THE CHANCING CONCEPT OF 'UNREASONABLENESS' IN AUSTRALIAN ADMINISTRATIVE LAW

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The ground of judicial review known as 'unreasonableness', or sometimes as 'Wednesbury unreasonableness'[1], has a long history in Australian administrative law. For most of its existence, a decision must have been found to be outrageous or completely devoid of merit – 'so unreasonable that no reasonable authority could ever come to it'[2] – to be struck down on this basis. For example, in *Australian Retailers Association v Reserve Bank of Australia*[3] Weinberg J stated that 'the current view, in this country, seems to be … to regard this ground as representing a safety net, designed to catch the rare and totally absurd decision which has somehow managed to survive the application of all other grounds of review'.

However, the High Court of Australia may now have left the door open for a wider interpretation of 'unreasonableness', perhaps similar to the Canadian 'standard of review' of unreasonableness, and to be taking steps towards the 'variegated unreasonableness' approach of the UK. This paper will briefly discuss the history of unreasonableness review in Australia and the current UK and Canadian approaches, before discussing the law as it stands in Australia in more detail.

Part 1 – The traditional approach to unreasonableness in Australia

History in the High Court prior to 2013

It appears that the first High Court decision based at least partly on a *Wednesbury* unreasonableness argument was *Election Importing Co Pty Ltd v Courtice*[4], which was handed down on 1 July 1949. *Courtice* concerned a dispute over the imposition of import duties, and one of the grounds of the appeal was that Mr Courtice had exercised a discretionary power in an unreasonable manner. Williams J found that despite the fact that the discretion was unfettered on its face, 'the *Customs (Import Licensing) Regulations* do not in my opinion confer on the Minister or his delegate an arbitrary and uncontrolled power to revoke a licence'[5]. However, the appeal was dismissed primarily on evidential grounds – Williams J, after referring to *Wednesbury*, found that there was simply no evidence that Mr Courtice had acted in an unreasonable manner.

The High Court did not decide another unreasonableness case until the 1972 decision of *Parramatta City Council v Pestell*[6], which concerned the council's ability to impose a 'local rate' on specified land, under s 121 of the *Local Government Act 1919 (NSW)*. Gibbs JA, as he then was, summed up the issue:[7]

> [T]he legislature has left it to the council to form its opinion as to whether a particular work is of special benefit to a portion of the area. A court has no power to override the council's opinion on such a matter simply because it considers it to be wrong. However, a court may interfere to ensure that the council acts within the powers confided to it by law … Even if the council has not erred in this way an opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it.

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The High Court found that the Council had misconstrued its power under the Act. A particular concern was that 90 dwellings had been specifically excluded from the special rating provisions, and there was no clear reason why. Stephen J stated that 'the facts make it clear that that portion of the council area left after excising the ninety-odd lots is not such a portion as is reasonably capable of being considered as the portion specially benefitted by the works here proposed'[8]. Fourteen years later, Mason J, as he then was, stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* that *Pestell* 'embraced' the *Wednesbury* test in Australia[9].

Prior to the decision in *Minister for Immigration and Citizenship v Li*[10], the High Court made the following important comments on the unreasonableness ground:

1. The basis of the unreasonableness ground was briefly discussed in *Kruger v Commonwealth* (the Stolen Generations Case), where Brennan CJ stated that 'when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised'[11]. Brennan CJ also noted that '[r]easonableness can be determined only by reference to the community standards at the time of the exercise of the discretion'[12].
2. In *Abebe v Commonwealth*[13] the High Court found that s 476 of the *Migration Act 1958*, which at that time excluded a claim of *Wednesbury* unreasonableness from the jurisdiction of the Federal Court, was constitutionally valid.
3. It was made clear in *Eshetu v Minister for Immigration and Multicultural Affairs*[14] that mere disagreement with an administrative decision is not sufficient for a finding of unreasonableness. Gleeson CJ and McHugh J stated:[15]

   > Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as 'illogical' or 'unreasonable', or even 'so unreasonable that no reasonable person could adopt it'. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.

4. Along similar lines, Mason CJ and Deane J of the High Court found in *Minister of State for Immigration and Ethnic Affairs v Teoh* that for a decision to be *Wednesbury* unreasonable, the decision-maker must make his or her decision 'in a manner so devoid of plausible justification that no reasonable person could have taken that course'.[16]

SZMDS

The High Court gave detailed consideration to the unreasonableness ground in the 2010 decision of *Minister for Immigration and Citizenship v SZMDS.*[17] The case involved an applicant for a Protection Visa[18], who claimed a well-founded fear of persecution on the basis of his membership of a particular social group, namely homosexuals. The Refugee Review Tribunal (RRT) rejected his claim, not accepting that he was even homosexual. Section 65 of the *Migration Act 1958* provided (and still provides) that if the Minister is 'satisfied' that the applicant meets all criteria for the grant of a visa then he or she must grant it, and if not, the application must be refused.

The RRT decision was set aside by the Federal Court, which found that the 'Tribunal's conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning'[19]. On appeal to the High Court, the Minister argued that the RRT's findings were not illogical, and that even if they were, this did not amount to a 'jurisdictional error'.

The leading judgment was given by Crennan and Bell JJ, with whom Heydon J agreed. Gummow ACJ and Kiefel J gave separate reasons, concurring on this point. Crennan and

Bell JJ started by finding that the Minister's satisfaction, referred to in s 65, was a jurisdictional fact.[20] The key passage in the judgment is at paragraphs 119 and 120:

> 119. Whilst the first respondent accepted that not every instance of illogicality or irrationality in reasoning could give rise to jurisdictional error, it was contended that if illogicality or irrationality occurs at the point of satisfaction (… s.65 of the Act) then this is a jurisdictional fact and a jurisdictional error is established. This submission should be accepted …
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> 120. An erroneously determined jurisdictional fact may give rise to jurisdictional error. The decision maker might, for example, have asked the wrong question or may have mistaken or exceeded the statutory specification or prescription in relation to the relevant jurisdictional fact. Equally, entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error.

In other words, illogicality or irrationality in a finding of jurisdictional facts is a jurisdictional error and will result in the decision under review being set aside. Crennan and Bell JJ further elaborated on this point:[21]

> In the context of the Tribunal's decision here, 'illogicality' or 'irrationality' sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s.65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words … it is an allegation of the same order as a complaint that a decision is 'clearly unjust' or 'arbitrary' or 'capricious' or 'unreasonable' in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached.

However, Crennan and Bell JJ found that the RRT's findings were open to it on the evidence before it, and that 'a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker'[22]. The Federal Court decision was therefore set aside and the RRT decision restored.

