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MODERNISING UNREASONABLENESS

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Abstract

This essay is a doctrinal examination of *Hu v Immigration and Protection Tribunal.* That case was a recent decision of Palmer J in which he developed a new test for the ground of unreasonableness in judicial review. The test is based on inferring an error of law as the cause of an unreasonable administrative decision. The new test has the advantage of being clearer and less tautological than the words used by Lord Greene in *Associated Provincial Picture Houses v Wednesbury Corporation*.

The essay examines *Hu* through the window of recent New Zealand High Court authorities, as well through several early authorities that articulated the unreasonableness standard. The analysis identifies that *Hu* provides useful clarity as a test for unreasonableness in the narrow circumstances where an error of law has led to an unreasonable decision. However, it is not a universal test for unreasonableness, which has many causes other than an error of law. It is concluded that care is required to both maintain the doctrinal integrity of the new test and to ensure that other types of inquiry are used when factual circumstances demand a different approach. The essay examines whether the new test has been applied with the strictness required to maintain consistency with the original error of law doctrine. It is concluded that care is needed to avoid inferring an error of law too readily, or there is a risk of crossing the process-merits review boundary. That is inconsistent with the fundamental legal principles that provide a constitutional basis for judicial review. A related question is addressed regarding how *Hu* can support variable intensity review, given the test represents a fixed standard of unreasonableness. It is concluded that if the intensity of review is increased using unstructured contextual approaches alongside the *Hu* test, then that creates problems by introducing uncertainty and inconsistency into the judicial assessment.

Key words

Judicial Review, Unreasonableness, *Hu*, *Wednesbury*, Error of Law

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I Introduction

Understanding the standard of unreasonableness in judicial review has troubled courts and litigants alike for over 70 years. Lord Greene's renowned dicta rejecting a picture theatre's challenge to a municipal council decision on Sunday trading sets an almost impossibly high standard for finding a decision is unreasonable.[1] It requires litigants must demonstrate a decision is absurd or tainted by impropriety before a court will intervene. In subsequent years it has become apparent that the standard is incapable of meeting the challenge of developments in individual rights and the growing complexity of the administrative State. These conditions have required the courts to develop methods that enable effective scrutiny of administrative decisions, including on substantive grounds. In a recent development, Palmer J decided the case of *Hu v Immigration and Protection Tribunal* in which he proposed a new simpler method to assess unreasonableness based on a test for an error of law.[2] The new approach has been warmly adopted by several other High Court judges but rejected by others. This essay examines how *Hu* has been applied and analyses the doctrinal questions that its positive and negative treatment reveals.

The essay shows that the new approach should be narrowly described as a test for unreasonableness caused by an inferred error of law. Properly applied, the test aligns with fundamental rule of law principles. However, unless *Hu* is strictly applied there is a risk of crossing the process-merits review boundary. The new test also stimulates a need for the courts to carefully consider the wide range of circumstances that can lead to unreasonableness. *Hu* does not provide a universal test. Many circumstances will not be covered, revealing a need to continue to develop ways to examine different sources of error underlying the unreasonableness ground. Finally, the new approach raises questions as to how it should be applied across a spectrum of intensity of review. Higher intensity approaches can lead to inconsistency and present a challenge to the doctrinal integrity of the error of law-based test.

The next section provides background to the ground of unreasonableness in judicial review in New Zealand. Section III then moves on to describe Palmer J's development of the new test for unreasonableness in *Hu*.

Section IV seeks to characterise the *Hu* test. The analysis shows that Palmer J's error of law-based formula can be ascribed to either an illegality head of review or to an unreasonableness head of review. It is suggested that the test should be precisely described as 'a test for error of law leading to unreasonableness'.

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1 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
2 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508.

Section V analyses the consistency of the *Hu* test with legal principles. That analysis illustrates a risk of straying into merits review. This could potentially challenge the accepted limits of the High Court's supervisory role.

Section VI examines the scope of the new test. The analysis confirms that it covers a relatively narrow range of situations where an error of law has led to unreasonableness. A broad range of circumstances can cause unreasonableness. Those include fraud, corruption, bad faith, as well as mistakes under other grounds of review, such as disproportionality, substantive unfairness, and other errors. Unreasonableness caused by these various errors require analytical approaches suited to the nature of the original mistakes. *Hu* is not a universal test that can be applied across all these situations. Therefore, *Hu* needs to be carefully applied to ensure that it is an appropriate test given the potential errors implicated by the facts of each particular case.

Section VII addresses how the new test has been applied, or rejected, in situations requiring different levels of intensity of review. This analysis shows that some judges have rejected the test in situations calling for a high degree of deference, preferring instead the traditional *Wednesbury* formula. Different approaches have also been adopted where human rights or important interests arise, with some judges rejecting *Hu* in favour of a contextual approach. Where *Hu* has been applied in cases requiring heightened intensity, then the approach of applying an external intensity standard appears to conflict with the requirement for a strict error of law analysis. Increased intensity also leads to problems with inconsistency and uncertainty.

The paper concludes by confirming that *Hu* provides useful clarity as a test for unreasonableness in the narrow circumstances where an error of law has led to an unreasonable decision. However, there is a need to continue to develop approaches to test for other causes of unreasonableness and to address challenges arising where cases call for increased intensity of review. The courts also need to be precise in the application of the *Hu* test. Care is required to both maintain the doctrinal integrity of the error of law test and to ensure that other types of inquiry are used when the factual circumstances demand a different approach.

II The unreasonableness ground

The foundation for the New Zealand approach to unreasonableness was laid in the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation.* Lord Greene MR established the test that a court should not intervene unless a decisionmaker had "come to a conclusion so unreasonable that no reasonable authority

could ever have come to it".[3] This was restated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service (CCSU)* as:[4]

> 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.

The *Wednesbury* standard was adopted in 1996 by the New Zealand Court of Appeal in the local authority rating case of *Wellington City Council v Woolworths*.[5] As long as a local authority acted within the policy and objectives of the relevant statute, and it considered all relevant factors and disregarded all irrelevant ones, then the only basis the Court could have to overturn the decision would be if "the exercise of discretion was irrational or such that no reasonable body of persons could have arrived at the decision".[6] *Woolworths* set the approach of applying an 'irrational' standard to assess the merits of decisions in the case of alleged public wrongs.

A year following *Woolworths*, the Court of Appeal decided *Waitakere City Council v Lovelock*.[7] The majority confirmed *Woolworths*.[8] Prior to *Woolworths*, Cooke P had articulated simpler concepts such as a requirement to "act reasonably" and a decision "within the limits of reason".[9] The New Zealand approach was brought back to the "more rigorous" standard in *Woolworths* following the Privy Council decision in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*.[10] Speaking to these developments in *Lovelock*, Thomas J provided a lengthy concurring judgement examining the approach to substantive review.[11] He opined that the *Wednesbury* standard was "never ... capable of providing an objective test".[12]

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3 *Wednesbury*, above n 1, at 234.
4 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 364 at 410.
5 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.
6 At 545:35.
7 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).
8 At 390:1 and 397:30 per Richardson P.
9 At 401 per Thomas J citing Cooke P in *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131–132 and *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.
10 At 402 per Thomas J citing Lord Greene in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 389.
11 At 400–408 per Thomas J.
12 At 400 per Thomas J.

