The Sir David Williams Lecture 2024
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"Judicial review of discretionary decision-making: differences of approach"

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It is an honour to be invited to give the Sir David Williams Lecture this year. I was a member of the audience in 2001 when the Honourable Justice Sandra Day O'Connor gave the inaugural Lecture in the presence of Sir David. The Lecture continues to be held annually in his memory. Sir David is remembered for his considerable contribution to scholarship in the area of public law and for the roles he undertook at University colleges and for the University itself as its Vice-Chancellor. He was also a remarkable teacher. Many LLM students attended Sir David's lectures on judicial review of administrative action over the years. That group included me. I think I speak for us all when I say that it was a privilege to be taught by him.

I believe Sir David and Lady Williams had a special fondness for Australia. Earlier in his academic career they spent a year there when he lectured at the University of Adelaide. I am told that later he came close to joining the legal academy in Australia, but Cambridge was to prevail and he was made the Rouse Ball Professor of English Law. He and Lady Williams nevertheless maintained a strong connection to Australia and visited many times. The connection was maintained through the many friendships that he forged within the academy, with judges and with former students and members of his colleges. He was invited to speak about public law including

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[1] I thank Duncan Wallace for his research for this Lecture.

to federal judges, such was the esteem in which he was held. These friendships and interactions were not confined to Australia.

David Williams was President of Wolfson College in the mid-1980s when my then future husband Michael and I applied to and were accepted for study in Cambridge. For both of us he played an important role in that process. He had previously been a Fellow and Reader in Public Law at Emmanuel College. His leadership of Wolfson was both dynamic and practical. His vision for the College involved it taking post-graduate students from many countries, including those of the Commonwealth. He was held in high regard and great affection by students and staff alike.

Overview

One of the most important roles undertaken by the courts of the United Kingdom and Australia, and the courts of other common law countries, is the review of decisions of executive and administrative decision-makers which affect those who are the subject of the decision. In undertaking judicial review the concern of the courts is that the power given by a statute to make the decision in question is exercised lawfully. If it is not the decision may be liable to be set aside by the courts. The role of the courts in judicial review is a strictly judicial one. In what was an

uncontroversial statement in the *Wednesbury* case[2], to which I shall later refer, it was explained that the courts "can only interfere with an act of executive authority if it be shown that the authority has contravened the law". The "law" here referred to is both the statutory law from which the decision-making power is drawn and the common law developed by the courts.

Statutes conferring decision-making power often give the decision-maker a discretion which allows for choices to be made about the decision or conditions which might be attached to it. The discretion may be expressed in very wide terms. Even so, such a discretion has never been regarded by the courts of the United Kingdom and Australia as completely at large or unlimited. The courts have insisted that a discretion be exercised reasonably in order for a decision to be lawful. But to state that requirement does not explain what the common law means by reasonableness and by what means it is to be tested.

In the mid-20th century the "*Wednesbury* test", so-called, restricted the requirement of reasonableness to one of rationality. It was some time before this view was questioned, notably by courts of the United Kingdom. From the late 1980s the *Wednesbury* test came to be considered as unduly restrictive when a fundamental human or other right was affected by a

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[2] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228.

discretionary decision. The UK courts came to apply differing levels of scrutiny of the decision which had regard to the nature of the right and applied a test similar to that of European "proportionality" analysis to determine the reasonableness of the decision.

Australian courts did not take that path. Although "reasonableness" in decision-making may now be said to require more than mere rationality and to be capable of being tested by drawing inferences from the outcome of the decision under review, the lawfulness of discretionary decision-making remains largely tethered to the question whether the exercise of the discretion is within the aim or purpose of the statute which gives the discretion. There is though also a question, perhaps not fully explored, as to the nature and extent of this enquiry.

It is not my purpose to suggest that either approach as to how discretionary decision-making is to be tested is to be preferred. Rather it is to suggest that we should acknowledge the differences of approach which have developed and attempt to identify what might explain those differences. What influences have the courts of either country been subject to in developing their jurisprudence? What are the respective frameworks within which judicial decisions of this kind are made? At the least such an enquiry, which is of a comparative kind, may better inform our understanding of the present position in each legal system.