The basis of the unreasonableness ground in Australia

Historically, an overwhelming consideration for Australian courts in deciding applications for judicial review, particularly on the 'unreasonableness' ground, is the distinction drawn by Australian courts between 'merits review' and 'judicial review'. There have been more cases than can possibly referred to in which courts have stated that they are not to interfere in the merits of a decision, but the reasons *why* this is the case are rather obscure.

Australian courts have generally taken the view that a court must stay out of consideration of the 'merits' of a decision altogether. A frequently cited statement of the rule against merits review can be found in *Attorney-General (NSW) v Quin*, in which Brennan J (as he then was) stated:[23]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. 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.

The key phrase is, of course, 'to the extent that they [the merits] can be distinguished from legality'. Margaret Allars makes the following points on that issue:[24]

> Three principles of judicial review qualify the operation of the legality/merits distinction. First, review for abuse of power where a decision is *Wednesbury* unreasonable is in practical terms review of the factual basis of the decision … This ground effectively sanctions as review for legality what is review of the merits in extreme cases of disproportionate decisions. Second, according to the 'no evidence' principle, an agency makes an error of law in the course of making a finding of fact if there is a

> complete absence of evidence to support the factual inference. The third qualification to the legality/merits distinction is the jurisdictional fact doctrine.

Allars cites in support of her proposition that the *Wednesbury* test allows for review of 'extreme cases of disproportionate decisions' the following passage from the judgment of Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[25]:

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind … Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned … It follows that, in 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 in exercising the statutory power … I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'.

In my opinion, the only difference distinguishing *Wednesbury* unreasonableness, the UK approach of 'variegated unreasonableness', proportionality and full review of the merits is the degree of deference provided to the decision-maker. The judicial analysis is identical in each case, and the only difference is the *degree* of unreasonableness that must be demonstrated before the decision will be quashed.

Part 2 – The Canadian approach to judicial review – 'substantive review'

One distinctive feature of Canadian administrative law is that Canadian courts do not in general concern themselves with attempting to identify errors of law, let alone jurisdictional or non-jurisdictional errors, in administrative decisions. Instead, Canadian courts will generally show a degree of deference to the decision-maker, both on questions of fact and of law in which the decision-maker has particular expertise (commonly known as the administrator's 'home statute') and will not, in most cases, set a decision aside unless it is 'unreasonable'. However, there are situations, commonly involving questions of law in which the administrator has no particular expertise (often, but not always, involving the Charter), in which a court will simply substitute its opinion for that of the decision-maker. These two 'standards of review' are generally known as 'reasonableness' and 'correctness' respectively.

The origins of reasonableness – Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp

Canadian commentators agree that *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*[26] (*CUPE*) is one of the most significant cases in Canadian administrative law. To give one example, L'Heureux-Dubé J of the Supreme Court, writing extrajudicially, has commented that 'in the wake of *CUPE*, it could no longer be assumed that an administrative tribunal's interpretation of its statute would be subject to correction on judicial review simply because the reviewing judge disagreed with the board's interpretation'.[27] *CUPE* overturned a line of decisions in the 1970s, foremost amongst them *Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796*[28] and *Bell v Ontario Human Rights Commission*[29], in which the Supreme Court took a highly interventionist role in finding jurisdictional errors. *CUPE* ensured that the focus from that time on would be on the substantive reasonableness of the decision.

The facts in *CUPE* were fairly straightforward and the legislation involved in the case anything but. The union went on strike in 1979 and on 22 August 1979 made a complaint to

the Public Service Labour Relations Board of New Brunswick (the Board) that the Corporation was replacing striking staff with management personnel. The Corporation in turn complained that the union was picketing their premises. Both of these actions were said to be contrary to s 102(3) of the *Public Service Labour Relations Act (NB)*[30], which provided that:

> Where subsection (1) and subsection (2) are complied with employees may strike and during the continuance of the strike
>
> (a) the employer shall not replace the striking employees or fill their position with any other employee, and
>
> (b) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

Dickson J, writing for the Supreme Court, stated that '[o]n one point there can be little doubt – section 102(3)(a) *is* very badly drafted … it bristles with ambiguities'.[31]

The Supreme Court allowed the union's appeal and restored the decision of the Board. The crucial passage in the judgment can be found at paragraph 29:

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so. Upon a careful reading of the Act, the Board's decision, and the judgments in the Court of Appeal, however, I find it difficult to brand as 'patently unreasonable' the interpretation given to s.102(3)(a) by the Board in this case. At a minimum, the Board's interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal.

Dickson J found that the interpretation of s 102(3) 'would seem to lie logically at the heart of the specialised jurisdiction confined to the Board'[32]. A court should only regard the Board's interpretation of its own legislation as a jurisdictional error when that interpretation is 'so patently unreasonable that its construction cannot rationally be supported by the relevant legislation'.[33] Dickson J also noted that because s 102(3) of the Act was badly drafted, there was no one clearly 'right' interpretation. None of the various interpretations of that subsection given by the lower courts, the Board or the parties was patently unreasonable, so the courts should let the decision of the Board stand. A decision will be reasonable if it is rational, in the sense that if it is a matter on which 'reasonable minds might differ'.[34]

The result of *CUPE* is that courts are no longer to take a strictly legalistic view of a decision-maker's jurisdiction and, instead, at least in most cases, should focus on the substance of the decision and whether it is reasonable in all the circumstances. Canadian courts have been willing to find that there are often multiple reasonable interpretations of a statutory provision, and thereby allow the interpretation of the administrative decision-maker to stand.

Standards of review in Canadian administrative law

We have seen that in *CUPE*, the Supreme Court recognised that administrative decision-makers have a role conferred by Parliament (sometimes referred to as 'democratic credentials') and expertise in their field, and that their interpretations of their own enabling legislation (including matters of jurisdiction), while never *definitive*, should at least be given 'weight' in judicial review. By finding that the interpretation given to s 102 by the Board was not 'patently unreasonable', Dickson J at least implicitly created the concept of the 'standard of review' of an administrative decision.

Since 1979, four standards of review have existed in Canadian administrative law. Until 1997, there were two standards – 'patent unreasonableness' and correctness. In 1997, the Supreme Court introduced a third, intermediate standard of 'reasonableness simpliciter'[35], instead of a 'sliding scale' of reasonableness. However, Canadian courts started expressing their dissatisfaction with the three-standards approach almost as soon as it was implemented[36], and it was inevitable that the Supreme Court would have to act to clarify the matter.

