

## LEGAL UNREASONABLENESS: LIFE AFTER *LI*

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In *Dunsmuir v New Brunswick (Board of Management)*,<sup>1</sup> the plurality of the Supreme Court of Canada observed of 'reasonableness' that it is one of the most widely used and yet most complex legal concepts and how, in any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. The Court then asked:

But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

In *Minister for Immigration and Citizenship v Li*,<sup>2</sup> the plurality of the High Court partially answered these questions, for an Australian audience at least, by stating that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'.<sup>3</sup>

Common law developments in judicial review in Australia, however, have sometimes been described as 'exceptional', particularly when compared with other common law jurisdictions such as Canada, the United Kingdom and New Zealand.<sup>4</sup> Not only is Australian law wedded to jurisdictional error as a central 'unifying concept' in administrative law,<sup>5</sup> but the Constitutional separation of powers has placed a distinct wedge between legality and merits review, with consequences for the availability of administrative law remedies and notions of deference to executive decision-making.

*Li* therefore provides an opportunity to explore the development of legal unreasonableness in Australia and to contrast the different trajectories of this concept in the United Kingdom, New Zealand and Canada.

Legal unreasonableness shares common origins across these jurisdictions and has been envisaged as a form of judicial 'safety net'<sup>6</sup> or an intervening 'judge over the shoulder'<sup>7</sup> in the exercise of discretionary authority. In light of the strong legal and academic interest in *Li*, it is interesting to survey the origins, rationale and continuing development of this concept across the common law world. To what extent is legal unreasonableness a familiar concept, imputed as a necessary component of good government according to law? To what extent does its ongoing development betray a level of convergence or perhaps, exceptional terrain, in Australian administrative law?

### Source of legal unreasonableness

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>8</sup> came to be regarded as an authoritative statement of the standard of legal unreasonableness imposed on decision-makers exercising discretionary powers. In his oft-cited judgment, Lord Greene MR stated that decision-makers will fall into error where they remain within the 'four corners of the matters which they ought to consider, [but] have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it'.<sup>9</sup>

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It is possible to distil from this judgment several principles governing the ambit of discretionary decision-making. First, the Court recognised in *Wednesbury* that a decision might be regarded as unreasonable in a general sense where particular errors are shown in the decision-making process. Yet unreasonableness also exists as a specific, residual ground of judicial review. A court might invalidate a decision on the ground of unreasonableness where a decision-maker has otherwise taken into account all relevant considerations, exercised power for a proper purpose and afforded the applicant procedural fairness.

Second, courts have accepted that legal unreasonableness is not an avenue for the court to substitute its own view of the correct or preferable decision to that of the administrative decision-maker. As Lord Greene MR recognised in *Wednesbury*, the question 'is not what the court considers unreasonable, a different thing altogether'.<sup>10</sup> The *Wednesbury* doctrine thereby preserved a certain realm of decision-making autonomy, recognising that decision-makers may reach different views and this alone will not be sufficient to establish legal unreasonableness.

As such, *Wednesbury* unreasonableness imposed a high threshold. To assuage concerns that this ground of review might allow courts to delve into the merits of a decision, or produce undue uncertainty for administrative decision-makers, legal unreasonableness was regarded as an exceptional ground, not lightly satisfied. Lord Greene MR indeed added in *Wednesbury*, that proving a case of legal unreasonableness 'would require something overwhelming'.<sup>11</sup>

The decision in *Wednesbury* has been rigorously analysed, applied in a number of common law jurisdictions and, in Australia, until *Li*, had acquired a significance much greater than the concrete factual situation before the court. As the High Court emphasised in *Li*, however, *Wednesbury* was not the first or only decision to import standards of reasonableness.

In *Sharp v Wakefield*,<sup>12</sup> Lord Halsbury LC observed that a discretionary power conferred by statute is intended to be exercised 'according to the rules of reason and justice, not according to private opinion; according to law, and not humour ... (and) not arbitrary, vague, and fanciful, but legal and regular'.<sup>13</sup> In *Rooke's Case*, the Court stated that the discretion of the commissioners of sewers 'ought to be limited and bound with the rule of reason and law'.<sup>14</sup>

A common thread underlying *Li*, by reference to earlier decisions, is the recognition that reasonableness is an essential element of administrative decision-making and is implied as a statutory condition on the exercise of discretionary power. French CJ observed that this 'framework of rationality' is premised on an implication that 'parliament never intended to authorise' a decision attended by legal unreasonableness.<sup>15</sup> Likewise Gageler J recognised that legal unreasonableness has its origins in a statutory implication, which is well-understood by the three branches of government.<sup>16</sup> So too the plurality emphasised that parliament is taken to intend that a discretionary power will be exercised reasonably.<sup>17</sup>

While, therefore, legal unreasonableness has common law origins and potentially even deeper historical antecedents, its force is now principally derived as a statutory implication. Analogous with the requirements of procedural fairness and the formation of specific states of mind in administrative decision-making, principles of statutory interpretation have an important role to play.

