(*Note*: this case concerned a lack of independence arising out of an issue of impartiality. See below.)

9.06 It has been held that 'independent' means independent of the executive and of the parties (*Ringeisen v Austria*).[2]

9.07 The right to a fair trial by an independent tribunal is unqualified. It is not to be subordinated to the public interest in the detection and suppression of crime (*Montgomery v HM Advocate and Another*).[3]

How can the independence of a tribunal be assured?

9.08 The ECtHR has repeatedly held that in order to establish whether a tribunal could be considered 'independent' within the meaning of the ECHR, regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. What the ECHR calls for is not any rigid or universal set of rules, but adequate assurances of independence. Such assurances may take different forms dependent on the nature of the regulator, such as:

- inclusion among the members of the tribunal of persons from outside the trade or profession in question;
- the lay members to be in the majority or the independent chairman to have a casting vote;
- appointment of the tribunal members by persons from outside the trade or profession; and
- security of tenure.

9.09 On their own, none of these assurances of independence may be sufficient to satisfy the requirement of Art 6, nor is it possible to say that a particular assurance will be essential to guarantee independence. In judging the compliance of a tribunal with the ECHR it is always necessary to look at the totality of its arrangements for the protection of independence: to concentrate exclusively on any one of the safeguards could give a false picture.

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2 *Ringeisen v Austria* (1971) 1 EHRR 455 (District Commission refused to permit purchase of land).

3 *Montgomery v HM Advocate and Another* (2000) SCCR 1044, [2000] All ER D 2272 (prejudicial pre-trial publicity).

The assurance of lay (or public interest) membership

Public interest members

9.10 Tribunals frequently include members who do not belong to the trade or profession in question. Such members are sometimes known as 'lay' members, but are better described as 'public interest' members.

An external element in the membership of a disciplinary tribunal offers the following advantages:

(1) an assurance of independence;

(2) the inclusion of a viewpoint that might not otherwise be found among members of the profession or trade in question; and

(3) a receptiveness to standards of probity acceptable to the wider public.

9.11 In the leading case of *Albert and Le Compte v Belgium*[4] the independence requirement of Art 6 of the ECHR was held to have been satisfied when the Appeals Council of the Belgian Medical Association was composed equally of medical practitioners and members of the judiciary, one of the latter having a casting vote. Exactly what this implies we deal with below.

The assurance of independent appointment

9.12 The ECtHR has disapproved of tribunals that are appointed by the prosecutor or even by the authority that appoints the prosecutor. Thus, in *Findlay v United Kingdom*,[5] the court condemned the former procedure whereby the members of courts-martial were appointed by a 'convening officer' who also appointed the prosecuting and defending officers, secured the attendance of witnesses and decided which charges should be brought. (The court also noted that the members of the court-martial were military personnel subordinate in rank to the convening officer.) Also see *Cooper v United Kingdom*.[6]

The assurance of security of tenure

9.13 In *Albert and Le Compte,* above, the ECtHR observed of the Appeals Council of the Belgian *Ordre des Medicins* that 'the duration of a Council member's term of office provides a further guarantee' of independence. It should be noted that this observation does not lay down a minimum period of

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4 *Albert and Le Compte v Belgium* (1983) 5 EHRR 533. The Commission had argued that, while the participation of doctors in the Appeals Council did not render it partial, the fact that the defendants were the subject of disciplinary proceedings 'on account of behaviour motivated by their opposition to the Medical Association, as such, and in particular by their obligation to become members of the Association' rendered the Appeals Council partial.

5 *Findlay v United Kingdom* (1997) 24 EHRR 221.

6 *Cooper v United Kingdom* (2004) 39 EHRR 8; [2003] ECHR 686 .

office for members of particular disciplinary committees; it says no more than that in that particular case a term of office of 6 years assisted in satisfying the provisions of the ECHR.

9.14 Public interest members who hold office for an unduly limited period of time may not be regarded as independent.

9.15 Thus it has been held that the former Scottish system of appointing temporary sheriffs for 12 months unless previously recalled did not provide an 'independent' tribunal within the meaning of Art 6 of the ECHR. See, for example, *Starrs v Ruxton*[7] in which Lord Reid made an important qualification, namely that a short term of office is not necessarily objectionable. However, a term of office expiring, not upon the completion of a particular task or the cessation of a particular state of affairs, but at the end of a fixed period of time of relatively short duration, was liable to compromise the judge's independence if the appointment could be renewed.[8]

Comment: It is suggested that the 'security of tenure' assurance would probably be unnecessary where the members of the tribunal were to be dismissible only by a body independent of the profession or regulator under pre-determined criteria, for example, gross misconduct.

