Principles of Public Law

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GROUNDS OF JUDICIAL REVIEW IV: IRRATIONALITY

15.1 Introduction

In this chapter, we examine the principles governing the ground of review which Lord Diplock, in the *GCHQ* case (*R v Minister for the Civil Service ex p Council of Civil Service Unions* (1985)), called 'irrationality'. In the broadest of terms, we can characterise this head as involving review of the *substance of the decision (or rule) challenged*; in other words, review (however limited) of the merits of the decision or rule. Judges have, in the past, been very reluctant to concede that this ground of review does involve a judgment of the merits of the decision; indeed, to a cynic's eye, the courts appear sometimes to have almost deliberately declined to clarify the basis upon which they do or do not intervene. As we shall see, one important task in this chapter is to distinguish what judges say from what they actually do.

It is helpful to highlight at the outset two fundamental issues which run throughout the chapter. The first concerns the *level of scrutiny* which the courts exercise when reviewing for irrationality: that is, *what degree of irrationality or unreasonableness must be shown before the court will quash a decision?* As we shall see, it is not enough that a judge thinks that he or she would have come to a different conclusion if he or she rather than the decision maker had been responsible for the decision. Something 'more extreme' is required before the court will be prepared to intervene. But how extreme? Is there any way of defining it, or, at least, is there any agreed formulation against which one can measure the rationality or reasonableness of the decision? And is the standard always the same, or is scrutiny more 'intense' in some circumstances (for example, where fundamental human rights are at stake) than in others?

The second issue is even more basic: *what is it that an applicant must show is irrational or unreasonable in order to establish a basis for judicial review?* Usually, the answer is simply 'the decision' or 'the result' itself: the court may decide that the conclusion which the decision maker reached (or the rule which the authority has enacted) is so unreasonable or irrational that it may be quashed. But there is another possible route by which an applicant may establish irrationality. If the process by which the decision maker has arrived at the decision is irrational (for example, tossing a coin), then the court may quash the decision even if the decision itself is one which, if it had been reached by a normal process of decision making, would not inherently be irrational or unreasonable.

It is worth considering a little further the difference between these two types of irrationality at this early stage.

(a) a classic example of a decision which is, of itself, 'inherently' irrational or unreasonable was suggested by Warrington LJ in *Short v Poole Corporation* (1926) (quoted by Lord Greene MR in his landmark judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948)), namely, a decision to dismiss a red haired teacher on the ground that she has red hair. But while Warrington LJ's example is relatively straightforward, it does give rise to some difficult questions. In particular, what are the principles upon which the courts act in holding certain decisions or rules to be 'irrational' or 'unreasonable'? At times, the courts simply appear to operate on an 'instinctive' basis: they 'know' when a decision is so perverse that they can strike it down for irrationality. We must try to identify principles upon which the judges act (even if they are not articulated), and we will therefore need to look at principles such as proportionality and certainty;

(b) irrationality of the '*process*' by which a decision was reached may be established in a number of ways. We have already encountered some of them in earlier chapters. For example, the process by which a decision is reached may be held to be irrational if a decision maker has taken into account a consideration which is so irrelevant that no reasonable decision maker could have considered it (compare above, 12.4 on irrelevant considerations). In Chapter 12, we focused on considerations which the courts found were irrelevant because they were contrary to the express or implied meaning of the legislation; the court may, on the other hand, conclude simply that the consideration taken into account is so unreasonable that no reasonable decision maker could have entertained it. Again, a decision which is reached in *bad faith* is sometimes described as being irrational; this may overlap with review for bias, considered above, 13.7. The dividing line between a challenge for irrationality and a challenge on other grounds may not, therefore, be as clear cut as first appears.

15.2 Judicial review of the 'merits'?

In Chapter 11, we contrasted judicial review, which is a supervisory jurisdiction ensuring the *legality* of public law decisions, with an appellate jurisdiction in which the court may be concerned with the *merits* of the decision under challenge (above, 11.3.1–11.3.3). It is frequently suggested that judicial review for irrationality infringes this distinction (or, more forceful critics would say, completely undermines it), because review for irrationality does involve a scrutiny of the merits of the decision.