A Rainbow of review

Wednesbury continues to be deployed when restraint is called for.[13] However, in practice there is no single standard of review.[14] A sliding threshold or variable intensity approach to unreasonableness has always been "part of the legal tapestry".[15] The applicable standard depends variously on factors such as the nature of the decision, the process by which it is made, the rights or interests affected, and the characteristics of the person or body who makes the decision.[16] The other end of the spectrum from the city council rating cases are those addressing questions of fundamental human or civil rights, which require a "hard look" review.[17]

In *Air New Zealand Ltd v Wellington International Airport Ltd* Wild J identified a "spectrum of review intensity under the head of unreasonableness".[18] That ranges from the *Wednesbury* standard at one end, to a much lower standard at the other. Wild J suggested his own judgement in *Wolf v Minister of Immigration* is representative of the end of the spectrum requiring higher intensity review.[19] *Wolf* confronted the question of an alternative standard in a situation involving important interests identified in international human rights instruments.[20] The case involved Mr Wolf's deportation, which would cause the breakup of his family.[21] Wild J held that a test involving closer scrutiny was appropriate.[22]

Variable intensity review was recognised at the appellate level both before and after *Woolworths*.[23] In *Thames Valley*, Cooke P had drawn a link between the grounds of substantive unfairness and unreasonableness and adopted the dicta of Lord Donaldson in *R v Panel on Takeovers and Mergers ex parte Guinness*, providing the Court with flexibility when examining alleged substantive unfairness.[24] Then later in *Pharmac v*

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13 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1001.
14 At 998.
15 At 1004–1005.
16 At 1006.
17 At 998.
18 *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [33].
19 *Wolf v Minister of Immigration* [2004] NZAR (HC) 414.
20 M B Rodriguez Ferrere "An Impasse in New Zealand Administrative Law: How Did We Get Here?" (2017) 28 PLR 310 at 317.
21 *Wolf*, above n 19, at [11] and [65].
22 At [47]–[48].
23 At [48] citing for example *Webster*, above n 9; *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA); *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA).
24 *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 (CA) at 652–653 approving of Lord Donaldson's speech in *R v Panel on Takeovers and Mergers ex parte Guinness plc* [1990] 1 QB 146 at 160.

Roussel Uclaf Australia Pty Ltd Blanchard J noted in obiter that a case involving human rights warranted "a less restricted approach" and "a 'hard look' may be needed".[25]

Variable intensity has a broader manifestation than just under the unreasonableness head. Taggart enumerated eight approaches on a "sliding scale or rainbow".[26] By 2014, Joseph expanded that list to describe eleven different approaches.[27] One variable intensity approach is "anxious scrutiny". An analogous "hard look" label is derived from United States jurisprudence denoting situations where a decisionmaker is on notice that they must take a "hard look" at relevant factors because of the issues raised.[28] In New Zealand the term has mostly been used in a different sense, to describe situations where a court will itself take a "hard look" at the decision.[29] The approach has become, in New Zealand at least, associated with administrative law cases involving human rights.[30] Another substantive approach is "reasonableness simpliciter", such as illustrated by *Wolf*.

Yet another approach is 'proportionality review', involving the examination of whether any infringement of human rights or common law rights is reasonable. Proportionality review has a strong methodological basis that can be linked to the New Zealand Bill of Rights Act 1990.[31] The approach has become a feature of the jurisprudence of England and Wales due to the impact of the Human Rights Act (UK) and the jurisdiction of the European Court of Human Rights. Proportionality review has the advantage of a clear methodology allowing for variable intensity as an inherent part of the balancing process.[32] The methodology is less well-suited to non-human rights cases, particularly when incommensurable values must be weighed. Knight differentiates the contexts of variable intensity in the "revised unreasonableness ground" from approaches addressing human rights. His four formulations of unreasonableness cover: a simple universal form; an intermediate standard; multiple categories varying with intensity; and a continuum.[33]

Several striking features can be distilled from these varied approaches and categorisations. One is the multiplicity of approaches and terms. Joseph describes a risk of "terminological overload" and "resurgent formalism".[34] He suggests the "sliding

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25 *Pharmac*, above n 23, at 66.
26 Michael Taggart "Administrative Law" [2006] NZ L Rev 75 at 83–85.
27 Joseph, above n 13, at 900.
28 Taggart, above n 26, at 85.
29 At 86.
30 At 86.
31 At 87.
32 At 88.
33 Dean R Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" (2010) 2 NZ L Rev 393 at 420.
34 Joseph, above n 13, at 900.

threshold of judicial review belies categorical attempts at definition".[35] Rodriguez Ferrere describes the High Court as "inspired but unbound" and "undertaking their own parallel development of intensity of review".[36] Another point is that, apart from proportionality, none of the approaches have any consistent standard or method associated with them.

Rodriguez Ferrere suggests *Wolf* was a "pressure release valve" to address the problem of rigidity.[37] The appellate courts have never fully endorsed the judgement. In *Huang v Minister of Immigration* the Court of Appeal referred to Wild J's analysis of proportionality, but made no reference to his analysis of reasonableness.[38] In *Ye v Minister of Immigration* a full bench of the Court of Appeal simply noted that, because of obligations under international treaties, Wild J had held "the Court was obliged to scrutinise the decision carefully and closely".[39] As recently as 2018, the Court of Appeal in *WK v Refugee and Protection Officer* referred to *Wednesbury* as the governing standard for reasonableness in immigration cases, noting *Wolf* as an example of conflicting approaches at the High Court level.[40] However, Wild J's dicta did recently receive renewed support from the Court of Appeal in *C P Group Ltd v Auckland Council*.[41]

In *Deliu v Connell* Palmer J identified the complexity arising because of an absence of appellate guidance on the scope and intensity of substantive review, which has been particularly marked by a consistent refusal of the Supreme Court to engage on the issue.[42] Rodriguez Ferrere suggests the reluctance of the Supreme Court to provide guidance is not due to disagreement with the concept of variable intensity of review but reflects a desire to remain rooted in "unstructured contextualism".[43] Geiringer similarly suggests a "hostility" towards formalism.[44] Comments by the former Chief Justice and other former members of the Supreme Court indicate an inclination to follow a simple approach grounded in the Lord Cooke tradition.[45] Rodriguez Ferrere suggests that the