Earlier times

The common law has for a very long time recognised and enforced limits on the exercise by decision-makers of discretionary powers. In the late 16th century, in *Rooke's Case*[3], the Commissioners of Sewers had the power to impose or apportion the cost of maintaining sewers, which included embankments and watercourses. In the decision under review the Commissioners imposed the cost of repairing the river bank on the riparian owners alone, although others involved in agriculture nearby also benefitted from the works. It was held that the Commissioners' discretion had miscarried. Sir Edward Coke said that regardless of the wide, seemingly unconfined, authority given by the statute, the decision of the Commissioners "ought to be limited and bound within the rule of reason and law".

This view was taken up in the late 19th century in *Sharp v Wakefield*[4], where Lord Halsbury LC equated the exercise of a discretion according to the rules of reason and justice with the exercise of a discretion "according to law". Its exercise he said, is to be lawful and regular, not "arbitrary, vague, and fanciful". The discretion "must be exercised within

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[3] (1597) 5 Co Rep 99b at 100a; 77 ER 209 at 210.

[4] [1891] AC 173.

the limit, to which an honest man competent to the discharge of his office ought to confine himself"[5].

A proper process of administrative decision-making must take as its starting point the statute which gives the power to make the decision, its purpose and its requirements, express and implied. A decision which is not consistent with or fails to have regard to the statute's aim or purpose, which fails to take into account a consideration which the statute requires to be taken into account or has regard to a consideration irrelevant to it is wrong at law. In some circumstances a failure of these kinds may also make the decision unreasonable, but this may be put to one side for present purposes.

Discretionary administrative decisions often involve the making of choices. The term "reason" applied to that thought-process may be understood to refer to a quality which effects a limit on administrative power. The cases mentioned provide some examples, such as that the exercise of the discretion must not be arbitrary or capricious. They notably do not include the adjective "fair", a term which courts are generally reluctant to use because it is something about which minds may reasonably differ and therefore too uncertain for the law in a context such as this. The cases mentioned otherwise leave open the question of what content the

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[5] [1891] AC 173 at 179.

common law gives to the requirement of "reason" which is to be applied in discretionary decision-making.

The *Wednesbury* case

This question was the subject of consideration in the *Wednesbury* case, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, which was decided by the Court of Appeal in 1947. The decision under review was that of the local authority, the Wednesbury Corporation, which was an exercise of a power under the *Sunday Entertainments Act 1932*. Prior to the Act it had not been possible for entertainments to take place on Sunday. The Act allowed local authorities in effect to lift that ban. They were given the power to grant permission to venues like cinemas to open on Sundays. The power to do so was expressed very broadly, in terms which allowed the local authority to impose "such conditions as the authority think fit to impose".

The condition which was imposed by the local authority was that cinemas could not permit the attendance of children under the age of 15. One obvious practical effect of such a condition was that many families would not attend cinemas. It was argued, unsuccessfully, for Associated Provincial Picture Houses Ltd that it could not have been the intention of the Act to leave the conditions to be imposed at large. It must have at least been intended that any condition imposed be reasonable. No reasonable authority could have imposed such a condition. The exclusion of children

even if accompanied by a parent or parents was unreasonable if not also beyond the power granted by the statute.[6]

The Court's decision did not pay much regard to the statute under which the decision was made or its purpose. Lord Greene MR identified "the well-being and the physical and moral health of children" to be an eligible reason, in the sense of being a "proper" explanation for the decision.[7] His principal concern was clearly not to arrogate the statutory discretion in question to the courts. He drew a firm line between the role of the courts and that of the decision-maker and said that the court must exercise restraint in its review of the decision.

The discretion was also viewed as so wide as to be almost absolute. As such the court held that there were only a very few legal principles which could effectively limit it. The court put to one side the circumstances where a decision-maker acted unreasonably by failing to take into account a mandatory consideration or taking into account an irrelevant consideration and focussed on what has come to be called "*Wednesbury* unreasonableness". According to this standard, a decision would be unreasonable in the eyes of the law if it was "so unreasonable that no

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[6] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 225-6 (argument of Gallop KC and Sidney Lamb).

[7] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

reasonable authority could ever have come to it"[8]. The decision therefore effectively limited the common law standard of reasonableness in discretionary decision-making to irrationality. And it did so to avoid the court assuming the role of decision-maker.