The emphasis placed on legal unreasonableness as a statutory implication, however, raises the question as to whether this requirement could be excluded by express statutory language. Could parliament grant a decision-maker licence to make decisions that are

arbitrary or patently unreasonable? Would the only check on such legislation be democratic processes, or would any Constitutional limitation stand in its way?

In *Minister for Immigration and Border Protection v Singh*, the Full Court of the Federal Court (Allsop CJ, Robertson and Mortimer JJ) accepted that reasonableness as a statutory presumption could be modified or abrogated by clear statutory language.<sup>18</sup>

Subject to any impinging Constitutional consideration, the presence of a clear statutory qualification or contrary intention may be capable of modifying or excluding either implication (natural justice or legal unreasonableness).

The Full Court left open what this 'impinging Constitutional consideration' might be. Indeed, following the High Court's decisions in *Plaintiff S157/2002 v Commonwealth*<sup>19</sup> and *Kirk v Industrial Court of New South Wales*,<sup>20</sup> there is ongoing discussion as to whether the entrenched minimum provision of judicial review might serve to shield substantive grounds of review, such as natural justice or legal unreasonableness, as well as a court's general supervisory jurisdiction.<sup>21</sup>

While not attempting to grapple with these Constitutional law dimensions here, the judiciary's approach to attempts to exclude or limit natural justice requirements is illustrative. Courts have accepted that the legislature may limit the application of natural justice principles by clear statutory language. The starting point, however, is always an assumption that the legislature intends such principles to apply, unless an express contrary intention is shown.<sup>22</sup> From this perspective, reasonableness will always remain the default position in administrative decision-making under statute.

### **Rationale for legal unreasonableness**

The acceptance of legal unreasonableness as a ground of judicial review raises important questions about the relationship between different arms of government and the intensity of review applicable to discretionary decision-making. In our system of law and government, it is not really controversial that discretionary powers should be bounded in some way; indeed, the notion of completely unbridled discretionary power is the antithesis of the rule of law. Yet, once it is accepted that discretionary powers should be subject to some form of legal regulation, the key question is the extent to which the judiciary should interfere in examining the reasonableness of the process or outcome of decision-making, and the ambit of decisional freedom otherwise left to a decision-maker.<sup>23</sup>

Notions of reasonableness in decision-making have long pervaded legal, political and philosophical thought. In *Laws*, Plato described reason as a 'sacred and golden cord ... the common law of the State'.<sup>24</sup>

Standards of legal reasonableness have been imported into a number of areas of decision-making. In the context of planning law, for example, the High Court has affirmed the test articulated by the House of Lords in *Newbury District Council v Secretary of State for the Environment*,<sup>25</sup> that a condition attached to a grant of a planning permission will be invalid unless:

- the condition is for a planning purpose and not for any ulterior purpose;
- the condition reasonably and fairly relates to the development permitted; and
- the condition is not so unreasonable that no reasonable planning authority could have imposed it.<sup>26</sup>

The ground of unreasonableness, or at least the formulation articulated in *Wednesbury*, also finds clear expression in s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This section provides that a person aggrieved by an administrative decision may challenge the decision on the ground that the exercise of power 'is so unreasonable that no reasonable person could have so exercised the power'.

Legal unreasonableness also shares parallels with the grounds for appellate review of discretionary judicial decisions. In *House v The King*, Starke J recognised that judicial discretion is 'very wide, but it must be exercised judicially, according to the rules of reason and justice, and not arbitrarily or capriciously or according to private opinion'.<sup>27</sup> The plurality (Dixon, Evatt and McTiernan JJ) similarly observed that appellate error might be demonstrated where the exercise of judicial discretion produces a result which is 'unreasonable or plainly unjust'.<sup>28</sup>

As an abstract value, reasonableness has strong appeal in administrative decision-making. The Hon Dame Sian Elias, Chief Justice of New Zealand, writing extra-judicially, has observed that '[g]ood government according to law is the end sought by administrative justice. It must entail reasonableness, fairness, legality, consistency, and equal treatment ...'<sup>29</sup> Likewise, Chief Justice French, also writing extra-judicially, has described reasonableness in the exercise of governmental power as 'an aspect of the rule of law'.<sup>30</sup>

The doctrine of unreasonableness serves to shore up a level of credibility, transparency and accountability in governmental decisions, helping to legitimate and justify the conferral of power on administrative decision-makers. In the modern administrative state, a plethora of functions and discretionary powers has been conferred on private and public decision-makers and lines of accountability have become increasingly complex. It is a core component of the rule of law that administrative decisions are made in accordance with the subject matter, scope and purpose of enacting legislation, which includes the requirement of reasonableness. This framework of rationality ultimately provides a level of indirect accountability for decision-makers exercising discretionary powers. As Galligan has suggested, 'discretion is a legitimate and central part of modern government, and legal regulation is concerned in its main emphasis to enhance that legitimacy'.<sup>31</sup>