Dunsmuir v New Brunswick

The Supreme Court of Canada gave a reasonably clear restatement of when the reasonableness and correctness standards of review will be applied in the 2008 decision of *Dunsmuir v New Brunswick.*[37] David Dunsmuir was an employee of the New Brunswick Court of Queen's Bench, who was dismissed from that employment under 'at pleasure' provisions of his contract after three reprimands. The letter of termination explicitly stated that he was not being dismissed for cause. Dunsmuir sought review of his termination under the *Public Sector Labour Relations Act*[38], arguing that despite the wording of the letter, he *had* in fact been dismissed for cause, and therefore had the right to certain procedural protections available under the *Civil Service Act.*[39]

Majority judgment

The majority opinion was given by Bastarache and LeBel JJ, writing for themselves, McLachlin CJ and Fish and Abella JJ. Bastarache and LeBel JJ begin by defining the terms 'reasonableness' and 'correctness'. The former is defined as follows:[40]

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions … In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The last sentence of this paragraph appears to mean, in my opinion, that it is possible for there to be more than one reasonable outcome in an administrative proceeding, and courts should be wary of simply substituting their view for that of the decision-maker. The term 'deference' is defined as follows:[41]

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers … Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference 'is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers' (*Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, at p 596, *per* L'Heureux-Dubé J, dissenting). We agree with David Dyzenhaus where he states that the concept of 'deference as respect' requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision'.[42]

It is important to note that deference is defined as 'respect' for the decision-making ability of the tribunal whose decision is under review on matters of both fact and (at least some) law. 'correctness' is defined as follows:[43]

> [T]he standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the

> court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

Note that 'jurisdictional [issues] and some other questions of law' are still to be reviewed on a correctness basis. Most significantly, '[a]dministrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*'[44]. Bastarache and LeBel JJ sum up at paragraph 64:[45]

> The [standard of review] analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

Finally, Bastarache and LeBel JJ go on to find that the appropriate standard of review of the arbitrator's decision was reasonableness, and that the arbitrator had acted unreasonably in his interpretation of s 97(2.1) of the *Public Sector Labour Relations Act* and his decision to reinstate Dunsmuir to his position. The decisions of the lower courts were therefore upheld.

Binnie and Deschamps JJ wrote separate concurring judgments. However, this paper does not address the issues they raised.

Summary

Cases decided since *Dunsmuir* have, in general, made it clear that the 'default' standard of review in Canada is that of reasonableness, and that questions relating to 'jurisdictional error' or 'merits review' will rarely if ever arise. Most importantly, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* Rothstein J, writing for the majority, found that *Dunsmuir* established a presumption that reasonableness is the applicable standard of review, unless the question in dispute relates to either constitutional law[46], a question of central importance to the legal system as a whole that it outside the expertise of the decision-maker, the question relates to jurisdictional lines between two or more competing tribunals, or that the question is one of 'true jurisdiction or vires'[47]. Rothstein J also went so far as to say that 'it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review'[48]. In other words, 'questions of true jurisdiction or vires' may still exist, but will be rare, and indeed the Supreme Court has not identified once since *Dunsmuir*.

In short, then, Canadian courts, when faced with an application of judicial review, are not concerned about unsustainable distinctions between 'judicial review' and 'merits review'. While it is still theoretically possible for a court to find that an administrative decision-maker has exceeded his or her jurisdiction, in the large majority of cases the question for the court will simply be whether, in all the circumstances, the decision is reasonable, while giving due deference to the decision-maker's 'democratic credentials' and expertise. The long and drawn out arguments about 'impermissible merits review', errors of fact and law, and jurisdictional and non-jurisdictional errors of law have no place in Canadian law.

Part 3 – Reasonableness review in the United Kingdom

UK law has evolved significantly since the seminal 1985 decision of *Council of Civil Service Unions v Minister for the Civil Service*[49] (the *GCHQ* case), and this brief examination of the UK law of judicial review will focus on the changes in the law since this judgment. It is my contention that since the *GCHQ* case, UK administrative law has been moving towards a

system similar to that of Canada's, albeit with different terminology, in which courts impose one standard of review for administrative decisions that impact on rights protected by the European Convention on Human Rights (ECHR), and a more stringent standard for other decisions.

The UK position is complicated by the fact that the *Human Rights Act 1998*[50] has incorporated the ECHR into UK law. The result has been that substantive review of administrative decision-making in the UK is expressed to be on different bases depending on the kind of law in question. When considering EU laws applicable in the UK, or UK laws expressly implementing EU laws in Britain (such as the *Human Rights Act*), British courts have undertaken a form of proportionality review common to European legal systems. In cases not involving any form of EU law, British courts have moved to a 'sliding scale' of reasonableness. The question that must be answered is whether there is in reality any difference between the two forms of review.

Reasonableness and irrationality – the GCHQ case

In *GCHQ*, the government attempted to introduce a policy whereby staff of the General Communications Headquarters, a crucial inter-governmental communications agency (and probably spy agency), were no longer permitted to be members of a trade union. The Council of Civil Service Unions (CCSU) sought judicial review of the decision, arguing that the union had a legitimate expectation that it would be consulted before any such decision was made, and that no such consultation had occurred. The House of Lords found that despite the lack of any statutory requirement to consult, the union *would* in fact generally have a legitimate expectation that it would be consulted before any decision adverse to its interests was made. However, no such requirement existed when national security issues were at stake, and this was one of those situations[51]. The CCSU therefore lost its case but did succeed in creating a legal duty to consult in most cases.

For the purposes of this article, however, the key part of the judgment can be found in the judgment of Lord Diplock. His Lordship stated:[52]

> … [O]ne can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' …
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> … By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'53. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it …

'*Wednesbury* unreasonableness' is not, therefore, the 'man on the Clapham omnibus' test but an issue going to the constitutional division of responsibilities between the courts and legislature. It is not sufficient that the 'reasonable person' would regard a decision as unreasonable, and instead it must be so unreasonable that it could not be an exercise of the power that was intended by the Parliament.

Varying the Wednesbury principle – 'anxious scrutiny'

Despite the *GCHQ* case equating 'irrationality' with '*Wednesbury* unreasonableness', only two years later we can see the first hint of a 'sliding scale' of reasonableness. A 'sliding scale' was first clearly applied in the 1987 case of *Budgaycay v Secretary of State for the Home Department*[54]. In that case, the House of Lords was concerned with a deportation order issued against the applicant. The case was argued on the *Wednesbury* unreasonableness ground, but the House of Lords, allowing the application, stated:[55]

> [T]he most fundamental of 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.

In other words, the more important the right at stake, the more carefully scrutinised an administrative decision will be. A decision will be more likely to be found to be outrageous and unsupportable when a fundamental right is impacted.

The 'anxious scrutiny' terminology was also called upon in two cases in the 1990s, both of which predated the *Human Rights Act*. In *R v Secretary of State for the Home Department, ex parte Brind*[56], the House of Lords considered directives made under the *Broadcasting Act 1981* preventing broadcasting of statements by persons representing groups that had been proscribed as terrorist organisations. Lord Bridge noted that there was not (at that time) any bill of rights under domestic UK law, but went on to state:[57]

> This surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction on the right to freedom of expression requires to be justified, and nothing less than an important competing public interest will be sufficient to justify it.