The UK—changes in approach

In the decades which followed, little attention appears to have been directed by the courts of the United Kingdom to the standard of unreasonableness stated in *Wednesbury*. This may be because it posed such a high standard for review that it was rarely invoked. There was a rare finding of *Wednesbury* unreasonableness in *Wheeler v Leicester City Council*[9]. There the Council passed a resolution banning a rugby club from using a city recreation ground for a period of time because three members of the club participated in a national playing tour of South Africa, which happened to be contrary to the Council's policy on apartheid. When the standard was stated in this and other decisions of the courts it was sometimes reformulated into equally demanding terms such as "so wrong that no reasonable person could sensibly take that view"[10]; "so outrageous in its defiance of logic or of accepted moral standards that no sensible

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[8] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

[9] [1985] AC 1054.

[10] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1026.

person who had applied his mind to the question to be decided could have arrived at it"[11]; and "so absurd" that the decision-maker "must have taken leave of his senses"[12].

But by the late 1980s signs were emerging that the standard was considered to be unrealistically high and should be relaxed, at least in particular categories of case. The signs were apparent from two cases: *R v Secretary of State for the Home Department, Ex parte Bugdaycay*[13] and *R v Secretary of State for the Home Department, Ex parte Brind*[14]. Both cases involved administrative decisions which affected a fundamental right. In one case the relevant right was recognised by the Refugees Convention; in the other it was recognised by the European Convention on Human Rights. At that time, as they are now, breaches of rights under the European Convention were dealt with by the European Court of Human Rights. Whether an administrative decision infringed the Convention such as to warrant it being held invalid was determined by that Court's application of proportionality analysis. Such analysis required that the decision be connected to a legitimate statutory object; that it go no further than was reasonably necessary to achieve that object; and that its ends were

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[11] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

[12] *R v Secretary of State for the Environment, Ex parte Nottingham County Council* [1985] AC 240 at 247.

[13] [1987] AC 514.

[14] [1991] 1 AC 696.

proportionate to the importance of the public interest involved. The tests, Prussian in origin, were also applied in decisions of the European Court of Justice. But at the time of the two decisions just mentioned the Convention did not form part of the law of the United Kingdom and would not do so until the coming into effect of the *Human Rights Act* in 1998. The courts of the United Kingdom therefore could not approach the question of the lawfulness of a discretionary decision in the same way as the European Court of Human Rights.

The 1987 decision of *Bugdaycay* involved a claim to refugee status. It concerned the adequacy of the consideration given by the Home Secretary to the danger that if the applicant was deported to Kenya, he might be removed from there to Uganda where he claimed to face persecution. Although the decision actually turned on the need to take account of Kenya's record in implementing the Refugees Convention, the circumstances of the case prompted Lord Bridge to propose that the courts should increase the rigour of the scrutiny for factual decisions which carry particularly serious consequences. He said that within the limitations of *Wednesbury* review the court must be entitled to subject an administrative decision to a more rigorous examination according to the gravity of the issue. There what was involved was the most fundamental of human rights,

the right to life. Where an individual's life was at risk the basis for the administrative decision must call for "the most anxious scrutiny"[15].

Brind concerned directives issued by the Home Secretary to broadcasters preventing them from broadcasting "any matter" consisting of words spoken by persons who represented prescribed terrorist organisations. For the reasons earlier explained, art 10 of the European Convention, which protected freedom of speech, could not at that time be used in English law to require that statutory directives be exercised in conformity with it. But as Lord Bridge again explained, this did not mean that the courts were "powerless" to prevent the exercise by the executive of apparently unlimited discretions in a way which infringes fundamental rights. Any restriction of the right of freedom of expression must be justified and this required there to be "an important competing public interest"[16]. Although the directive was found to be justified, by reason of its correspondence with the particular statutory purpose, it was observed that lack of proportionality may qualify as *Wednesbury* unreasonableness[17].

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[15] *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514 at 531.

[16] *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696 at 748-9.

[17] *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696 at 759, 762 per Lord Ackner.

