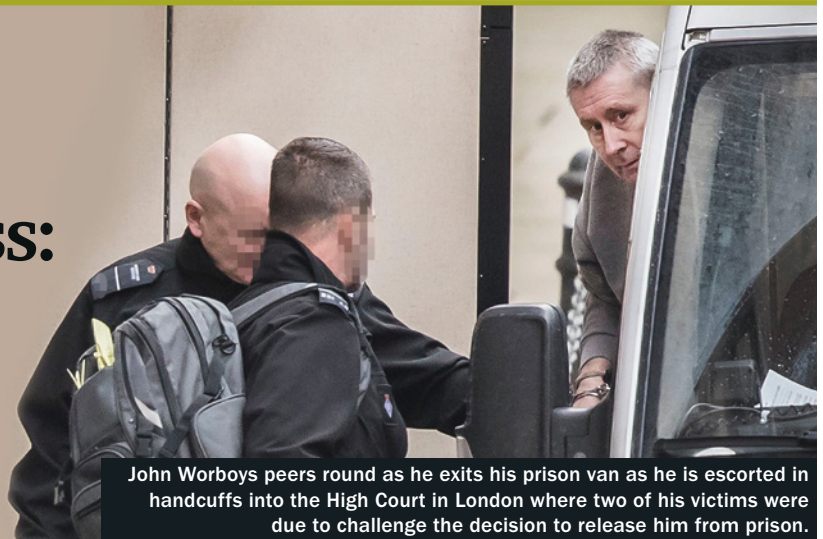


Wednesbury unreasonableness: alive & kicking?

Simon Parsons shares a brief history of the interpretation & use of *Wednesbury* unreasonableness



John Worboys peers round as he exits his prison van as he is escorted in handcuffs into the High Court in London where two of his victims were due to challenge the decision to release him from prison.

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IN BRIEF

- ▶ *Wednesbury* unreasonableness: an introduction.
- ▶ The first limb of the test: decision-making process.
- ▶ The second limb of the test: outcomes.

In the famous case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680 the Court of Appeal held that Wednesbury Corporation had acted reasonably and *intra vires* when it granted Associated Provincial Picture Houses a licence under the Sunday Entertainments Act 1932 to show films in its cinema on a Sunday which was subject to a condition that no children under the age of 15 years should be admitted on a Sunday with or without an adult. This case introduced a test for reasonableness of an administrative decision which became known as *Wednesbury* unreasonableness. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935 Lord Diplock called this ‘irrationality’ and he went to say at 410: ‘By “irrationality” I mean what can by now be succinctly 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.’

Many academics believe that this formulation is a precise rendition of the test of *Wednesbury* unreasonableness when in fact it is only part of the test set out by Lord Greene MR in *Wednesbury*. His test has two limbs: ‘The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. (The first limb.) Once that question is answered in favour of the local

authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.’ (The second limb and that defined by Lord Diplock.)

First limb

The first limb has as its focus the decision-making process of the public body and the emphasis is whether that body has taken into account the right issues when it reaches its decision. This limb still has a role in administrative law. A recent example of this ground is *R (DSD and NBV) v The Parole Board* [2018] EWHC 694 (Admin), [2018] 3 All ER 417 which concerned the controversial decision of the Parole Board to release from prison the black cab rapist John Worboys. The Administrative Court quashed the decision as *ultra vires* and ordered the Parole Board to reconsider its decision because the Board, in reaching its decision, had acted irrationally or unreasonably as it only considered the offences committed between 2006 and 2008 for which Worboys had been convicted but there was no consideration of the issue of wider offending which had started in 2003. Worboys maintained that his offending was caused by a relationship breakdown in 2005 or 2006 but DSD was attacked in 2003.

Also, this limb has a role in private law as it has been applied where a contractual term gives one party to a contract a ‘true or real’ discretion (contractual discretion) as opposed to a ‘binary choice’ where there is only a choice between two alternatives (an absolute contractual right). The leading case is *Braganza v BP Shipping Limited and another* [2015] UKSC 17, [2015] 4 All ER 639.

The facts were that Mr Renford Braganza was a chief engineer on one of BP’s oil tankers and he disappeared overboard. After a BP inquiry BP concluded he had committed suicide and that amounted

to a ‘wilful act’ under the terms of his contract of employment which meant no death benefit was payable under that contract to his widow. Mr Braganza’s widow appealed to the Supreme Court where a majority held that the contract gave BP a real discretion as it had a range of options to pay the death benefit or part or to refuse to pay it. But this contractual discretion was not unfettered as there was an implied term in the contract that where the discretion involves determining that some event has happened, the more unlikely that event is, the greater need for cogent evidence that it happened. The Supreme Court allowed the widow’s appeal holding that BP should have considered cogent evidence of suicide before it made its decision. Thus, the first limb of the *Wednesbury* test was applied. It could be argued that this amounted to a rewriting of the contract because the majority wanted the widow to have the death benefit and to achieve that they were willing to impose their own decision on BP.

Second limb

The second limb focuses on outcomes—even though the right things have been taken into account, the result is so outrageous that no reasonable decision maker could have reached it. This limb gives the decision-maker a very wide discretion as ‘to prove a case of that kind would require something overwhelming’ per Lord Greene. Thus, it is hard to prove and should be seen as a last resort and is usually pleaded alongside other grounds for judicial review. This limb amounts to an abuse of power by a public body and could also include the situation where a public body has acted in ‘bad faith’. *Roberts v Hopwood* [1925] AC 578, [1925] All ER Rep 24 and *Backhouse v Lambeth LBC* [1972] 116 Sol Jo 802 are examples of the very few cases where this limb has succeeded.

NLJ

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