To this end, legal unreasonableness provides an important final check on administrative decision-making. While unreasonableness has been regarded hitherto as an exceptional ground of review in Australia, its existence confirms the importance our system of law and government places on logical and rational decision-making.<sup>32</sup> When it is viewed as a component of good decision-making and an aspect of accountability which the legislature and executive are taken to have endorsed, legal unreasonableness promotes a level of certainty and stability in administrative law decision-making over time.<sup>33</sup>

Nonetheless, the invocation of unreasonableness as a ground of judicial review has often been controversial, due to concerns that it presents an assault on the traditional distinction between merits and legality review.<sup>34</sup> There is a fine line between an unreasonable decision and a reasonable decision with which one disagrees.<sup>35</sup> The High Court has repeatedly emphasised that legal unreasonableness is not a covert method for the judiciary to express its disapproval of an administrative decision.<sup>36</sup> The tension in every legal system is how to introduce a check on discretionary authority and ensure that judges are not blinkered when it comes to the reasonableness of an administrative decision; yet simultaneously, manage to preserve the flexibility at the heart of discretionary power and accommodate the expertise, democratic accountability and Constitutional limitations placed on different decision-makers.

A survey of recent developments in the United Kingdom, New Zealand, Canada and Australia provides a useful framework for examining how each common law country has responded to these tensions in reasonableness review.

### **United Kingdom**

*Wednesbury* unreasonableness continues to be applied in the United Kingdom, although the precise formulation and level of scrutiny applied to discretionary powers has evolved considerably. Several attempts have been made to reformulate the test. For example, Lord Diplock described legal irrationality as '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'.<sup>37</sup>

In its various guises, the notion of legal unreasonableness has survived and continued to prosper in the United Kingdom. The trend has been towards adopting a variegated standard of *Wednesbury* review, which requires courts to give 'anxious scrutiny' to decisions impacting on fundamental rights,<sup>38</sup> rather than to anxiously scrutinise the distinction between merits and legality review. Under this approach, the intensity of judicial review of a decision will vary according to the subject-matter and the gravity of the impact on individuals affected by the decision.<sup>39</sup>

Laws LJ explained this approach in *R v Department of Education and Employment; Ex parte Begbie*.<sup>40</sup>

Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another. It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.

According to Laws LJ, the principle of variegated unreasonableness review is closely intertwined with other developments in the United Kingdom, such as the doctrine of substantive legitimate expectation. At their roots, each of these concepts is directed towards limiting 'abuse of power'.<sup>41</sup>

On occasion, judges in the United Kingdom have expressed concerns about the vagueness or circularity of *Wednesbury* unreasonableness, and some commentators have gone so far as to call for a 'Wednesburial'.<sup>42</sup> For example, Lord Cooke of Thorndon stated in *R (on the application of Daly) v Secretary of State for the Home Department* that 'the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation'.<sup>43</sup>

As *Wednesbury* has evolved and courts have become more familiar with principles flowing from the *Human Rights Act 1998* (UK), the debate has shifted to whether proportionality should replace unreasonableness as a more apt instrument of legal regulation. Proportionality, a concept emerging from civil legal systems and adopted in the text of treaties and jurisprudence of the European Court of Human Rights, has come to be regarded by some as 'at least a rival to, if not a complete substitute for, *Wednesbury* unreasonableness'.<sup>44</sup> However, courts have not yet made the leap to embrace proportionality review and, instead, legal unreasonableness continues to be applied as the appropriate legal test.<sup>45</sup>

### **New Zealand**

The development of legal unreasonableness in New Zealand has largely paralleled trends in the United Kingdom. Initially, New Zealand courts accepted the primacy of Lord Greene MR's judgment in *Wednesbury*. In *Wellington City Council v Woolworths New Zealand Ltd (No 2)*, the Court of Appeal held that a decision may be vitiated on the ground of unreasonableness, 'if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision'.<sup>46</sup> In this respect, legal unreasonableness was similar to the position in Australia at the time.<sup>47</sup>

However, in the 1990s, New Zealand courts followed the United Kingdom and recognised a variegated standard of legal unreasonableness.<sup>48</sup> Courts have accepted that the intensity of review will adapt to the context of the discretionary power, and will require heightened scrutiny when a decision affects fundamental rights.