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35 At 1007.
36 Rodriguez Ferrere, above n 20, at 323.
37 At 323.
38 *Huang v Minister of Immigration* [2008] NZCA 377, [2009] 2 NZLR 700 at [64] referring to *Wolf*, above n 19, at [25]–[36].
39 *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [314].
40 *WK v Refugee and Protection Officer* [2018] NZCA 258, [2018] NZAR 1146 at [51] and footnote 23.
41 *C P Group Ltd v Auckland Council* [2021] NZCA 587 at [134] citing *Wolf*, above n 19, at [47].
42 *Deliu v Connell* [1997] NZFLR, [2016] NZAR 475 (HC) at [6].
43 Rodriguez Ferrere, above n 20, at 329.
44 Claudia Geiringer "Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective" ch 13 in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (1st ed, Hart Publishing, Oxford, 2015) at 357–358.
45 Rodriguez Ferrere, above n 20, at 329 and Knight, above n 33, at 403 both citing Sean Elias "Administrative Law for 'Living People'" (2009) 68(1) CLJ 47 at 48.

abandonment of any willingness to analyse the various approaches is the very antithesis of the Cooke tradition.[46] "Theoretical chaos" has followed.[47] What this means is that approaches to variable intensity remain open for doctrinal development, particularly in the interest of consistency and greater legal certainty.

The history of divergent approaches at the High Court invites appellate engagement. In November 2019, when refusing leave to appeal in *Dean v Associate Minister of Immigration*, the Supreme Court did note that the intensity of review "may be an issue worthy of consideration by this Court".[48] This may foreshadow a change of stance, with an entirely new Supreme Court bench since earlier negative indications against the prospect of addressing variable intensity.

It is in this context of the wide range of approaches hitherto exhibited by the High Court and the lack of appellate guidance that Palmer J issued his judgement in *Hu v Immigration and Protection Tribunal*. The judgement attempted to provide a clearer and less tautological test of unreasonableness than the original *Wednesbury* formula, while remaining grounded in the original doctrine. In several subsequent cases, Palmer J has also indicated how the new test might be applied with varying degrees of intensity.

III Hu v Immigration and Protection Tribunal

Mr Hu and his wife Ms Li were Chinese citizens facing deportation.[49] The couple arrived in New Zealand in 2003 accompanied by their first child. They separated shortly after arriving and both quickly remarried New Zealand citizens. In 2004 they separately applied for New Zealand citizenship, but their applications were declined on the basis their new marriages were not genuine. They were served with removal orders in 2009 but remained in New Zealand on work visas. Those visas expired in 2015 and they became eligible for deportation. In the intervening years the couple's second child was born a New Zealand citizen. The couple also had two subsequent children with Chinese citizenship. All four children were enrolled in New Zealand private schools, the eldest in her final year.

The couple appealed their deportation to the Immigration and Protection Tribunal under humanitarian grounds set out in ss 206–208 of the Immigration Act 2009.[50] The tribunal considered that the deportation of the children amounted to exceptional humanitarian

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46 Rodriguez Ferrere, above n 20, at 330.
47 At 330.
48 *Dean v Associate Minister of Immigration* [2019] NZSC 119 at [5].
49 *Hu*, above n 2, at [4]–[9].
50 At [10]–[11].

circumstances under s 207(1) of the Act.[51] Against this, the parents fraudulent conduct did not justify a grant of residence.[52] However, the tribunal granted temporary visas until December 2016 so the eldest child could complete her schooling in New Zealand.[53]

The couple were granted leave to appeal on the ground that it was arguable the decision not to grant residence was unreasonable.[54] The tribunal had granted the temporary visas on the basis it was not contrary to the public interest to do so but had not indicated why it would be contrary to the public interest for the family to remain permanently.[55]

Palmer J commenced his analysis of the law by describing the *Wednesbury* standard.[56] He noted Lord Greene's principle has been regularly criticised by academics and by courts.[57] He suggested that reluctance to dispense with *Wednesbury* reflected a lack of any suitable and accepted alternative.[58] Palmer J criticised Lord Greene's formulation as tautological and approved of Lord Cooke's dicta in *R (Daly) v Secretary of State for the Home Department* that *Wednesbury* was an "unfortunately retrogressive decision".[59]

In an effort to find a clearer indication of what reasonableness means, Palmer J turned to the New Zealand Supreme Court's decision in *Bryson v Three Foot Six Ltd*.[60] That case involved a claim that the Employment Court made an error of law when determining whether a modelmaker on a film set was a contractor or an employee.[61] Reformulating Lord Radcliffe's second error of law manifestation from *Edwards and Bairstow* the Supreme Court characterised this as a state of affairs where:[62]

> ... an ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law, because proper application of the law requires a different answer.

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51 At [16].
52 At [17].
53 At [20].
54 *Hu v Immigration and Protection Tribunal* [2016] NZHC 1661 at [46].
55 *Hu*, above n 2, at [21].
56 At [22]–[27].
57 At [26].
58 At [26].
59 At [27].
60 At [28]–[29]; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
61 *Bryson,* at [2].
62 At [26] paraphrasing Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14; *Hu*, above n 2, at [28].

Palmer J considered this formulation represented a clearer "account of unreasonableness constituting illegality in judicial review".[63] He restated the test as:

> Where a decision is so insupportable or untenable that proper application of the law requires a different answer, it is unlawful because it is unreasonable.

Returning to *Edwards and Bairstow* Palmer J identified three circumstances that would constitute unreasonableness under this formula.[64] Two scenarios involve problems with the evidential foundation of a decision. The first where a decision is "not supported by any evidence". The second where the evidence is inconsistent with the decision. The third scenario is an error in logical reasoning whereby the "only reasonable conclusion contradicts the [decision]". Drawing a link back to the ground of unreasonableness, Palmer J characterised each of these scenarios as reasoning errors that could be equated with the notion of "irrationality" used by Lord Diplock in *CCSU*.[65]

Palmer J acknowledged his test may not cover all conceptions of unreasonableness, but suggested it was potentially broadly applicable and filled a hitherto unoccupied gap.[66]

Palmer J then addressed the issue of intensity of review, suggesting it "is desirable to engage more openly with what contextual factors matter".[67] However, that does not necessarily require recourse to "labels". He also noted the "courts will focus very carefully on cases where human rights are at stake".

Palmer J applied his new approach to the deportation order faced by Mr Hu and Ms Li. The tribunal's finding of exceptional humanitarian circumstances was logically tied to the eldest child's schooling, which had led to the conclusion it was not contrary to the public interest for the family to remain in New Zealand while her schooling was completed.[68] The tribunal had failed to clearly state the humanitarian circumstances affecting the children. One circumstance was that the impact of deportation was only a temporary issue and that only impacted on the eldest child. The other circumstance was that the impact of deportation on the other children was unexceptional since they had the capacity to adjust to new lives in China. Despite the lack of clarity in the reasons, there was no defect of reasoning in the tribunal's decision "that would be unreasonable or irrational at law".[69]

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63 *Hu*, above n 2, at [29].
64 At [30].
65 At [31] citing Lord Diplock in *CCSU*, above n 4, at 410.
66 At [31].
67 At [32].
68 At [34]
69 At [37].

