Abuse of power as a ground for review in judicial review

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This article is a reproduction of a lecture on administrative law delivered by **John Stanton** at the University of Malta on the 14th February 2023. In it, he examines the ground of judicial review known as 'abuse of power' as developed and applied in English Common Law.

TAGS: Administrative Law; Judicial Review; Abuse of Power

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OLJ
ONLINE LAW JOURNAL

1. Introduction

Judicial review in the UK is common law based. Whilst there is a statutory framework that outlines the procedures involved and the relevant remedies, these are of little help without the plethora of cases that clarify the rules regarding access to review, that is, the procedural requirements necessary to satisfy before a claim can be brought, and the grounds for review, which set out the more substantive bases upon which a claim can be brought.

Today, the grounds for judicial review in UK law fall into four broad categories, which were set out by Lord Diplock in the case of *Council for Civil Service Unions v Minister for the Civil Service*. These grounds are: (1) illegality, which covers issues including – but not limited to – where power has been used for improper purposes; where decisions have been taken *ultra vires*; where irrelevant considerations have been taken into account; and where errors of law or fact have perhaps been made. (2) Irrationality is the second ground and this equates with the notion of unreasonableness. The third, (3) proportionality, has developed more recently than the other grounds (but was nonetheless identified by Lord Diplock in the *Civil Service Unions* case) and it equates with the principle of proportionality that is common in Europe and particularly within the Council of Europe. Finally, (4) procedural impropriety is another broad category that determines whether appropriate procedures have been followed, both in terms of any relevant statutory procedures and in terms of the principles of natural justice.

With these grounds in mind, in this lecture, I want to focus in particular on how these grounds deal with abuses of administrative power and to explore and examine some of the landmark cases in UK law that have shaped and developed this area. To understand the notion of categorising abuses of power, however, we first expand on something that is central to appreciating the role of the courts in judicial review, namely, discretionary power.

2. Discretionary Power and *Roberts v Hopwood* (1925)

Discretionary power or discretion exists where the party receiving the power has a number of ways and a range of degrees in which the power can be exercised. To put this another way, the power is not prescriptive or precise in what it means for the Government; it is instead imbued with an inherent flexibility as to how it should be exercised or used. This is important because when such powers are framed by Parliament, it is difficult to predict all the various circumstances in which the power might or could be used, and to impose restrictions on the power might hinder or obstruct its effective use.

By providing a broad power, therefore, it leaves it up to Government to decide how it is to be exercised. It is here, though, that we encounter the potential for abuse of such power. First, an example of a discretionary power; one that is relevant to our first case. The power outlines how local council employees are to be paid. In this regard, section 62 of the Metropolis Management Act 1855 states that a local council '*shall* [...] *employ* [...] *such* [...] *servants as may be necessary and may allow to such* [...] *servants* [...] *such* [...] *wages as* [the Council] *may think fit*.' It is through these last few words that we can identify this power as a discretionary power. Parliament is empowering local councils to act as it deems appropriate in the circumstances.

The potential for abuse, however, stems not from what the power says but from what it *doesn't* say. On a strict reading of this provision, for example, a council might lawfully pay its employees £1 million a year. There is nothing in the Act suggesting that this would be unlawful. But think about it: what if a council *did* pay its employees £1 million a year? Though it might seem ostensibly lawful, we might think that it amounts to a gross misuse of public money, faithfully paid to the council through local taxation; we might think that a decision has been taken for personal profit since the members of the council would benefit from that decision; and more practically, we wouldn't have a council for much longer because local authorities in the UK do not have anywhere near the money required to pay those sort of wages. They would become insolvent.

In short, we might say that, despite its apparent lawfulness, the council is abusing its power and its position. So, what are we saying? Simply put, whilst this discretionary power might appear limitless, society must put to use a means of ensuring that it is exercised within certain limits of acceptability. This means is provided by the courts through judicial review and in this vein, judges have, through countless cases, carved out the rules that police the boundaries of discretion.

Our first case in this regard involves this power from the Metropolis Management Act, which stated that a local council '*shall* [...] *employ* [...] *such* [...] s*ervants as may be necessary and may allow to such* [...] *servants* [...] *such* [...] *wages as* [the Council] *may think fit*.' In this case, a challenge was brought to a London council's efforts to pay its employees a wage that was far above the national average and that paid men and women the same wage. The court in *Roberts v Hopwood* noted that this power permits an extremely broad discretion: there is no qualification and there is no indication as to what might or might not amount to reasonable or appropriate wages. The legal basis for this challenge, though, was that the discretionary power set out by the 1855 Act had been used improperly and abused. Echoing our concern that discretionary power, despite its breadth, must be exercised within certain limits of acceptability, the House of Lords stated in the case that the broad power should be read to mean that the council should pay wages as they '*thought fit and proper for the services rendered*'. Lord Atkinson

stated in the case that the broad power in section 62:

> [...] *cannot* […] *mean that the employer, especially an employer dealing with moneys not entirely his own, may pay to his employee wages of any amount he pleases* […] *The only rational way by which harmony of administration can be introduced into the various departments of Local Government* […] *is by holding that in each and every case the payment of all salaries and wages must be 'reasonable'*.