As we noted earlier, defenders of the '*ultra vires*' theory do have an answer to this criticism. Review for irrationality, they would admit, may involve some scrutiny of the merits of the decision (although not, perhaps, in cases of

irrationality challenges to the decision making *process*). It is, in fact, only a 'light' degree of scrutiny, because, as we shall see, the court will not intervene simply because it would have come to a different decision; it will only intervene if the decision is irrational. But even this 'light' level of scrutiny is explicable by the *ultra vires* theory, they would say: the court intervenes because there is a *presumption* that Parliament cannot have intended, in conferring the decision making power or rule making power upon the public body challenged, to have allowed that power to be exercised in an irrational or unreasonable way. Hence, if the judge comes to the conclusion that the decision or rule is irrational or unreasonable, then it is outside the powers conferred on the decision maker by Parliament and can be quashed. The power to review for irrationality is, therefore, explicable in the terms of the ultra vires theory; it is part of a system of review.

We noted, in Chapter 11, that this explanation can be criticised for its artificiality (above, 11.4.1). However, it should be noted that judges do take the 'traditional' explanation seriously. In cases with a high profile, particularly with a political dimension, judges frequently emphasise that their view of the merits of the decision under challenge is quite irrelevant to the case before them; that they are simply charged with assessing the legality of the decision. But this will only remain true, at a practical level, for so long as review for irrationality remains a 'light touch' scrutiny. If the court intervened every time it found a decision 'a little unreasonable', or every time the court would have come to a different decision from the decision maker, the judicial disclaimer would soon ring obviously hollow. The courts therefore have a strong interest in limiting the intrusiveness of review for irrationality; of restricting it to an 'extreme case' remedy. This, in general terms, is what happens. In practice, it is rare for review on the ground of irrationality to succeed. And it is extremely rare for an applicant to succeed purely on the ground of irrationality; where irrationality succeeds, it is normally in conjunction with another ground of review. Whilst irrationality is an important ground of review, its modest practical significance should be borne in mind.

15.3 *Wednesbury* unreasonableness

The traditional starting place for a consideration of this ground of review is the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948). The case involved a challenge by APPH to a condition imposed by Wednesbury Corporation upon a cinema licence, that no children under 15 should be admitted to Sunday performances. The corporation had a wide power to impose conditions upon licenses 'as the authority think fit'. APPH challenged the condition upon several grounds, one of which being that it was unreasonable. In his judgment, Lord Greene MR considered the nature of a challenge for unreasonableness:

> It is true to say that if a decision on a competent matter is *so unreasonable that no reasonable authority could ever have come to it*, then the courts can interfere. That, I think, is quite right, but to prove a case of that kind would require something overwhelming ... It may be possible to say that although the local authority have kept within the four corners of the matters which they ought to consider, *they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it*. In such a case ... I think the court can interfere (emphasis added).

This formulation describes what has come to be known as '*Wednesbury* unreasonableness', after the name of the case. It was, for many years, adopted as (and, some would argue, still is) the best characterisation of this ground of review. It is not enough, to succeed on this ground, to convince a judge that the decision is unreasonable; instead, it must be shown that the decision is *so unreasonable that no reasonable decision maker could ever have come to it*. Of course, as a definition of unreasonableness it is tautologous, because it defines unreasonableness in terms of itself. But it does, in practice, indicate that 'unreasonable' means 'extremely unreasonable', or, as Lord Greene said, 'overwhelming'. What it does not do is to give any indication of any principled basis of assessing whether a decision is so unreasonable that this high hurdle of '*Wednesbury* unreasonableness' has been met.

Two further points should be made about the *Wednesbury* case. First, Lord Greene, in his judgment, also considered in general terms the different grounds of judicial review, setting out a list of different heads of challenge. This list is sometimes referred to as 'the *Wednesbury* catalogue', and the grounds of review are sometimes still referred to collectively as 'the *Wednesbury* principles'. It is important to distinguish these general references from the concept of *Wednesbury* unreasonableness, with which we are dealing here.