The threads of reasoning in these cases were drawn together in *R v Ministry of Defence, Ex parte Smith*[18] which involved a policy of the Ministry of Defence to discharge personnel of homosexual orientation. Although the Court of Appeal did not consider itself in a position to find the policy to be irrational, it stated the proposition that "[t]he 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"[19]. This introduced a more calibrated technique of judicial review.

In *R (Daly) v Secretary of State for the Home Department*[20], the House of Lords endorsed the test explained in *Smith*. By this time the European Convention had become part of the law of the United Kingdom, but *Daly* did not involve a human right. It concerned legal professional privilege and a policy which involved infringement of prisoners' rights to maintain that confidentiality. Nevertheless this was a fundamental common law right and as such attracted stricter scrutiny. It was held that the infringement of the right was greater than was necessary to serve the legitimate public objective of discipline and control. This is the language of proportionality analysis, as the discussion in *Daly* confirms.

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[18] [1996] QB 517.

[19] *R v Ministry of Defence, Ex parte Smith* [1996] QB 517 at 554.

[20] [2001] 2 AC 532.

The result of these developments was to allow for a "sliding scale" of reasonableness review of decisions which involve fundamental rights, whether human rights or rights recognised by the common law, the intensity of which review depends on the nature or gravity of what is at stake[21]. It may now be that, more simply, review will correspond to the perceived importance of the legal right at stake[22].

In *Daly*, a three-stage test of proportionality similar to the European test was stated[23]. Later, in *Pham v Secretary of State for the Home Department*[24], Lord Reed identified counterparts to proportionality as the analysis applied in review of unreasonableness, but observed that this does not mean that the *Wednesbury* test, as applied by anxious or heightened scrutiny, is the same as the principle of proportionality applied under the Human Rights Act. In *Daly* it had been accepted that there was a material

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[21] *R v Secretary for Education and Employment, Ex parte Begbie* [2000] 1 WLR 1115 at [78].

[22] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 at [105]-[106] per Lord Sumption.

[23] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [27] per Lord Steyn, quoting *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80 per Lord Clyde.

[24] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 at [114]-[119].

difference between the two principles[25] and in *Brind* the court declined to accept proportionality as a distinct head of review.[26]

Nevertheless, as in European proportionality analysis, a margin of discretion was maintained for the original decision-maker. So much is evident from the decision in *Smith* and by statements in more recent cases[27]. In *Pham*, Lord Sumption explained that the court's assessment of rational decisions must depend in part on the extent to which the court is competent to reassess the balance which the decision-maker was called on to make.

The Australian approach

The three-stage European test for proportionality is not unknown to Australian law, but it has only been applied in a constitutional context with respect to the freedom of communication on matters of politics and governance. The freedom is considered to be both implied and guaranteed by the Australian Constitution[28]. As the term "freedom" suggests, it does

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[25] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [27].

[26] *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC at 749-50, 762-63, 766-67.

[27] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 at [21]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 at [106], [109] per Lord Sumption, [116] per Lord Reed.

[28] *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards* (2019) 267 CLR 171.

not have the status of a personal right. It is understood as a freedom in a more general sense but nevertheless operates as a substantial limitation on legislative power. Proportionality is used as a means of analysis, rather than as a principle, to determine whether legislation unduly limits or burdens the freedom and is for that reason invalid.

The Australian Constitution was not written as a charter of citizens' rights. Australia does not have a Human Rights Act, although some States do. Federal law has not involved any concept of proportionality in judicial review to test reasonableness of the exercise of a statutory discretion including where a human right is affected. Interferences with fundamental common law rights are taken account of as a matter of statutory interpretation. Where the exercise of a discretion interferes with a common law right, Australian law does not necessarily regard this as a question of reasonableness but rather whether the discretion was truly authorised. The principle of legality requires that any intended interference must be expressed in the clearest possible terms to be effective[29]. The principle is also applied in the United Kingdom and was referred to by Lord Bingham in *Daly*[30].

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[29] *Potter v Minahan* (1908) 7 CLR 277 at 304; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [158]; *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 310-11 [314].

[30] See *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198, 212; *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 at 131; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [12].

Long before Australian courts articulated *Wednesbury* unreasonableness as a ground of judicial review, it was made clear that every administrative discretion is limited by the subject matter and purpose from which it is derived. Such an approach had been confirmed in a case decided in June 1947[31]. *Wednesbury* was decided in November of that year.