We have then, one of the first common law rules when it comes to the exercise of discretionary power in order that it not be abused: discretionary power is not limitless but must be exercised reasonably.

3. Unreasonableness and *Wednesbury*

We encounter at this point, however, an issue that has troubled the UK courts for most of the last century: what does it mean to exercise power reasonably? The closest Lord Atkinson gets to offering any definition is, in the context of the section 62 power, that reasonable means that the employer shall pay a wage they '*think fitting and proper*'. This almost sounds like proportionality, which we shall come to later. For now, our next stop on this exploration of the way in which abuse of power is dealt with by the courts is the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation.* The facts of this case are as follows. Wednesbury Corporation was granted the power, under section 1(1) of the Sunday Entertainments Act 1932 to '*allow places in that area licensed under the* […] Act *to be opened and used on Sundays for the purpose of cinematograph entertainments, subject to such conditions as the authority think fit to impose*'. In other words, the local council was given, under the 1932 Act, a broad discretionary power to impose conditions on Sunday opening hours in the local area. Under this power, the Wednesbury Corporation granted the Associated Provincial Picture Houses Ltd permission to show films at the cinema on Sundays on the condition that no children under fifteen years of age should be permitted. The Picture House brought an action challenging this decision, arguing that to exclude those under the age of fifteen from Sunday performances was *ultra vires* and unreasonable. The court found that the Wednesbury Corporation had not acted unreasonably or *ultra vires* in setting out the policy, and the decision was, therefore, held to be lawful.

In giving judgment in *Wednesbury*, Lord Greene MR discussed the nature of actions against councils and considered that there were a range of permissible grounds of attack in cases challenging exercises of local authority power. Chief amongst these, however, Lord Greene singled out and discussed the notion of unreasonableness. He defined this in saying:

> *It is true the discretion must be exercised reasonably* […] *Lawyers familiar with the phraseology commonly used in relation to exercise*

> *of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.*

These last words are commonly held as defining what is meant by Wednesbury unreasonableness and it is perhaps the most prominent, if the most contentious, example of abuse of discretionary power.

Other judges have also sought to interpret these words and offer views as to what it means to be unreasonable. In 1977, for example (in the case of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council)*, Lord Denning stated that '[n]*o one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view*'. And in the aforementioned *Civil Service Unions* case, Lord Diplock categorised irrationality as equating with unreasonableness, going on to state that the test '*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*'.

In the application of Wednesbury unreasonableness, however, we encounter a problem. Judicial review is a process that is designed to permit the courts to review the lawfulness of administrative action. The *lawfulness*. To do more than this; to comment on the merits of administrative decisions and actions would compromise the separation of powers and place the courts in a position where they were perhaps usurping the power of the executive branch. In this vein, we say that the court in judicial review cases is exercising a supervisory jurisdiction, rather than an appellate jurisdiction. The courts are supervising the lawful use of administrative power. The contention is, however, that to ask whether an action or decision is unreasonable arguably involves a line of inquiry that goes beyond simply asking whether such actions or decisions are lawful; arguably it goes beyond this supervisory jurisdiction. To declare something unreasonable, in other words, might in certain situations be said to be passing judgments on its substantive merit. For this reason, the courts have come to interpret the unreasonableness test with incredible stringency. Actions and decisions are found to be unreasonable not when they are merely disagreeable or unpopular, but where they are so wrong as to cross over the boundaries of lawfulness. Echoing this, Lord Ackner stated in the early 1990s that:

> *This standard of unreasonableness* […] *has been criticised as being too high. But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its* […] *judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision.*