The convenor of the tribunal

9.16 The person convening an adjudicatory body should not be closely associated with the prosecution. See *Moore and Gordon v United Kingdom*.[9]

Can a lack of independence be cured by the appointment of a fresh tribunal?

9.17 In some circumstances it may be possible to cure a lack of independence by appointment of a fresh panel.

9.18 Thus, in the case of *R (Beeson) v Dorset County Council*[10] Richards J held that where a residential care assessment review panel had been appointed which contained only one independent person and in which the director of social services took the final decision its lack of independence could be cured by the appointment of an independent panel.

7 *Starrs v Ruxton* [2000] JC 208.

8 *Starrs v Ruxton* was followed in *Singh v Secretary of State for the Home Department* [2003] ScotCS 342 (appointment of part-time adjudicator to hear asylum appeals held to lack independence when the appointment was for a renewable period of 5 years).

9 *Moore and Gordon v United Kingdom* (2002) 29 EHRR 728, which dealt with courts-martial.

10 *R (Beeson) v Dorset County Council* [2001] EWHC Admin 986.

9.19 A similar approach was suggested by Woolf J in the case of *R v Frankland Prison Board of Visitors, ex parte Lewis*[11] as appropriate in the case of boards of visitors.

9.20 For whether a lack of independence in the tribunal of first instance can be cured by a right of appeal to an ECHR conformable tribunal see Chapter 15.

(2) THE RIGHT TO AN IMPARTIAL TRIBUNAL

The common law right to an impartial tribunal

9.21 Historically, the common law has paid little attention to the need for an independent tribunal. Most of the jurisprudence concerns the need for the impartiality of tribunal members.

9.22 The need for the members of a tribunal to be impartial was explained as follows by Lord Browne-Wilkinson in the House of Lords in the case of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)*:[12]

> 'The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.'

11 *R v Frankland Prison Board of Visitors, ex parte Lewis* [1986] 1 All ER 272, 277.

12 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577. In this case the former head of state of Chile, Senator Pinochet, was the subject of extradition proceedings in this country at the instigation of the Spanish legal authorities. On a legal challenge to the proceedings the House of Lords held by a majority that the senator was not immune from such proceedings. This decision was challenged on the ground that one of the members of the Judicial Committee, Lord Hoffmann, was a director and chairman of Amnesty International Charity Ltd, which had campaigned strongly against Senator Pinochet and which intervened in the earlier hearing to support the case for extradition. Lady Hoffmann also worked for the international arm of Amnesty. Lord Browne-Wilkinson said: 'The present case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure.'

9.23 By what test should a tribunal member recuse himself? This question was finally answered by the House of Lords in the case of *Porter v Magill*[13] in which Lord Bingham declared:

> 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

9.24 Thus, for example, the House of Lords has held that no challenge could be sustained on the ground of apparent bias where a medically qualified member of the three-person disability appeal tribunal was a doctor who had been providing reports to the Benefits Agency in disability living allowance cases and incapacity benefits cases as an examining medical practitioner (*Gillies v Secretary of State for Work and Pensions*).[14]

9.25 The ECtHR has commented that:

> 'The small but important shift approved in *Magill v Porter* has at its core the need for "the confidence which must be inspired by the courts in a democratic society."' (*Belilos v Switzerland*)[15]

The fair-minded and informed observer

9.26 The leading case of *Porter v Magill and another*[16] is authority for the proposition that bias in a tribunal member is to be judged by the views of the fair-minded and informed observer. How is the fair-minded and informed observer to be recognised?

9.27 Guidance on this point was given by Lord Hope in the case of *Helow v Secretary of State For The Home Department and Another (Scotland)*,[17] when he said at paras 1 and 2:

> 'The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson*.[18] Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.'

In *Helow's* case a Scottish judge was challenged for failing to recuse herself when dealing with a Palestinian litigant on the ground that she was a member of the International Association of Jewish Lawyers and Jurists. Lord Hope observed that:

> 'The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views about anything that she reads. She can be assumed to be capable of detaching her own mind from things that they contain which she does not agree with. This is why the complete absence of anything said or done by her to associate herself with the published material that the appellant complains of is so crucial to what the observer would make of this case. In the absence of anything of that kind there is no basis on which the observer would conclude that there was a reasonable possibility that the judge was biased.'

And see the discussion of this subject by the Court of Appeal in the case of *Virdi v The Law Society of England and Wales & Another*,[19] paras 42 to 44.