Brind therefore stands for the proposition that where fundamental rights are involved, the courts will not wait for a 'red-haired teachers' type of situation before intervening.

In *R v Ministry of Defence, ex parte Smith*[58] a challenge was brought against the then existing policy of discharging known homosexuals from the armed forces. Quoting *Budgaycay*, the House of Lords found 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',[59] but was not prepared to find that the decision *was* unreasonable, given that it impacted on matters of military discipline and potentially national security.

On the other hand, Ian Turner has identified a number of situations where courts will be reluctant to find that a decision of an administrator is unreasonable or 'irrational'.[60] These include matters relating to raising and spending public revenue,[61] and the exercise of wide discretionary powers.[62]

The Human Rights Act 1998

The *Human Rights Act* has been a major influence on the development of British administrative law and requires brief examination. Section 1 of the Act defines the term 'convention rights' in terms of a number of rights set out in the European Convention on Human Rights (ECHR) and a number of protocols. The *Human Rights Act* therefore incorporates the ECHR, at least in part, into domestic British law. Unlike the Canadian Charter, the *Human Rights Act* does not permit a court to invalidate primary legislation, but a court can issue a 'declaration of incompatibility' under s 4 of the Act.

A number of commentators have argued that the *Human Rights Act* has transformed British administrative law from a focus on procedure and rationality on the part of the decision-maker to a focus on the rights of the person affected. Thomas Poole writes as follows:[63]

> For the era we are now entering is marked by a much more direct and frequent recourse to arguments about rights – especially but not exclusively those of the European Convention on Human Rights (ECHR) … While there had been an increase in rights talk in cases like *Bugdaycay*[64], *Witham*[65] and *Smith*[66] only the introduction of the HRA facilitated the kind of deep, structural change we have seen since.

Canada has gone through the same process with the Charter – only the introduction of the Charter has caused a definitive shift from a 'jurisdictional analysis' approach of the kind used in *Metropolitan Life,*[67] to a rights-based approach that is particularly obvious in *Doré v Barreau du Québec.*[68] That is, the idea of 'rights-based' administrative law jurisprudence is not something unique to the UK.

Irrationality after the Human Rights Act

Definition of 'rationality'

There does not appear to have been any comprehensive restatement of the rationality principle since the *Human Rights Act* came into effect. That is, the rationality ground of review is still a 'so unreasonable that no reasonable person could come to it' ground, although the nature of the right impacted on will be a consideration in determining when a decision is taken to be unreasonable. However, the UK courts, in pursuing rationality review, have not taken the Canadian approach that there are clear and discrete 'standards of review' – instead, there is a spectrum or continuum of reasonableness. In *R (Mahmood) v Secretary of State for the Home Department*[69] Laws LJ referred to the 'anxious scrutiny' test and stated at paragraph 19:

> … that approach and the basic *Wednesbury* rule are by no means hermetically sealed the one from the other. There is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required.

At least in cases where there are no unqualified rights involved, the UK courts appear to take the view that a decision will not be irrational if there is some evidence to support it[70].

Moves towards a single test of judicial review?

Despite the acceptance of the proportionality approach in cases concerning the *Human Rights Act* and other EU laws applicable in the UK, British courts have continued to apply the reasonableness or irrationality test to other matters of substantive review. There have been a number of cases in which courts have suggested that the end of the irrationality approach is nigh, or even desirable, but there has not yet been any definitive move to do away with the doctrine altogether. For example, in *R (Association of British Civilian Internees – Far East Region) v Secretary of State for Defence,*[71] Dyson LJ noted that the application of an irrationality test will often (although not always) yield the same result as a proportionality analysis.[72] However, his Lordship then added that 'it is not for this court to perform its [irrationality's] burial rites'.[73] In other words, while *Wednesbury* had to be extended to cover a variable scale of review, the Lords were not prepared to move to a (then) little-tested proportionality regime for all administrative decisions.

Similarly, in *Doherty v Birmingham City Council,*[74] the House of Lords again found that a universal 'proportionality' test for review of all administrative decisions in the UK should not be introduced. This was despite the comment by Lord Walker that human rights 'must be woven into the fabric of public law'[75] and a number of observations by Lord Mance. At paragraph 135 Lord Mance states:

> The difference in approach between the grounds of conventional or domestic judicial review and review for compatibility with Human Rights Convention rights should not however be exaggerated and can be seen to have narrowed, with 'the "*Wednesbury"* test … moving closer to proportionality [so that] in some cases it is not possible to see any daylight between the two tests' (*ABCIFER,*[76] para 34). The common law has been increasingly ready to identify certain basic rights in respect of which 'the most anxious' scrutiny is appropriate.

There are three key points in this paragraph. Firstly, the difference between *Wednesbury* and proportionality should not be exaggerated; there is often no 'daylight' between the tests, especially where 'anxious scrutiny' is involved. Secondly, *Wednesbury* unreasonableness and proportionality remain distinct tests and the former may not necessarily provide the same level of protection from administrative action. Finally, future cases may require further convergence of the tests.

Proportionality

Origins of the principle

Proportionality is a form of judicial review that began in continental Europe, and has been 'transplanted' into the UK as a result of the *Human Rights Act* and other EU legislation applicable to the UK. Margit Cohn explains the origins of proportionality as follows:[77]

> The principle of proportionality *(Verhaltnismaβigkeitsgrundsatz)* is central to German public law … The principle is now applied as an independent and perhaps the most important and extensive umbrella ground for examining the validity of administrative actions … In its current form, the formula created by German courts comprises three subtests or limbs. First, the measure must be suitable for the achievement of the aim pursued. Secondly, no other milder means could have been employed to achieve that aim (a 'necessity' test). Finally, under a proportionality *stricto sensu* test, a type of cost-benefit analysis is required; for the measure to be upheld, the benefit at large must outweigh the injury to the implicated individual

That is, under a proportionality analysis, the court must effectively determine whether the decision was justified in terms of its objectives. The question could almost be rephrased as 'are the objectives justifiable, and do the ends justify the means'?

The prompt for the introduction of the proportionality principle into UK law, at least where the *Human Rights Act* is concerned, was the decision of the European Court of Human Rights in *Smith and Grady v United Kingdom.*[78] Having been unsuccessful before the UK courts, the applicants from *R v Ministry of Defence ex parte Smith*[79] took their case to the European Court and were successful. The European Court found that Smith's and Grady's rights under Article 8 of the ECHR had been infringed, and that although Article 8 is a 'qualified right', the Ministry of Defence could not justify the breach. The Court found that the UK reasonableness test, even applying the 'anxious scrutiny' test, was insufficient and stated:[80]

> The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.

