

THE ART OF JUDICIAL REVIEW

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THE JUDGE'S PERSPECTIVE

- Ultimate goal is to persuade the judge
- Understanding her perspective therefore critical to good advocacy:
 - Be the judge's friend:
 - out of court (well ordered small bundles, critical authorities, short readable pleadings).
Make her life easy not hard!
 - in court (don't waste time, focus on best points, smile!)
 - Your point of view is to win your client's case. But judge's point of view is to get the right answer (failing that, not be appealed!)
 - If judge sees your legal team as there to assist with that, you start ahead
 - If judge sees your legal team as obstructing getting right answer, you are in trouble

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THE JUDGE'S PERSPECTIVE IN JR: WHO AM I TO SAY?



- Starting point in judicial review: public body, not court, has task of deciding an issue
- Whether or not sympathetic to a claimant's position, most judges come to JR with a strong anxiety not to usurp the public body's role: "who am I to say?"
- Normally, this is based on principle – important to acknowledge that
- So JR is "asymmetric". The Defendant starts ahead – the Claimant must show not merely that the decision might be wrong, but that there is some basis for judge to interfere.
- The **Wednesbury Trap**



THE WEDNESBURY TRAP

- a decision “so unreasonable that no reasonable authority could ever have come to it” *Wednesbury Corp* [1948] 1 KB 223
- “So outrageous in its defiance of logic or accepted moral standards that no sensible person ... could have arrived at it” *CCSU* [1985]
- “he must have taken leave of his senses”: *Notts CC* [1986] 2 WLR 1
- “perversity” ... a very high hurdle ... the word meant what it said: it was a demanding concept” *R (Iran)* [2005] Imm AR 535
- **DEFENDANT OFTEN WINS!!**
- Sometimes, CLAIMANT has no choice to run irrationality:
 - Be upfront about it
 - Don’t be half-hearted – full steam ahead or not at all!



ART OF JUDICIAL REVIEW: MANOEUVRES

- FOR CLAIMANTS:
 - Avoid the *Wednesbury* trap.
 - Find a position where the judge will feel comfortable deciding for you
 - Approach the grounds for judicial review on that basis
- FOR DEFENDANTS:
 - Maintain advantage - manoeuvre back to *Wednesbury* if you can
 - If not, then be prepared to deal with the merits of the argument

JR GROUNDS 1: PRECEDENT FACT



- In a precedent fact case, facts are for court to determine, not Defendant
- Basic idea is that there is some factual issue which *precedes* the existence of D's power to decide (e.g. can only detain or deport someone who is a UK Citizen)
- Well known example: age disputes in judicial review (*R (A) v Croydon* [2009] 1 WLR 2557)
- But precedent fact often overlooked: e.g. WINDRUSH SCANDAL (see blog: <https://www.freemovement.org.uk/an-overlooked-weapon-in-windrush-cases-judicial-review/>).



JR GROUNDS 2: DETENTION



- In *Hardial Singh* cases, overall issue is “reasonableness” of (length of) detention
 - Court decides reasonableness: *R (A) v SSHD* [2007] EWCA Civ 884. Not whether “perverse” to detain, nor whether “entitled” to think a period was reasonable.
 - All issues of underlying fact therefore equally for court
- Not true for challenges based on policy: *O v SSHD* [2015] 1 WLR 641, questioned but not overturned by SC ([2016] 1 WLR 1717)
- Not relevant of course outside of detention



JR GROUNDS 3: HUMAN RIGHTS



- In a human rights case, *court decides* whether right is breached or not: *R (Begum) v Denbigh High School* [2007] 1 AC 100, *Miss Behavin'* [2007] 1 WLR 1420
- So issue is not whether decision maker “*had regard*” to human rights, or applied the right test. It is whether, applying the HR test objectively, there was a breach.
- By same token, in principle, *facts* will generally be for court
- NB Fresh claims and “certification”. Authorities say that:
 - Court determines correctness of certificate for itself, *R (Atkinson) v SSHD* [2004] Imm AR 596
 - Court applies *Wednesbury* review to fresh claims *WM (DRC)* [2006] EWCA Civ 1495.

JR GROUNDS 4: EQUALITY ACT



- Substantive discrimination:
 - Direct discrimination under section 15 EA 2010
 - Indirect discrimination under section 19 EA 2010
 - “Reasonable adjustments” sections 20-21 EA 2010
- Essentially private law concepts which can sometimes be relied on in JR (mainly under “public functions” in Part 3 EA 2010)
- For that reason, no public law deference built in. Court must decide, including what is “justified” and what adjustments are “reasonable”: *R (Gill) v SSJ* [2010] EWHC 364 (Admin), *MM v SSWP* [2014] 1 WLR 1716.
- Mainly relevant to challenging government “policy” or “practice”. Cannot be used to attack legislation



JR GROUNDS 5: “ANXIOUS SCRUTINY”

- Much more problematic and dubious concept. Two possible meanings:
 - Higher intensity of review in public law in human rights context: *Wednesbury review: Bugdaycay* [1987] AC 514, *ex p Smith* [1996] QB 517
 - Decision maker must think anxiously! On this view, judge conducts ordinary review but then asks whether the decision maker thought sufficiently hard about the case.
- As a matter of principle the former is correct, latter seems worthless



OTHER JR GROUNDS WHERE COURT DECIDES

- Natural justice and fairness
- Interpretation of primary and secondary legislation
- Interpretation of common law
- Interpretation of policy

DEFENDENT'S ARGUMENTS: "Material considerations"



- "Material considerations": Other than where, as a matter of statutory construction, decision maker is *bound* to have regard to a material consideration, question of what factors must be had regard to are for decision maker subject only to *Wednesbury* review: *R (Khatun) v Newham* [2005] QB 37
- *Tameside*: decision maker must "inform itself" of factors with sufficient enquiry. But "manner and intensity" of enquiry is a matter for decision maker, subject to *Wednesbury* review: *R (Plantagenet Alliance) v SSJ* [2014] 1662 (QB)

THE OTHER SIDE'S PERSPECTIVE



- Just as it is important to approach things from the perspective of the judge, so too it may be critical to approach it from the perspective of the other party, claimant or defendant.
- If you have not understood their case, your response to it will be superficial:
 - Claimants may see only the adverse effect on them, without really understanding why the decision was made
 - Defendants may fail to appreciate what it is in the claimant's case which will attract the judge's sympathy
- NB Critical benefit of experiencing acting for both sides in judicial review.

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