



Proportionality to supplant rationality?

Louise Jones, Guildhall Chambers

In advance of Lord Kerr's lecture to the Administrative Law Bar Association (ALBA) on 18 January 2016, which will be streamed live to Guildhall Chambers, Louise Jones considers some recent case-law in relation to the common law standard of review.

Next time you take your children to the cinema on a Sunday, you may wish to spare a thought for the children of *Wednesbury* in the 1940s. They were prevented by a licence issued by the council from attending the cinema on a Sunday, even if accompanied by their parents and notwithstanding the nature of the film on offer. Of course, the facts of *Wednesbury*¹ are not what public lawyers remember about the case. The council's decision to impose such a licence was not, the Court of Appeal held, unreasonable, in the sense that it was not a decision "so unreasonable that no reasonable authority could ever come to it."² But just as society (and cinema-attendance) has changed, so too has the approach taken by the courts to the common law standard of review: so-called '*Wednesbury* irrationality' has evolved as a ground of judicial review. Two key questions are particularly apposite for public lawyers at the moment: will the test of irrationality soon be replaced by a test of proportionality; and if so, what does proportionality as a ground of review require?

Three different constitutions of the Supreme Court have recently had cause to consider the common law standard of review. In *Kennedy*³ and *Pham*⁴, the judgments emphasized the flexibility of the common law standard of review and that the nature of judicial review in every case depends upon the context. Lord Mance in *Kennedy* said⁵ that Lord Bridge's speech in *Bugdaycay*⁶ had heralded the change from the rigid test of irrationality: Lord Bridge had indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, "the court must ... be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines."⁷ Put another way, the courts will adapt the intensity of the review to the subject matter of the decision in question.

But, *Kennedy* and *Pham* appeared to make it plain that, even where the subject matter of the decision is such that the review to be conducted is an intense one, the exercise remains one of review, rather than one of the court substituting its own decision for that of the decision maker.

In the very recent decision of the Supreme Court in *Keyu*⁸ (judgment handed down on 25 November 2015), the claimants were seeking a public inquiry into the events of December 1948 where a Scots Guard patrol shot and killed 24 unarmed civilians in

¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

² *Wednesbury* at 234

³ *Kennedy v Charity Commission* [2015] AC 455

⁴ *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591

⁵ *Kennedy*, §51

⁶ *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514

⁷ *Bugdaycay*, 531

⁸ *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69



Batang Kali, Selangor. One of their grounds of appeal was based on the common law through the medium of judicial review. Here, the appellants raised the argument that the time had come to reconsider the basis on which the courts review decisions of the executive. In particular, the appellants argued that the traditional *Wednesbury* rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality. In effect, the appellants were contending that the four-stage test identified by Lord Sumption and Lord Reed in *Bank Mellat*⁹ should now be applied in place of rationality in all domestic judicial review cases. That four-stage test is:

- (1) Whether the objective of the measure is sufficiently important to justify the limitation of a fundamental right;
- (2) Whether the measure is rationally connected to the objective;
- (3) Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
- (4) And, *per* Lord Sumption, whether, having regard to those matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community¹⁰.

Lord Neuberger considered that the five-Justice panel in *Keyu* was insufficient to accept, or reject, this argument which he considered potentially to have “implications which are profound in constitutional terms and very wide in applicable scope.”¹¹ Had he not considered that the appeal would fail even if it were based on proportionality, it would have been necessary to have the point re-argued before a panel of nine Justices. The profundity of the issue arose, in Lord Neuberger’s judgment, because it would involve the courts considering the merits of the decision at issue.

Lord Kerr tended to agree with Lord Neuberger that it would not be appropriate for a five member panel of the Supreme Court to reach a final conclusion on the question whether proportionality should supplant rationality as a ground of judicial review challenge at common law. Lord Kerr queried, however, whether the question carries as much constitutional importance as many commentators believe. He said that, “at its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense.”¹²

Given that the common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle, and where context is everything, there may not be as much to choose between tests

⁹ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, §§20 and 74

¹⁰ In *Bank Mellat (No 2)*, Lord Reed preferred a fuller version of the wording of stage 4 of the test to Lord Sumption (Lord Reed preferred: “whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter”), but said that there was no difference of substance between their formulations.

¹¹ §132

¹² §272



of proportionality and irrationality as first meets the eye. Nonetheless, Lady Hale, who dissented in *Keyu*, found that the *Wednesbury* test did have some meaning in a case such as this.¹³ The test is certainly not dead yet.

In *Keyu*, Lord Kerr suspected that the question will have to be frankly addressed by the Supreme Court sooner rather than later. In the words of Lord Neuberger in *Keyu*, “there is no more fundamental aspect of the rule of law than that of judicial review of executive decisions or actions”¹⁴ and as such, even if a move to proportionality would not be as much of a sea-change as may first appear, the answer to the questions that arise will no doubt be eagerly awaited by public lawyers of all disciplines.

In the meantime, we look forward to hearing Lord Kerr speak on ‘Proportionality and Democratic Legitimacy’ on 18 January 2016.

Louise Jones
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¹³ §313
¹⁴ §127