A Preliminary observations

As an initial reflection, the formal structure of the *Hu* test has the benefit of providing a method to enable a court to provide a clear articulation of the logic and reasons for its decision. The method enabled Palmer J to clearly state reasons why the decision was not unreasonable, which is an advantage over more intuitive approaches.[70]

Despite the apparent simplicity and clear structure of Palmer J's new approach, *Hu* raises several difficult questions. One is whether it is doctrinally sound to characterise the test as a separate ground from an error of law. A second doctrinal question is whether applying *Hu* aligns with fundamental legal principles that justify judicial review. Another more practical issue relates to the scope of the test. Assessing scope requires examining the limits of the *Hu* test. Clarifying those limits will identify situations when other tests are needed that are better suited to sources of unreasonableness that are not an error of law. Finally, there is a question as to how the *Hu* approach might be deployed at different points across the spectrum of intensity of review.

Some answers to these questions are revealed by examining how *Hu* has been applied in the High Court over the past five years. *Hu* has been cited in at least 33 High Court cases. The new test has received a mixed response. Sixteen of these cases have given *Hu* neutral treatment.[71] The only substantive comment in those 16 cases being made by Lang J who acknowledged the transparency of Palmer J's formulation, suggesting *Hu* might avoid a problem of the *Wednesbury* approach whereby a court risks substituting its own views on the merits of a case.[72] The other 17 cases where *Hu* has either been applied or rejected touch on the doctrinal issues identified above. These 17 cases are discussed in the following sections. The cases assist in characterising the test, clarifying its scope, and illustrate how the test has been applied across the spectrum of variable intensity review.

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70 M B Rodriguez Ferrere "Redefining reasonableness" [2017] NZLJ 67 at 69.

71 *Ink Patch Money Transfer Ltd v Reserve Bank of New Zealand* [2022] NZHC 1340; *Muaūpoko Tribal Authority Inc v Minister for Environment* [2022] NZHC 883; *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843; *Singh v Chief Executive of Ministry of Business, Innovation and Employment* [2021] NZHC 2954; *AGPAC Ltd v Hamilton City Council* [2021] NZHC 2222; *Redmond Retail Ltd v Ashburton District Council* [2021] NZHC 2887; *Kamal v Restructuring Insolvency and Turnaround Association of New Zealand Inc* [2021] NZHC 1626; *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201; *Singh v Chief Executive of Ministry of Business, Innovation and Employment* [2021] NZHC 787; *Enterprise Miramar Peninsula Inc v Wellington City Council* [2021] NZHC 549; *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456; *Goundan v Immigration and Protection Tribunal* [2018] NZHC 1756; *Patel v Minister of Immigration* [2018] NZHC 577; *WK v Refugee Protection Officer, MBIE, Auckland* [2018] NZHC 514; *AX (Afghanistan) v Immigration and Protection Tribunal* [2017] NZHC 2840.

72 *Galani v Chief Executive of the Ministry of Business Innovation and Employment* [2018] NZHC 383 at [19].

IV Characterisation of the Hu test

This section addresses the question of whether the *Edwards v Bairstow* derived error of law analysis can be correctly characterised as a test of unreasonableness in judicial review. Doctrinally, it appears that the error of law formula could be ascribed either to an illegality head of review or to unreasonableness. Examination of the original English cases show that an error of law has always been seen as a potential source of an unreasonable outcome. I suggest that the *Hu* test should be precisely described as a test for 'an inferred error of law that has led to unreasonableness'. While the test appears to be doctrinally consistent with the unreasonableness head of review, that characterisation has implications when justifying a court's intervention. Unreasonableness is a residual ground. Any finding of unreasonableness inevitably raises concerns about whether the court may have substituted its own view for that of the original decisionmaker. The implication for the *Hu* test is that a court should be careful not to find an error based on Palmer J's formula too readily, given that a finding of unreasonableness will be based on an indirect inference.

A Error of law or unreasonableness?

Palmer J addressed doctrinal characterisation in *Hu,* highlighting the link between the failure of logic representing error of law and illogicality underlying the concept of "irrationality", which had been equated to unreasonableness in *CCSU*.[73] Other judges also see *Hu* aligned with unreasonableness. In *Zhang v Minister of Immigration* Gwyn J saw the *Hu* formulation provided "operational content" to understand unreasonableness but stated that it did not lower the *Wednesbury* standard.[74] Hinton J similarly equated *Hu* to the *Wednesbury* ground in *Parmenter v Legal Complaints Review Officer*, concluding that decisions based on reasons or evidence that did not support the administrative finding were "unreasonable in *Wednesbury* terms".[75] In *Ragg v Legal Complaints Review Officer* Osborne J similarly saw *Hu* simply reflected the *Wednesbury* standard and was "a better account of unreasonableness than the circular words used in *Wednesbury*".[76]

A detailed depiction of the relationship between an error of law and unreasonableness was articulated in *Jiang v Immigration Advisers Complaints and Disciplinary Tribunal*. Venning J saw the second manifestation of error of law as an indicator of unreasonableness. The judge drew a link between the ground of unreasonableness when indicated by an "evident logical fallacy" as had been identified in *Re Erebus Royal*

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73 *Hu*, above n 2, at [31] citing *CCSU*, above n 4, at 410 per Lord Diplock.
74 *Zhang v Minister for Immigration and Border Protection* [2020] NZHC 568 at [87].
75 *Parmenter v Legal Complaints Review Officer* [2021] NZHC 2025 at [45].
76 *Ragg v Legal Complaints Review Officer* [2020] NZHC 2057 at [22].

Commission.[77] In his analysis Venning J maintained a link between unreasonableness and error of law, stating "the ultimate issue … is whether the adverse credibility findings were an error of law so as to be unreasonable".[78] In *Kim v Minister of Justice* Mallon J also noted a link could be drawn between unreasonableness and error of law. She saw *Hu* was one of several examples where judges had attempted to "give the [*Wednesbury*] test more content" and noted Palmer J's formulations overlapped with other grounds of review, including error of law.[79]

Other judges have acknowledged *Hu* as a test for unreasonableness but have considered it reflects a different standard compared to *Wednesbury*. Moore J declined to follow *Hu* in a local body rating case in *CP Group Ltd v Auckland Council* and saw *Hu* as reflecting a lower standard compared to the traditional test.[80] Similar sentiments are reflected by several other judges who favoured the traditional approach. Walker J rejected *Hu* in *Bosson v Racing Integrity Unit Ltd,* in favour of a description of the *Wednesbury* standard that emphasised giving weight to the competence of a specialist body.[81] Similarly, Muir J in *Singh v Associate Minister for Immigration and Border Protection* determined the standard for reviewing an absolute discretion decision is *Wednesbury*.[82] Whata J, who adopted *Hu* in *Ngati Te Ata v Minister for Treaty of Waitangi Negotiations* also identified the *Hu* standard as different from *Wednesbury*, commenting that he adopted the *Hu* formulation because it was more favourable to the applicants in that case.[83]

B Relationship with Wednesbury

None of the New Zealand High court judges have expressly rejected the notion that an underlying error of law is a species of unreasonableness. However, there are divisions in the way *Hu* has been perceived in relation to the traditional *Wednesbury* standard. Reconciling these different perceptions requires examination of how the *Edwards v Bairstow* error of law test relates to the unreasonableness standard as originally stated in *Wednesbury* and in *CCSU*.