Secondly, it is worth bearing in mind the actual decision in the *Wednesbury* case. The court decided that the condition imposed by the corporation could not be said to be unreasonable in the sense set out by Lord Greene MR, and it therefore refused to overturn the condition. Whether the result of the case would be the same if the facts were repeated today is a different question; this is a useful reminder that caution is required in citing older cases as authority in this area. Standards of reasonableness, and even standards of 'overwhelming' unreasonableness, may change from generation to generation. Perhaps the best illustration of this is the even earlier decision of *Roberts v Hopwood* (1925), which involved a challenge to the decision of Poplar Borough Council to pay its employees, both male and female, an equal wage, and to set that wage at a rate above the 'market' rate of pay. The House of Lords held that the decision was not reasonable; there was 'no rational proportion between the rates of wages ... and the rates at which they would be reasonably remunerated'. Lord Atkinson made his view of the merits clear, criticising the council for 'allow[ing] themselves to be guided in preference by some

eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour'. You may well consider that the decision is of dubious authority today; indeed, compare *Pickwell v Camden LBC* (1983), where Ormrod LJ was of the view that an allegedly overgenerous wage settlement with striking employees by Camden was 'a matter for the electorate at the next election', and not a ground for review of the decision.

15.4 Irrationality

As we have noted (above, 11.4), in the *GCHQ* case, Lord Diplock preferred the term 'irrationality' to '*Wednesbury* unreasonableness'. He stated that irrationality

> 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 would be well equipped to answer, or else there would be something badly wrong with our judicial system ... 'Irrationality' can now stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review [pp 410–11].

An important element of this definition is Lord Diplock's recognition that the test involves an assessment of both the *logic* which led to the decision, and the *moral standards* which it embodies. Some judges have, however, been less than welcoming to the adoption of the word 'irrationality' itself. In *R v Devon CC ex p G* (1988), Lord Donaldson MR expressed a preference for the old term '*Wednesbury* unreasonable':

> I eschew the synonym of 'irrational', because, although it is attractive as being shorter than '*Wednesbury* unreasonable' and has the imprimatur of Lord Diplock in [the *GCHQ* case], 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.

Lord Donaldson's point is that the term 'irrational' surely implies a lack, or absence, of rational justification for the decision under attack. This may be a good description of some unreasonable decisions – for example, it will cover the decision maker who consults an astrologer, or spins a coin (examples given by Diplock LJ, as he then was, in *R v Deputy Industrial Injuries Commissioner ex p Moore* (1965)). But there are other decisions which might be described as unreasonable, even though the decision maker has acted in a deliberate and 'coldly rational' manner. For example, in *Backhouse v Lambeth LBC* (1972), the council attempted to avoid a requirement that it increase rents generally in its area by loading the whole of the required increase onto a single

property (on which the rent was increased from £7 to £18,000 per week), while leaving all the other properties with unchanged rents. While such a decision may be held to be unreasonable, it is perhaps not accurate to describe it as irrational.

Thus, the term 'irrational', while frequently used by judges, has by no means been universally adopted. The phrase '*Wednesbury* unreasonableness' is still in use, and has been joined by other formulations; it has been suggested that a decision is reviewable if, for example, it can be said that 'the public body, either consciously or unconsciously, are acting perversely' (*per* Lord Brightman in *R v Hillingdon LBC ex p Puhlhofer* (1986)), or (even) if the decision provokes the reaction, 'My goodness, that is certainly wrong!' (*per* May LJ in *Neale v Hereford and Worcester CC* (1986)).

15.5 Substantive principles of review?

There have been a number of attempts to formulate 'substantive principles' which underlie and explain review for irrationality; see, for example, Jowell, J and Lester (Lord), 'Beyond *Wednesbury*: substantive principles of administrative law' [1987] PL 368, and Peiris, GL, '*Wednesbury* unreasonableness: the expanding canvas' [1987] CLJ 53. Jowell and Lester have emphasised the advantages of developing such principles:

> The recognition and application of substantive principles would satisfy the need in a fast developing area of law for clarity and coherence. Far from encouraging judges to meddle with the merits of official decisions, it would we believe promote consideration of the proper role of the courts in the growing common law of public administration. It would also enable the courts to strengthen the protection of fundamental human rights against the misuse of official discretion without usurping legislative or executive powers [pp 368–69].

