CONFERENCE

The Resurgence of Rationality?

session at

Public Law in 2025:
One Day Symposium

with Clare Parry and
Jeremy Ogilvie-Harris

cornerstone
barristers

cornerstone barristers

The resurgence of rationality

Clare Parry

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A little history

Wednesbury Picture House

Outcome test-a high test

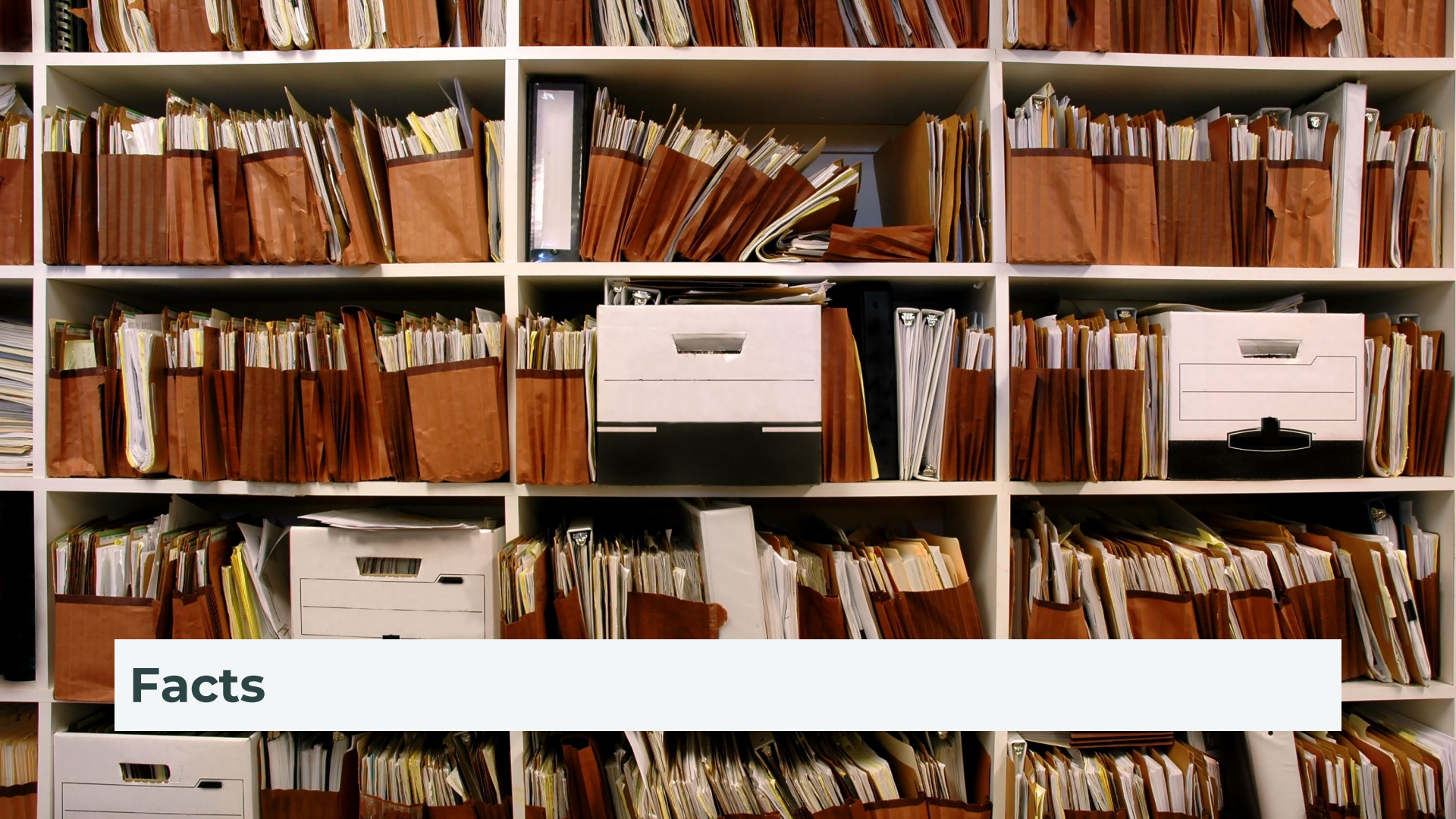
- "decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (Lord Diplock, CCSU v Minister for Civil Service [1985] 1 AC 374
- "consequences of his guidance were so absurd that he must have taken leave of his senses" (Lord Scarman, R v SSE Ex P Nottinghamshire County Council [1986] AC 240

Outcome irrationality in planning

02

R (Law Society) v Lord Chancellor

[2018] EWHC 2094



Facts

Two aspects of unreasonableness

(1) Outcome test:

“whether the decision under review is capable of being justified”

“so unreasonable that no reasonable authority could ever have come to it”

“whether the decision is outside the range of reasonable decisions open to the decision-
Maker”

(2) The process test

“A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it - for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error.”