Edwards v Bairstow addressed a Crown challenge to a decision of taxation commissioners. The commissioners had characterised a commercial transaction as an

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77 *Jiang v Immigration Advisers Complaints and Disciplinary Tribunal* [2018] NZHC 3152, [2019] NZAR 363 at [58] citing *Re Erebus Royal Commission, Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC) at 681.
78 At [80].
79 *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823 at [18].
80 *C P Group Ltd v Auckland Council* [2020] NZHC 89 at [164].
81 *Bosson v Racing Integrity Unit Ltd* [2021] NZHC 23 at [39] citing Eichelbaum CJ in *Le Roux v New Zealand Rugby Football Union* [2006] NZAR 434 (HC).
82 *Singh v Associate Minister for Immigration and Border Protection* [2018] NZHC 44 at [38].
83 *Ngati Te Ata v Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058 at [66] and [71].

activity not of a nature attracting income tax under the Income Tax Act (UK) 1918.[84] Virtually all evidence pointed towards the transaction being "in the nature of trade" and therefore eligible for taxation. The statute contained no right of appeal from the commissioner's determination, so neither the High Court nor the Court of Appeal would disturb the assessment because the challenge was based on "purely a question of fact".[85] The House of Lords could only intervene if the "determination … [was] erroneous in point of law". Lord Radcliffe described two situations where an error of law could be recognised by the Court.[86] First when something "ex facie … is bad law". Secondly, inferring an error of law has occurred by analysing the conclusion reached by the original decision-maker in light of the facts:[87]

> … this state of affairs [could be] described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination.

Lord Radcliffe suggested that each of these three explanations describe "the same test". He preferred the formula "a state of affairs … in which the true and only reasonable conclusion contradicts the determination". The analysis remains focused on whether an error of law can be inferred. No link is drawn anywhere in the *Edwards v Bairstow* judgement to the portrayal of unreasonableness in the Court of Appeal's decision in *Wednesbury*.

Palmer J drew the error of law test from a recent decision of the New Zealand Supreme Court. The Supreme Court had addressed the question of whether the Employment Court made an error of law in finding an employment relationship existed between the parties in *Bryson v Three Foot Six*. Like the statute in the 1955 taxation case, the Employment Relations Act 2000 makes no provision for an appeal from a decision of the Employment Court for any reason other than on a question of law. It is on this basis that the decision proceeded to the Court of Appeal.[88] That the case was a statutory appeal, not a judicial review, explains why the Supreme Court does not draw any link in their judgement between error of law and the judicial review ground of unreasonableness. However, the judgement does provide insight into the Courts view on the application of Lord Radcliffe's formula that is generally relevant, even to judicial review. Two situations may reveal an error of law. A decisionmaker's reasoning may

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84 *Edwards*, above n 62, at 55:F.
85 At 55:G.
86 At 57:H.
87 At 57:I.
88 Employment Relations Act 2000, s 214; *Bryson,* above n 60, at [2].

directly reveal that they have misdirected themselves on a point of law.[89] Alternatively, the "ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law".[90]

Turning to the standard of unreasonableness, a link between Lord Radcliffe's formula of an error of law manifested as an unreasonable conclusion and Lord Greene's conception of unreasonableness was drawn by Lord Diplock in *CCSU.* Lord Diplock identified three grounds of judicial review as illegality, irrationality and procedural impropriety.[91] He characterised irrationality as unreasonableness, meaning a decision "so outrageous in its defiance of logic or of accepted moral standards that no sensible person … could have arrived at it".[92] Lord Diplock saw the ground of irrationality broadened beyond the "inferred though unidentifiable mistake of law by the decision-maker" that had earlier been identified by Viscount Radcliffe in *Edwards v Bairstow*.[93] Thus for Lord Diplock, irrationality or unreasonableness included, but was not restricted to, situations where an error of law could be inferred from the outrageousness of a decision. So, in the absence of a clearly identified error of law, the outrageousness of a decision may indicate an illegality. Importantly though, it does not logically follow that outrageousness is confined to decisions involving illegality. A decision that transgresses acceptable moral standards may equally offend the irrationality ground. In other words, errors of law do not demarcate the full extent of irrationality/unreasonableness.

Whether unreasonableness and the second conception of error of law in *Edwards and Barstow* should be recognised as completely separate grounds of judicial review is not entirely clear.[94] Lord Greene's original dicta did not clearly differentiate an unreasonable decision outcome from acting unreasonably in the decision-making process.[95] Lord Diplock's analysis in CCSU perhaps suggests that maintaining a separation is unnecessary and has never been a feature of the unreasonableness head, which has always accounted for unreasonableness caused by errors of law. However, Rodriguez Ferrere suggests that the New Zealand courts have rarely drawn a link between error of law and unreasonableness.[96] Taylor criticises attempts to link unreasonableness with errors in reasoning as unnecessary.[97] For him the question of

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89 *Bryson* at [24].
90 At [26].
91 *CCSU*, above n 4, at 950:h per Lord Diplock.
92 At 951:a.
93 At 951:b.
94 Rodriguez Ferrere, above n 70, at 69.
95 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis NZ Ltd, Wellington, 2018) at 716.
96 Rodriguez Ferrere, above n 70, at 69 citing *CMP v D-GSW* [1997] NZFLR 1 (HC) at 38 and *Bell v Victoria University of Wellington* HC Wellington, CIV-2009-485-002634 8 December 2010 at [123].
97 Taylor, above n 95, at 728–729.

unreasonableness is properly focussed on the outcome of a decision, with unreasonableness in some aspect of the decision-making process simply reflecting flaws the courts should recognise under other grounds.[98] A failure to differentiate these conceptions leads to what Taylor terms "unfocussed reasonableness".[99] Notably, in that it indicates the acceptance of a more intertwined view, is that the Canadian standard of beyond "the range of acceptable outcomes which are defensible in respect of the facts and the law" aligns with the test for error of law.[100]

In summary, there is no doctrinal difficulty characterising the *Hu* approach as a test for unreasonableness. Illegality as a potential source of unreasonableness was recognised in the original English cases. *Hu* should be precisely described as a test for 'an inferred error of law that has led to unreasonableness'. As has been identified by several New Zealand High Court judges, the error of law formula used in *Hu* provides greater clarity and simplicity than the tautological statements derived from the original Wednesbury and CCSU decisions. However, as will be seen in following sections, while the simpler *Hu* test is useful, it must only be applied in circumstances where a detectable error of law can properly be inferred. If *Hu* is applied too loosely then that risks crossing the process-merits review boundary. The issue of keeping the *Hu* test within strict bounds is examined in the following section on legal principle.

