Substantive grounds of review: unreasonableness

Law

Administrative Action Are grounds of judicial review so poorly defined that they enable the courts to pick and choose the cases in which they will grant judicial review? Should that be the case? Introduction Unreasonableness as a ground of review is difficult to define with any clarity or certainty and as a direst result has often been branded as a problem ridden aspect of administrative law.

The concept of Wednesday unreasonableness, formulated in the case of Associated Provincial Picture Houses v. Wednesbury Corporation [1948] and further developed in Council of Civil Service Unions v. Minister for the Civil Service [1985] per Lord Diplock was that courts would intervene to correct an administrative action based on the ground of reasonableness only if it was " so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Indeterminacy as to the definition of Unreasonableness: Poorly defined grounds of review? The concept of unreasonableness as propagated by Lord Greene and adopted by Australian courts is inherently indeterminate. Whether a particular decision is reasonable or not is often nothing more than a question of degree and opinion by the courts. This creates an overt sense of arbitrariness which then calls into question the consistency and subsequently effectiveness of such a ground of review as illustrated by case law.

The effectiveness of unreasonableness as a ground of review was blatantly called into question in the case of Chan v Minister forImmigrationand Ethnic Affairs where the High Court and the Federal Court differed in opinion as to what constituted unreasonableness which was manifestly unfair. This

apparent inability of the courts to reach a consensus on what precisely constitutes the required degree of unreasonableness in order to allow a reversal of the disputed administrative decision calls into question the consistency with which it can be applied by courts.

Although subsequent cases (Prasad v Minister for Immigration and Ethnic Affairs/ Luu v Renevier/ Minister for Aboriginal Affairs v Peko-Wallsend) seemed to prefer an expansive interpretation of unreasonableness, in neither of these cases can it be said that the delegate's decision represented something that was manifestly unfair or overwhelming as required by Lord Greene's original version. Conversely, it can be argued that the Federal Court simply reviewed the merits of the case and substituted its decision for that of the original one.

In these cases although it was difficult to reach the conclusion that the decision was so unreasonable that no reasonable person would have come to them, that is exactly what the courts did. This further prompts arguments that the ground of unreasonableness is so poorly defined that courts can pick and choose the cases in which they grant judicial review. The wider the interpretation of unreasonableness greater the risk that courts are in essence given greater opportunity to conduct a merits based review with the effect being that judicial review becomes less effective as it loses the element of consistency.

In light of this realization, this ground has recently come under close scrutiny by both the judiciary and the legislature. Where unreasonableness does exist as a ground of review, both the High Court and the Federal Court have held unequivocally that it must be strictly construed and that the courts must

abstain from using unreasonableness as a guise to hear an appeal and so engage in merits review of a case.

In the cases of Minister of immigration and Ethnic Affairs v Eshetu and Minister for Immigration and Multicultural Affairs v Betkhoshabeh, the Court established strict constraints for unreasonableness, insisting that it is only to be used in the most extreme of cases and that the review should only extend to the legality of the decision. These cases clearly mark a turnaround from the earlier approach in Prasad. In essence his ground of review has been narrowed so that it is to be used only where there is unreasonableness in the very strict sense of the word such that courts can only intervene where only one possible conclusion could have been reached by the decision maker but was not so reached. Therefore precisely defining this ground of review is impossible due to conflicting needs to reign in unreasonableness as a ground of review as opposed to limiting its scope excessively.

Proponents of the restrictive approach advocated in Eshetu would argue that a wider interpretation and application of unreasonableness may eventuate in judicial review extending to the merits of a case and possibly usurping the administrative process. However to restrict unreasonableness as a ground of review to that extent runs the risk of marginalizing this ground to the effect of making it redundant. This then gives birth to the possibility that occasions where judicial review was warranted due to the oppressive nature of administrative decisions would go unchecked.

There must be a ground of review that can capture decisions such as that in Chan that would otherwise escape scrutiny. Moreover the arguments for and against a restrictive approach to interpreting unreasonableness do not of

themselves remove other elements of unreasonableness as a ground of review that are poorly defined. The requirements for something overwhelming or for the evidence to support only one possible conclusion are no more determinate than those of the concept of reasonableness itself.

There still exists the need for courts to engage in an evaluative, value laden inquiry as to the reasonableness (or the extent thereof) of a decision and this necessarily involves delving into the merits of a decision rather than its legality. The test of whether a decision is reasonable then hinges upon whether the evidence has been considered with propriety and reasonably and it is precisely this which makes the test one of poor definition.

