PUBLIC LAW

LECTURES IN *ADMINISTRATIVE LAW* XXII

Robert Musumeci

Biography

Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled '*Judicial Interpretation of Maltese development planning law. Eliciting the added value*' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled '*The Development Planning Act 2016 – A critical Appraisal*'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a *perit* in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is a senior lecturer in planning law and administrative law at the University of Malta. He also authored the book '*Selected Principles of Maltese Planning Law*' (Kite Publications, 2021). Dr Musumeci is the first to hold warrants to practice both as a lawyer and a *perit* in Malta.

Unreasonableness

Let's embark now on a captivating exploration of the realm of administrative law, where reasonableness takes centre stage. To fully comprehend this concept, we must first pay homage to the iconic legal case of 1947, **Associated Provincial Picture Houses Ltd vs Wednesbury Corp**, affectionately known as the Wednesbury case.

Imagine this: in 1947, the Wednesbury Corporation issued a cinema license with a stipulation that barred children under the age of 15 from attending screenings on Sundays. Associated Provincial Picture Houses Ltd was dissatisfied with this decision, deeming it 'unreasonable'. However, when the matter came before the court, Lord Greene found nothing so absurd or irrational about the restriction that would render it beyond the realm of a rational authority's decision-making. In this case, the court noted that the ban on children attending Sunday screenings, while perceived as unreasonable by one party, didn't cross the threshold of unlawfulness. Thus, there wasn't a level of absurdity that would render the ban unlawful, underscoring the principle that judicial interference was warranted only under specific circumstances. Indeed, upon closer examination, this significant judgment has pinpointed three pivotal aspects that contribute to an administrative decision potentially being deemed unlawful:

(i) When the decision-maker gave undue importance to irrelevant facts;
(ii) When the decision-maker ignored relevant facts that should have been considered;
(iii) When the decision was so absurd and unreasonable that no rational authority could have reached it.

When reviewing this work, my dear and highly insightful friend, John Stanton, recommended that I should directly quote Lord Greene's precise words

regarding the concept of unreasonableness. I believe he is absolutely right. Here is Lord Greene's exact statement on the matter:

> *"It is true that discretion must be exercised reasonably. Now what does that mean? ... [T]here may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

What Lord Greene is essentially saying here is that the fundamental premise is that the exercise of discretion must be grounded in reason. But what does this actually entail? It's conceivable that certain situations can be so inherently nonsensical that no reasonable individual could envision them falling under the jurisdiction of the governing body. In substantiating his argument, Lord Greene aptly referenced the case of **Short vs Poole Corporation**[1], wherein Warrington LJ vividly portrays a situation where a red-haired teacher faced dismissal solely due to her hair colour. This not only showcases unreasonableness from one angle but also involves the consideration of irrelevant factors from another standpoint.

Indeed, I've previously addressed matters concerning irrelevant considerations or the disregard of relevant facts in preceding sections. Now, as the theme of this particular section unmistakably underscores, it's time to delve into the captivating realm of reasonableness—a concept that has garnered both accolades and critiques from legal scholars.

Some argue that the Wednesbury decision introduces the notion of absurd unreasonableness as a yardstick for asserting unlawfulness, yet it halts there without furnishing a precise definition. In other words, the Wednesbury case doesn't explicitly define the term 'reasonableness' but merely directs us to

[1] **Short vs Poole Corporation** [1926] Ch 66, 90, 91

consider the reasonableness of others in similar positions - the rationale behind why these others can be deemed reasonable and serve as models for emulation remains unexplained.

As a matter of fact, I concur with the sentiments expressed by Anthony Lester and Jeffrey Jowell[2], who contend that merely invoking the term 'unreasonable' falls short of being sufficient. What we truly require is a comprehensive elucidation of the reasons underlying the decision's unreasonableness. Moreover, I must also acknowledge that aligning unreasonableness in administrative decisions with extreme irrationality, as proposed by Wednesbury, isn't the most optimal approach. Embracing such a stringent standard would inevitably lead to only a handful of successful challenges in court.

Nonetheless, I find the Wednesbury principle to be a valuable starting point. It serves as a reminder that unreasonableness, akin to the other ultra vires grounds we've examined thus far, could potentially serve as a foundation to declare an administrative decision unlawful.