Reconciling *Pinochet No 2* with *Porter v Magill*

9.28 As Rix LJ observed in the Court of Appeal, the doctrines in *Pinochet No 2* and *Porter v Magill*, above, may be seen:

> '... as two strands of a single overarching requirement: that judges should not sit or should face recusal or disqualification where there is a real possibility on the objective appearances of things, assessed by the fair-minded and informed observer (a role which ultimately, when these matters are challenged, is performed by the court), that the tribunal could be biased. On that basis the two doctrines might be analytically reconciled by regarding the "automatic disqualification" test as dealing with cases where the personal interest of the judge concerned, if judged sufficient on the basis of appearances to raise the real possibility of preventing the

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13 *Porter v Magill and another* [2002] 1 All ER 465, [2001] UKHL 67, [2002] 2 AC 357 (approving the test laid down in the case of *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, and disapproving the test in *R v Gough* [1993] AC 646, [1993] 2 All ER 724.) *Porter v Magill* concerned the alleged partiality of a local authority auditor. (Exercise of self-promotion by local authority auditor did not amount to bias.)

14 *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2.

15 *Belilos v Switzerland* (1988) 10 EHRR 466, at para 67; *Wettstein v Switzerland* (App No 33958/96) para 44; In *Re Medicaments*, at para 83.

16 *Porter v Magill and another* [2002] 1 All ER 465, [2001] UKHL 67, [2002] 2 AC 357.

17 *Helow v Secretary of State For The Home Department and Another (Scotland)* [2008] UKHL 62.

18 *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53.

19 *Virdi v The Law Society of England and Wales & Another* [2010] EWCA Civ 100.

15.33 Langstaff J summarised the role of the court in an appeal by way of rehearing as follows in the case of *Bhatt v General Medical Council*:[33]

> '(i) [The court] will give appropriate weight to the fact that the [FTTP] Panel is a specialist tribunal, whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect;
> (ii) that the tribunal has had the advantage of hearing the evidence from live witnesses;
> (iii) the court should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body;
> (iv) findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, are close to being unassailable, and must be shown with reasonable certainty to be wrong if they are to be departed from;
> (v) but that where what is concerned is a matter of judgement and evaluation of evidence which relates to police practice, or other areas outside the immediate focus of interest and professional experience of the FTPP, the court will moderate the degree of deference it will be prepared to accord, and will be more willing to conclude that an error has, or may have been, made, such that a conclusion to which the Panel has come is or may be "wrong" or procedurally unfair.'

(4) JUDICIAL REVIEW

15.34 This section deals with the grounds for and the machinery for applying for judicial review. The question of which bodies are subject to judicial review is dealt with in Chapter 2.

15.35 A person aggrieved at the decision of a disciplinary tribunal may be able to challenge it in the courts by way of an application for judicial review whereby access may be had to the mandatory, prohibitory and quashing orders, as well as to the remedies of injunction and declaration. Damages may be awarded in judicial review if a claim for them is joined with the application, but this provision does not create a new right of action.

15.36 Judicial review is, as the term implies, not an appeal from a decision, but a review of the manner in which the decision was made, per Lord Brightman in *Chief Constable of the North Wales Police v Evans.*[34] He added:

[33] *Bhatt v General Medical Council* [2011] EWHC 783 (Admin). A doctor who had been acquitted by the Crown Court of seven counts of sexual assault against six patient was found guilty by the FTTP of the GMC two years later of examining those patients for a sexual rather than a medical reason. He appealed on the ground that his application to have the proceedings stayed should have been granted and that various evidential issues made it unfair for him to have been tried by the panel.

[34] *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, 155.

> 'Judicial review is not concerned with the decision but with the decision making process. Unless that restriction on the power of the court is observed the court will ... under the guise of preventing the abuse of power, be itself guilty of usurping power.'

For the circumstances in which the court will strike out part of an order or decision but leave the rest, see *R v Secretary of State for Transport, ex parte Greater London Council.*[35]

Person aggrieved

15.37 Judicial review may only be obtained by a 'person aggrieved'. For a review of the criteria determinative of whether an applicant is a person aggrieved for the purpose of bringing proceedings for judicial review see the judgment of Otton J in *R v Inspectorate of Pollution and Another, ex parte Greenpeace Ltd (No 2).*[36]

The application

15.38 Application for judicial review is governed by Part 54 of the Civil Procedure Rules (CPR).

Time for making application

15.39 An application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose[37] (Pre-Action Protocol for Judicial Review). The court has a discretion to permit a late claim: CPR, r 3.1(2)(a). Compliance with the protocol alone is unlikely to be sufficient to persuade the court to allow a late claim (Pre-Action Protocol for Judicial Review).

