

Discretionary powers in admin law essay



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Introduction. While discretionary powers are an integral and necessary part of Administrative Law they cannot be exercised in an indiscriminate way. The courts are regularly called upon to determine whether the persons or bodies entrusted with this discretion have used it in a fair and reasonable manner. This discussion, following an explanation of discretionary powers, will through case law, show the importance of controls in preventing an abuse of these powers. It will examine how these abuses manifest themselves while at the same time investigating the rules that the decision maker must adhere to while exercising their discretion.

We will also see that where the decision maker acts outside the powers entrusted to them, although not an abuse, it will still invalidate the decision. We shall also look at the factors which need to be considered by the decision maker while reaching a decision, and the courts view, as to the relevancy and weight that must be applied to these considerations. Finally we will investigate if there are any other factors necessary to control the exercise of discretionary powers and why this control is required. Discretionary Power.

Many academics have given various definitions as to what a discretionary power entails. One of the more succinct was given in *Baker v Canada*, where it was described as a power which referred: ... " to decisions where the law does not dictate a specific outcome, or where the decision maker is given a choice of options within the statutorily imposed boundaries"... Put simply, where a decision maker has been granted discretion by the wording of a statute, e. g. " the minister may", that discretion must be exercised in the manner which the statute provides for.

However it should be noted that within a statute, discretionary power may be laid out in the precise manner in which the legislators intend it to be used or in a manner where only a basic objective is outlined. Therefore the discretion exercised in the latter is more susceptible to an allegation of abuse.

Although discretionary power is regularly challenged on grounds of an abuse of its application, it is however a necessary requirement for the legislators. In a world where the needs of society are constantly changing legislators need to frame legislation in a manner that takes into account the many complexities that rise in so many different areas e. g. housing, education and health. Therefore, on occasion, legislation may dictate a flexible approach, rather than the rigid rule of law. Whereby, this also allows for the input of expert opinion when dealing with these complex issues. Control of Discretionary Power. As the use of a discretionary power involves making a decision based on a number of alternatives, it is imperative that the ultimate decision does not adversely impact on the rights of the citizen.

Therefore it is important that constraints are put in place to prevent such an occurrence. However, even with such constraints, public bodies can deliberately or inadvertently ignore them and make their decision based upon on a misinterpretation as to the level or nature of their discretion. It has been established that an incorrect use of discretion will be viewed in one of two ways. First, where the body exercising the power exceeds the limits of its discretion, i. e. it acts ultra vires and secondly, the body abuses its discretion e. g. he body appears to be acting mala fides. Ultimately, both instances will give grounds for a challenge to the decision by way of judicial review. Where the use of a discretionary power has been challenged, the

court, barring circumstances where there has been “ an identifiable error in law or an unsustainable finding of fact by a tribunal”, will be slow to interfere with a decision from a lower jurisdiction or tribunal. This reluctance stems from the fact the court is interested in the manner in which the decision was made not in the actual decision.

And, even where the judicial review does lie, it is important to be aware that where the body exercising discretion is an “ expert body” with a specialised knowledge, the courts are inclined to give certain latitude pertaining to this knowledge. This concept of giving added respect to a body with particular knowledge is referred to as the doctrine of curial deference. While exercising a discretionary power the decision maker must be able to give the reasons why a specific decision was reached, due to the fact the court will examine all the reasons considered.

It will examine the weight given to relevant considerations while making sure that irrelevant considerations were not central to the decision. Where the decision maker cannot show the reasons behind a decision it should benefit the applicant as the court has increasingly ruled that a failure to do so is unreasonable. It should also be noted that an abuse of discretion (as distinct from acting ultra vires) can occur, not only by the manner in which the discretion has been exercised, but also by a failure on behalf of the authorised body to exercise their discretion.

Ultra Vires. Before investigating the areas in which an abuse of discretion can take place, we must first examine a fundamental of administrative law, the ultra vires rule. The rule dictates, that where the executive or

administrative bodies are granted powers through legislation, the powers are only granted on the proviso that they are exercised within the express and implied limits as intended. Therefore when a decision maker is exercising discretion and these limits are not adhered to, the decision will be ultra vires and therefore invalid.

