HR and EU issues in Scots public law
Gerry Moynihan Q.C.

Life was simple

- Wordie Property Co. v Secretary of State for Scotland
1983 SLT 345 @ 347-8 (LP Emslie)

A decision of the Secretary of State acting within his statutory remit is ultra vires if he has improperly exercised the discretion confided to him. In particular it will be ultra vires if it is based upon a material error of law going to the root of the question for determination. It will be ultra vires, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly it will fall to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it. It will also fall to be quashed if it, or any condition imposed in relation to a grant of planning permission, is so unreasonable that no reasonable Secretary of State could have reached or imposed it.

- Somerville v Scottish Ministers 2008 SC (HL) 45

PBA on proportionality

Baleful neglect of common law

Kennedy v Information Commissioner, [2014] 2 WLR 808 @ [133] Lord Toulson

What we now term human rights law and public law has developed through our common law over a long period of time. The process has quickened since the end of World War II in response to the growth of bureaucratic powers on the part of the state and the creation of multitudinous administrative agencies affecting many aspects of the citizen's daily life. The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998 , although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.

Proportionality

- Bank Mellat v HM Treasury [2013] 3 WLR 179
- Counter – Terrorism Act 2008, Schd. 7, para 9(6):

  The requirements imposed by a direction must be proportionate having regard to the advice mentioned in paragraph 1(2) or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national interests of the United Kingdom.
- Lord Sumption @ [20]

  The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. ..Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

OBJECTIVE TEST OR VALUE JUDGMENT

- Bank Mellat
- Lords Sumption and Reed agreed on test
- Both agreed should not be a merits based review on a matter as significant as nuclear non-proliferation.
- Disagreed in the result.
- Sinclair Collis [2012] QB 394, 2013 SC 221
- EU Law case
- Court of Appeal and Court of Session disagreed on test
- Will a Court intervene only where the measure is "manifestly unreasonable" or "inappropriate" ?
- Agreed in the result

Muscularity of adjudication

- Anxious scrutiny
- Sinclair Collis [2012] QB 394 @ [80] Laws LJ
- muscular adjudication of the facts by the court
- Secretary of State for Home Department v MN and KY [2014] UKSC 30 @ [31] Lord Carnwath
- Commenting on 'anxious scrutiny'
- R (YH) v Secretary of State for Home Department [2010] 4 All ER 448
- ...the expression [anxious scrutiny] in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an 'axiomatic' part of any judicial process, whether or not involving asylum or human rights.

No longer so simple

- Kennedy v Information Commissioner [2014] 2 WLR 808 @ 51, Lord Mance
- The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223* . The nature of judicial review in every case depends on the context. The change in this respect was heralded by Lord Bridge of Harwich said in *R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514* , 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, "the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is *838 in no way flawed, according to the gravity of the issue which the decision determines".
- It can cover issues of fact as well as law: at [54]

Flexibility

- Kennedy v Information Commissioner [2014] 2 WLR 808 @ 55, Lord Mance
- Speaking generally, it may be true (as Laws J said in a passage also quoted by Lord Bingham from *R v Ministry of Agriculture, Fisheries and Food, Ex p First City Trading [1997] 1 CMLR 250* , 278–279) that " *Wednesbury* and European review are two different models—one looser, one tighter—of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power". But the right approach is now surely to recognise, as *de Smith's Judicial Review* , 7th ed (2013), para 11-028 suggests, that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation. Among the categories of situation identified in *de Smith* are those where a common law right or constitutional principle is in issue. In the present case, the issue concerns the principles of accountability and transparency, which are contained in the Charities Act and reinforced by common law considerations and which have particular relevance in relation to a report by which the Charity Commission makes to explain to the public its conduct and the outcome of an inquiry undertaken in the public interest.
- Lord Toulson @ 132
- If denial of disclosure by Charity Commissioners was challenged by Judicial Review the Court would decide for itself whether the principle of open justice required disclosure, giving due weight to the decision and reasoning of the Commission.