulate the brute beasts that have no understanding”: *Laws Is the High Court the Guardian of Fundamental Constitutional Rights?* [1993] PL 59, 69, 74

³⁹ *R (Mahmood) v Home Secretary* [2001] 1 WLR 840 para 18-19 per Laws LJ. Lord Cooke was ready to abandon *Wednesbury* with its standards defined by the “capricious and the absurd”, recognising that “the depth of judicial review and the deference due to administrative discretion vary with the subject matter”: *R v Secretary of State for the Home Department Ex p. Daly* [2001] 2 A.C. 532

⁴⁰ Exemplified respectively by *R(CND) v Prime Minister* [2002] EWHC 2777; *Notts CC* [1986] AC 240; *R v Devon CC ex p George* (“my goodness, that is certainly wrong”); and *Brind*.

⁴¹ *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 para 112, per Lord Phillips MR Cf the Canadian “spectrum of standards”, including inter alia “correctness”, “reasonableness simpliciter, and “not patently unreasonable”: *Canada (Director of Investigation) v Southam* [1997] 1 SCR 748

⁴² Le Sueur *op cit* p 6

On one side of the sliding scale, it is said, are “the nature and gravity of what is at stake”. But how are they to be judged? In terms of gravity, how is the educational system of Tameside Borough to be compared with Mr Musisi’s right to life? Or at the other end of the spectrum, take two notorious examples of minimal review: the *Nottinghamshire* case⁴³ (local authority finances), and *Pulhofer*⁴⁴ (housing the homeless). Neither was lacking in gravity: the first raising issues of national importance about the relationship of national and local financial competence; the latter, in a quite different way, touching on the basic need to have a roof over one’s head. In restricting the scope of review, the courts were making judgments, not about relative gravity or importance, but about relative competences, and about allocation and definition of relative responsibilities within a prescribed statutory framework. In these cases, it was decided, the issues, however important their subject-matter, were for policy-makers not the courts. But could not the same have been said about education in Tameside, or indeed transport fares policy in Greater London?

So I return to the more theoretical debate. As I have said, in my 1996 article I suggested that the various attempts at reformulating the *Wednesbury* test tended to obscure the underlying issue which was generally reducible to one of statutory interpretation on *Padfield* lines.⁴⁵

In his recent articles Paul Craig argues the case for a move to a general proportionality test. He gives a long list of cases where as he says the courts

⁴³ *R v Secretary of State ex p Nottinghamshire CC* [1986] AC 240

⁴⁴ *Pulhofer v Hillingdon LBC* [1986] AC 484

⁴⁵ *Ibid* p 258

have moved way beyond anything like pure rationality review.⁴⁶ Some of them were discussed in my 1996 article. Then as now I would put human rights cases on one side. For the most part, whether under the Human Rights Act, or by analogy with it, proportionality offers a workable tool and a generally adequate explanation for decisions. Professor Craig would extend its reach, pointing to the “varying degrees of intensity” with which proportionality is applied in the case-law of the European courts.⁴⁷ For me that is an undesirable complication. We have arrived at settled understanding of proportionality in domestic law,⁴⁸ and I prefer to keep it that way.

Unlike Professor Craig, I would also put on one side cases in his list about procedure. Heightened scrutiny in such cases can be seen as an assertion of relative competence of the court on questions of procedural fairness.⁴⁹ For example in *Niarchos*⁵⁰ (one of his examples, on which I also commented in 1996), it was held “unreasonable” for the Minister to re-open a public inquiry, when the relevant facts had been found at a previous inquiry, and the views of the objectors were already well known. No-one thought it necessary to ask whether the decision was “outrageous”. As I said, the essential issue was what was required by procedural fairness; “unfairness

⁴⁶ (2011) *op cit* note 31; also (2013) *op cit* p 12ff. Cf Le Sueur’s appendix “Sample of Wednesbury unreasonableness/irrationality cases Jan 2000-July 2003”: *op cit* p 14ff

⁴⁷ *Proportionality, Rationality and Review* *op cit* p 268ff

⁴⁸ *Bank Mellat v Treasury* [2013] 3 WLR 179 para 20 per Lord Sumption

⁴⁹ *Op cit* p 261, citing *R v Takeover Panel, ex Guinness* [1990] 1 QB 146, 183 per Lloyd LJ, on the heightened role of the court on issues of procedural fairness.