That approach did not put Australia at odds with that of the United Kingdom. Statutory purpose as marking the limits of decision-making power was well accepted in both systems. But it remained steadfastly the guiding principle in Australian judicial review of statutory discretions. In the judgment of Justice Dixon, in 1963, in *Klein v Domus Pty Ltd*[32] it is evident that the approach to be taken was to look both first and foremost to the statute providing the discretion and its purpose. He said: "This Court has in many and diverse connexions dealt with discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised … We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object."

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[31] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 per Dixon J.

[32] (1963) 109 CLR 467 at 473.

Wednesbury unreasonableness also did not receive much attention in Australia for some time and appears to have been rarely applied. It was spoken of in a case in 1949[33] and applied by one justice in a case in 1972 which had some similarity to the circumstances of *Rooke's Case*[34]. However it was stated as a ground of review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which referred to a decision or conduct being "so unreasonable that no reasonable person could have so exercised" it[35].

Wednesbury unreasonableness was not endorsed by the High Court until 1986 in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[36]. It and the subsequent case of *Attorney-General (NSW) v Quin*[37] adopted the *Wednesbury* test and its focus on who is the repository of the statutory discretion. These cases have never been challenged or doubted.

In *Peko-Wallsend* the Minister recommended that land should be granted to its traditional owners on the basis of a report which omitted information which was subsequently supplied. The circumstances were held to be such as to require the Minister to take account of the new

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[33] *Election Importing Co Pty Ltd v Courtice* (1949) 80 CLR 657 at 664.

[34] *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 327.

[35] *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(g), 6(2)(g).

[36] (1986) 162 CLR 24.

[37] (1990) 170 CLR 1.

material as part of the duty to take account of relevant considerations and also as part of the duty to make a decision in light of "the actual facts as disclosed by the material in his possession"[38]. In connection with the unreasonableness ground of judicial review, Justice Mason said that the limited role of a court reviewing the exercise of an administrative discretion "must constantly be borne in mind". He went on: "It is not the function of the court to substitute its own decision for that of the administrator ... [I]n the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account[39]. This approach was subsequently confirmed in *Quin*, where it was said that the "merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone"[40].

That *Wednesbury* unreasonableness required something approaching irrationality in decision-making was evident from its application in *Chan v Minister for Immigration and Ethnic Affairs*[41]. The

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[38] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30 per Gibbs J.

[39] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR at 40-41.

[40] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J.

[41] (1989) 169 CLR 379.

appellant claimed to be a refugee. The Minister's delegate found he did not have a well-founded fear of persecution by reason of his political opinion, despite also finding that he did have a fear of persecution and had experienced discrimination on the basis of his membership of a family known for having anti-revolutionary views. It was held that the delegate misconceived the notion of persecution and irrationally treated the appellant's association with anti-revolutionary views as having nothing to do with political opinion[42].

The legal standard of unreasonableness for review was considered more recently by the High Court in *Minister for Immigration and Citizenship v Li*[43]. There the applicant sought review of a decision by a Tribunal refusing her a skilled residence visa. Following a hearing by the Tribunal the applicant requested it delay its decision to enable her to obtain a further skills assessment based on genuine information. She had previously provided materials which were not so based. The Tribunal had a statutory discretion to adjourn the review from time to time but refused the applicant's request to do so on the basis that it was "not prepared to delay any further" and affirmed the delegate's decision. The refusal to adjourn was held to be unreasonable.

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[42] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389-90 per Mason CJ; see also at 392, 400 per Dawson J, 407-8 per Toohey J and 422, 433-4 per McHugh J.

[43] (2013) 249 CLR 332.

There is some basis for thinking that there was some widening of the stringent approach of *Wednesbury*, at least in the joint judgment. It was there said that *Wednesbury* is neither the starting point nor the end point for the standard of unreasonableness. That standard should not be regarded as limited to an irrational if not a bizarre decision[44]. And it was added that unreasonableness could be inferred in some cases, as it sometimes is in cases involving review of a judicial exercise of discretion. The latter idea means an appellate court may infer that in some way there has been a failure properly to exercise the discretion if upon the facts the result is unreasonable or plainly unjust[45].