15.40 The European Court of Justice has in quite another context impliedly condemned limitation periods, the duration of which was placed at the discretion of the competent court, and thus not predictable in its effects: *Uniplex (UK) (Law Relating to Undertakings)*[38] (procedures for review of award of public contracts).

15.41 The Court observed that:

> '... the national court dealing with the case must, as far as is at all possible, interpret the national provisions governing the limitation period in such a way as to ensure that that period begins to run only from the date on which the claimant

[35] *R v Secretary of State for Transport, ex parte Greater London Council* [1985] 3 All ER 300.

[36] *R v Inspectorate of Pollution and Another, ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329.

[37] *Allman v HM Coroner for West Sussex* [2012] EWHC 534 (Admin) in which HHJ Thornton QC held that (para 27) 'the 3 month period is a long stop position, a claimant must file the claim promptly and will be shut out if the claim is filed within the 3 month period but it is not filed promptly'.

[38] *Uniplex (UK) (Law Relating to Undertakings)* [2010] EUECJ C-406/08.

knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question.'

15.42 An application for an extension of time has been dismissed as being out of time notwithstanding that the fault was that of the applicant's lawyers (*R v Institute of Chartered Accountants in England and Wales, ex parte Andreou*).[39]

Disclosure

15.43 General disclosure is not available in judicial review procedure as it is in a writ action, but an order can be made which will be refused if disclosure is not necessary for disposing of the case fairly (*R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*[40] and see also, *R v Secretary of State for the Environment, ex parte Islington London Borough Council*).[41]

Availability of alternative remedy

15.44 Judicial review is a discretionary remedy which may be refused where an alternative remedy is available to the applicant (*R v Peterkin, ex parte Soni;*[42] *R v Birmingham City Council, ex parte Ferrero Ltd*).[43] Hence, a defendant will usually be expected to exercise any internal right of appeal before seeking judicial review. The High Court sometimes takes a more liberal approach to the use of judicial review even when the right of appeal to the tribunal of first instance has not been exercised. Thus, judicial review may be considered where:[44]

> '... the decision in question is liable to be upset as a matter of law because on its face it was clearly made without jurisdiction or in consequence of an error of law.'

In *R v London Borough of Hillingdon, ex parte Royco Homes Ltd* it was said to be 'more efficient, cheaper and quicker to proceed by *certiorari*' than to pursue a statutory appeal from a decision of a local planning authority.[45]

15.45 See generally the comments of Simon Brown LJ in *Falmouth and Truro Port Health Authority, ex parte South West Water.*[46]

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39 *R v Institute of Chartered Accountants in England and Wales, ex parte Andreou* (1996) 8 Admin LR 557, [1998] 1 All ER 14, [1997] EWCA Civ 2189.

40 *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd* [1995] 1 All ER 611, [1994] EWHC Admin 1.

41 *R v Secretary of State for the Environment, ex parte Islington London Borough Council* (1991) *The Independent*, 6 September.

42 *R v Peterkin, ex parte Soni* [1972] Imm AR 253.

43 *R v Birmingham City Council, ex parte Ferrero Ltd* [1993] 1 All ER 530.

44 *R v London Borough of Hillingdon, ex parte Royco Homes Ltd* [1974] 2 All ER 643.

45 The case of *Gee v General Medical Council* [1987] 2 All ER 193 (where an application for judicial review was heard before the matter went to the Professional Conduct Committee of the GMC) must be presumed to have fallen into this category. Also see *R v Hereford Magistrates' Court, ex parte Rowlands* (1997) 9 Admin LR 186.

46 *Falmouth and Truro Port Health Authority, ex parte South West Water* [2000] 3 All ER 306.

The grounds for judicial review

15.46 The grounds on which administrative action was subject to judicial review can be classified under three heads, 'illegality', 'irrationality' and 'procedural impropriety' (per *Council of Civil Service Unions v Minister for the Civil Service*).[47]

15.47 Each of these grounds for judicial review is considered separately below.

Illegality

15.48 'By "illegality" as a ground for judicial review', said Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*,[48] 'I mean the decision maker must understand the law that regulates the decision making power and must give effect to it'.