Until recently, however, the courts have been reluctant to take up this invitation, perhaps because 'clarity and coherence' of reasoning, while desirable in principle, may, in fact, expose judges more readily to the charge that they are intervening in the merits of decisions. It is, therefore, sometimes necessary to read between the lines of the decisions, rather than looking for clear statements of principle. Recently, however, one may detect a greater judicial readiness to accept and articulate the reasoning behind the concept of irrationality. This has gone hand in hand with a growing debate as to the appropriate intensity of review, as forecast in the last sentence of the passage quoted above; there has been increasing judicial recognition that heightened scrutiny is appropriate in cases engaging fundamental rights.

15.5.1 Decisions affecting fundamental human rights

Is a rule or decision more susceptible to review for irrationality if it impinges upon important rights of the individual affected? In such circumstances, is the decision subject to 'heightened scrutiny'? As a matter of common sense, it is surely right that in deciding whether a decision or rule is unreasonable, it is inevitable that one of the factors which must be taken into account is the effect which that decision or rule is likely to have. We will explore this further when considering the concept of proportionality (below, 15.6), but, if this is right, then it follows that a decision having a serious impact upon fundamental human rights may be more susceptible to challenge for irrationality/unreasonableness simply because such an important decision requires greater justification.

There are a number of older decisions which provide some support for this line of reasoning. The old case of *Kruse v Johnson* (1898) involved a challenge to a bylaw which sought to prohibit singing 'in any public place or highway within 50 yards of any dwelling house' (a measure clearly impinging upon what would now be described as freedom of speech or expression). Lord Russell CJ held that the courts had the power to strike down even a bylaw for unreasonableness 'if, for instance, they were found to be partial and unequal in their operation between different classes; if they were manifestly unjust; [or] ... if they involved such oppressive or gratuitous interference with the rights of those subject to them ...' – although, on the facts, the court found that the bylaw was not unreasonable. In *R v Secretary of State for Transport ex p de Rothschild* (1989), there was a challenge to the Secretary of State's decision to approve a recommendation of a planning inspector in favour of the compulsory purchase of the applicant's property. Slade LJ appeared to accept that increased judicial scrutiny was appropriate where property rights were affected:

> ... in cases where a compulsory purchase order is under challenge, the draconian nature of the order will itself render it more vulnerable to successful challenge on *Wednesbury* ... grounds unless sufficient reasons are adduced affirmatively to justify it on its merits ... Given the obvious importance and value to land owners of their property rights, the abrogation of those rights would, in the absence of what he perceived to be a sufficient justification on the merits, be a course which surely no reasonable Secretary of State would take [pp 938–39].

And, in the House of Lords decision in *Bugdaycay v Secretary of State for the Home Department* (1987), Lord Bridge stated that the courts are entitled, within limits:

> ... to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the

> individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

(Lord Templeman delivered a similar opinion on this point.)

The matter was further considered by the House of Lords in *R v Secretary of State for the Home Department ex p Brind* (1991). This case concerned a directive by the Secretary of State requiring the British Broadcasting Corporation and Independent Broadcasting Authority not to broadcast any matter which included words spoken by persons representing certain organisations proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984 (such as the IRA and Sinn Fein). The directive was challenged by journalists who argued (*inter alia*) that it involved a significant infringement of the right of freedom of expression, and that it was *Wednesbury* unreasonable and disproportionate. One question which arose was as to the 'intensity' of scrutiny appropriate in a case where fundamental human rights were at issue. It is not at all easy to derive a clear *ratio* from the five speeches of their Lordships. On the one hand, Lord Ackner appeared to deny that the fact that a decision impinged upon fundamental human rights would alter the degree of scrutiny appropriate on a challenge for unreasonableness; he denied that Slade LJ in the *Rothschild* case was in any sense 'increasing the severity of the Wednesbury test' (p 757), although Lord Ackner did accept that 'in a field which concerns a fundamental human right – namely, that of free speech – close scrutiny must be given to the reasons provided as justification for interference with that right'. On the other hand, Lord Bridge (with whom Lord Roskill agreed) appeared to take a more interventionist line:

> I do not accept that ... the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights ... We are ... perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it ... We are entitled [to ask] whether a reasonable Secretary of State, on the material before him, could reasonably make [that decision] [pp 748–49].