03

Endorsement of the Law Society


Finch

Really new?

- "What the not very apposite term irrationality generally means in this branch of the law is a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic" (R v Parliamentary Commissioner for Administration ex p Balchin)

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04

Application of Law Society

R (Lindsey Smith) v CCNP

- Challenge to decision Chief Constable to march with Pride.
- Focussed on process irrationality
- Set out thinking process would expect rational decision maker to follow
- Identified flaws in way which CC approached her decision.
- Failure to analyse whether participation was likely to interfere with impartial discharge officers duties.
- Concluded that reasoning did not provide a rational basis for her decision.

R (Asylum Aid) v SSHD

- Challenge to change to immigration rules concerning ability of stateless persons to apply for leave to enter UK.
- Stateless person's dependents now required to apply under appendix FM

05

Structured Rationality Review

Keyu v SSFCA [2015] UKSC 69

- Whether to hold a public inquiry into a controversial series of events which began on 11 and 12 December 1948, when a Scots Guards patrol shot and killed 24 unarmed civilians in the village of Batang Kali, in Selangor.
- Per Lady Hale (dissenting):

> *"309. Any rational decision-maker would take into account, at the very least, the following salient points about the background history:*
>
> > *(1) The enormity of what is alleged to have taken place. If the guardsmen did indeed kill innocent and unarmed villagers in cold blood, then even by the different standards of the time, this was a grave atrocity which deserves to be acknowledged and condemned.*
> >
> > *(2) The inadequacy of the initial investigation. There were many people present at the scene who could have been asked for their accounts. It was totally unacceptable to assume that the guardsmen and their police escorts were telling the truth but that survivors and civilian eyewitnesses would not do so."*

Keyu v SSFCA [2015] UKSC 69

- Per Lady Hale (dissenting):

> "*(3) The weight which should be accorded to the confessions made in 1970. Although originally given to a newspaper, four were repeated under caution to the police. They were enough to cast serious doubt on the official account and to prompt a serious police inquiry.*
>
> *(4) The premature termination of that inquiry, which was obviously being conscientiously conducted by DCS Williams, and his view that this was a political decision, unsurprising given that it happened very shortly after the change of government in 1970.*
>
> *(5) The evidence obtained from the Royal Malaysian Police inquiry in the 1990s. Although some of the relatives and survivors had previously given their accounts to others, this evidence had only recently come to light.*
>
> *(6) The petering out of that inquiry, in the face, it would appear, of an unhelpful attitude of the British authorities when the Malaysian Police wished to pursue their inquiries here*."

Keyu v SSFCA [2015] UKSC 69

- Per Lady Hale (dissenting):

> "*(7) The thorough analysis of all the available evidence in Slaughter and Deception at Batang Kali. The authors did have a particular point of view, being determined to undermine the official account, but they collected together a great deal of information and analysed it in great detail.*
>
> *(8) The evidence from the archaeologist, Professor Black, as to what exhuming and examining the bodies of the deceased could show and how it would help in determining the facts.*
>
> *(9) The persistence and strength of the injustice felt by the survivors and families of the men who were killed, which has led them twice to petition the Queen and to launch these proceedings.*"

Keyu v SSFCA [2015] UKSC 69

- Per Lady Hale (dissenting):

> *"310. Bearing all that in mind, a rational decision-maker would then consider the advantages of some sort of inquiry, in summary:*
>
> > *(1) The very real possibility that, despite the difficulties, conclusions could be drawn about what is most likely to have happened.*
> >
> > *(2) The importance of the British authorities, at long last, seeking to make good the deficiencies of the past inquiries and the very real benefits this could bring in terms of catharsis, accountability and public confidence, whether or not firm conclusions could be reached.*
> >
> > *(3) If firm conclusions could be drawn, the huge importance of acknowledging what had gone wrong and setting the record straight*."