This approach is exemplified by the decision in *Discount Brands Ltd v Northcote Mainstreet Inc*.<sup>49</sup> Hammond J explained that New Zealand courts have moved to adopt a 'hard-look doctrine' or 'super-*Wednesbury*' doctrine, whereby the depth of review is 'altered to (at least) a less deferential "reasonableness" inquiry' where important interests are involved.<sup>50</sup>

In *Wolf v Minister of Immigration*, Wild J stated that the context in which a decision is made is important, having regard to the identity of the decision-maker, the process of decision-making, the subject matter, policy content and the importance of the decision to those affected by it.<sup>51</sup> His Honour explained the basis for the variegated standard of unreasonableness as follows:<sup>52</sup>

- a) The decision in *Wednesbury* was made more than fifty years ago, a time at which administrative law scarcely existed as a discrete area of law and neither New Zealand nor the United Kingdom had enacted a Human Rights Act.
- b) Courts have recognised a variable standard of legal unreasonableness for at least twenty years.
- c) Many leading administrative law texts and commentators have accepted this shift.
- d) Similar developments have occurred in the United Kingdom and Canada.

### **Canada**

Legal unreasonableness in Canada has been characterised by attempts to create a more 'finely calibrated system of judicial review', which adequately balances respect for parliamentary supremacy with the rule of law.<sup>53</sup> In *Canada (Director of Investigation and Research) v Southam Inc*, Iacobucci J held that an unreasonable decision is one that 'in the main, is not supported by any reasons that can stand up to a somewhat probing examination'.<sup>54</sup>

The Supreme Court endorsed a 'pragmatic and functional' approach to legal unreasonableness in *Baker v Canada (Minister of Citizenship & Immigration)*.<sup>55</sup> It recognised that there is a spectrum of standards of review, ranging from patent unreasonableness, which is the most deferential; through to correctness, where no deference is shown; with reasonableness *simpliciter* lying somewhere in the middle.

However, these three standards produced complexity and uncertainty, which cut against the usefulness of having multiple standards of review. The plurality remarked in *Dunsmuir* that '[t]he recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide

real guidance for litigants, counsel, administrative decision makers or judicial review judges'.<sup>56</sup>

The plurality acknowledged that it may be difficult to distinguish between the patent unreasonableness standard and the reasonableness *simpliciter* standard, and that the strictness of the patent unreasonableness standard contemplates that there will be times when parties must simply accept an unreasonable or irrational decision, if the unreasonableness of the decision is not sufficiently immediate or obvious.

The plurality decided in *Dunsmuir* that only two standards of review should be used: correctness and reasonableness. Questions of fact, discretion and policy will generally attract a reasonableness standard, whereas constitutional questions, legal questions important to the legal system as a whole and matters of jurisdiction will involve a correctness standard.<sup>57</sup> A court reviewing the reasonableness of a decision should consider the 'justification, transparency and intelligibility' of the decision-making process and whether the decision 'falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'.<sup>58</sup> The plurality observed in *Canada (Citizenship and Immigration) v Khosa* that the test of reasonableness 'takes its colour from the context' in which it is invoked.<sup>59</sup>

In determining which standard of review is to be applied, the court will consider the tribunal's purpose and expertise, in light of its 'home statute', the nature of the decision, and the existence of any privative clause.<sup>60</sup> The plurality in *Dunsmuir* noted that this inquiry is not required in every case and courts may have regard to previous case law in determining the level of deference to be applied.

In decisions after *Dunsmuir*, courts have continued to grapple with the level of deference given to administrative tribunals' interpretations of their enacting legislation.<sup>61</sup> In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, Rothstein J (McLachlin CJ, LeBel, Fish, Abella and Charron JJ concurring) suggested that there is a presumption in such cases that the standard of reasonableness, rather than correctness, will apply.<sup>62</sup> They queried whether, for the purposes of judicial review, there is a category of true questions of jurisdiction that will attract a standard of correctness in Canada.<sup>63</sup> Wihak has drawn attention to the 'overwhelming extent' to which Canadian courts have applied the reasonableness standard in cases not involving a legislated standard of review or constitutional law question.<sup>64</sup>

### **Australia - Li unreasonableness**

The recent decision in *Li* provides a useful basis for contrasting the standard of legal unreasonableness in Australia.<sup>65</sup> As McDonald has noted, it is one of a small number of cases where a decision has been invalidated on the sole ground of unreasonableness, offering 'a sighting of the "rare bird" of unreasonableness in solo flight'.<sup>66</sup>

Ms Li had been training and working as a cook in Australia and applied for a Skilled-Independent Overseas Student visa in 2007, which required her to obtain an assessment that her skills were suitable for this occupation. The Minister's delegate initially refused her visa application on the basis that her application contained false information and Ms Li sought merits review of this decision before the Migration Review Tribunal. By this time, Ms Li had obtained further work experience and sought a fresh skills assessment. This further skills assessment was unsuccessful, but Ms Li's migration agent advised the Tribunal that there were errors in the skills assessment and asked the Tribunal not to make any decision until the assessment authority had reconsidered the assessment. Nonetheless, the Tribunal decided not to grant an adjournment and informed Ms Li that it considered she had

'been provided with enough opportunity to present her case and is not prepared to delay any further'. The Tribunal relied on the unfavourable skills assessment and dismissed her application for merits review.