Addressing the submission that the Tribunal may have thought that "enough is enough", in terms of the process afforded to the applicant up to the point of her request for delay, it was said that it was not apparent how such a conclusion could be reached having regard to the facts and the statutory purpose to which the discretion to adjourn is directed—namely to provide an applicant for review the opportunity to present their case on the questions in issue. It may be observed that statutory purpose was not used as determinative of the question of the lawfulness of the discretionary decision; rather it was used to inform the question of reasonableness.[46]

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[44] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [68].

[45] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76].

[46] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 368-9 [81]-[85].

In the joint judgment it was stated that unreasonableness is a conclusion which may be applied to a decision "which lacks an evident and intelligible justification"[47], a view which has been repeated subsequently[48]. The reference to a decision requiring an "intelligible justification" may to an extent be thought to impart notions of proportionality. Indeed it was accepted[49] that theoretically an obviously disproportionate response, one by which more weight than is reasonably necessary having regard to the statutory purpose, is one path by which a conclusion of unreasonableness might be reached. But it was also observed that that proposition had not been the subject of argument on the appeal. It has not been raised since.

Whatever expansion of the standard of unreasonableness can be found in *Li*, the decision did not involve any recognition that the review would differ according to the rights in question. There is absent from the Australian approach any suggestion of a sliding scale of review. Moreover the decision in *Li* did not involve any reconsideration of the earlier decisions of the court in *Peko-Wallsend* and *Quin*. The court made it clear[50] that the standard of legal unreasonableness does not involve substituting a court's

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[47] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 367 [76].

[48] *Minister for Immigration and Border Protection v SZVFW* (2018) 265 CLR 541 at 550 [10], 573 [82].

[49] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [74]. See also at 352 [30] per French CJ.

[50] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363 [66], 375 [105]-[106].

view as to how a discretion should be reviewed. Whether a test similar to proportionality analysis does involve replacement of the administrative decision may be put to one side for present purposes. It has not been the subject of consideration by the High Court. What remains clear is that there remains a reluctance to enter upon the field of the discretion.

Observations on the approaches

The standard of *Wednesbury* unreasonableness had been subjected to considerable criticism in the United Kingdom by both the academy and the courts for some time before it was revisited. In *Daly*[51], Lord Cooke described *Wednesbury* as an "unfortunately retrogressive decision in English administrative law". In Australia there has been strong criticism from some academic lawyers[52], but less so from the judiciary. And as has been seen, the approaches of the courts of the two legal systems to the *Wednesbury* standard and the review of discretionary decision-making more generally has been markedly different.

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[51] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 549.

[52] See eg Mark Aronson, "The Growth of Substantive Review: The Changes, their Causes and their Consequences" in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016), 119; Matthew Groves and Greg Weeks, "Substantive (Procedural) Review in Australia" in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015), 149.

The approach to judicial review of discretionary decision-making is not the only area of divergence which has taken place between Australian and United Kingdom courts with respect to administrative law particularly since the 1990s. It is a simple enough matter to point to the United Kingdom's relationship with Europe, its Conventions and rights-based jurisprudence as well as the coming into effect of the Human Rights Act as influential in the sphere of administrative law. This would include the approach to legal unreasonableness. But one would think there must be other factors at play, such as the constitutional framework within which the courts operate and perceptions gleaned from it as to the role of the courts.

Australian administrative law has a strong constitutional dimension. Australian courts have largely developed their approach to judicial review by reference to the framework provided by the Constitution. As earlier mentioned, Australia's Constitution was not written with a view to the protection of individual rights. Neither it nor any Commonwealth statute contains reference to human rights. Such protection was left to the common law upon which the Constitution is based but to which it is also subject. The unwritten British Constitution may not be understood to be so limiting and the Human Rights Act has put the role of the courts beyond doubt.

The Australian Constitution provides for a separation of powers, most relevantly for a separation of judicial from legislative and executive power. It does so by requiring that certain courts only exercise judicial power and that the legislature and the executive cannot. This may be

thought to be a stricter separation of powers than that provided by the unwritten British Constitution[53].