This stringency has, on occasion, given rise to difficult and sensitive decisions, as is shown by *R v Ministry of Defence, ex parte Smith* (1996). In the case, the Ministry of Defence, in 1994, set out a policy which stated that 'homosexuality was incompatible with service in the armed forces and that personnel known to be homosexual or engaging in homosexual activity would be administratively discharged'. The policy had been debated at length in both Houses of Parliament and had been discussed by select committees on two separate occasions. In these instances, the policy had been approved and deemed to be 'consistent with advice received from senior members of the services'. Four individuals, all serving members of the armed forces, were discharged from duty on the basis of their homosexuality. They brought actions for judicial review in respect of the decision to discharge, claiming that it was irrational and contrary to Article 8 of the ECHR. Though the application failed, the Court of Appeal explained that, as the policy involved human rights issues, greater justification would be needed before the court would be satisfied that the decision was unreasonable. It was found that because the policy had been so widely approved in Parliament and by Select Committees at various stages and, consequently, found to be consistent with advice received, the policy could not be deemed unreasonable. It is hardly surprising that this decision was appealed to Strasbourg and overturned by the European Court of Human Rights (the domestic decision predates the UK's incorporation of the ECHR).

In view of this decision, and many others like it, should we be distancing ourselves from a test that many have described as being too strict to be effective? This is not a novel suggestion but is in fact one that many judges have asked over the years, and it has been asked in conjunction with queries as to whether proportionality should perhaps replace unreasonableness as a more measured and appropriate standard against which to assess abuse of power, especially keeping in mind the use of that test in Europe. In 2001, the House of Lords acknowledged that:

> *I think that the day will come when it will be more widely recognised that* […] Wednesbury […] *was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.*

In that same case, the court explored the possible use of proportionality as a replacement.

Just as there has been reticence to make findings of unreasonableness, however, so has there also been judicial restraint in overturning the legendary *Wednesbury* decision. In 2002, the Court of Appeal said that '*it is not for* […] [the Court of Appeal] *to perform* […] [*Wednesbury's*] *burial rites*', implying that it was perhaps a responsibility of the Supreme Court to fulfil. But, in 2015, the Supreme Court itself said that '[i]*t would not be appropriate for a five-Justice panel of this court to*' overturn the decision because it would have '*profound*' constitutional ramifications. This is an unusual declaration by the highest court that nothing short of a full house could correct what is widely regarded as a flawed aspect of English administrative law.

4. Abuse of Power and Illegality

Though the evolution of unreasonableness is the most prominent area through which the courts have developed their policing of abuse of power, it is not the only area. Returning to the *Wednesbury* case, Lord Greene stated there that there were other categories or grounds of attack that might justify an action for judicial review. He identified, for example:

> [b]*ad faith, dishonesty, attention given to extraneous circumstances, disregard of public policy* […] *a person entrusted with a discretion must* […] *direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.*

There is some overlap between these categories, but the point is made. When the courts entertain actions alleging abuse of power, unreasonableness is not the only test in their armoury.

I want to spend some time, then, just highlighting a few other cases and areas that the courts have developed in recent decades.

4.1 The decision-maker must exercise their discretion to further, rather than undermine, the purpose of the Act of Parliament granting discretion.

Where legislation grants to an authority or a decision-maker a particular power, that power must of course be used in such a fashion that furthers or

complements the objectives of the Act. To neglect this would be to abuse power. We can see this requirement at work in the case of *Padfield v Minister of Agriculture, Fisheries and Food* (1968). In this case, there was a dispute regarding the prices producers of milk could sell their milk for, the Milk Marketing Board setting the price at a level lower than was desirable. As a result, milk producers complained to the Minister under the Agricultural Marketing Act 1958. Section 19 of that Act required a committee to investigate any complaint the Minister '*in any case so directs*'. The Minister refused to direct the committee to investigate the complaint. The Minister argued that the Act gave him total discretion over whether to refer a complaint. The House of Lords rejected that argument. Lord Reid held that the purpose of the Agricultural Marketing Act 1958 was to provide '*machinery for investigating and establishing whether the scheme is operating or the board is acting in a manner contrary to the public interest*'.

The Minister had refused to forward the complaint because of the potential political embarrassment he may face should the committee uphold the complaint and the Minister chose not to give effect to this decision. The court interpreted section 19 to mean that Parliament had not given the Minister an absolute discretion over whether to forward complaints or not and by choosing not to forward the complaint the Minister was frustrating the very purpose of the Act which was to ensure that complaints from milk producers could be considered by the Board.

4.2 If the decision-maker is given a discretionary power, it must be exercised in full use of the discretion. Discretion, in other words, must not be fettered.