In other words, when considering rights provided for by the ECHR, 'irrationality' is too high a standard for a court to have to reach. Only a proportionality approach is sufficient.

Differences between the irrationality and proportionality approaches

The difference between the irrationality and proportionality approaches is usually explained as the latter requiring an additional step in analysis. In *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, Lord Clyde stated that a court, in applying a proportionality analysis, needed to consider the following three issues:[81]

> (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective

are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The contrast with the irrationality ground was more clearly expounded in *R v Secretary of State for the Home Department, ex parte Daly,*[82] in which Lord Steyn stated:

> Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach … I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, ex parte Smith* is not necessarily appropriate to the protection of human rights.

The exact difference between proportionality and a 'variable unreasonableness' analysis is not particularly clear, and indeed in *Daly* Lord Steyn admitted that '[m]ost cases would be decided in the same way whichever approach is adopted'.[83] Lord Steyn added:[84]

> This [the shift to proportionality analysis] does not mean that there has been a shift to merits review. On the contrary … the respective roles of judges and administrators are fundamentally distinct and will remain so … Laws LJ rightly emphasised in *Mahmood,*[85] at p 847, para 18, 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights.

'Merits review'

It is notable that Lord Steyn in *Daly*[86] denies that courts engage in 'merits review'. British courts remain insistent that they do not undertake 'merits review' of administrative decisions. The exact difference between merits and judicial review is not always – perhaps never – clear, but the former Australian Solicitor-General, David Bennett QC, has defined the terms:[87]

> A merits review body will 'stand in the shoes' of the primary decision-maker, and will make a fresh decision based upon all the evidence available to it. The object of merits review is to ensure that the 'correct or preferable'[88] decision is made on the material before the review body. The object of judicial review, on the other hand, is to ensure that the decision made by the primary decision-maker was properly made within the legal limits of the relevant power.

'Merits review', on this definition, is a very wide term, ranging from internal review of a decision to a quasi-judicial hearing before a formally constituted tribunal, but not including proceedings before a court. To give one example, in *Huang v Secretary of State for the Home Department*[89] Mrs Huang, a failed applicant for humanitarian stay in the UK, appealed against the Home Department's decision to an 'adjudicator', as permitted by s 65 of the *Immigration and Asylum Act 1999*. That Act permitted a further appeal to the Court of Appeal from the adjudicator's findings on a question of law. Lord Bingham, writing for the House of Lords, found that the adjudicator, by focusing on whether there was an error in the original decision, did not fulfil his or her role. His Lordship stated:[90]

> It remains the case that the judge is not the primary decision-maker … The appellate immigration authority, deciding an appeal under section 65, is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up to date facts.

That is, the appellate authority had acted in too 'judicial' a manner in this case, and should have considered Mrs Huang's case *de novo* rather than simply examining the primary

decision-maker's decision for any errors. It is the *court* that is prohibited from engaging in 'merits review'.

Some cases have expressly stated that the difference between merits review and judicial review is that the latter affords a degree of deference to the decision-maker that the former does not. For example, the House of Lords stated in *Tweed v Parades Commission for Northern Ireland:*[91]

> In addressing the critical question in any proportionality case as to whether the interference with the right in question is objectively justified, it is the court's recognition of what has been called variously the margin of discretion, or the discretionary area of judgment, or the deference or latitude due to administrative decision-makers, which stops the challenge from being a merits review. The extent of this margin will depend, as the cases show, on a variety of considerations and, with it, the intensity of review appropriate in the particular case.

That is, the stated difference between pure merits review and judicial review on the proportionality ground is that a judge may not simply substitute his or her decision for that of the primary decision-maker, where an administrative tribunal can and indeed sometimes must (such as in *Huang*[92]). Instead, some degree of deference must be given to the primary decision-maker.

Finally, in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*,[93] the substantive issue was whether the school's uniform policy breached the student's Article 9(1) rights when it refused her permission to wear a particular form of Islamic dress known as a 'jilbab' (other forms of Islamic dress were permitted). The House of Lords took the view that Parliament had left such decisions to schools, and that those schools were the 'experts' in what was acceptable or required in their local area. Lord Bingham noted at paragraph 33 that '[t]he school did not reject the respondent's request out of hand: it took advice, and was told that its existing policy conformed with the requirements of mainstream Muslim opinion'.

Baroness Hale gave a broadly concurring opinion, finding that the school's dress code was 'devised to meet the social conditions prevailing in the area at that time and was a proportionate response to the need to balance social cohesion and religious diversity'.[94] In other words, the school had a particular expertise and exercised its discretion in a reasonable and proportionate manner.

Lord Hoffmann commented at paragraph 64 of the judgment that 'a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms'. His Lordship also stated at paragraph 66:

> What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done.

Taken together, these judgments illustrate the point that the school was both empowered by the Parliament to make the sort of decisions that it did, and had a better 'on the ground' knowledge of prevailing conditions than the court. Its decision was therefore reasonable and proportionate in all the circumstances.

Merits review, 'variable' review and proportionality – is there any difference?

The House of Lords in *Daly* stated that the acceptance of proportionality review for *Human Rights Act* issues 'does not mean that there has been a shift to merits review'.[95] Is this in fact

the case? Surely any kind of review on the basis of unreasonableness, or even patent unreasonableness, *is* a form of merits review. In any such case, the court is examining the substance of the decision and determining whether it meets a minimum level of reasonableness. This is so regardless of the degree of deference to be given to the primary decision-maker.

The view that there is no real difference between merits and proportionality review has also been taken by a number of commentators. For example, Bradley Selway has noted that 'the new English approach clearly permits merit review subject only to whatever forbearance the judge, as a matter of policy, is prepared to give'.[96] It is important to note that even the orthodox *Wednesbury* approach is really a form of merits review, with a greater degree of deference given to the decision-maker than the 'anxious scrutiny' or proportionality approaches.

A number of commentators have also argued that, while it is important to distinguish between judicial and merits review, the difference, at least when undertaking a proportionality analysis, is really only one of degree, that degree being the degree of deference given to the decision-maker. Mark Aronson has commented as follows[97]

> Judicial review's professed indifference to the substantive merits of the impugned decision is not always convincing, and not ultimately reconcilable with some of the grounds of review. (Review for 'reasonableness, eg, clearly involves an examination of the impugned decision's merits, albeit from a perspective of a large degree of deference.) But even though the difference between judicial review and merits review may at places be only one of degree, it is important to maintain that difference. Judicial deference to the views and actions of the primary decision maker is in one sense the essence of judicial review's technique. That difference is underpinned by a political sense of the court's secondary role in relation to the primary decision-maker, and by the practical sense of the latter institutional competence in the substantive issues relative to that of the court.