All members of the High Court found that the refusal of an adjournment in these circumstances had a certain arbitrariness about it that rendered it unreasonable. In reaching this conclusion, the Court revisited the test of legal unreasonableness and held that Lord Greene MR's statement of principle in *Wednesbury* does not exhaustively cover the errors in decision-making that will give rise to a finding of legal unreasonableness in Australia.

French CJ recognised that once the process and reasoning requirements have been met, there is generally an area of 'decisional freedom' left to a decision-maker exercising discretionary power.<sup>67</sup> However, every decision is bounded by 'rules of reason' derived from legislation and will be affected by jurisdictional error where it is 'arbitrary or capricious or ... abandon(s) common sense'.<sup>68</sup>

The plurality emphasised that legal unreasonableness is not confined to an irrational or bizarre decision, or one so unreasonable that no sensible decision-maker would have made it, as '*Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point'.<sup>69</sup> Instead, a decision will be vitiated by legal unreasonableness where it 'lacks an evident and intelligible justification'.<sup>70</sup>

In examining the justifications for a decision, the plurality emphasised<sup>71</sup> that the scope and purpose of the statute conferring the discretion will need to be regarded.

The plurality also appears to have accepted that, at least in certain circumstances, questions of proportionality in decision-making may be a relevant consideration. For example, their Honours noted<sup>72</sup> that one of the paradigm cases of unreasonableness considered in *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation*<sup>73</sup> involved the application of a proportionality analysis by reference to the scope of the power.

In particular, their Honours, by reference to the case before them said<sup>74</sup> regard might be had to the scope and purpose of the power to adjourn and, with that in mind, consideration could be given to whether the Tribunal gave excessive weight – more than was reasonably necessary – to the fact that Ms Li had had an opportunity to present her case. Their Honours then observed:<sup>75</sup>

So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis.

French CJ also accepted that a disproportionate exercise of an administrative discretion might be characterised as irrational and unreasonable on the basis that it 'exceeds what, on any view, is necessary for the purpose it serves'.<sup>76</sup>

By contrast, Gageler J relied upon the stringent test in *Wednesbury*. His Honour emphasised that this ground of review is difficult to satisfy, particularly where a decision is made by an administrative decision-maker and influenced by matters of public policy. Gageler J observed that the successful invocation of *Wednesbury* unreasonableness has been rare and '[n]othing in these reasons should be taken as encouragement to greater frequency'.<sup>77</sup>

How then does the standard of legal unreasonableness formulated in *Li* compare with the common law developments discussed earlier?

There are obvious differences in the constitutional background, institutional relationships and influence of human rights jurisprudence in each country. This has had a real impact on the continuing evolution of legal unreasonableness. While *Li* appears to have broadened the test for legal unreasonableness in Australia, the plurality and French CJ did not expressly endorse a variegated standard of review. The Federal Court has disavowed this concept on several previous occasions.<sup>78</sup> In *SHJB v Minister for Immigration and Multicultural and Indigenous Affairs*, the Full Court (Carr, Finn and Sundberg JJ) observed that the *European Convention on Human Rights*, related human rights jurisprudence and the legislative enactment of the *Human Rights Act 1998* (UK) have each had a gradual and important influence on administrative law in the United Kingdom.<sup>79</sup> The Full Court emphasised that while a number of recent High Court cases have involved basic human rights, the High Court has not adopted a notion of variable intensity of review in such cases and it is not possible to import such a test from other common law jurisdictions.<sup>80</sup> Instead, legal unreasonableness has typically been regarded as an 'exception that proves ... the rule' in Australia,<sup>81</sup> rather than a standard that might expand or contract in its intensity, depending on the nature of the rights and interests affected by the decision.

Yet, simply because Australian courts have not endorsed a variegated intensity of review, this is not to say that an administrative decision is less likely to be successfully challenged on the basis of unreasonableness or another ground of review in Australia than in these other jurisdictions. In *Li*, a majority of the Court accepted that specific errors in decision-making may overlap with a finding of unreasonableness, or unreasonableness may invalidate a decision on its own. McDonald has observed that 'harsh or inhumane decisions and policies' have often been resisted through vehicles other than legal unreasonableness in Australia.<sup>82</sup>

The dicta of the plurality in *Li* concerning legal unreasonableness suggests that the ground of unreasonableness may be applied in relation to any statutory discretion, whether or not it is thought to impact on fundamental rights. In Ms Li's case, not having the opportunity to convince the Tribunal that she was wrongly denied a residence visa was no doubt of great moment to her. But there is no reason to think that the particular value to be attached to a right or interest effectively or potentially denied by a decision-maker should affect the application of the *Li* unreasonableness test. Nothing in *Li* suggests that it should. That said, the value at stake is, however, likely to be regarded in the course of ascertaining the scope, subject and purpose of the statutory power in question for the purpose of deciding whether its exercise was unreasonable, that is to say, lacking an evident and intelligible justification.