Wednesbury Principles. When examining whether or not a decision maker has abused their discretionary power in coming to their decision, it is necessary to address the question of reasonableness. The concept of reasonableness is a fundamental control in the use of any discretionary power, an understanding of which was given by Lord Greene in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* through his definition of unreasonable: "...a general description of things that must not be done.

For instance, a person entrusted with a discretion must, so to speak, direct himself properly at law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said...to be acting " unreasonably. "... This extract from Lord Greene's judgment lays out clearly the manner in which a decision maker must exercise a discretionary power for the decision to be considered lawful.

Through an examination of this passage it can be seen that where these rules are not adhered to, a decision maker is open to an allegation of an abuse of their discretionary power. Properly Directed at Law. For a decision

maker to direct himself properly at law, it naturally follows that any decision made should be both within the confines of the enabling statute i. e. *intra vires* (discussed above) and the Constitution. However, there are a number of ways in which he can be deemed not to have directed himself properly. Hence, a decision maker cannot act in bad faith i. . . act in a manner so as to achieve an unauthorised objective. A point which is clearly made by *Rand J*, where he stated: “...Discretion necessarily implies good faith in discharging the public duty, there is always a perspective within which a statute is intended to operate...” Bad faith however is an extremely difficult action in which to succeed, especially as the onus is on the applicant. The reason behind the courts unwillingness to uphold a decision having been taken in bad faith stems from a deference given to elected officials or public representatives.

The court does not wish to label any such person as having acted in bad faith due to the seriousness of such an allegation. Many would argue that under the separation of powers it is irrelevant whether the decision maker is an elected representative and that the judiciary should remain completely objective where an allegation of bad faith is made. The other problem that arises is that many of the decisions are taken by a group or a committee. Therefore, due to the different views and affiliations within such a committee , it is extremely difficult to prove that their combined intention was to act in bad faith.

In the past recklessness was equated with bad faith. In *SBBS*, it was held that the decision maker was not required to be aware they were acting in bad faith, so long as it could be shown that they had been reckless as to whether

or not they were. There has however been a move away from this principle. In *NAKF v Minister for Immigration and Multicultural Affairs*, Gyles J. made the point that: "...[A] person cannot blunder into bad faith, no matter how stupid and careless he is, any more than a person can blunder into deceit or wilful blindness.... Another example of an abuse of discretionary power where the decision maker has not directed himself properly at law arises where the decision has been made for an improper purpose. I. e. where a power has been granted for one purpose it cannot subsequently be used for another purpose. Where the enabling statute has granted a discretionary power in a vague manner, the courts are still able to exercise control by reading in an implied purpose. However they will not allow the decision maker to imply a purpose based on unreasonable grounds. A problem can arise where an implied purpose is read into an Act, and that purpose is open to varying interpretations as in *Rowling v Takaro Properties Ltd*. Here the Privy Council overturned a Court of appeal decision that a minister had acted for an improper purpose, a clear example of interpretative discretion. Where there are plurality of purposes i. e. a discretionary power has been exercised for a number of purposes, it can become more complicated, especially where one of them was of an improper nature. This is further complicated by the fact that a number of jurisdictions use a different test when considering whether a decision is valid.

In Ireland as in England and Wales the test normally used is called the dominant purpose test. The dominant purpose test dictates that if the main purpose for making a decision is a valid one, then the decision will stand, even where an improper secondary purpose is achieved. In Australia the test

adopted tends to be of a more stringent nature, where the decision will not be held valid if the improper purpose was the reason behind the use of the discretionary power. This can be contrasted with New Zealand where a less stringent test is now used.

The test used here dictates that the purposes used are not necessarily invalid where they do not fall within the contemplation of the Act so long as they do not run contrary to the overall objective of the legislators. Relevant and Irrelevant Considerations. When a decision maker is exercising a discretionary power it is important that they take into account all factors which are relevant to their decision while disregarding those that are irrelevant. In deciding what is relevant they must first look at the enabling statute, which may expressly state which relevant considerations need to be taken into account.

However in many cases the wording will not be precise enough to determine this and therefore what is relevant will need to be implied into the statute. Where a statute lays out a clear list of considerations and the decision maker considers a factor not expressed in the statute it does not automatically invalidate the decision. However, it is necessary to examine on a case to case basis whether the legislator intended the list to be final. Moreover this can only be achieved by examining the subject matter, scope and purpose of the Act.