Under this head, the courts seek to determine and uphold that, in the course of exercising a discretionary power, all the relevant individual circumstances have been considered by the decision-maker charged by Parliament to make the decision in question. Discretion is given to be exercised, not to be abused. We can see this rule at work in the case of *R (on the application of S) v Secretary of State for the Home Department* (2007). Here, an Afghan national made an application for asylum in 1999. Two years later, in January 2001, the Home Office decided to delay considering claims made before January 2001. This was in order to meet a target agreed with the Treasury to process sixty per cent of new claims within 61 days. Carnwath LJ considered this to be a 'textbook case' of unlawful fettering of discretion. The Home Office had adopted a blanket policy which prevented it from considering individual cases on their merits. The effect of the policy was to '*defer a whole class of applications without good reasons and without consideration of the effects on the applicants*'.

4.3 If a decision-maker is given a discretionary power, it must not be unlawfully delegated to a subordinate.

Underpinning this requirement is the reality that, in entertaining judicial

review cases, the courts are being required to interpret legislation and ensure that it is upheld in the manner that Parliament demands. When Parliament grants a statutory power to a decision-maker, it is presumed that the intention of Parliament is for that decision-maker to exercise the statutory power in question. It would be unlawful and too onerous if that decision-maker were to take it upon themselves to transfer that power, authority, and responsibility to another decision-maker.

The leading case in this area is *Barnard v National Dock Labour Board* (1953). Under the Dock Workers (Regulation of Employment) Order 1947, the National Labour Dock Board was required to delegate to Local Dock Labour Boards various functions, including the power to discipline dock workers, and suspend dock workers without pay. The Local Labour Dock Board for London, however, had further delegated the power to discipline dock workers to the Port Manager. Barnard was one dock worker of several who had been suspended by the Port Manager, and they challenged their suspensions. The Court of Appeal held that the dock workers had been suspended unlawfully. As the Local Labour Dock Board did not have any lawful authority by which they could further delegate the power delegated to them by the National Labour Dock Board, the Local Labour Dock Board should have made the decision itself. As the decision was made by the Port Manager, this was unlawful, and the suspensions were overturned.

All this said, there is a notable exception to this rule, namely, legislation that empowers the Government. Due to the often frequent changes that are made to Government structures, the departments, the individuals involved, etc., legislation that empowers the Government invariably does so in the name of the Secretary of State: 'The Secretary of State has the power …'. Whatever government department is responsible for the relevant area will always have a Secretary of State. But, of course, given that departments can make many thousands of decisions a day, it is 'physically impossible for the Minister to exercise personally all the powers vested in the Minister in his or her official capacity'. Parliament is assumed, therefore, to permit officials within government departments to act in the name of ministers without any formal delegation of power. This is bolstered by the convention of ministerial responsibility, which ensures that the Secretary of State is responsible for everything that goes on in their respective departments. The exception was identified in the case of *Carltona*.

4.4 Powers granted by Parliament must be used for the purpose for which they were granted.

This is central to the use of discretion and is another prominent area in which the courts have developed their dealings with alleged abuse of power. Where legislation grants a discretionary power to a decision-maker, that power must be used for the purpose for which it was granted, not for any other purpose. A leading case here is *Wheeler v Leicester City Council* (1985), in which the Act in question was not only ignored but used for an altogether

different purpose than that intended by Parliament. The facts of this case are that players from Leicester Rugby Football Club had chosen to take part in a tour of South Africa organised by the English Rugby Football Union. This was a controversial decision because the tour was taking place during the period of apartheid in South Africa, and many sports had chosen to boycott South Africa. Though the rugby club had condemned apartheid, they took no action against the players for taking part in the tour as they felt that it was up to the individual players to decide if they wished to attend.

Leicester City Council, however, had taken a strong stance against apartheid and disagreed with the rugby players' participation in the tour. As a punishment, therefore, and in response, the Council decided to ban the rugby club from using fields owned by the council for training and matches. The Council argued that they were acting on the basis of section 71, Race Relations Act 1976, and the duty of the Council to '*promote* […] *relations, between persons of different racial groups*'. However, the court disagreed. Essentially, the Council had requested the rugby club, a private organisation, to pursue an objective that the Council wanted. When the rugby club refused to do this, in response, the Council banned the rugby club from using its field. The effect of this was that the Council was effectively punishing the club for taking a different view on this matter. The Court considered that this was a misuse of the Council's powers.

The final case I want to look at is *Porter v Magill* (2001). In this case, the Conservative Party-controlled Westminster City Council developed a policy to sell some of its council-owned housing. This was perfectly legal under section 32 of the Housing Act 1985. However, this policy was adopted in the belief that homeowners were more likely to vote Conservative in future elections, and that this policy would create more homeowners. The House of Lords found that the defendants had acted under an improper purpose in so far as the powers granted to the council were used to achieve a purely political objective rather than the objective intended when the legislation was passed.

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