⁵⁰ *Niarchos v Secretary of State (No 2)* [1998] JPL 118

may result from giving a hearing when it is not needed, as much as denying one when it is”.⁵¹

More interesting are cases where there is no such ready explanation for the more intrusive review. A prime example, both for me in 1996 and for Professor Craig in 2013, was *West Glamorgan CC v Rafferty*⁵² (1987). It was held unreasonable for an authority to evict gypsies from its own property, in circumstances where they were in breach of their duties under the Caravan Sites Act to provide caravan sites. I remember at the time thinking it a surprising decision in law, although it seemed to make good sense in practical terms. On one view, as Paul Craig says, the court was going beyond the traditional view that, in balancing material considerations, matters of relative weight are not for the court. Assuming the decision was right, I prefer, as I suggested in 1996, to see it as an exercise in the interpretation of two interacting statutory schemes.⁵³ In the words of Ralph Gibson LJ:

“The reasonable council in the view of the law is required to recognise its own breach of legal duty for what it is and to recognise the consequences of that breach for what they are.... The decision is

⁵¹ Similar thinking can be used to explain two of Professor Craig’s more recent examples: *R v Secretary of State ex p Wagstaff* [2001] 1 WLR 292, and *R v Lord Saville ex p A* [1999] 4 All ER 860. In the first, the court held, disagreeing with the decision of the Secretary of State, that the inquiry into the murders by Dr Shipman should be in public, the supposed advantages in terms of speed and candour being outweighed by the special importance and public interest of the case and the presumption that such an inquiry should be in public. In *Saville* the court, disagreeing this time with the decision of Lord Saville as Chairman of the Bloody Sunday inquiry, held that soldiers appearing before the inquiry should be given anonymity. Although it was explained by the court by reference to “heightened reasonableness review” in a context where the soldiers’ right to life was potentially at risk, both these cases can be explained as the simple assertion of relative competence by the court over issues of court or inquiry procedure.

⁵² [1987] 1 WLR 457

⁵³ *Op cit* p 261

only explicable to me as one made by a council which was either not thinking of its powers and duties under law or was by some error mistaken as to the nature and extent of those powers and duties”.⁵⁴

The new De Smith takes a rather less prescriptive line. The editors tell us of the many attempts over the years to reformulate *Wednesbury*. The most popular, it seems, are variants of the words “within the range of reasonable responses”.⁵⁵ They signal a move away from the line taken in some earlier editions, that unreasonableness “required something ‘overwhelming’ and was therefore rather rare”. Instead, they say, -

“Trawling through the case law that had developed by the 1990s, we found that there were a relatively large number of cases where the decision was held to be unreasonable. Deeper analysis revealed that in virtually every instance the decision could have been held unlawful on the ground of a much more specific tenet or principle of substantive judicial review (occasionally, but often, then articulated independently).”⁵⁶

One of the editors, Professor Jeffrey Jowell took that line of thinking a stage further in a short summary paper prepared for a recent exchange with the Consiglio di Stato in Rome⁵⁷. Commenting on the “clumsiness” of the *Wednesbury* formulation he said:

“However, because of its vagueness and the fact that it was such a high hill to climb, courts adopted more specific phrases to indicate more precisely why a decision was unreasonable (or substantively unacceptable). Such include cases where the decision was:

⁵⁴ *Ibid* at p 477E

⁵⁵ *Op cit* para 11-024

⁵⁶ *Ibid* para 11-028

⁵⁷ *Proportionality, Unreasonableness, and Other General Principles* (Consiglio di Stato Rome 25.10.13)

- Illogical or lacking a rational connection between the evidence and the decision
- Unduly uncertain or excessively vague in its reasoning
- Where the decision placed undue weight on a particular (relevant) consideration and insufficient weight on another (relevant) consideration
- Where the discretion which should have been exercised flexibly was “fettered” by a self-imposed policy or rule
- Where the decision was made under a mistake or ignorance of a material fact
- Where the decision violated an ingredient of the rule of law, including the violation of a legitimate expectation
- Where the decision violated the principle of equal application of the law (consistency)
- Where the decision was unduly harsh or oppressive”