Keyu v SSFCA [2015] UKSC 69

- Per Lady Hale (dissenting):

> *"311. Against those advantages, a rational decision-maker would set the following disadvantages:*
>
> *(1) The passage of time, the death of so many of the participants and witnesses, and the conflict of evidence, which would make finding the facts more difficult.*
>
> *(2) The changes which have taken place in the organisation and training of the army, the climate of law and public opinion, such that it is unlikely that practical lessons could be learned about how better to handle such situations today.*
>
> *(3) The cost of even a "stream-lined" inquiry, which would be not inconsiderable, involving as it would have to do inquiries to be made in Malaysia, which would depend upon the co-operation of the Malaysian authorities."*

Keyu v SSFCA [2015] UKSC 69

- Per Lady Hale (dissenting):

> *"313. […] In my view, the Wednesbury test does have some meaning in a case such as this. The Secretaries of State did not take into account all the possible purposes and benefits of such an inquiry and reached a decision which was not one which a reasonable authority could reach. I would have allowed this appeal."*

R (Johnson) v SSWP [2020] EWCA Civ 778

- Universal Credit assessment periods and calculation of income.
- Usually claimants were paid their salary on a particular day each month, such as on the last day of the month.
- However, this would be paid on a different day if their usual payment date fell on a weekend or a bank holiday.
- The four claimants were all single working mothers in receipt of universal credit with monthly pay periods who suffered financial hardship caused by the non-banking day salary shift.
- They brought claims for judicial review challenging the rationality of the system adopted by the Secretary of State to calculate their universal credit.
- Rose LJ:

> *"46. […] The respondents were correct, in my view, to focus the challenge in their original claim forms on the irrationality of the outcome, whereby the happenstance of the date on which they applied for universal credit results in them losing, several months each year, the entitlement to the work allowance which the Regulations clearly intend to confer on them."*

> *"47. […] What is alleged to be irrational is the initial and ongoing failure of the SSWP to include in the Regulations a further express adjustment to avoid the consequence of the combination of the non-banking day salary shift and the application of regulation 54 for claimants in the position of the respondents."*

R (Johnson) v SSWP [2020] EWCA Civ 778

The Test Applied

- What are the perverse consequences of the policy?
- What are the disadvantages of resolving the problem?
- Is the balance struck irrational?
- Was the possibility of solving the problem considered and rejected when the policy was adopted?
- Other factors
  - Size of cohort affected
  - Duration of impact
  - Arbitrary nature of occurrence
  - Disincentivising work

R (Johnson) v SSWP [2020] EWCA Civ 778

- Rose LJ relied on *Law Society*: see §§48-50. In particular, the following factors were relevant to rationality:

> *"50. […] We need to consider what are the disadvantages of deciding not to "fine-tune" the Regulations thereby allowing the non-banking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the non-banking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP—or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?"*
>
> *"51. As to the disadvantages of allowing the non-banking day salary shift problem to persist, the respondents describe three main ways in which the earned income calculation method produces perverse results for them: (i) the wide and frequent oscillation in monthly universal credit payments; (ii) the loss for several months each year of the work allowance; (iii) the potential effect on other aspects of the scheme which are triggered by the absolute value of earned income received in assessment periods, in particular the exception from the benefit cap in regulation 82."*
>
> *"92. Other factors I consider relevant to the rationality of the ongoing decision not to create an exception to allow for the non-banking day salary shift are: (a) the size of the cohort affected; (b) the duration of the impact on them; (c) the arbitrary occurrence of the effect; and (d) the inconsistency between the effect of the problem and the aims of the universal credit regime."*

R (Johnson) v SSWP [2020] EWCA Civ 778

- Rose LJ concluded:

> *"106. Although I do not consider this to be a case within the Padfield jurisdiction of the court to which Longmore LJ referred, the fact that the absence of an exception to regulation 54 operates in so many cases and in a way which is antithetical to one of the underlying principles of the overall scheme, is an important factor when considering the rationality of the SSWP's choices. The evidence establishes in this case that there is a very substantial number of claimants who are likely to come to the same conclusion as the respondents have arrived at, namely, that it is preferable in many ways not to work because they would then receive a stable, maximum amount of universal credit every month making budgeting much easier and avoiding debt; that the benefits of working longer hours or progressing to higher paid work may be outweighed by the increased fluctuations in benefit award, particularly if the benefit cap exception is lost; and that looking for a job where the salary pay date does not coincide with the end of the assessment period may take priority over accepting a job which makes use of the claimant's skills and educational achievements or which builds on her previous work experience."*
>
> *107. The threshold for establishing irrationality is very high, but it is not insuperable. This case is, in my judgment, one of the rare instances where the SSWP's refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable SSWP would have struck the balance in that way."*