V Consistency with legal principle

The court's supervisory role primarily addresses decision-making flaws, not merits review that would lead a court to substitute its own view for that of the original decisionmaker. This has two implications. First, a high threshold is necessary for a court to intervene under the residual unreasonableness ground. Secondly, the need to distinguish between process and object is important constitutionally.[101] This section examines whether *Hu* is consistent with the principles that define the boundary between judicial review and merits-based appeal. It concludes that *Hu* challenges that constitutional boundary, with courts risking the substitution of their own view for that of the original decisionmaker if the *Hu* test is not strictly applied

The legitimacy of the court's function in supervising the executive action can be observed through two different perspectives: the ultra vires doctrine and the common law constitutional approach. The traditional administrative law model is grounded in the Diceyan theory of unitary democracy, which holds out the ultra vires doctrine as

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98 At 717.
99 At 717–718.
100 At 720 citing *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at [47].
101 At 718.

the foundation for judicial review. Judicial review is justified on the basis that it represents the enforcement by the courts of the boundaries of statutory power set by Parliament.[102] The principle of parliamentary supremacy means that statute law is supreme. The principle of legality holds that statute law is the source of executive power and the executive must act within those limits.[103] Courts draw their powers of judicial review because an independent judiciary is required to enforce Parliament's intent. The doctrine holds that the executive should be held accountable even though a statute may neither specifically define the power of the courts nor the principles of review.[104]

Under a common law constitutional approach judicial review powers are "based on an inherent jurisdiction of the superior courts".[105] The justification for judicial review lies in principles developed under the common law. Under this approach the court itself will determine the boundaries of its powers of review and may decide to extend those boundaries.[106] The rule of law lies at the heart of the approach. Although an inherently pluralistic concept, the rule of law in this context includes being a source of substantive rights and providing lawful basis for the exercise of public power.[107]

The rule of law encapsulates several subordinate principles. One is the principle of legality, which addresses how public power is authorised and governed. This includes constraining the exercise of public power to prevent arbitrariness and misuse.[108] The principle of separation of powers addresses the independence of the three branches of government. The judiciary draws its supervisory jurisdiction under this principle. It is also this principle that gives rise to the notion of institutional comity.[109]

These constitutional delineations raise threshold questions. The relevance, in the context of *Hu,* being whether the test might extend judicial review across the process-merits boundary. An intrusion by the courts into merits review undermines the

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[102] Mark Elliott and Tom Hadden *The Constitutional Foundations of Judicial Review* (1st ed, Hart Publishing, Oxford, 2001) at 3; Paul Craig "Ultra vires and the foundations of judicial review" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (1st ed, Hart Publishing, Oxford, 2000) at 48.

[103] Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 35.

[104] At 36.

[105] John McGarry *Intention, Supremacy and the Theories of Judicial Review* (1st ed, Routledge, Oxford, 2016) at 34.

[106] At 12 citing Sir John Laws "Illegality: The Problem of Jurisdiction" in Michael Supperstone and James Goudie (eds) *Judicial Review* (Butterworths, London, 1991) at 69–70.

[107] Paul Craig *Administrative Law* (8th ed, Sweet & Maxwell UK, 2016) at 18.

[108] Mary Liston "Governments in Miniature: The Rule of Law in the Administrative State" ch 2 in Lorne Sossin and Colleen Flood *Administrative Law in Context* (2nd ed, Emond Montgomery, Toronto, 2013) at 43.

[109] Aileen Kavanagh "The Constitutional Separation of Powers" ch 11 in David Dyzenhaus and Malcolm Thorburn *Philosophical Foundations of Constitutional Law* (1st ed, Oxford University Press, Oxford, 2016) at 237.

discretion afforded to executive decision-making bodies and affects the "constitutional balance of power".[110]

Although the ultra vires approach does not necessary define precise boundaries, the doctrine supports a distinction between merits-based appeal and review, with the appeal courts having "no inherent appellate jurisdiction".[111] The separation of powers principle is "consistent with some aspects of control being kept from the courts, including … merit review".[112] Where an executive body is operating within the limits of the powers granted to it then the "courts … should be wary of substituting their view".[113] It has been suggested that the ultra vires principle has fostered judicial activism.[114] It promotes the courts as superior to administrative executive bodies in resolving legislative intention alongside an inherently unclear boundary between determining merits and legislative validity.

Under common law constitutionalism there is more room for the courts to develop constitutional principles. "The courts [impose] controls they [believe to be] normatively justified".[115] Under this conception a rights-based view prevails, in which the limits of administrative action are interpreted in accordance with fundamental rights and principles of good administration.[116] Sir John Laws describes a balance struck between the Kantian morality of the courts, centred on the rights of individuals, and a utilitarian morality of democratic government, centred on the interests of society.[117] Allan suggests substance and process are interlinked.[118] In extreme situations when very serious rights are at stake then the rule of law will "require a suitably rigorous procedure" leading to only one acceptable outcome.[119] In such situations a clear distinction between review and a merits-based challenge to the decision all but disappears.

A Cases challenging the process-merit boundary

The Supreme Court indicated in *Bryson v Three Foot Six* that it would be "rare" to infer that an error of law on the basis of the *Edwards v Bairstow* test.[120] An appellant seeking

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110 Elliott and Hadden, above n 102, at 18.
111 Craig, above n 107, at 5.
112 John Basten "The supervisory jurisdiction of the Supreme Courts" (2011) 85 ALJ 273 at 278.
113 Craig, above n 107, at 5.
114 At 6.
115 At 14.
116 At 15–17 citing Ronald Dworkin *Taking Rights Seriously* (1st ed, Harvard University Press, Cambridge, 1977).
117 Sir John Laws *The Constitutional Balance* (1st ed, Hart Publishing, Oxford, 2021) at 38.
118 T R S Allan *The Sovereignty of Law* (1st ed, Oxford University Press, Oxford, 2013) at 113.
119 At 113.
120 *Bryson,* above n 60, at [26].

to assert "the true and only reasonable conclusion contradicts the determination" based on the evidence considered by the original decisionmaker "faces a very high hurdle".[121] The Supreme Court highlighted the danger of a court too easily convincing itself that: "as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong".[122] In cautioning against such an approach the Court cited Lord Donaldson's statement in *Piggott Brothers & Co Ltd v Jackson* that inferring an error of law requires "be[ing] able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law".[123] It is notable that the determiner "*any"* is emphasised in italics in Lord Donaldson's statement. Also, where a particular fact that supported a factual finding was in error, but other fact(s) still supported the finding, then that is not a situation where a court can say there was "no evidence" to support the outcome the tribunal reached.[124] "It could nonetheless lead or contribute to an outcome which is unsupportable".[125]

The way the *Hu* test has been used suggests the process-merits constitutional boundary is being challenged. Out of 10 cases where *Hu* has been applied, the original decision has been found to be unreasonable in four.[126] On the surface this suggests that, when courts have used the test, inferring an error of law has not been rare.

