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Robust decision-making - how to reduce the scope for an irrationality challenge

Public bodies must understand the scope of 'irrational' or 'unreasonable' challenges so that proactive steps can be taken to reduce the likelihood of successful judicial intervention.

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'Irrationality' is one of the three traditional heads of judicial review, along with 'illegality' and 'procedural impropriety' (Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374). Decisions made by public bodies are therefore often attacked on the basis that they are somehow 'irrational' or 'unreasonable'.

'Irrationality' and 'unreasonableness' are pejorative terms that are perhaps no longer suitable labels in administrative law. They are also apt to mislead – the courts will not only scrutinise those decisions that are so bizarre or unfounded that they fall at the outer end of the spectrum of what is considered to be a rational or reasonable. It is therefore important for public bodies to understand the scope of this ground of challenge so that proactive steps can be taken to reduce the likelihood of successful judicial intervention.

Irrationality is a ground of substantive review that requires a forensic analysis of the reasons given by the decision-maker. What is often cited as the classic test for irrationality is to examine whether the decision was so unreasonable that no reasonable decision-maker could have reached it. This is what is known as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1KB 223). Irrationality has similarly been described elsewhere as *"a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person"* (Council of Civil Service Unions (n 1)); *"my goodness, that is certainly wrong"* (Neale v Hereford and Worcester CC [1986] I.C.R. 471); or *"so devoid of any plausible justification"* (Bromley LBC v Greater London Council [1983] 1 A.C. 768).

It has historically been very difficult to establish that a decision is unlawful on this basis. However, the ground of irrationality has evolved over the last 70 years since Wednesbury was decided and the court's approach today is far more nuanced. There is now a significant body of cases where the courts have quashed the decision because it was found to be irrational and public bodies should not consider themselves shielded from judicial scrutiny simply because their reasoning is not deficient in the Wednesbury sense. Whilst these cases can turn on their own facts, there are some common lessons that public bodies can draw upon to make their decision-making more robust.

First, it is always helpful for public bodies to take a step back and consider the context of the decision-making process. This is because the intensity of judicial scrutiny varies depending on the scope, subject and purpose of the particular statutory provisions in issue. A decision that has a significant impact on the rights and freedoms of individuals will be subject to greater judicial scrutiny than a decision that does not. Public bodies should therefore ensure that greater care is taken to a decision, including in terms of the adequacy of reasoning for that decision and the procedure adopted to arrive at it, that falls into the former category. Decisions in the latter category involving large scale matters of economic policy or political judgment usually receive lesser scrutiny and are only likely to be overturned where there is *"manifest absurdity"* (Nottinghamshire CC v Secretary of State for the Environment [1986] 1 All ER 199; Hammersmith and Fulham London BC v Secretary of State for the Environment [1990] 3 All ER 589).

Second, in cases where the courts will apply greater scrutiny, what the evidence says is always critical and will be the focal point for the court's assessment. If there is an absence of a rational or logical connection between the evidence and a decision then there will be greater scope for challenge. Simply put, if the evidence says X and the decision-maker concludes Y then there is a significant risk that the decision will be found to be unlawful because it cannot be justified or supported by the evidence (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1976] 3 All ER 665 at 681–682 per Lord Wilberforce; Brind v Secretary of State for the Home Dept [1991] 1 All ER 720; Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48 at 57).

Third, there is often a correlation between decisions that are irrational in the substantive sense and those decisions where there is some form of procedural flaw, such as where the decision-maker failed to take into account relevant decisions, took into account irrelevant considerations, or failed to keep an open mind during the process. These types of procedural errors alone are usually sufficient to justify the court quashing the decision being challenged. But they also provide helpful signposts for public bodies to keep in mind when giving reasons for a decision. Again, the key to reducing the risk of a decision being overturned by the courts is to focus on the available evidence and ensure that you can demonstrate that everything relevant has been taken into account.

It is worth emphasising that the existence of the ground of irrationality does not mean that public bodies should be concerned about the prospect of the courts substituting a different outcome. Judicial review is not an appellate procedure and it is not role of the courts to review the merits of a decision (Michalak v General Medical Council [2017] 1 WLR 4193 at [21]-[22]). In many cases a claim that labels a decision as irrational is in substance no more than a way of expressing emphatic disagreement with it. Public bodies have the right to choose between more than one course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred (Tameside (n 7)). And, of course, public bodies should not be pressured into reaching a certain outcome because an individual otherwise threatens to commence judicial review proceedings.

Whilst the intensity of the judicial scrutiny will depend on the context, public bodies will always be in a better position to defend a challenge if they ensure that their decision-making process is thorough and fair, the decision can be justified on the evidence and the reasons given for it are adequate. Ultimately, this is something that public bodies should be concerned about irrespective of the threat of legal challenge - after all, good decision-making is a public good in itself and something that public bodies should strive towards in all cases.

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