Hence, what we've affirmed is the recognition of 'unreasonableness' as a basis for asserting the unlawfulness of an administrative decision. Nonetheless, we still need to define the standards that allow us to identify when unreasonableness becomes apparent. Therefore, my primary objective in the forthcoming sections will involve establishing guidelines for recognizing instances in which a declaration of unreasonableness holds merit. It's crucial to underscore, though, that the forthcoming discussion may delve into novel viewpoints that could potentially diverge from established legal precedents. Furthermore, I am not particularly concerned with categorizing the degree of extremeness in unreasonableness. I will therefore outline six indicators that, in my opinion, signify the potential to declare an administrative act as unreasonable and

[2] Anthony Lester and Jeffrey Jowell, '*Beyond Wednesbury: Substantive Principles of Administrative Law*' [1987] PL 368, 371

consequently legally void.

ILLOGICALITY: This refers to a situation where the rationale should include a logical progression of analysis that can guide the decision-maker from the evidence to the final decision without any critical flaws in reasoning. The opposite scenario involves circular logic, false dilemmas, baseless generalizations, or an unreasonable premise leading to a conclusion. To illustrate, consider a scenario where a planning authority receives an application for a new supermarket in a commercial zone. Despite a traffic impact assessment demonstrating that the supermarket's impact on traffic flow would be minimal, the authority declines the application, citing concerns about potential traffic problems. This decision contradicts the evidence from the traffic impact assessment, which indicates that the new supermarket wouldn't significantly affect traffic flow or cause congestion. In essence, I'm asserting that the decision-maker's reasoning is flawed, illogical, or lacks a logical link between the available facts (or rather in the absence of facts) and the ultimate decision.

DIFFERENTIAL TREATMENT: What I have in mind are past decisions of similar nature that were simply ignored without reason. An illustration of this could be a planning authority that grants construction permits in a seemingly arbitrary manner, seemingly without adhering to consistent guidelines or rationale. For instance, imagine a scenario where the authority approves building permits for several high-rise residential complexes in a particular neighbourhood without question. However, when a similar proposal is submitted for a neighbouring area, the authority denies the permit without providing a clear rationale for the distinction. If the authority can justify the differential treatment based on valid distinctions between the two areas – such as variations in infrastructure, traffic patterns, or community needs – then its actions could potentially be considered reasonable. However, if there is a lack of clear and rational explanations for the divergent decisions, it would likely raise questions about the authority's

adherence to logical decision-making, thus making it less likely to be considered reasonable.

BAD FAITH: The term 'bad faith' is quite comprehensive. What I am primarily alluding to are actions motivated by ill intent, indicating that the decision-maker acted with dishonest motives driven by personal gain or self interest. However, identifying bad faith is a psychological aspect that is challenging to allege and even more difficult to substantiate. The responsibility of proving the presence of bad faith rests with the individual making the accusations, and this burden is notably substantial. Neither explicit nor implicit bad faith can be automatically deduced or presumed. Consequently, it is the obligation of the party aiming to contest the administrative action to substantiate the claim of bad faith, given that there exists a presumption in favour of the administration, assuming that it consistently wields its authority in a genuine and sincere manner. Let's consider an example involving a public official engaging in a legal transgression while operating with bad faith. Suppose a member of a planning board chooses to oppose a planning application for adding an extra floor, even though the proposal adheres to the established planning regulations. Subsequently, it comes to light that the member is the owner of the neighbouring property, whose seaside views would have been obstructed if the application had been approved. Certainly, bad faith can manifest in actions that revolve around leveraging one's authority for personal gain and individual benefit. This doesn't solely pertain to accepting bribes to favour someone; it also encompasses capitalizing on your position to the detriment of those who are subject to your decisions. Surely enough, this doesn't imply that every legal wrongdoing is accompanied by bad faith. Consider a scenario where a transportation authority denies an operating license to a taxi driver after determining that the applicant lacks a clean driving record. Eventually, it's revealed that the decision was based on inaccurate records pertaining to another individual who shares the applicant's name. In this case, the authority cannot be charged with acting in

bad faith unless there exists evidence suggesting that this error was orchestrated by someone with motives such as seeking revenge.