Subsequent decisions have confirmed that a contextual and fact-driven approach to legal unreasonableness will be taken and there is no reasonableness 'checklist' in administrative decision-making.<sup>83</sup> Since *Li* was handed down on 8 May 2013, it has been applied on at least 16 occasions,<sup>84</sup> distinguished on six occasions and considered in more than 35 judgments, including the recent decision of the High Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.<sup>85</sup> Of these cases, legal unreasonableness was successfully invoked on three occasions, in *Singh*; *SZRHL v Minister for Immigration and Citizenship*;<sup>86</sup> and *SZSNW v Minister for Immigration and Border Protection*.<sup>87</sup>

In *Singh*, the Full Court held that the Migration Review Tribunal's refusal of an adjournment, in the circumstances, was legally unreasonable. The principal factor leading to this conclusion was that Mr Singh had sought the adjournment in order to obtain a re-marking of an English language test, which the Tribunal had accepted he should be able to take before it made its decision. The Court found that the Tribunal had not given an 'objective or intelligible' justification for its decision to refuse the adjournment, in circumstances where the request was for a specific purpose, there was a reasonable basis to doubt the accuracy of the result for one component of the test, the period required for the re-mark was not likely to

be very long and there would be significant and inevitable prejudice to Mr Singh if his request was refused.<sup>88</sup> The Court noted that if a proportionality analysis were undertaken, the decision to refuse the adjournment was disproportionate to the way the review had been conducted to that point, to what was at stake for Mr Singh and what he reasonably hoped to secure through the re-mark.<sup>89</sup>

In *SZRHL* and *SZSNW*, the Court found that the process of reasoning which led the decision-maker to make adverse credibility findings in each case was legally unreasonable. In *SZRHL*, Logan J held that the Refugee Review Tribunal's adverse credibility findings were premised upon the basis that the first appellant had made no reference to a 'false case' brought against him in Bangladesh at the time his protection visa application was made, when this was not the case.<sup>90</sup> His Honour found that this false premise was not 'peripheral' to the Tribunal's reasoning,<sup>91</sup> with the consequence that the reasoning process was 'illogical or irrational' or procedurally unfair to the appellant.<sup>92</sup>

Similarly, in *SZSNW*, Judge Driver held that the way the Independent Merits Reviewer dealt with the 'delicate and sensitive' issue of the applicant's claim of sexual torture was legally unreasonable and coloured the Reviewer's opinion of the applicant's credibility.<sup>93</sup> His Honour found that the Tribunal had dealt with the applicant's claim of sexual torture in a 'dismissive' way,<sup>94</sup> had not taken into account his unique circumstances as a vulnerable person under the relevant guidelines,<sup>95</sup> and had relied upon a false factual premise.<sup>96</sup> Due to the importance of this finding to the outcome, Judge Driver concluded that the Reviewer's report and recommendation were 'fatally flawed'.<sup>97</sup>

Yet, in other cases following *Li*, courts have not acceded to arguments based on legal unreasonableness. In *Chava v Minister for Immigration and Border Protection*, Mortimer J observed that *Li* does not mark the beginning of a new era for courts to minutely scrutinise the reasoning of an administrative decision-maker and in that case, it was not appropriate to apply 'excessive hindsight or document-based logic ... to a busy tribunal conducting a review hearing'.<sup>98</sup> In *Minister for Immigration and Border Protection v Pandey*, Wigney J accepted that the legal reasonableness of the Tribunal's decision was 'borderline', but the decision fell within a category of decisions where reasonable minds might differ as to the correct or preferable decision.<sup>99</sup>

These decisions highlight that courts will give close consideration to the reasoning process and outcome of an exercise of discretionary power. While courts will not seek to substitute their own view of the merits of the decision, *Li* confirms that decision-makers should take care to ensure a decision is lawfully made, even where a wide discretion has been conferred.<sup>100</sup>

The decision in *Li* also indicates that courts have a 'margin of evaluation'<sup>101</sup> in applying legal unreasonableness to the specific statutory context and factual circumstances of each case, recognising that conceptions of reasonable decision-making change over time. For example, it was not overly long ago in *Short v Poole Corporation*<sup>102</sup> that the English Court of Appeal upheld the decision of a local education authority to dismiss all married women teachers in its employment. The education authority justified its decision on the basis that there was an oversupply of teachers at the time and it had elected to favour those female teachers who were 'devoting their lives and energies entirely to the business of teaching without assuming the privilege and the burden of domestic ties'.<sup>103</sup> The Court of Appeal allowed this decision to stand and held that it was not made for an improper purpose or taking into account irrelevant considerations.<sup>104</sup> However, it is very difficult to imagine such a decision being accepted as anything other than unreasonable in today's Australia.