Again, can this distinction really be maintained? Does the existence of a level of deference, or a 'margin of appreciation', somehow transform merits review into judicial review? Again, I would argue that it does not. Regardless of whether any deference is given or not, the court is reviewing the merits of the decision. The only issue is whether it decides that a decision is *sufficiently* unreasonable or disproportionate to warrant it being set aside.

Summary

There has been a significant convergence in Canadian and UK administrative law since the 1980s. Both countries now use an approach involving a standard of review of reasonableness for most administrative decisions, and a proportionality approach for decisions involving fundamental rights (those protected by the Charter in Canada, and the HRA in the UK[98]). Neither jurisdiction now attempts to argue that there is more than one standard of reasonableness. The most significant remaining difference is that the UK uses a variable scale of reasonableness in non-HRA decisions, while Canada still refuses (in the main) to admit that reasonableness is a continuum.

Both jurisdictions have moved to a rights-based approach to judicial review. This is most clearly seen in the UK in *Budgaycay*, in which the House of Lords, instead of simply examining the powers of the decision-maker, focused on the impact of the decision on the applicant. A corollary of this is that when a decision does impact on fundamental rights, particularly those protected by the Charter or the HRA, the decision-maker must provide justification for doing so, by way of written reasons, specifying the evidence before him or her. This requirement can be seen most clearly in *Smith*[99] and *Denbigh*[100] in the UK, and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*[101] in Canada.

Part 4 – *Minister for Immigration and Citizenship v Li* and subsequent Australian cases

Having examined the interpretation of 'unreasonableness' in both Canada and the UK, we can now turn to examine how the decision in *Minister for Immigration and Citizenship v Li*[102] may have the potential to move Australia towards a form of 'substantive review' of administrative decisions that more closely follows the law in those countries.

The facts in Li

The basic facts in *Li* are set out in paragraph 3 of the judgment, in which French CJ states:

> The first respondent applied for a Skilled – Independent Overseas Student (Residence) (Class DD) visa on 10 February 2007 which required satisfaction of a 'time of decision criterion' set out in cl 880.230(1) of Sched 2 to the Migration Regulations 1994 (Cth) (the Regulations):
>
> A relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no evidence has become available that the information given or used as part of the assessment of the applicant's skills is false or misleading in a material particular.

The application was supported by a skills assessment made on 8 January 2007 by TRA.[103] The assessment was found to be based on false information submitted to TRA by the first respondent's former migration agent and on 13 January 2009 the Minister's delegate refused the application for a visa.

The first respondent, through a new migration agent, applied to the MRT[104] for review of the delegate's decision on 30 January 2009. The migration agent submitted a fresh application to TRA for a new skills assessment on 4 November 2009.

The MRT convened a hearing for 18 December 2009 and on 21 December 2009 wrote to the first respondent inviting comment upon allegedly untruthful answers given to departmental officers in connection with her initial application. It required a response by 18 January 2010, but advised the first respondent that she could seek an extension of time.

On 18 January 2010, the first respondent's migration agent replied to the MRT's letter of 21 December 2009 and advised that the application for a second skills assessment had been unsuccessful. The migration agent pointed out 'two fundamental errors' in TRA's assessment and said that the first respondent had applied to TRA for review of its adverse decision. The migration agent requested the MRT to 'forbear from making any final decision regarding her review application until the outcome of her skills assessment application is finalised'.

On 25 January 2010, without waiting for advice of the outcome of the migration agent's representations to TRA, the MRT affirmed the delegate's decision … It did not explain its decision to proceed to a determination beyond saying:

> The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further and in any event, considers that clause 880.230 necessarily covers each and every relevant assessing authority's assessment.

Full Federal Court decision

Ms Li succeeded at the Full Federal Court in her argument that the MRT had acted unreasonably in making its decision prior to the new skills assessment being provided. The

Full Federal Court found that a refusal to adjourn the MRT hearing amounted to a jurisdictional error, and stated:[105]

> The appearance afforded by the MRT to an applicant by [an] invitation must be meaningful, not perfunctory, or it will be no appearance at all. The MRT is given power to adjourn proceedings from time to time: s 363(1)(b) of the Act. An *unreasonable refusal* of an adjournment of the proceeding will not just deny a *meaningful appearance* to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision. This failure constitutes jurisdictional error for the purposes of s 75(v) of the Constitution.

In other words, the MRT's unreasonable refusal to adjourn the hearing led to a breach of its own enabling legislation, and therefore to a jurisdictional error. The Minister sought and obtained special leave to appeal to the High Court.

High Court judgment

French CJ in the High Court found that the reasons of the MRT made 'no reference to the probability that [Ms Li] would be able, within a reasonable time, to secure the requisite skills assessment'.[106] The Chief Justice held that the concept of unreasonableness:[107]

> … reflects a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision. After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusion about the correct or preferable decision. However the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

In a similar vein, French CJ also stated:[108]

> The rationality required by the 'rules of reason' is an essential element of lawfulness in decision-making. A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute. To that framework, defined by the subject matter, scope and purpose of the statute conferring the discretion, there may be added specific requirements of a procedural or substantive character. They may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions.

As a result, French CJ found that the MRT decision to deny Ms Li the adjournment did not engage with the submission made on her behalf about the imminent decision by TRA. His Honour held that there was 'an arbitrariness about the decision, which rendered it unreasonable'.[109]

In a joint judgment, Justices Hayne, Kiefel and Bell developed further the idea that unreasonableness is linked to rationality and logicality. Their Honours held that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'.[110] While their judgment admitted that in some cases a decision-maker may decide that 'enough is enough', and certainly an administrative tribunal cannot be expected to adjourn a matter indefinitely,[111] they held that it was not clear how the MRT reached that conclusion in the particular circumstances of Ms Li's case. As the decision lacked an 'evident and intelligible justification', it was unreasonable.

Hayne, Keifel and Bell JJ also noted:[112]

> The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision − which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited

> unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.

Here we see a clear acknowledgement that 'reasonableness' has moved on from indefensible 'red-haired teachers' situations. Unreasonableness can be ascertained from looking at the decision as a whole and asking whether there is an intelligible basis to that decision. In this case, it was found that there was no attempt by the MRT to explain why Ms Li's request for an adjournment should be refused, looking at all the circumstances of her individual case, and this failure rendered the decision unreasonable.

Finally, Gageler J held that decision-making authority 'conferred by statute must be exercised according to law and to reason within limits set by the subject-matter, scope and purpose of the statute'.[113] His Honour found that the MRT's decision lacked a true weighing-up of Ms Li's application for an adjournment, stating that '[t]he MRT identified no consideration weighing in favour of an immediate decision on the review and none is suggested by the Minister'.[114] This is the same kind of reasoning as the joint judgment, looking at the matter from the opposite perspective – Hayne, Keifel and Bell JJ emphasised that the MRT failed to properly consider a request for an adjournment, while Gageler J takes the view that the MRT made a decision to proceed to an immediate conclusion of Ms Li's application. Either way, the decision was unreasonable, as it did not consider all the circumstances of Ms Li's case.