Lord Templeman, the 'swing' member of the House of Lords on this issue, did not come to a clear conclusion on the question, but did appear to have regard to the fact that human rights were affected by the decision; he stated that 'the courts cannot escape from asking themselves whether a reasonable Secretary of State ... could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable' (p 751). On the facts, none of the members of the House of Lords thought that the broadcasting ban was a significant infringement of freedom of speech or expression, because there was nothing to prevent the words of the 'banned' person being spoken by an actor (see, also, below, 24.3.6).

Post-*Brind*, the Court of Appeal in *R v Ministry of Defence ex p Smith* (1996) has accepted that the majority judgments in *Brind* are authority for the proposition that 'the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense [that it is within the range of responses open to a reasonable decision maker]' (*per* Sir Thomas Bingham MR). On the facts of the case, the court held (with some reluctance) that the ministry's policy that homosexuality was incompatible with service in the armed forces, whilst plainly affecting the human rights of the applicants (discharged servicemen and women) and thus calling for close scrutiny, could not be stigmatised as irrational.

Ex p Smith appears to mark an increasing recognition by the courts that they are entitled to impose a lower threshold of unreasonableness (that is, heightened scrutiny) in cases involving fundamental rights. As Laws J has put it (writing extra-judicially) 'the greater the intrusion proposed by a body possessing public powers over the citizen into an area where his fundamental rights are at stake, the greater must be the justification which the public authority must demonstrate' 'Is the High Court the guardian of fundamental constitutional rights?' [1993] PL 59); see, also, the interventionist approach of Simon Brown LJ in *R v Coventry Airport ex p Phoenix Aviation (*1995). On the other hand, there have been warnings (not least from Lord Irvine: see 'Judges and decision makers: the theory and practice of *Wednesbury* review' [1996] PL 59) that to impose stricter scrutiny is 'to stray far beyond the limits laid down in *Brind*, and to lead the judges into dangerous territory' (p 65). Lord Irvine suggests that the *Brind* judgment, properly understood, holds that the *Wednesbury* threshold is not lowered in fundamental rights cases, and asserts that this limitation should be respected (see, also, *R v Secretary of State for the Environment ex p NALGO* (1993), *per* Neill LJ).

Whatever the outcome of this debate (and it looks increasingly as if the courts are prepared to engage in stricter scrutiny), the courts have, in any event, devised (and been handed) other tools to ensure strict scrutiny of decisions affecting fundamental rights. The most obvious are the powers conferred by the Human Rights Act 1998, considered in Chapter 19. But, in an important parallel development, the courts have, in two recent cases, held that where a statutory power does not clearly authorise the infringement of a fundamental right (whether a treaty right or, simply, an implied domestic 'constitutional right'), the courts will infer that the statutory intent was not to infringe that right. Accordingly, a delegated rule or decision infringing the right will be *ultra vires* the statutory power (*R v Secretary of State for the Home Department ex p Leech (No 2)* (1994); *R v Lord Chancellor ex p Witham* (1997)). This reasoning is perhaps more accurately characterised as falling under the ground of illegality rather than irrationality, but it is worth noting here because its impact is similar to that flowing from the 'heightened scrutiny' cases. Thus, in *ex p Witham*, the Divisional Court held that increased court fees

deprived citizens of their constitutional right of access to the courts, and (not being authorised by the Supreme Court Act 1981 to such a level) were *ultra vires* and unlawful.

15.5.2 Decisions subject to reduced scrutiny?

At the other extreme, there appear to be types of decision which the courts are reluctant to scrutinise even on the *Wednesbury* test. In general terms, the courts are particularly chary of involvement in decisions involving questions of resource distribution, and matters of 'high policy'. Normally, the courts will simply dismiss irrationality challenges to such decisions with the minimum of analysis, but, on occasions, the courts have gone further and held that the *Wednesbury* test should not even be applied. In *R v Secretary of State for the Environment ex p Nottinghamshire CC* (1986), the House of Lords had to consider a challenge to a decision of the Secretary of State to reduce the grant paid by central government to Nottinghamshire (because of overspending by the council). The decision to reduce the grant had been approved (as the legislation required) by an affirmative resolution of the House of Commons, and was not only highly 'party political', but was part of a very complex settlement of grants with local authorities throughout the country. Nottinghamshire's submission that the Secretary of State's decision was unreasonable was not even entertained by the House of Lords; Lord Scarman (with whom the rest of the House agreed) held that, where a decision concerned matters of public expenditure, and where it had been approved by resolution of House of Commons, then it was constitutionally improper for the court to entertain a challenge on *Wednesbury* grounds. Instead, a challenge could only succeed if 'the consequences of the [decision] were so absurd that he must have taken leave of his senses'. It is almost inconceivable that a decision which the House of Commons had approved by resolution could fail to pass such a test (see, also, the later decision of the House of Lords in *Hammersmith and Fulham LBC v Secretary of State for the Environment* (1991), approving *Nottinghamshire*).

