MONCKTON CHAMBERS

"Trends in Public Law"

By Tim Ward
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THE STANDARD OF REVIEW

1. The *Wednesbury* 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."

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410, per Lord Diplock.

2. Does the Human Rights Act 1998 ("HRA") make any difference?

"inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." *Soering v United Kingdom* (1989) 11 EHRR 439 para 89.

3. Most Convention rights require a balancing exercise between interference, and a form permitted justification. The central question for the court is whether such interference is "proportionate to the legitimate aim pursued".

4. Is the standard of proportionality any different to the *Wednesbury* test? Early cases under the HRA revealed sharp differences of opinion:

B v Secretary of State for the Home Dept [2000] HRLR 439

R (Samaroo) v Secretary of State for the Home Dept [2001] Imm AR 324.

R (Mahmood) v Secretary of State for the Home Dept [2001] HRLR 14.

Monckton Chambers
4 Raymond Buildings
Gray's Inn
London WC1R 5BP

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

R (Isiko) v Secretary of State for the Home Dept [2001] HRLR 15.

5. The question was resolved in *R (Daly) v Secretary of State for the Home Dept* [2001] 2 AC 532. An interference is proportionate under the HRA when the public authority can show:

    - that the objective of the interference is sufficiently important to justify limiting the right;
    - that the measures designed to meet the objective are rationally connected with it;
    - that the means used to impair the right are no more than is necessary to accomplish that objective; and
    - that the interference does not have excessive or disproportionate effect on the affected individual.

6. Does the *Wednesbury* test continue to apply to judicial review outside the scope of the HRA, and outside the scope of Community law?

> "I consider that even without reference to the Human Rights Act the time has come to recognise that this principle [proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing…
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> "This principle does not go so far as to provide for a complete rehearing on the merits of the decision. Judicial control does not need to go so far. It should not do so unless Parliament specifically authorises it in particular areas."
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> *R (Holding & Barnes) v SSETR* [2001] HRLR 45 per Lord Slynn at paras 51,52.

PUBLIC LAW DAMAGES

There is no general right to damages for misuse of public law powers.

- a claim for judicial review may include a claim for damages but may not seek damages alone: CPR Pt 54.3(2)
- on an application for judicial review, the court has a discretion to award damages to the applicant, provided that it is satisfied that:

> "if the claim had been made in an action begun by the applicant at the time making his application, he could have been awarded damages." Supreme Court Act 1981 s 31(4).

7. Thus, damages may only be awarded in judicial review proceedings where there also exists a freestanding claim to damages under some other head of claim.

8. There are a number of heads of claim under which monetary awards may be made in respect of the use of public law powers:

- misfeasance in public office: *Three Rivers DC v Bank of England (No 3)* (2001) 2 All ER 513;
- restitution for money paid under mistake of fact or law: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.
- breach of rights in Community law where:

(i) the rule of law infringed must be intended to confer rights on individuals;

(ii) the breach is sufficiently serious; and

(iii) there is a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured party.

If those criteria are satisfied, the reparation provided must be "commensurate with the loss or damage sustained".

Cases C-46 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-5357, paras 38, 82.

9. The HRA permits the award of damages in some circumstances.

- Although Convention rights may be relied upon in "any legal proceedings" (s 7(1)(b)), damages may only be awarded by a court which has power to award damages, or to order the payment of compensation in civil proceedings": s 8(2).
- Damages may only be awarded if "necessary to afford just satisfaction": s 8(3).
- Any other relief granted by the court must also be taken into account: s 8(3).
- In determining whether to award damages, or the amount of the award, the court must take account of the principles applied by the European Court of Human Rights in relation to the award of compensation: s 8(4).

10. What "principles" does the Strasbourg court apply in its approach to damages?

- it awards damages for both pecuniary and non-pecuniary loss;

- a truly compensatory approach is sometimes adopted, and has been reasserted recently:

  "the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements": *Kingsley v United Kingdom* (2002) 35 EHRR 10 para 40.

- the award of damages is, however, discretionary, and where damages are awarded, the Court generally awards an "equitable" amount;

- the Court frequently concludes that judgment in the applicant's favour is itself "sufficient reparation" and refuses to make an award even where the applicant has suffered demonstrable harm.

11.So far, there have been only two awards of damages under the HRA.

- *Marcic v Thames Water* (2002) HRLR 22: flooding to land caused by failure to repair sewers. Overturned in the Court of Appeal, but now on appeal to the House of Lords. Court of Appeal held that the Claimant's right to damages in common law displaced any such claim under the HRA.

- *R (Bernard) v London Borough of Enfield* [2002] EWHC 2282, 25 October 2002, damages awarded for 20 months delay in providing appropriate accommodation to a disabled person under obligations arising under community care legislation.

  "The guiding principle is *restitutio in integrum"* Sullivan J at para 42.

  "While awards by the European Court of Human Rights have been 'moderate' and certainly not 'unduly generous' it is difficult to see why damages under section 8 should be 'on the low side' by comparison with tortious awards. Equally it is difficult to see why they should be high by comparison with tortious awards." (para 45)

  "The award to the claimants should not be minimal, that would undermine the policy underlying the Act that Convention rights should be respected by all public authorities." (para 58)

- There was no comparable tort, and damages of £10,000 award by reference awards by Ombudsman for maladministration.

DELAY

12.A claim for judicial review must be brought:

"(a) promptly; and

(b) in any event not later than three months after the grounds to make the claim first arose."

CPR Pt 54.5(1)

13. In recent years, the rule has been applied on occasion with striking rigour, at least outside contexts such as social welfare or immigration.

14. The high water mark was *R v Secretary of State for Trade and Industry ex p Greenpeace Ltd* [1998] Env LR 415, where Laws J held at 424:

"a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act is done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late ..."

15. In *R v London Borough of Hammersmith and Fulham, ex p Burkett* [2002] UKHL 23, the House of Lords criticised the approach in *Greenpeace*:

> "Unfortunately, the judgment in the *Greenpeace* case and the judgment of the Court of Appeal, though carefully reasoned, do not produce certainty. On the contrary, the proposition in the *Greenpeace* case, at p 424, "that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint" leaves the moment at which time starts to run uncertain...
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> "The lack of certainty is a recipe for sterile procedural disputes and unjust results." Lord Steyn at paras 48, 49.

APPEAL TO THE HOUSE OF LORDS AGAINST REFUSAL OF PERMISSION

16. The case of *Burkett* is also important for another, unrelated reason. The House departed from the "extempore observation" of Lord Diplock in *In re Poh* [1983] 1 WLR 2, in which he had held that the House of Lords had no jurisdiction to hear an appeal from a refusal to grant leave to apply for judicial review.

17. In *Burket*, the House held that it did have such jurisdiction.

TIM WARD
Monckton Chambers