This strictness about the separate roles of the courts and the other branches of government may explain the strong dichotomy viewed between legality and merits in administrative law. Professor Cheryl Saunders has observed[54] that "Australian doctrine limits the appropriate scope of judicial review by drawing a sharp distinction between questions of lawfulness on the one hand and questions of merit on the other", "merit" being understood to encompass considerations of policy, fact and the exercise of discretion within parameters.

This distinction is in turn explained by the roles the High Court of Australia has historically seen for the courts and administrative decision-makers. That view both precedes and coincides with that expressed in *Wednesbury*. As noted earlier, in the leading case of *Peko-Wallsend*, Justice Mason cautioned that it is not the function of the court to substitute its decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Australian

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[53] Cheryl Saunders, "Constitution as Catalyst: Different Paths within Australasian Administrative Law" (2012) 10 *New Zealand Journal of Public and International Law* 143 at 148-49, 154-55; Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 260, 267-8.

[54] Cheryl Saunders, "Constitution as Catalyst: Different Paths within Australasian Administrative Law" (2012) 10 *New Zealand Journal of Public and International Law* 143 at 148.

case law shows that the High Court has strongly sought to defend the separate role for the judiciary provided by the Constitution. One way of ensuring that it is not encroached upon is to be seen to recognise the role of the other branches of government and not to trespass upon them.

Another constitutional difference may be that for Australian courts the validity of legislation made under constitutional power is always in the background. Courts are attuned to the scope and limits of legislative power. It is almost impossible where the exercise of a discretion is challenged as going beyond its limits to ignore, as a starting point, the validity of the legislation in question. In this context the constitutional role given to the judiciary may once again be relevant.

In this regard one might consider, hypothetically, the approach of Australian courts to the circumstances prevailing in *Pham*, which involved the deprivation of a person's British and EU citizenship on the ground of national security with the possibility that the person was rendered stateless. The decision in question was viewed through the lens of the person's rights. The Supreme Court held that the intensity of the scrutiny to be applied was high given the radical consequences of the decision. An Australian court is likely first to consider whether the law which gave the executive that decision-making power was valid. If revocation of citizenship is seen as a form of punishment for particular conduct, or the threat of it, that kind of

decision may be considered by Australian courts to be solely a matter for judicial decision[55].

The strictness of approach to the separate role of the courts and other branches of government and the resulting dichotomy between the law and merits on judicial review may largely explain the focus of Australian courts on the statute where the reasonableness of a discretionary decision made under it is challenged. It may be accepted that the approach in Australia is to view reasonableness through a statutory lens and, in particular, statutory purpose. The use of proportionality-style analysis by the United Kingdom courts does not ignore the purpose of the statute in question[56]. Indeed it is integral to it, although as a preliminary step in reasoning as distinct from being determinative of the question of the lawfulness of the decision. There is no suggestion that lack of consistency with statutory purpose is no longer a ground for review, but it may be that there is now less focus upon it.

It may be added that to state that a review of the exercise of a statutory discretion has regard principally to statutory purpose does not necessarily provide a full picture as to the approach actually taken by

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[55] See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28, 53; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 367-76 [71]-[96]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1013 [28], 1015 [39].

[56] *R v Secretary of State for Education and Employment, Ex parte Begbie* [2000] 1 WLR 1115 at 1129-33.

Australian courts. More needs to be understood about the identification of purpose in the course of statutory construction and any choices that are open as to what the statutory purpose may require and the limits that it therefore effects on discretionary decision-making. Justice Brennan's remarks in *Quin*[57] may be apposite to such a question. He said that "the modern development and expansion of the law of judicial review ... have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power".

***Wednesbury* revisited**

The courts of the United Kingdom and Australia do share in common a recognition that statutory purpose has a part to play in the review of discretionary decision-making. A question which might be asked is whether *Wednesbury* could have simply been decided on this basis. On one view it was an argument the appellant sought to raise. The condition having the effect of limiting cinema audiences might not be thought to be consistent with a statutory purpose of opening entertainment venues to the public on Sundays. At the least that might accord with a modern approach to statutory construction. And if this had been the approach taken one wonders how the law relating to the reasonableness of the exercise of a discretion may have otherwise developed.

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[57] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.