BREACH OF PRINCIPLES OF STATUTORY INTERPRETATION: It's a valid expectation that the interpretation of laws and policies should remain within the bounds of acceptable statutory interpretations. Ascribing an unconventional meaning to a statutory term or disregarding it entirely leads to the conclusion that the decision lacks rationality and, therefore, deemed unreasonable. Similarly, an interpretation that contradicts the original intent of the statute presents its own array of problems. I'm not suggesting that instances of diverse interpretations of a statutory provision do not exist; however, in such scenarios, the context and purpose of the law play a crucial role in determining whether the interpretation is justifiable. Thus, what I am asserting is that administrative decision-makers should not disregard statutory language and impose an unnatural significance on a statutory term. Proper attention must still be accorded to the statutory language when the wording allows for a discretionary range of judgment within which decision-makers can operate - decision-makers are not at liberty to introduce their own terms beyond those envisioned by the legislature. Let us illustrate instances of incorrect construction of explicit statutory provisions: **Article 61(1)(c) of Chapter 573 of the Laws of Malta** stipulates that the Land Arbitration Board must provide compensation to landowners whose land is expropriated by the government, equivalent to the value that the land holds during the period of Declaration publication, as adjusted over the years according to the inflation index published in the schedule of the Housing (Decontrol) Ordinance. The Board, however, opts to modify the value using the property immovable index instead of the inflation index, believing the former to yield a fairer valuation. In this instance, the language employed is unequivocal and clear, and the legislator's intent is apparent in specifying the acceptable index for adjustment. Therefore, the Board commits a legal error by misinterpreting a clear statutory provision. Another example of unreasonableness due to deviation from the seemingly straightforward meaning of the statute is as follows: **The Building and Construction Authority Act** sets limitations on hourly excavation works.

Nonetheless, the Building and Construction Authority extends this provision beyond its intended scope, encompassing not only excavation operations, which were the primary source of noise nuisance, but also applying these restrictions to any construction activity. Having stated this, I acknowledge that situations emerge where statutes are ambiguous enough to support multiple interpretations, and the materials reflecting legislative intent are often scant. In such cases, I reiterate that decision-makers are within their rights to interpret statutes based on their own inclinations, albeit grounded in reason within the given circumstances. Allow me to provide an example where statutes are ambiguous enough to support multiple interpretations: A legal provision in the **Customs Act** declares that 'upon the delivery of goods from outside the European Union, customers are required to pay the relevant customs tax in dollar.' The Customs Department cannot be faulted for misconstruing a clear statutory provision if it opts to charge its customers in Australian, Canadian, or American dollars. Conversely, the Customs Department would make a legal error by misinterpreting a clear statutory provision if it chooses to charge its customers in euros.

MANIFEST ABSURDITY: The Australian judge, Douglas Menzies, served as a Justice of the High Court of Australia from 1950 to 1974. In his groundbreaking decision, **Reg. vs The District Court, Ex parte White**[3], he made the following observation:

> *"Even if the reasoning by which the Court arrived at its factual conclusion were clearly flawed, it would not qualify as an error of law apparent on the face of the record. A flawed inference of fact, such as one that is illogical, would not constitute an error of law."*

I hold great respect for Judge Menzie's perspective. However, as firmly established in the case of Wednesbury, it is recognized that actions reaching a