It does appear, however, that the *Nottinghamshire* principle is only of application in the limited situation where the challenged decision has been approved by resolution of the House of Commons. The courts have recently rejected the submission that there should be reduced scrutiny merely because there is a high policy content (or resource allocation content) to a decision: *R v Ministry of Defence ex p Smith* (1996); cf Irvine (Lord), 'Judges and decision makers: the theory and practice of *Wednesbury* review' [1996] PL 59, pp 65–67.

15.5.3 Other substantive principles of review

Commentators have drawn on European legal principles to put forward other substantive principles of review which, it is suggested, underlie review for *Wednesbury* unreasonableness or irrationality. A principle of equality has been

proposed. Jowell and Lester, in the article cited above, suggest that both the principle of legal certainty and the principle of consistency are nascent in our administrative law. The latter principle underlies the concept of the substantive legitimate expectation, which we have already considered in Chapter 14 (see above, 14.4 and, for example, *R v Inland Revenue Comrs ex p Preston* (1985)). It is also beginning to be invoked as a free-standing principle; see, for example, *R v Secretary of State ex p Urmaza* (1996), *per* Sedley J (and can itself be seen (along with legal certainty) as a fundamental human right: see Chapter 22). An example of the former principle, Jowell and Lester suggest, can be seen in the decision of the House of Lords in *Wheeler v Leicester CC* (1985), which concerned a resolution of the council to ban Leicester Rugby Football Club from continuing to use a council-owned ground (pursuant to a statutory power to grant permissions for the use of its sports grounds), because three members of the club had participated in a tour of South Africa. The House of Lords quashed the resolution, at least in part on the basis that it was *Wednesbury* unreasonable; as Lord Templeman put it, 'the club having committed no wrong, the council could not use their statutory powers in the management of their property or any other statutory powers in order to punish the club'. Jowell and Lester suggest that the decision 'could be justified more convincingly than [it was] by spelling out more clearly the notion that legal certainty requires no punishment without the breach of established law' (p 377). This case should be considered in the context of subsequent cases such as *R v Lewisham LBC ex p Shell UK Ltd* (1988) (where Lewisham's decision not to contract with Shell as part of a South African sanctions campaign was held to be unlawful), and *R v Somerset CC ex p Fewings* (1995) (where Somerset's ban on stag hunting on council land was held to be unlawful – although, in this case, the court preferred to base the decision on the ground that Somerset had adopted an improper purpose, rather than on irrationality).

The place of a 'principle of equality' in English law has also recently been considered in some depth, by Laws J in *R v MAFF ex p First City Trading Ltd* (1997). He concluded that the European principle (requiring a substantive justification of unequal treatment) was not a part of domestic law, or the *Wednesbury* test, but did note that 'if a public decision maker were to treat apparently identical cases differently there would no doubt be a *prima facie Wednesbury* case against him, since on the face of it such an approach bears the hallmark of irrationality.' However, he accepted that where an explanation of the unequal treatment was offered, the court would only be entitled to reject it, in the usual way, on grounds of perversity.

15.6 The doctrine of proportionality

As we have noted, Jowell and Lester draw on the jurisprudence of European Community law and the European Convention of Human Rights to suggest substantive principles underlying review for irrationality (see above, 15.5). It

is important to remember, however, that the European Convention was not, until the Human Rights Act 1998, part of UK law, save by virtue of treaty obligation (see above, 2.12.1), and European Community law is applicable only in so far as a Community law right is in issue (see below, 18.1). This raises the awkward question (likely to be increasingly awkward post-Human Rights Act) of the extent to which the courts are obliged to use different legal principles according to whether a case falls under 'European' principles. Nowhere is this question starker than in relation to the doctrine of proportionality.