1 Sweeney v Prison Manager

The challenge of adhering to the strictness of the *Hu* test without conflicting with legal principles is revealed by examining *Sweeney v Prison Manager*. The case was a review of a prison manager's decision to revoke the visitor approval of a drug treatment counsellor due to perceived gang connections and an unauthorised visit to a self-care unit within the prison.[127] Palmer J found that the prison manager's concerns lacked foundation in light of evidence the applicant had only encountered former gang associates at a tangi and had visited the prison under a mistaken understanding.[128] For Palmer J the evidence the prison manager had "was inconsistent with, and contrary to, his decision". On that basis the revocation of the visitor permit by the prison manager was held by Palmer J to be "unreasonable at law".[129]

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[121] At [27].
[122] At [27].
[123] At [27] citing Lord Donaldson MR in *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85 (CA) at 92:F.
[124] At [28].
[125] At [29].
[126] *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27; *Jiang,* above n 77; *Zhang,* above n 74; *Parmenter,* above n 75.
[127] *Sweeney,* at [1].
[128] At [65].
[129] At [66].

The factual finding of the prison manager that Sweeney had gang connections fell away following an error of law analysis. Attendance at a tangi did not indicate Sweeney was actively associating with gang members. That particular evidence was clearly inconsistent or contradictory to the prison managers decision to revoke the visitor permit.

However, the managers decision to revoke the visitor permit was also based on evidence that Sweeney visited a self-care unit without authorisation.[130] The applicant provided an explanation to the effect that "he understood he had permission to enter the [self-care] unit".[131] I believe that it was open to the prison manager, who was faced with conflicting evidence, to form a view that the visit to the unit was an unauthorised breach of prison rules. The Supreme Court in *Bryson v Three Foot Six* highlighted the danger of a court too easily convincing itself the lower tribunal was wrong. Here, it was within the scope of the prison manager's discretion to accept the facts indicating the self-care unit visit contravened prison regulations and to reject the applicant's explanation. The prison manager does not misdirect themselves in law if they reach a conclusion that is open on the facts. This is not to say there was not an error. There was a hint of procedural impropriety. The circumstances surrounding the self-care unit visit surfaced following discovery of Facebook posts associated with the tangi.[132] The weight of concern regarding the perceived gang links raised the prospect that the prison authorities may have closed their minds to the applicant's explanation regarding the self-care unit visit. However, having a closed mind is not an error of law. It is a procedural error and, as such, requires a different analysis to the *Edwards v Bairstow* derived formula.

Palmer J accepted the applicant's explanation for the unauthorised visit, identifying the prison manager had not investigated the explanation given.[133] Having formed his own conclusion on the correct position Palmer J uses that as the yardstick for assessing whether the prison manager's decision was unreasonable. The Supreme Court in *Bryson* identified that an error in one or some fact(s) but not others "could lead or contribute to an outcome which is unsupportable".[134] However, *Bryson* also highlighted the danger of a court persuading itself it would not reach the same conclusion as the lower tribunal. That latter approach is doctrinally inconsistent with an error of law analysis, as it extends the parameters of the analysis beyond simply identifying whether the extant facts could support the original decision. Instead, it involves an evaluation of the correct conclusion by resolving conflicting evidence. That approach risks substituting the view

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130 At [14] and [19].
131 At [19] and [65].
132 At [11]–[13]
133 At [65]
134 *Bryson,* above n 60, at [28].

of the court for that of the original decisionmaker and challenges the process-merits boundary. Such an approach is inconsistent with the legal principles governing judicial review.

2 Jiang v Disciplinary Tribunal

Jiang v Immigration Advisers Complaints and Disciplinary Tribunal is another case where unreasonableness was found using the *Hu* formula. The reasoning in this case also deviates from the strictness of the *Edwards v Bairstow* error of law standard, providing another example of inconsistency with legal principle.

Jiang addressed an adverse credibility finding made against an immigration advisor.[135] The issue for the Court was whether the finding was "an unreasonable, insupportable or untenable conclusion".[136] Venning J addressed under what circumstances an inference drawn by a decisionmaker could be held unreasonable, citing Lord Diplock in *Re Erebus Royal Commission* that the Court could intervene where there is an "evident logical fallacy".[137] Venning J then restated the test for the purposes of the case to be:[138]

> whether the … chain of logic and reasoning from the … facts to the … findings was so disconnected, or so stretched, that its findings may be said to be unreasonable and therefore unlawful.

Venning J identified several errors in the tribunal's reasoning process, including relating to a conclusion it drew regarding being misled by the applicant. The judge observed that the tribunal's finding that it had been misled was "not the only implication" and that "plainly it isn't the only ... conclusion".[139] Notably, Venning J's observation highlights that the tribunal's conclusion was open on the facts. That alone might have been sufficient to reject inferring an error of law. However, instead Venning J found that "no reasonable tribunal would have made its findings with such certainty, given the paucity of evidence … [for] its inference and … in light of … plausible explanations …". I believe that analysis introduces an evaluative gloss, which moves beyond the simple question of whether the decision made by the tribunal was available to it on the facts. That conclusion steps into the realm of substituting the court's own view of the correct decision, which is inconsistent with legal principles underlying the court's supervisory jurisdiction.

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[135] *Jiang,* above n 77126, at [2].
[136] At [25] and [52]–[53].
[137] At [58].
[138] At [59].
[139] At [84].

In a novel step that further sensitised the unreasonableness test, the judge also found the tribunal findings were "unnecessary" under the governing Act, which he stated "assists … in satisfying the test for error of law or unreasonableness".[140] A question of necessity is more obviously associated with proportionality or substantive unfairness analyses than an error of law analysis.

This is not to say that the disciplinary tribunal's decision was not unreasonable for other reasons. The tribunal's role was to resolve a disciplinary complaint pertaining to performance in an immigration advisor role. Yet the tribunal expressly referred to "implications" for other professional roles that the applicant subsequently held.[141] A tribunal making an adverse credibility finding that it does not need to make raises the prospect that it may have pursued an improper purpose.