In determining whether the available evidence was reasonably interpreted, even considering the more recent restrictive approach propagated by courts, the courts are essentially disagreeing with the decision under review on an indeterminate ground. The danger of illegitimate judicial incursion into the merits of the decision remains present despite its strict construction. Violating the Distinction between merits and judicial review: Poorly defined grounds of review?

Although courts can justify judicial review on the basis of Wednesbury unreasonableness, this justification is limited in that the courts cannot intervene simply because they do not agree with the administrative decision or view the facts differently. The distinction between judicial and merits review requires that courts only concern themselves with the question of whether the decision maker had acted within the confines of his power subject to the issues of relevancy, proprietary of purpose and unreasonableness.

In no way must they concern themselves with the appropriateness of nor the policy considerations behind the decision in a bid to influence or criticize the policy. To do so would amount to a merits review and this would be contrary to the rule that the final authority on the merits of a decision should be the body vested with the discretionary power to do so by Parliament.

The theory behind this is that although Courts have the constitutional authority to review decisions of the other arms of government, there is an ever present danger that they might extrapolate this duty excessively and effectively exercise the power vested by Parliament in the primary decision maker, hence substituting their decision for that of the intended decision maker. This would amount to a radical breach of the doctrine of Separation of Powers due to the courts' exercise of a " surrogate political process" in direct and conflictual contravention of the notion of Parliamentary sovereignty.

The aggregate effect would be a decay of our established system of parliamentary democracy as the courts are neither democratically elected nor politically accountable. The credibility and legitimacy of both the judiciary (and judicial review) and the Constitutional guarantee against excesses by any arm of the Government would be impaired should such a development occur. However the problems surface when there is attempt to apply the theory to practice. Judicial review, despite the grounds on which it is justified, ecessarily involves a process that is evaluative, with emphasis on examining the merits of a decision. When this is compounded by the fact that a conferral of discretionary powers are done so in language that often lacks clarity and is open-ended, it is not too remote to state that courts, in

their attempt to evaluate the reasonableness of a decision, will have to embark upon the path of a value-laden judgment about whether there was a breach of the confines of the discretionary power.

This inherent problem within grounds of review is particularly exacerbated in the case of Wednesbury unreasonableness because, although the enacting statue would include the requirement of reasonableness, it will inconveniently leave out the definition of reasonableness, hence creating more room for an evaluative process by the courts. This then amounts to a process of pitting a contested decision against an ideal standard of reasonableness, a standard which has to be construed by the courts.

It is then no surprise that the result is often an opaque and loose standard which tends to veer towards the substantive elements of a decision rather than the procedural elements. The fundamental problem of Wednesbury unreasonableness as a ground of judicial review is that the trigger for raising this ground is the disputed quality of the administrative decision. Hence what this amounts to is an intervention by the courts in lieu of the merits of the decision, hence blurring the distinction between legality and merit.

When courts attempt to evaluate the legality of administrative action on the murky grounds of unreasonableness, they risk justifying a merits review as judicial review and hence risk an intervention based on their construction of unreasonableness and not based on the legality of the decision in question. Procedural Grounds of review: Bias Bias is afailureto have an open mind on the issues. Actual bias, a closed mind, may lead to other reviewable errors but exists as a separate ground of review.

Bias as a ground of review also looks at the perceptions and a decision may be set aside for a perception of bias, whether there was any or not. The test is whether a fair minded lay observer would perceive a possibility of bias. This portion of the essay deals with judges continuing to act in a decision making process when they have an interest in the outcome of the case. A judge with a financial interest in a decision is not automatically barred from hearing the case and is only barred if the interest was such as to create a perception of bias [Ebner v Official Trustee in Bankruptcy (2000)]

The distinction between actual bias and an apprehension of bias is that for the latter there needs to be no issue of whether the judicial officer might or did in fact bring an impartial mind to the resolution of that case. All that is required is that he might or might have brought an impartial mind to the resolution of the case. The High re-defined the apprehension of bias principle in Ebner v Official Trustee in Bankruptcy (2000) such that the governing principle now is that a judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to resolving the case at hand.

The principle may also need to be modified in the case of some administrative decision makers, to recognize and accommodate the different legal framework within which administrative decisions are made. Indeed, in Minister for Immigration and Multicultural Affairs v Jia, the High Court made it clear that the application of the Ebner principles will depend on the circumstances of the case at hand. Judicial officers, by virtue of their public duty do not lose their rights as citizens to engage in a private life and participate in all that a private life necessarily entails.