The doctrine of proportionality requires that the means employed by the decision maker to achieve a legitimate aim must be no more than is reasonably necessary – no more than is *proportionate* – to achieve that aim. It is sometimes described as requiring that 'one must not use a sledgehammer to crack a nut', or as requiring that the means adopted are the 'least intrusive' to another's rights sufficient to achieve the aim. The European principle allows a 'margin of appreciation' for the decision maker, but would clearly require judicial intervention in circumstances where the decision would not, on domestic principles, be held to be *Wednesbury* unreasonable or irrational (see, generally, Jowell, J and Lester (Lord), 'Proportionality: neither novel nor dangerous', in Jowell, J and Oliver, D (eds), *New Directions in Judicial Review*, 1988, London: Sweet & Maxwell).

The status of proportionality as a ground of review in UK law (which Lord Diplock, in the *GCHQ* case, had contemplated as a possible future development) was considered by the House of Lords in *R v Secretary of State for the Home Department ex p Brind* (1991) (see above, 15.5.1). The journalists submitted that the directive banning the broadcasting of the voices of members of proscribed organisations was unlawful because it was disproportionate to the legitimate aims of the Secretary of State. Whilst all the members of the House of Lords rejected the argument based on proportionality (not least because they considered that, on the facts, the interference with freedom of speech and expression was minimal), there was a wide variation of approach between their Lordships. Any attempt to summarise the different speeches is difficult, given the ambiguities which exist, but the following propositions can be put forward:

(a) all the members of the House of Lords agreed that reference to the law of the European Convention on Human Rights was only permissible if there was an ambiguity in the relevant domestic legislation (*Garland v British Rail Engineering* (1983)), and agreed that no ambiguity existed where (as in *Brind*) the legislation simply conferred a wide discretion upon the Secretary of State (this must, of course, now be read in the light of the Human Rights Act);

(b) hence, the applicants could not refer to the ECHR. The issue was simply whether proportionality existed in domestic law. Their Lordships were

unanimous that proportionality, as a separate doctrine, could not, on the facts of *Brind*, be invoked;

(c) Lords Ackner and Lowry were of the view that proportionality was simply not part of domestic law: 'there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country' (*per* Lord Ackner, p 763);

(d) on the other hand, Lords Bridge and Roskill expressly left open the possibility of the future adoption of the principle in an appropriate case. What sort of case might be appropriate was not indicated;

(e) Lord Templeman expressed no views either way as to the possible future development of the doctrine;

(f) however, all the members of the House of Lords appeared to accept that the test of proportionality, as outlined above, had a role within the confines of *Wednesbury* unreasonableness; that it might be useful as a way of helping to decide whether a decision is irrational or *Wednesbury* unreasonable. Thus, even Lord Ackner asked whether the Secretary of State had, in issuing the directive, 'used a sledgehammer to crack a nut' (the classic description of 'proportionality' reasoning); he commented: 'Of course, that is a picturesque way of describing the *Wednesbury* 'irrational' test. The Secretary of State has in my judgment used no sledgehammer' (p 759).

The use of proportionality in the limited sense envisaged by Lord Ackner and the other members of the House of Lords was clearly assumed to be very different from the more interventionist test applicable under European law. But as UK courts have increasingly used proportionality in this more 'limited' sense – as assisting in '*Wednesbury* scrutiny' – it may increasingly be asked whether the latitude accorded to a decision maker under *Wednesbury* is so different from the margin of appreciation allowed in European law. The 'convergence' of the two principles is, ironically, assisted by the fact that *Wednesbury* scrutiny now appears to require 'heightened scrutiny' in cases affecting fundamental rights (see above, 15.5.1). This development is itself clearly prompted by the philosophy of proportionality: that the more intrusive a decision on the rights of others, the more is called for in terms of justification.