Pantellerisco v SSWP [2021] EWCA Civ 1454

- Claimant was single mother of three depended children.
- Claimant was employed for 16 hours per week at national living wage rate.
- Paid on a four-weekly cycle.
- Universal Credit assessment period and calculation of income.
- In 11 of the yearly assessment periods they received four weeks' payand in the 12th they received eight weeks' pay.
- Benefit cap applied resulting in £490 per month reduction in entitlement.
- Admin Court relied on *R (Johnson) v SSWP* and found irrationality.
- Underhill LJ:

> "54. In *Johnson [2020] PTSR 1872* Rose LJ noted that the court had not received detailed submissions on the test of irrationality: see para 48 of her judgment."
>
> "*55. No doubt taking their lead from Johnson , counsel before us did not feel the need to advance any detailed submissions on the test of irrationality. That being so, this is not the case in which to attempt any wide-ranging analysis I am broadly content to adopt the very general formulation derived from Boddington v British Transport Police [1999] 2 AC 143 which appears in the Law Society case: it is clearly not intended to be essentially different from the time-honoured Wednesbury language, but, as the Divisional Court there says, the Boddington formulation is simpler and less tautologous*."

Pantellerisco v SSWP [2021] EWCA Civ 1454

- Underhill LJ:

> "*56. It is now well-recognised that the degree of intensity with which the court will review the reasonableness of a public law or act or decision (including a provision of secondary legislation) varies according to the nature of the decision in question.*"
>
> "*57. It is also well-recognised that in the context of governmental decisions in the field of social and economic policy, which covers social security benefits, "the administrative law test of unreasonableness is generally applied … with considerable care and caution" and the approach of the courts should "in general … [accord] a high level of respect to the judgment of public authorities" in that field.*"
>
> "*59. […] I would add that the very complexity and difficulty of the exercise is bound to mean that following the implementation of the scheme it may become clear with the benefit of experience that some choices could have been made better. But it does not follow that the legislation was in the respect in question irrational as made, or that it would be irrational not to correct the imperfections once identified: the court cannot judge the lawfulness of such schemes by the standard of perfection. Whether any errors or imperfections are of such a nature or degree as to impugn the lawfulness of the relevant regulations must depend on the circumstances of the particular case, having regard to the appropriate intensity of review.*"

Pantellerisco v SSWP [2021] EWCA Civ 1454

- Underhill LJ:

> *"69. The pay-cycle effect arises from the interaction of three important elements of the scheme governing UC, namely: (a) the adoption of a threshold for disapplication of the benefit cap by reference to a minimum level of earned income rather than a minimum number of hours worked (regulation 82(1)(a)); (b) the adoption of a calendar month as the period for the calculation of that earnings-related threshold (again, regulation 82(1)(a)); and (c) the definition of earned income in terms of actual receipts (regulation 54)."*
>
> *"70. The elimination (or at least substantial mitigation) of the pay-cycle effect—what in Johnson was referred to as a "solution"—would require a modification of, or a partial exception to, one or more of those principles. In order to decide whether the Secretary of State is required, as a matter of rationality, to make such a modification, it is necessary to understand the extent of the departure involved and (again, in the terminology of Johnson) the "disadvantages", so as to be able to consider what form such a modification would take. This is not entirely straightforward. It is not easy to detect in the claimant's pleadings, evidence or written submissions any clear identification of her case in this regard. Likewise, although Garnham J discusses the advantages and disadvantages of "the solution" to the lunar month problem, he does not spell out what form that solution might take. It is for that reason that the court put the question that it did to Mr Drabble: see para 67 above. I will consider each of the three elements identified above, though not in the same order."*

Pantellerisco v SSWP [2021] EWCA Civ 1454

- Underhill LJ:

> *"77. I make three general points by way of preliminary:*
>
> *(1) The threshold of irrationality in this case is high. I have identified the proper approach of the court at paras 54–59 above. In the present case, the features of the scheme which result in the pay-cycle effect reflect important policy decisions made by the Secretary of State. Those choices are explicit on the face of the Regulations, which were approved by both Houses of Parliament.*
>
> *(2) Mr Brown is clearly right in principle to point out that it is often necessary in a complex scheme of this kind to apply general rules or principles which will sometimes produce harsh results in particular cases ("bright lines", in the jargon): both Rose LJ and I made this point in Johnson —see paras 72–73 and 113. However the threshold is defined, there will inevitably be UC claimants who miss out by a narrow margin.*
>
> *(3) The effect is suffered only by UC claimants with the very specific characteristics identified—working exactly 16 hours per week, at exactly the NLW rate, and paid on a regular pay-cycle other than the calendar month; and who cannot realistically avoid it in one of the ways noted at para 30 above."*

Pantellerisco v SSWP [2021] EWCA Civ 1454

- Underhill LJ:

> "*82. It should be clear from the foregoing that the similarity between this case and Johnson [2020] PTSR 1872 is superficial. In the first place, the claimants' challenge in Johnson was not directed at any fundamental feature of the scheme of the Regulations. They were entitled to be paid by the calendar month, which is the assessment period prescribed by the Regulations and which it is the policy of the Secretary of State to encourage. The problem only arose because of the quirk of their periodically, as I put it at para 114 of my judgment, "[receiving] salary in the 'wrong' month because of the mechanics of bank payment". That was, in Rose LJ's words, a "a very specific problem" (see para 107). It is true that in a strictly literal sense the solution (ie treating the payment as received on the date that it would have been received if it was a banking day) involved a departure from the principle of assessment by reference to actual receipts. But that could fairly be described, as Rose LJ put it at para 50 of her judgment, as "fine-tuning", which allowed payments to be treated in accordance with the common-sense reality. The problem in the present case, by contrast, arises from the fact the claimant is paid by reference to a period which does not correspond to the assessment period which is a cornerstone of the Regulations. That is a real and fundamental mismatch*."

Pantellerisco v SSWP [2021] EWCA Civ 1454

- Underhill LJ:

> *"83. Two further points about Johnson arise from that distinction:*
>
> *(1) […] Rose LJ said that the claimants were losing a benefit "which the Regulations clearly intend to confer on them". That was a fair observation in the circumstances of Johnson but it has no application here. The Regulations clearly do not intend that the disapplication of the benefit cap should be calculated by reference to sums received in a period other than the calendar month. […]*
>
> *(2) A central part of the Secretary of State's case in Johnson was that the non-banking day salary shift problem could only be solved by manual intervention on a case-by-case basis, which was contrary to the important principle that the calculation of entitlement should be automated. The court rejected that contention not because it did not recognise the importance of automation but because it found as a matter of fact that the necessary adjustments could (at least in due course) be incorporated in the relevant software, given that the only relevant variable, ie the incidence of non-banking days, was wholly predictable […]. Any revisions to the software to address the pay-cycle effect would have to be of a different character and would almost certainly be a good deal less straightforward. But the real point is that the problems […] go beyond difficulty of automation and are ultimately based on the difficulties of departing from the straightforward and fundamental principle of working on the basis of actual receipts."*

06

Intensity of Review

The sliding scale

- *Nottingham County Council v Secretary of State for the Environment* [1986] AC 240, Lord Scarman:

  "*Judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power*."

- *R (King) v Secretary of State for Justice* [2015] UKSC 54:

  "the test for unreasonable has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effect on those interests."

- *R (Packham) v Transport Secretary* [2020] EWCA Civ 1004 [2021] Env LR 10 at §51:

  "… fundamental that both the intensity of review and the extent to which a court will accord a margin of judgment or discretion to a decision-maker will always depend on fact and context."

The sliding scale

- *Secretary of State for the Home Department ex p. Bugdaycay* [1987] AC 514:

  "*The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.*"

- *R v Ministry of Defence ex p. Smith* [1995] 4 All ER 427:

  "*The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations.*"

The sliding scale

- *Anxious scrutiny:*
  - "*human life or liberty was at risk*": *Bugdaycay*.
  - "*impact in relation to vulnerable persons*": *R (AA) v London Borough of Bexley* [2019] EWHC 130 (Admin).
  - Fundamental rights:
    - Article 8 (right to way of life) – *Clarke v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 819.
    - Environment: *R. (on the application of Fighting Dirty Ltd) v Environment Agency* [2024] EWHC 2029 (Admin)
- Deference*:*
  - Policy decisions: *Smith*.
  - Social security legislation: *Pantelleresco*.
  - Homelessness decisions: *R (Begum) v Tower Hamlets London Borough Council* [2003] UKHL 5.
  - National security: *Secretary of State For The Home Department v. Rehman* [2001] UKHL 47.

Rationality and Proportionality?

- Compare sliding scale with proportionality:
  - "Very weighty reasons": *JD v United Kingdom* (32949/17) [2020] H.L.R. 5.
  - "Manifestly without reasonable foundation": *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] A.C. 223.
- Is there a difference?
  - Anxious scrutiny only entitled the court to determine whether the **balance** which the decision-maker had struck between the right and the competing interests was **within the range of rational possibilities**, but not whether he had got the balance right.
  - Anxious scrutiny **did not justify a court in reviewing the relative weight accorded to the competing factors**.
  - Anxious scrutiny **could not enable a court to consider whether the interference was greater than was necessary in a democratic society.**

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