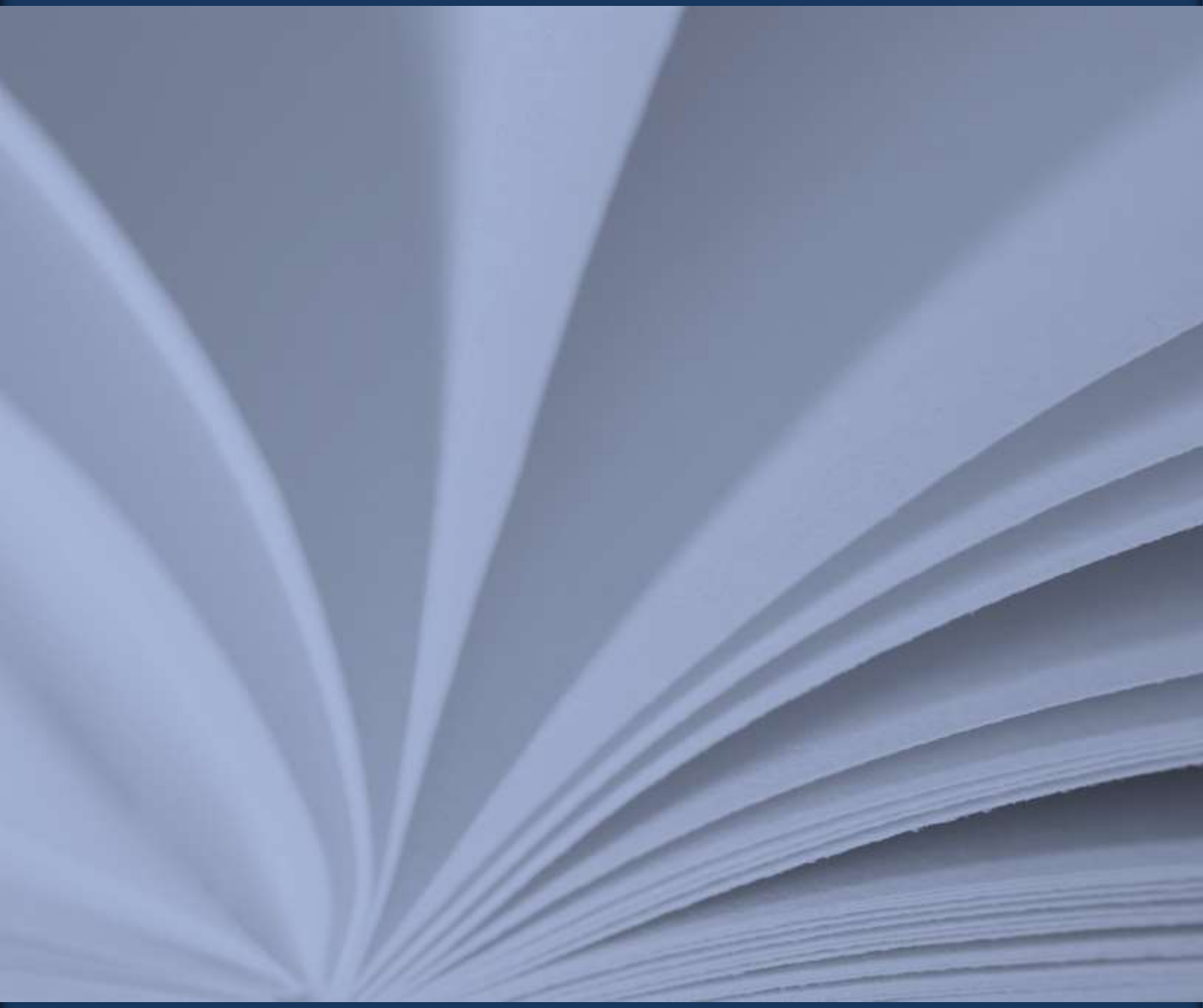
[3] **Reg. vs The District Court; Ex parte White** [1966] HCA 69

point of manifest absurdity are deemed unreasonable and should not be allowed to encroach upon the executive domain without legal constraint, a scenario similar to the one pointed out by Lord Greene: a highly competent and experienced teacher seeks a teaching position at a public school. Astonishingly, the school's governing body rejects the teacher's application based on a completely unrelated factor, such as deeming the teacher's hair colour unsuitable for the teaching role. This decision stands as entirely irrational and defies any rational rationale, considering the teacher's qualifications, expertise, and capability to fulfil the role. The provided justifications lack any credible foundation or alignment with the essential requirements for the teaching position. I acknowledge that this approach might create a potential avenue for judges to allow their personal biases to influence decisions, which is not the intended role of judges, as they are not meant to substitute the executive's factual assessments with their own preferred outcomes. Nevertheless, I firmly believe that manifest absurdity should never be accepted within the boundaries established by the law.

LACK OF PROPORTIONALITY: I'll dedicate a separate section to exploring proportionality. However, for the moment, it's beneficial to recall this example in conjunction with reasonableness. Indeed, the principle of proportionality stands as a distinct legal concept that originated in European legal systems. This principle mandates that the means adopted to achieve a valid objective must be balanced with the sought-after goal. Proportionality examines how the objective and means interrelate, especially concerning rights or interests. Imagine a scenario where a homeowner in a residential neighbourhood inadvertently placed a small decorative structure in their backyard without obtaining the proper permit. Instead of issuing a warning or a reasonable penalty in line with the infraction's severity, the planning authority levies an excessively high fine that is completely disproportionate to the offense. In this case, the planning authority's decision to impose a hefty fine for such a minor violation lacks proportionality because the penalty doesn't align with the gravity of the situation.

This lack of proportionality could be seen as a clear indicator of unreasonableness since there is no logical link between the decision, its objectives, and the case's circumstances.

Having discussed the above, I recognize that I've led you down a path where reasonableness isn't confined to a rigid, fixed definition but an assessment based on how a mind of an ordinary individual would perceive an administrative act as 'unreasonable'. My intention was to, at least, establish specific and measurable benchmarks, which is why I found it necessary to identify the six indicators mentioned earlier as a foundational starting point.



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