## Conclusion

Legal unreasonableness shares a similar origin and rationale in Australia, the United Kingdom, New Zealand and Canada, although in the latter three countries it has shifted to become a more flexible standard, capable of adapting to different decision-makers, subject-matters and legislation. The formulation and practical application of this concept in Australia, however, have differed. While Australian courts have not adopted a variegated standard of legal unreasonableness or gravitated towards any explicit notion of deference towards administrative expertise, the High Court in *Li* has now endorsed a more flexible, contextual approach to legal unreasonableness in Australia that is capable of responding to a range of administrative decisions. The High Court also appears to have explicitly recognised that in some circumstances at least, a proportionality analysis of the decision-making process may be appropriate in determining whether or not the decision produced was unreasonable.

It may be, as Justice Basten has suggested, that *Li* marks the commencement of the next 'large step' in the process of reformulating public law concepts in Australia.<sup>105</sup> The fact that *Li* has been applied on at least 16 occasions since it was handed down on 8 May 2013 suggests this is so. Indeed, *Li* unreasonableness may reasonably be said to constitute the ultimate rule of law governing the exercise of statutory discretion. Decision-makers made aware of the ruling in *Li* will surely think twice before making a decision, the second thought being whether the decision has an evident and intelligible basis and, in appropriate cases, is a proportionate response to the question to be decided, having regard to the evident scope and purpose of the discretionary power in question.

## Endnotes

- 1 [2008] SCC 9 at [46] (*Dunsmuir*) (McLachlin CJ, Bastarache, LeBel, Fish and Abella JJ).
- 2 [2013] HCA 18; (2013) 249 CLR 332 (*Li*).
- 3 *Ibid* [76].
- 4 See eg, Michael Taggart, 'Australian Exceptionalism' in *Judicial Review* (2008) 36 *Federal Law Review* 1; Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10 *New Zealand Journal of Public Law and International Law* 143.
- 5 Hon JJ Spigelman AC, 'Public Law and the Executive' (Garran Oration, Institute of Public Administration Australian National Conference, Adelaide, 22 October 2010) 20.
- 6 Michael Taggart, 'Proportionality, Deference, Wednesday' [2008] *New Zealand Law Review* 423, 427.
- 7 Hon Dame Sian Elias, 'National Lecture on Administrative Law: 2013 National Administrative Law Conference' (2013) 74 *AIAL Forum* 1, 6.
- 8 [1948] 1 KB 223 (*Wednesday*).
- 9 *Ibid* 234 (Somervell LJ and Singleton J concurring).
- 10 *Ibid* 230.
- 11 *Ibid*.
- 12 [1891] AC 179 at 180.
- 13 Cited in *Li* at [24] (French CJ).
- 14 (1597) 5 Co Rep 99b at 100a.
- 15 *Li* at [26]-[28].
- 16 *Ibid* [88]-[92].
- 17 *Ibid* [63].
- 18 [2014] FCAFC 1 at [43] (*Singh*).
- 19 (2003) 211 CLR 476.
- 20 (2010) 239 CLR 531.
- 21 See generally Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463.
- 22 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. See generally Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285.
- 23 D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986) 219.
- 24 Plato, *The Laws* (Benjamin Jowett trans, 2009) 18.
- 25 [1981] AC 578.
- 26 *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at [57].
- 27 (1936) 55 CLR 499 at 503.
- 28 *Ibid* 505.

