

Answers to end-of-chapter quick test questions

Chapter 12 – Judicial review: irrationality and proportionality

1. How did Lord Greene MR define unreasonableness in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*?

In the *Wednesbury* case, Lord Greene MR defined unreasonableness as follows: a 'decision is unlawful if it is one to which no reasonable authority could have come'. He also added that it 'may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority'.¹

2. Why do you think the courts have applied the test for unreasonableness so strictly?

The strict nature of the courts' approach to unreasonableness can, in part, be attributed to the supervisory jurisdiction that the courts fulfil when hearing judicial review applications. Because the courts, in dealing with judicial review claims, are merely supervising the use of discretionary authority, they are limited in the extent to which they can consider the substance of any decisions or actions of public bodies subject to such claims. It is often argued, however, that to consider in detail the reasonableness of public bodies' decisions or actions would require the courts to depart from their supervisory jurisdiction and potentially interfere in the administrative process. As such, a strict approach to the unreasonableness test has typically been adopted.

3. What are the circumstances underpinning the development of proportionality in judicial review?

Though uses of the proportionality test are evident from the mid-1970s, it was not really until incorporation of the ECHR into UK law that the test came to feature more prominently within the sphere of judicial review. Indeed, the House of Lords in the *Brind* case (discussed at section 12.4 of the chapter) rejected the proportionality test for the reason that the ECHR was not then applicable law in the UK. However, with *Daly* and many others after, the proportionality test has begun to feature in judicial review cases involving a human rights element. More recently, cases have increasingly considered whether proportionality should be used in non-ECHR cases, potentially as a replacement for *Wednesbury* unreasonableness.

4. What is the test for proportionality, as set out in *Bank Mellat v HM Treasury*?

Following and drawing from cases such as *de Freitas* and *Huang* (see section 12.4 of the chapter), the Supreme Court stated in *Bank Mellat* that the questions to consider in applying the proportionality test are:

'(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the

¹ [1948] 1 KB 223, 229, also summarised in HWR Wade and CF Forsyth, *Administrative Law* (10th edn, OUP 2009) 303.

objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter'.²

5. Do you think that there is scope for both unreasonableness and proportionality to work alongside each other within the field of judicial review?

This is a matter of opinion and academic judgment. Some argue that unreasonableness and proportionality occupy much of the same 'ground' and, therefore, proportionality should be used as a permanent replacement to the *Wednesbury* test. Concerns for the manner in which the proportionality test takes courts beyond their supervisory jurisdiction, however, have led to arguments suggesting that unreasonableness should be retained in non-ECHR cases.

² [2013] UKSC 39 [74]