Therefore to assert that there will be conflicts of interest between the public duty and private life of judicial officers seems to be an otiose argument. Any argument that this conflict of interest could result in bias, hence forming a ground for review must then be contemplated with skepticism. Interest The prominence of financial diversity, prevalent interest in shareholding, necessity of investing in superannuation and its related equity funds all result in a significant number of judicial officers, like their counterparts in other professions to have an interest in publicly listed companies.

These publicly listed companies are not only the dominant incumbents of their industries but also, as a result of their expansive service production, likely to be involved in litigation periodically. Therefore there is potential scope for litigants to argue that there should be judicial review of a decision made on the basis of an apprehension of bias because of the pecuniary interest of the judge in the case. However, the resolution of most cases involving large companies is unlikely to be significant in affecting the value of a shareholding.

Hence shareholdings in large companies will not be disqualifying factors in most proceedings. The proportion of the shares held to the value of the company as an aggregate is likely to be insignificant such as to warrant an intervention on this account. Association There is no clear touchstone that can provide an easy method of identifying what might be a disqualifying association and this could provoke arguments that this ground of review is poorly defined and arbitrary. Obviously a judicial officer cannot preside in a case in which he or she is a party; or in which a close relative is party.

On the other hand, the judicial and planning appeal systems would be unworkable if a member was disqualified simply because they knew a party, let alone a representative of a party. The High Court has stated that a reasonable apprehension of bias may exist where the presiding judge has a substantial personal relationship with a party to, or a person involved in, proceedings or a substantial personal relationship with a member of thefamilyof that party or person. However what constitutes a substantial personal relationship may, in practice, be elusive.

Much depends on the nature, duration and closeness of the relationship. The High Court decision in Bienstein v Bienstein, which established the general principle that a judge is not disqualified from hearing a matter simply because, when a barrister, he or she has appeared for a party in the past. The recent decision of the House of Lords in Gillies v Secretary of State for Work and Pensions is illustrative that, in the case of an expert tribunal or court, a relationship with the agency whose decision was under review might not be a disqualifying factor.

The House of Lords considered that a fair minded observer, who had considered the facts properly, would appreciate that professional detachment and the ability to exercise an independent judgment lay at the heart of such decisions. No-one is immune from a complaint of apprehended bias. Judges cannot be expected to be value-free. Conduct Sometimes the conduct of a judicial officer may be such that a reasonable person may apprehend that the matter might not be decided impartially.

But this does not mean that a judicial officer cannot have an opinion about the general reliability of a witness who regularly appears before a court or

tribunal; provided that the officer is open to persuasion and does not make comment indicating prejudgment. It must be stressed that the expression of tentative views, designed to elicit relevant submissions, does not constitute bias nor create a reasonable apprehension of bias. Indeed, this practice actually enhances procedural fairness by alerting the parties to the thoughts of the tribunal and providing them with an opportunity to persuade the tribunal to adopt a different course.

Demands to disclose interests or associations When should a judicial officer respond to questions about their interests or associations? There are different schools of thought as to the appropriate practice to adopt when a judicial officer is asked about his or her interests or associations. My view is that, within reason, it is better to answer specific questions in relation to factual matters in order to put minds at rest; or, if minds are not put to rest, to require the parties to confront the potentially disqualifying interest or association and identify the logical connection this may have with a partial adjudication.

However a judicial officer should not feel compelled to identify and disclose all possible interests and associations, direct and indirect, whether or not relevant to the case at hand. And there is certainly no obligation to answer questions about opinions, values or attitudes. Effect of non-disclosure of non-disqualifying interest What happens if a judicial officer does not disclose an interest or association which might have been disclosed as a matter of prudence (on the asis that it was potentially disqualifying), but, when revealed, was not ultimately found to be a disqualifying interest or association? In Ebner, the majority of the High Court thought it necessary to

distinguish between considerations of prudence and requirements of law. The court considered that, as a matter of prudence and professional practice, judicial officers should disclose interests and associations if there is a serious possibility that they are potentially disqualifying.

But it thought it was neither useful nor necessary to describe this practice in terms of rights or duties. Thus if a judicial officer does not disclose a non-disqualifying interest or association, his or her silence cannot reasonably support an inference of want of impartiality. Conclusion The High Court has emphasized that judicial officers should not be too ready to disqualify themselves when confronted with an insubstantial objection, lest that this will lead to forum shopping.

But the same does not go to disclosure of potentially disqualifying interests or associations. Quite apart from any moralresponsibility, recent decisions have shown the practical virtues of disclosure in circumstances of any doubt. But in determining any objection a court or tribunal should apply a method that requires there to be some logical connection between the alleged disqualifying matter and an inability to impartially determine the proceeding.