- 29 Hon Dame Sian Elias, 'National Lecture on Administrative Law: 2013 National Administrative Law Conference' (2013) 74 *AIAL Forum* 1, 6.
- 30 Chief Justice French, 'Singapore Academy of Law Annual Lecture 2013: The Rule of Law as a Many Coloured Dream Coat' (2014) 26 *Singapore Academy of Law Journal* 1, 14.
- 31 D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986), 218.
- 32 *Ibid* 4.
- 33 Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223, 228.
- 34 Bill Lane and Eleanor Dickens, 'The Revitalisation of Wednesbury Unreasonableness – The Decision in Minister for Immigration and Citizenship and Li [2013] HCA 18' (2013) 33 *Queensland Lawyer* 168, 168.
- 35 Leighton McDonald, 'Rethinking unreasonableness review' (2014) 25 *Public Law Review* 117, 122-4.
- 36 See, eg, *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611, 626 (Gleeson CJ, McHugh J).
- 37 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410.
- 38 *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940 at 952.
- 39 See, eg, *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (EWCA) at [18].
- 40 [2000] 1 WLR 1115 at [78].
- 41 *R v Department of Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115 at [76].
- 42 Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 426.
- 43 [2001] 2 AC 532 at [32].
- 44 Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 427.
- 45 See *R (Association for British Civilian Internees – Far Eastern Region) v Secretary of State for Defence* [2003] QB 1397.
- 46 [1996] 2 NZLR 537 at 545.
- 47 *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 at [49].
- 48 Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 446; Dean R Knight, 'A Murky Methodology: Standards of Review in Administrative Law' (2008) 6 *New Zealand Journal of Public International Law* 117, 123.
- 49 [2004] 3 NZLR 619.
- 50 *Ibid* [50].
- 51 [2004] NZAR 414 at [47].
- 52 *Ibid* [48].
- 53 See *Dunsmuir* at [44] (plurality).
- 54 [1997] 1 SCR 748 at [56].
- 55 [1999] 2 SCR 817 at [55].
- 56 *Dunsmuir* at [1].
- 57 *Ibid* [58]-[61].
- 58 *Ibid* [47].
- 59 [2009] 1 SCR 339 at [59].
- 60 *Dunsmuir* [64].
- 61 Justice Evans, 'Triumph of Reasonableness: But How Much Does it Really Matter?' (2014) *Canadian Journal of Administrative Law and Practice* 101, 101.
- 62 [2011] 3 SCR 654 at [39]; Cf Binnie and Deschamps JJ at [83]; Cromwell J at [92].
- 63 *Ibid* [34].
- 64 Lauren Wihak, 'Wither the Correctness Standard of Review? Dunsmuir, Six Years Later' (2014) *Canadian Journal of Administrative Law and Practice* 173, 182.
- 65 See generally Rebecca Heath, 'Casenotes – *Minister for Immigration and Citizenship v Li*' (2013) *Australian Journal of Administrative Law* 20(4) 174.
- 66 Leighton McDonald, 'Rethinking unreasonableness review' (2014) 25 *Public Law Review* 117, 117.
- 67 *Li* at [28].
- 68 *Ibid*.
- 69 *Ibid* [68].
- 70 *Ibid* [76].
- 71 *Ibid* [67] and [74].
- 72 *Ibid* [73].
- 73 (1990) 96 ALR 153 at 167-168.
- 74 *Li* at [74].
- 75 *Ibid*.
- 76 *Ibid* [30].
- 77 *Ibid* [113].
- 78 See *STKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 546; *SZADC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1497.
- 79 [2003] FCAFC 303; (2003) 134 FCR 43 at [30].
- 80 *Ibid* [31].
- 81 Leighton McDonald, 'Rethinking unreasonableness review' (2014) 25 *Public Law Review* 117, 127.
- 82 *Ibid* 127-8.

- 83 *Singh* at [42].
- 84 See *A v Corruption and Crime Commissioner* [2013] WASCA 288; *Agar v McCabe* [2014] VSC 309; *Chava v Minister for Immigration and Border Protection* [2014] FCA 313; *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; *Financial Ombudsman Services Ltd v Pioneer Credit Acquisition Services Pty Ltd* [2014] VSC 172; *Flegg v Crime and Misconduct Commission* [2014] QCA 42; *Isbester v Knox City Council* [2014] VSC 286; *Jones v Office of the Australian Information Commissioner* [2014] FCA 285; *Lo v Chief Commissioner of State Revenue* [2013] NSWCA 180; *McLaren v Rallings* [2014] QSC 68; *Minister for Immigration and Border Protection v Pandey* [2014] FCA 640; *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; *Regional Express Holdings Limited v Dubbo City Council (No 3)* [2014] NSWLEC 87; *SZRHL v Minister for Immigration and Citizenship* [2013] FCA 1093; *SZRHS v Minister for Immigration and Citizenship* [2014] FCA 121; *SZSNW v Minister for Immigration and Border Protection* [2014] FCCA 134.
- 85 [2014] HCA 22 at [45].
- 86 [2013] FCA 1093 (*SZRHL*).
- 87 [2014] FCCA 134 (*SZSNW*).
- 88 *Singh* at [73]-[76].
- 89 *Ibid* [77].
- 90 *SZRHL* at [34].
- 91 *Ibid*.
- 92 *Ibid* [35]-[36].
- 93 *SZSNW* at [37].
- 94 *Ibid*.
- 95 *Ibid* [47].
- 96 *Ibid* [55].
- 97 *Ibid*.
- 98 [2014] FCA 313 at [72].
- 99 [2014] FCA 640 at [51].
- 100 See Australian Government Solicitor, 'High Court considers unreasonableness ground of judicial review of administrative decisions', *Express Law* (21 May 2013) 4.
- 101 See Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223, 228.
- 102 [1926] Ch 66.
- 103 *Ibid* 92 (Warrington LJ).
- 104 *Ibid* 88 (Pollock MR); 91-2 (Warrington LJ); 95 (Sargant LJ).
- 105 Justice Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35, 35.