To the extent that proportionality is not fully developed within UK law, domestic judges face the prospect of having to employ the doctrine in cases where a European Community right is in issue or where recourse can be had to the European Convention (see, for example, *Stoke-on-Trent CC v B & Q plc* (1991); *R v Intervention Board ex p ED and F Man (Sugar) Limited* (1986)), but of having to foreswear the principle in other cases, save as an 'aid to construction' in applying the test of *Wednesbury* unreasonableness or irrationality. The divergence will become increasingly marked after the entry into force of the Human Rights Act 1998, which requires courts determining

convention rights to take into account Strasbourg jurisprudence (by s 2) (see below, 19.10).

Whilst there is no juridical basis for arguing that merely because the doctrine of proportionality has been imported into cases involving European Community or convention rights, it should, or will, thereby be translated into the common law, it is nevertheless reasonable to suggest that that importation may provide a stimulus for further development of the doctrine in the common law. It would appear that the majority of the House of Lords in *Brind* did leave the door at least a little ajar to further judicial development of the doctrine, and it would also appear that the courts are beginning to push at that door, by way of cases involving both proportionality and 'heightened scrutiny'.

GROUNDS OF JUDICIAL REVIEW IV: IRRATIONALITY

The ground of review known as irrationality involves (to a limited degree) review of the 'substance' or 'merits' of the decision or rule challenged. In the traditional formulation (as set out in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948)), the applicant must show that *the decision is so unreasonable that no reasonable decision maker could ever have come to it* ('*Wednesbury* unreasonableness').

Lord Diplock reformulated the test in the *GCHQ* case, preferring the term '*irrationality*', and describing it as applying 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'.

Both the terms 'irrationality' and '*Wednesbury* unreasonableness' are still in use – along with 'perversity' (*ex p Puhlhofer* (1986)), and other terminological variations. In practice, it matters little which phrase is used; what is more significant is the 'level of scrutiny' which the courts require.

A decision may be flawed for irrationality *either* because the decision itself (the 'end result') is irrational or unreasonable (for example, the dismissal of the red haired teacher), *or* because the process by which the decision is reached is irrational (tossing a coin or consulting an astrologer). Standards of irrationality may change between generations!

Lord Greene's definition of 'unreasonableness' was (intentionally) tautologous. Academics and judges have attempted to clarify the principles on which the courts act by developing '*substantive principles*' of review, such as the following:

Decisions impinging upon fundamental human rights may be susceptible to 'heightened' scrutiny for irrationality

See *Bugdaycay v Secretary of State for the Home Department* (1987); *R v Secretary of State for the Home Department ex p Brind* (1991) – where the court was divided on the issue; *R v Ministry of Defence ex p Smith* (1996); Jowell, J and Lester (Lord), 'Beyond *Wednesbury*: substantive principles of administrative law' [1987] PL 368. But see also warnings to the contrary: Irvine (Lord), 'Judges and decision makers: the theory and practice of *Wednesbury* review' [1996] PL 59.

Compare decisions construing legislation as not authorising action interfering with fundamental rights: *R v Secretary of State for the Home Department ex p Leech (No 2)* (1994); *R v Lord Chancellor ex p Witham* (1997).

The principle of legal certainty

The law must be accessible and foreseeable; no one should be punished except for breach of an established law); see *Wheeler v Leicester CC* (1985).

The principle of consistency

Compare the doctrine of substantive legitimate expectation, above, 14.4.

The doctrine of proportionality

The means employed by the decision maker to achieve his legitimate aim must be no more than is reasonably necessary – no more than is proportionate – to achieve that aim). The status of the doctrine is uncertain in domestic law after the decision of the House of Lords in *R v Secretary of State for the Home Department ex p Brind* (1991):

(a) it is clear that the European doctrine has not been incorporated into domestic law (although the better view is that the majority of the House of Lords left open the possibility that this could happen by judicial intervention in a future suitable case); but

(b) it would appear that the doctrine is of relevance in assessing whether a decision is *Wednesbury* unreasonable or irrational; if a decision maker uses an excessively large sledgehammer, then the decision may be unreasonable/irrational.

The doctrine must be applied by the domestic courts with full rigour when dealing with a European Community or Convention law right); see *Stoke-on-Trent CC v B & Q plc* (1991); Human Rights Act 1998, s 2. It may well be that the further development of the doctrine in the common law will be stimulated by its use in a European context.