There is a necessity to establish, through the wording of the statute, whether the factor being taken into consideration, is mandatory or discretionary.

Sometimes the enabling statute will by its use of words such as “ bound” or “

may” clearly instruct the decision maker as to whether or not they must consider any such factor. It is important to note that where a factor needs to be considered on a discretionary basis, a failure to do so will not invalidate the decision. There is an important distinction to note between relevance and legal relevance. Where a factor that is legally relevant i. . a factor is so important that to dismiss it would be irrational, is overlooked when coming to a decision, the decision will be invalid. However in comparison, where a factor is relevant but not carrying the same weight of relevance, failure to consider it will not invalidate the decision, even if it is expressly stated in the statute. Where a factor has not been expressly stated within a statute, who should decide upon its relevance? When this question was initially raised before the English courts it was ruled that the decision maker should be the one to dictate what was relevant.

A decision that many may find somewhat strange, because it was giving the decision maker a self regulating role. However, in a later case this opinion was reversed where Lord Keith remarked : “...It is for the courts... to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant...the decision cannot stand...” He also went on to concur with what Deane J. had stated in *Sean Investments*, that where the factor taken into consideration was deemed relevant, it was solely for the decision maker to decide upon as to how much weight it should carry when arriving at his final conclusion.

This ruling was later confirmed in Ireland where in *Scrollside Ltd. V Broadcasting Commission of Ireland*, Sullivan J. stated: “...[I]t is well established that it is a matter for the decision maker and not the courts as to
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the weight they attach to various considerations...” While the courts are in agreement that the amount of weight attributed to a relevant consideration is in the domain of the decision maker, caution must still be exercised. The courts have intervened in situations where it was felt that an incorrect weighting was attached to the relevant consideration.

As mentioned earlier it is extremely important that the decision maker can give adequate reasons as to how a decision was reached. Therefore the decision maker must, when weighing up relevancy and weight, be capable of explaining their reasoning in coming to their conclusion. While giving these reasons, an omission to refer to a specific relevant consideration will not invalidate a decision, as this is not necessarily proof that the pertinent factor was not considered.

Where this reasoning shows that an irrelevant factor was considered in conjunction with relevant factors, a decision will not be invalidated where it can be shown that the weight attached was insignificant. Other Factors.

There are a number of other factors which must be examined when discussing whether a discretionary power has been exercised in an appropriate manner. The first of these is whether the decision reached was reasonable. We have already discussed reasonableness with reference to how the decision maker must act.

However this perspective is different in that it looks at the rationality of the decision as distinct from how the decision was reached. Here the courts will intervene if they are of the impression that the decision was “...so unreasonable that no reasonable authority could ever have come to it...”

However, in Ireland there has been a certain amount of inconsistency shown in establishing the test for unreasonableness. In *State (Keegan) v Stardust Victims' Compensation Tribunal*, it was stated as being a decision that flew in the face of fundamental reason and common sense.

However, a much stricter definition was adopted by the Supreme Court in *O'Keeffe v An Bord Pleanala*, where it was stated that to satisfy a court it must be established that the decision made by the authority was done in the absence of any relevant material. The final factor that needs to be addressed is where the decision maker ignores their discretion or introduces a policy that limits it, i. e. fettering of discretion. This most frequently occurs where a policy is in place which allows for discretion but it is applied so rigidly that it is unwilling to take into account individual circumstances.

This point was made by Lord Reid in *British Oxygen v Board of Trade*. Where he stated: "...there is no objection to policy provided that the authority is willing to listen to anyone with something new to say..." In Ireland the approach is similar, with a strong emphasis on the need to examine each case on an individual basis, as a rigid adherence of a policy does not give latitude for reviewing differing circumstances. Conclusion. As we have seen discretionary power is an important facet of Administrative Law due to the wide range of decisions that are required in the proper governance of society.

There is a need for expert opinion and that coupled with the sheer volume of legislation, leave it impossible for legislators to adequately lay down precise wording capable of covering every scenario. These problems can only be

overcome by the granting of discretionary power. However, where there is discretion there is the potential for abuse and the requirement to control abuse in the exercising discretionary power is as important as the discretionary power itself. Bibliography. Hogan & Morgan, *Administrative Law in Ireland* (3rd ed. , Roundhall, Sweet & Maxwell). Coffey, *Administrative Law* (Roundhall).

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