Gageler J also made some significant comments on the scope of unreasonableness in his judgment and indicated that it should move on from the classic *Wednesbury* formulation. His Honour stated that '[r]eview by a court of the reasonableness of a decision made by another repository of power 'is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process' but also with 'whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'',[115] expressly applying the Canadian reasonableness formulation. The 'possible, acceptable outcomes' formula has been applied in a number of cases since, although not expressly by the High Court.

In summary, the High Court in *Li* has expanded the unreasonableness formulation from outrageous and indefensible decisions to those that lack an 'intelligible basis', or those that fall outside a range of 'possible, acceptable outcomes'. The High Court now appears to be focused on whether the reasons for an administrative decision allow it to ascertain a justification for that decision, a theme taken up in the pre-*Li* decision of *SZOOR v Minister for Immigration and Citizenship*[116] and a number of cases since. The reasonableness of a decision-maker's *procedures* will also be important.

Post-Li decisions

Li has been cited frequently by all levels of courts since it was handed down; it is not possible to examine all of the relevant decisions. The High Court has yet to revisit the reasonableness issue, except to briefly dismiss the plaintiff's unreasonableness argument in *S156-2013 v Minister for Immigration and Border Protection.*[117] *Li* has, however, been successfully invoked in a number of court decisions, including:

1. *Minister for Immigration and Border Protection v Singh (Vikram),*[118] which involved a set of facts remarkably similar to *Li* itself, this time concerning an English test score instead of a skills assessment. The decision of the MRT to refuse an adjournment to allow Mr Singh to seek review of an International English Language Testing System (IELTS)

result with the testing authority was held to fall squarely within the *Li* scope of unreasonableness.

2. In *SZSNW v Minister for Immigration and Border Protection*[119] an 'independent merits reviewer' had made findings adverse to the applicant's credibility, after he raised an allegation of 'sexual torture' that had not been disclosed to the primary decision-maker. The Federal Circuit Court found that a decision is unreasonable 'when a decision maker makes a choice that is arbitrary, capricious or without common sense',[120] and was particularly critical of the way in which the reviewer appeared to ignore procedural instructions for dealing with applicants for refugee status who make claims of this kind.[121] The decision was therefore set aside.
3. In *SZRHL v Minister for Immigration and Citizenship* the Federal Court noted:[122]

> [H]aving regard to [*Li*], it must now be accepted that the Tribunal is constrained to undertake its 'core function' of review reasonably, which includes exercising, reasonably, ancillary discretionary powers granted to the Tribunal for that purpose. A decision on review would only transgress this underlying requirement of reasonableness and thereby constitute jurisdictional error if the decision were so unreasonable that no reasonable Tribunal could have so decided the review application. That is a conclusion to be reached with restraint, having regard to the constitutional separation of powers and recognition that the task of determining eligibility for the grant of a protection visa is one consigned by Parliament to the Executive, not to the Judiciary.

This was another credibility case, in which the applicant made claims before the Refugee Review Tribunal (RRT) that the RRT considered had not been made to the primary decision-maker. The issues in question *had* been mentioned in the applicant's original protection visa application form, although they had not been expanded on since. The adverse credibility finding made by the RRT was therefore based on an incorrect set of facts, and the court found that they could therefore have 'been deprived of the possibility of a successful outcome on the merits of their protection visa applications'.[123] The RRT decision was therefore unreasonable and was set aside.

It is also worth noting that *Li* has been applied by a number of state Supreme Courts, seemingly most frequently in Victoria. For example, *Topouzakis v Greater Geelong City Council*[124] involved a decision by the Council to exclude an employee from leisure centres managed by it, which effectively terminated his employment. A number of patrons had campaigned to have the applicant dismissed after a previous criminal conviction incurred by him came to light, a conviction of which the Council was already aware. After quoting from *Li*, the Supreme Court of Victoria stated that the issue in the case at hand was 'whether the Council's decision to impose the ban is 'reasonable' in the sense that there is evident and intelligible justification for it and whether the ban is proportionate to the breaches of the local law identified by the Council'.[125] In the end, the Court found that the decision to ban the applicant from the premises contravened Council by-laws, as it was made on the basis of a perceived lack of remorse on the part of the applicant, rather than the safety of patrons of Council property.

Part 5 – Conclusions

In *Li*, the High Court has moved the 'reasonableness' ground beyond the kinds of outrageous decisions envisioned by *Wednesbury* and closer to the Canadian and UK concepts of this ground of review. While it is true that *Li* did not expressly endorse any kind of 'variegated unreasonableness' concept, the High Court has clearly indicated that 'reasonableness' can now only be ascertained by looking at all the circumstances of an applicant's case, and the impact of a decision on them, an approach which has its roots in *Budgaycay,*[126] and is also similar to the 'possible, acceptable outcomes' approach of *Dunsmuir.*[127] Therefore, the High Court is moving towards the wider concepts of unreasonableness in those jurisdictions.

It will be interesting to see how this movement progresses. In the UK, a proportionality approach is used to assess the reasonableness of decisions covered by the HRA, and a 'variegated reasonableness' approach to others. In Canada, cases such *Doré v Barreau du Québec*[128] indicate that a proportionality approach will decide cases involving Charter rights, and the *Dunsmuir* reasonableness test will decide other cases (unless a rare 'true question of jurisdiction or vires' arises). Australia lacks any kind of constitutional Bill of Rights, but perhaps a similar kind of approach could take root all the same – rights protected by, say, the *Racial Discrimination Act 1975* and other Acts which can form the basis of complaints to the Human Rights Commission could require a proportionality approach to review of decisions impacting on those rights, while other decisions could be reviewed on the *Li* unreasonableness test. This day may be a long way off, but the real future for Australian administrative law has to be in the direction of a rights-based jurisprudence, and not simply the current fixation on jurisdictional errors of law. *Li* might be one small step on that journey.