15.49 The courts have sometimes allowed a certain latitude in the construction of extra-statutory rules. Thus, in *R v Panel on Take-overs and Mergers, ex parte Datafin plc and Another*[49] Sir John Donaldson MR said of the panel:

> '... when it comes to interpreting its own rules, it must clearly be given considerable latitude both because, as legislator, it could properly alter them at any time and because of the form which the rules take, i e laying down principles to be applied in spirit as much as in letter in specific situations. Where there might be a legitimate cause for complaint and for the intervention of the court would be if the interpretation were so far removed from the natural and ordinary meaning of the words of the rules that an ordinary user of the market could reasonably be misled. Even then it by no means follows that the court would think it appropriate to quash an interpretative decision of the panel. It might well take the view that a more appropriate course would be to declare the true meaning of the rule, leaving it to the panel to promulgate a new rule accurately expressing its intentions.'[50]

'Irrationality', or '*Wednesbury* unreasonableness'

15.50 'By "irrationality"', said Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*,[51] 'I mean what can now succinctly be referred to as "*Wednesbury* unreasonableness" ... It 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'.

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47 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

48 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

49 *R v Panel on Take-overs and Mergers, ex parte Datafin plc and Another* [1987] 1 All ER 564, 579.

50 Also see *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport* Ltd [1993] 1 WLR 23, *R v Investors Compensation Scheme Ltd, ex parte Bowden* [1996] 1 AC 261.

51 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

15.51 The so-called *Wednesbury* principles derive from dicta of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation,*[52] where he said of a local authority's discretion:

> '… the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority.'[53]

In summary, Lord Greene said that:

> '… the court is entitled to investigate the action of the local authority with a view to seeing if it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still may be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could have ever have come to it. In such a case, again, I think that the court can interfere. The power of the court to interfere in such a case is not that of an appellate authority to override a decision of a local authority, but is that of a judicial authority which is concerned and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided to it.'

15.52 Judicial review on the ground of irrationality has been used to challenge the interpretation of terms in rules, for example, the meaning of the term 'investment business' in the (now repealed) Financial Services Act 1986 (*R v Investors Compensation Scheme Ltd, ex parte Weyell*).[54]

15.53 In recent years the term 'irrationality' has been extended to include lack of 'proportionality'. In the case of *R v Secretary of State for the Home Department, ex parte Brind and others*[55] Lord Donaldson of Lymington MR said that, under the head of 'irrationality': 'I include *Wednesbury* unreasonableness, perversity and lack of proportionality.'

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52 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, 682.

53 'This test has not to be diluted': *R v Governors of St Gregory's RC Aided High School and Appeals Committee, ex parte M* [1995] ELR 290 at 301E–301G.

54 *R v Investors Compensation Scheme Ltd, ex parte Weyell* [1994] QB 749.

55 *R v Secretary of State for the Home Department, ex parte Brind and others* [1991] 1 AC 696.

Proportionality as a factor in appeals

15.54 The doctrine of proportionality means that, 'an official measure must not have any greater effect on private interests than is necessary for the attainment of its objective': *Konninlijke Scholton-Honig v Hoofproduktchap voor Akkerbouwprodukten.*[56]

15.55 Proportionality is probably not a ground for review separate from judicial review, but when a decision is challenged by judicial review the effect of the HRA was described by Lord Steyn in *R (Daly) v The Secretary of State for the Home Department.*[57]

> 'There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Minister of Defence ex parte Smith.*[58] The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: *Wilson v The First County Trust Limited (No 2).*[59] Proportionality must be judged objectively, by the Courts: *R (Williamson) v The Secretary of State for Education and Employment.*[60]

See also the comments of Lord Bingham in the case of *R(SD) v The Governors of Denbeigh High School.*[61]

15.56 Exactly how the courts should approach issues of proportionality was discussed by Lord Steyn in the case of *R (Daly) v SSHD*:[62]

> 'The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[63] the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."'

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56 *Konninlijke Scholton-Honig v Hoofproduktchap voor Akkerbouwprodukten* [1978] ECR 1991, 2003.

57 *R (Daly) v The Secretary of State for the Home Department* [2001] 2 AC 532, paras 25–28.

58 *R v Minister of Defence ex parte Smith* [1996] QB 554.

59 *Wilson v The First County Trust Limited (No 2)* [2004] 1 AC 816, paras 62–67.

60 *R (Williamson) v The Secretary of State for Education and Employment* [2005] 2 AC 246, para 51.

61 *R(SD) v The Governors of Denbeigh High School* [2007] 1 AC 100, para 30.

62 *R (Daly) v SSHD* [2001] 2 WLR 1622 at para 27.

63 *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.