I like that analysis. The important question is not whether the decision is beyond the range of reasonable responses, but why? The reason must be found either in the statute, expressly or by implication, or in some other general but separately identifiable principle of the common law. I like it also because it accords to my own experience of the development of administrative law over the 45 years or so of my professional career. The judges have been like sculptors chipping away at the relatively formless block bequeathed to them by Lord Greene, in order to carve out some more practical and specific tenets of the law such as can be applied to real cases. General judicial theorising even at the highest level should not always be

taken too seriously. Much more important is what the courts have actually decided – particularly those where the challenges have been successful, and where the reasoning has stood the test of time.

I can still remember the cases that made a particular impact in those early years. *Padfield* (1968)⁵⁸, which had just been decided, established the principle that there are no unfettered discretions in public law, and that statutory powers must be used to promote the policy and objects of the statute, to be determined by the courts as a matter of law. Much of what follows can be traced back to that. Others that I remember from those early years are: *Lavender* (1970)⁵⁹ (fettering planning discretion); *Coleen Properties* (1971)⁶⁰ (decision must be supported by substantial evidence); *Congreve* (1976)⁶¹ (abuse of licence revocation powers); *Tameside* (1977) (duty of authorities to inform themselves); the *Hong Kong* case (1983)⁶² (the beginnings of the doctrine of legitimate expectation).

In 19 years as a judge of administrative law cases I cannot remember ever deciding a case by simply asking myself whether an administrative decision was “beyond the range of reasonable responses”, still less whether it has caused me logical or moral outrage. Nor do I remember ever asking myself where it came on a sliding scale of intensity. My approach I suspect has been much closer to the characteristically pragmatic approach suggested by Lord

⁵⁸ *Padfield v Minister of Agriculture* [1968] AC 997 Developed by Professor Wade under the heading “No unfettered discretion in public law” (Wade *op cit* p 296), in a passage adopted by Lord Bridge in *R v Tower Hamlets LBC* [1988] AC 858, 872

⁵⁹ *Lavender & Sons v MHLG* [1970] 1 WLR 1231

⁶⁰ *Coleen Properties v MHLG* [1971] 1WLR 433

⁶¹ *Congreve v Home Office* [1979] QB 629

⁶² *AG of Hong Kong v Ng Yuen Shui* [1983] 2AC 629

Donaldson in 1988, by way of a rider to what Lord Diplock had said in *CCSU*: “the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take”.⁶³ If the answer appears to be yes, then one looks for a legal hook to hang it on. And if there is none suitable, one may need to adapt one.

That in effect was what we did in relation to mistake of fact as a ground of challenge in the Court of Appeal in *E v Secretary of State*⁶⁴. We saw that judges at first instance had in practice been overturning administrative decisions for mistake of fact, particularly in planning and immigration cases, without going as far as to say the decisions were perverse or outrageous; and that the higher courts and the academics had not cried foul. So we decided to formulate some principles, based not on unreasonableness or irrationality, but, taking our cue from Lord Templeman in *Preston*, simple unfairness⁶⁵. As far as I know, those principles have not attracted serious criticism.

Conclusion

I think the time has come to abandon judicial outrage and sliding scales. We may also have to abandon the search for residual principles, whether of reasonableness or rationality. I doubt if there are any, other than the interests of justice. Anxious scrutiny is probably too embedded in the jurisprudence to be discarded, but we should be wary of thinking that it means anything. Perhaps we as judges should cut out the theorising and concentrate on doing justice in real cases. Where doing justice requires us to develop and refine new, more specific principles, we should be willing to do

⁶³ *R v Take-over Panel ex p Guinness plc* [1990] 1QB 146, 160C

⁶⁴ [2004] QB 1044

⁶⁵ Taking our cue from Lord Templeman in *Ex p Preston* [1985] AC 835, 865-6 (see above)

so. Generally we should look to the academics to do the theorising, and to put our efforts into a wider context. That way, we can decide the cases, and then they can tell us what we really meant, so that we can make it sound better next time.

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