Endnotes

1 Referring to *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.
2 Ibid at 230.
3 [2005] FCA 1707 at paragraph 555, citing M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004).
4 (1949) 80 CLR 657.
5 Ibid at paragraph 12. The finding that an apparently unfettered discretion must nevertheless be exercised reasonably is similar to the Supreme Court of Canada's decision in *Roncarelli v Duplessis* [1959] SCR 121.
6 (1972) 128 CLR 305.
7 Ibid at paragraph 2 of the judgment of Gibbs JA.
8 Ibid at paragraph 13 of the judgment of Stephen J.
9 (1986) 162 CLR 24 at paragraph 15 of the judgment of Mason J.
10 [2013] HCA 18.
11 (1997) 146 ALR 126 at 135.
12 Ibid.
13 *Abebe v the Commonwealth; Re Minister for Immigration and Multicultural Affairs, ex parte Abebe* (1999) 162 ALR 1.
14 (1997) 197 CLR 611.
15 Ibid at paragraph 40.
16 (1995) 183 CLR 273 at 290.
17 [2010] HCA 16.
18 Under s 36 of the *Migration Act 1958*, the key criterion for the grant of a Protection Visa is that the applicant has been found to be a refugee as defined by the *Convention Relating to the Status of Refugees*.
19 *SZMDS v Minister for Immigration and Citizenship* [2009] FCA 210 at paragraph 29.
20 Referring to *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 207 ALR 12.
21 Supra n17 at paragraph 30.
22 Ibid at paragraph 135.
23 (1990) 170 CLR 1 at 36.
24 Margaret Allars, '*Chevron* in Australia: A Duplicitous Rejection?', (2002) 54 *Administrative Law Review* 569 at 583-4.
25 *Peko-Wallsend*, supra n9 at paragraph 15 of the judgment of Mason J.
26 [1979] 2 SCR 227.
27 Madame Justice Claire L'Heureux-Dubé, 'The "Ebb" and "Flow" of Administrative Law on the "General Question of Law"' in Michael Taggart (ed), *The Province of Administrative Law*, (Hart Publishing, 1997) at 308-9.
28 [1970] SCR 425.
29 [1971] SCR 756.
30 RSNB 1973, *c* P-25.
31 Supra n26 at 299.
32 Supra n26 at paragraph 15.
33 Ibid at paragraph 16.
34 See for example *SZMDS*, supra n17 at paragraph 131.
35 *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748.
36 See in particular *Toronto (City) v Canadian Union of Public Employees, Local 79* [2003] 3 SCR 77 and *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] SCC 15.
37 [2008] 1 SCR 190.
38 RSNB 1973 c P-25.
39 SNB 1984, c C-5.1.

40 Supra n37 at paragraph 47.
41 Ibid.
42 David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', in Michael Taggart (ed), *The Province of Administrative Law*, (Hart Publishing, 1997) at 286.
43 Supra n37 at paragraph 50.
44 Ibid at paragraph 59.
45 Ibid at paragraph 64.
46 On this point now see *Doré v Barreau du Quebec* [2012] SCC 12.
47 [2011] SCC 61 at paragraphs 54 and 57-61. See also John Evans, 'Standards of Review in Administrative Law', paper prepared for the 2012 British Columbia Administrative Law Conference at 3.
48 Ibid at paragraph 42.
49 [1984] 3 All ER 935.
50 1998 c 42.
51 Supra n49 at 944 – 945.
52 Ibid at 950-1.
53 *Wednesbury*, supra n1. *Wednesbury* actually envisaged *two* kinds of unreasonableness – the use of a power for an improper purpose, or a decision that is 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (supra n1 at 229) referred to by Paul Craig as 'substantive unreasonableness' – Craig, *Administrative Law* (6th ed), Sweet and Maxwell, 2008 at paragraph 17-002 (p 532). It is the latter meaning of the term that has popularly become known as '*Wednesbury* unreasonableness'.
54 [1987] AC 514.
55 Ibid at 531.
56 [1991] 1 AC 696.
57 Ibid at 748-9.
58 [1996] QB 517.
59 Ibid at 554.
60 Ian Turner, 'Judicial Review, Irrationality and the Limits of Intervention by the Courts', [2010] 21 *Kings Law Journal* 311 at 322-3.
61 *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 2 AC 240.
62 *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418.
63 Thomas Poole, 'The Reformation of English Administrative Law', (2009) 68 *Cambridge Law Journal* 142 at 145.
64 Supra n54.
65 *R v Lord Chancellor, ex parte Witham* [1998] QB 575.
66 Supra n58.
67 Supra n28.
68 Supra n46.
69 [2001] 1 WLR 840.
70 See for example *R v Johns ex parte Derby City Council* [2011] EWCA 375 (Admin).
71 [2003] QB 1397.
72 Ibid at paragraphs 33 and 34.
73 Ibid at paragraph 35.
74 [2009] 1 AC 367.
75 Ibid at paragraph 109.
76 *British Civilian Internees*, supra n71.
77 Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of Administration in the United Kingdom', (2010) 58 *American Journal of Comparative Law* 583 at 608-9.
78 (1999) 29 EHRR 493.
79 Supra n58.
80 Supra n78 at 543.
81 [1999] 1 AC 69 at 80.
82 [2001] 2 AC 532.
83 Ibid at paragraph 27.
84 Ibid at paragraph 28.
85 Supra n69.
86 Supra n82.
87 David Bennett, 'Balancing Merits Review and Judicial Review', (2003) 53 *Administrative Review* 3 at 7.
88 Referring to *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68.
89 [2007] 2 AC 167.
90 Ibid at paragraph 13.
91 [2007] 1 AC 650 at paragraph 55.
92 Supra n89.
93 [2007] 1 AC 100.
94 Ibid at paragraph 98.
95 *Daly*, supra n82 at paragraph 28.

96 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues', (2002) 30 *Federal Law Review* 217 at 223-4 at 224.
97 Mark Aronson, 'Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law*, (Hart Publishing, 1997) at 47-8.
98 *Doré*, supra n46 (Canada); *Daly*, supra n82 (UK).
99 Supra n68.
100 Supra n93.
101 [2011] SCC 62.
102 Supra n10.
103 Trades Recognition Australia.
104 Migration Review Tribunal.
105 [2012] FCAFC 74 at paragraph 29.
106 Supra n10 at paragraph 21.
107 Ibid at paragraph 28.
108 Ibid at paragraph 26.
109 Ibid at paragraph 31.
110 Ibid at paragraph 76.
111 Ibid at paragraph 81.
112 Ibid at paragraph 68.
113 Ibid at paragraph 90.
114 Ibid at paragraph 122.
115 Ibid at paragraph 105, citing *Dunsmuir v New Brunswick*, supra n37 at paragraph 47.
116 [2012] FCAFC 58 at paragraph 8, citing the decision of the Supreme Court of Canada in *Newfoundland Nurses*, supra n101.
117 [2014] HCA 22 at paragraph 44.
118 [2014] FCAFC 1.
119 [2014] FCCA 134.
120 Ibid at paragraph 52.
121 Ibid at paragraph 47.
122 [2013] FCA 1093 at paragraph 19.
123 Ibid at paragraph 37.
124 [2014] VSC 87.
125 Supra n151 at paragraph 71.
126 Supra n63.
127 Supra n37.
128 Supra n46.