B Justifying judicial intervention

The way *Hu* has been applied suggests the boundary between inferring illegality and courts forming their own view of the merits or correctness of decisions has not been respected. *Sweeney* and *Jiang* both illustrate a sensitised test that in practice has not readily conceded the presence of evidence that should have supported a margin of appreciation being given to the original decisionmakers. It is arguable that giving prominence to rights and important interests may provide the courts with a normative justification for these developments. However, cases such as *Jiang* and *Sweeney* do not raise fundamental human rights or other important interests that would justify such a development. Judicial intervention will only be justified under either the ultra vires or the common law constitutionalism doctrines if illegality is able to be detected or inferred according to the strict standard set out by the Supreme Court in *Bryson*. The implication for future application of *Hu* is that the courts need to pay careful attention to avoid too readily inferring the presence of an error of law leading to unreasonableness in order to remain within constitutional limits.

VI Scope of unreasonableness

This essay now turns towards clarifying the circumstances when the *Hu* test should or should not be used. Unreasonableness is a broader concept than solely situations where there are gaps between the facts and the conclusion reached, or when there is illogicality.[142] The broad scope of unreasonableness is noted under Knight's analysis of

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[140] At [82].
[141] At [33], [42] and [81].
[142] Rodriguez Ferrere, above n 70, at 69.

grounds of review as taking in decisions that are irrational, unreasonable, and disproportionate.[143] It follows that an error of law analysis in the manner of *Hu* will not necessarily be suitable for all situations. If the source of the potential error is incorrectly identified, then the wrong type of analysis will be deployed. As noted above, the cases of *Sweeney* and *Jiang* included errors such as predetermination and improper purpose that appear to have contributed to unreasonable outcomes. This section identifies other situations that lie beyond the scope of the *Hu* test. Unreasonableness caused by different types of error each require an analytical approach that is suited to the nature of the original mistake. What this shows is that although *Hu* is a useful test for an error of law leading to an unreasonable decision, it is not a unifying test for unreasonableness. The implication is that courts need to be alive to the circumstances of each individual case and select an appropriate unreasonableness test based on the factual matrix of the case in hand.

The limit of the *Hu* standard has only indirectly been raised in the High Court. No cases have directly confronted whether the *Hu* error of law formulation is too narrow to assess the particular factual scenario underlying an unreasonable decision. Palmer J himself identified in *Hu* that error of law would not necessarily cover all circumstances under the unreasonableness ground. Fitzgerald J, who adopted *Hu* in *Tesimale v Manukau District Court*, similarly acknowledged the *Hu* approach was "relatively narrow" and only focussed on whether a decision "was available as a matter of law".[144]

As a matter of logic, a decision or action that is unreasonable in a substantive sense must originate from some type of error. Thomas J stated that "for the most part … a decision will be unreasonable for a reason", which should be "spelt out".[145] Knight agrees that "a court's reasoning is as important at its intervention".[146] Basten similarly highlights the importance of identifying what it is that makes an outcome unreasonable.[147] As a matter of principle the original error should be able to be characterised under a recognised head of review, otherwise there is no legal justification for impugning the substantive decision. Drawing the link to the cause of the error is not only necessary to justify intervention, but also to engage the other aspects of the rule of law principle. It is necessity to support a learning dimension, which is a source of good administration. It is also necessary to provide clarity and certainty in the law.

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[143] Dean R Knight *Vigilance and Restraint in the Common law of Judicial Review* (1st ed, Cambridge University Press, Cambridge, 2018) at 78.
[144] At [97].
[145] *Lovelock*, above n 7, at 413 per Thomas J.
[146] Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL 117 at 157.
[147] Basten, above n 112, at 290.

To provide a normative justification for a court to interfere with a decision it must be possible to account for the grounds why a decision is seen as unreasonable. Without having recognisable grounds there is no yardstick to measure unreasonableness by. This is not to say that the nature of the underlying error will necessarily be clear. If the underlying error is clear, then the decision would likely be directly challenged under a head of review other than unreasonableness. However, if the initial indicator of an error of uncertain character is substantive unreasonableness, then an inference as to the likely cause of that result may be the only possible reason for overturning the decision. In such a case, attempting to draw the link from substantive unreasonableness to the likely causal factor(s) is important, if not essential to justify judicial intervention.

A Original English authorities

The reasoning in the original *Wednesbury* and *CCSU* decisions provide some insight into the broad scope of unreasonableness. Jowell and Lester identify that Wednesbury and CCSU speak to two different forms of substantive error.[148] One type of substantive challenge is based on discovering an illegality, where the decision fails to remain within the powers allocated by the legislature or by the common law. The second type, founded on irrationality, is where a decision offends "substantive principles" independent of the statute in question even though it may fall within the legal limits.

Lord Greene identified illegality could lead to a substantive error, as well as identifying other situations where a decision might be based on capriciousness or absurdity. The type of illegalities Lord Greene had in mind included failure to take account of relevant considerations and taking account of irrelevant factors. Circumstances of capriciousness included bad faith, corruption, and dishonesty. Absurd considerations were illustrated by Lord Greene's example of discrimination against a teacher with red hair.

Unreasonableness was equated to irrationality by Lord Diplock in *CCSU*. Lord Diplock saw irrationality as a recognised stand-alone ground, noting a previous need to justify intervention through recourse to "an inferred though unidentifiable mistake of law by the decision-maker".[149] The previous link to an illegality had been drawn via the second manifestation of error of law analysis from *Edwards and Bairstow*. Lord Diplock identified that irrationality could occur under two different conditions. First, because a decision might be illogical. Secondly because it may lie outside acceptable moral standards.[150] That second condition, which is not based on illogicality, has a completely

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[148] Jeffrey Jowell and Anthony Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" (1988) 14 Commw L Bull 858 at 859.
[149] *CCSU*, above n 4, at 951:B per Lord Diplock.
[150] At 951:A–B per Lord Diplock.

different character to an error of law and indicates circumstances associated with unreasonableness that fall outside the *Hu* formula.

Jowell and Lester advocate for the recognition of "independent principles of justice" that can be applied by the courts when reviewing administrative decision on substantive grounds.[151] They suggest these general principles lie "lurking beneath the underbrush of *Wednesbury*".[152] Jowell and Lester derive three categories of principle that are instructive because they reveal the nature of transgressions that could lead to unreasonableness. In the first category are "principles prohibiting decisions that are irrational" such as decisions underlain by "no intelligible reason, or arbitrary decisions".[153] These reflect circumstances covered by the *Edwards v Bairstow* second manifestation of error of law formula. The second category covers principles upholding "standards of administrative probity".[154] These reflect circumstances that were overtly signalled in the *Wednesbury* decision such as fraud and bad faith. Principles supporting proportionality in decision-making, legal certainty and administrative consistency would also be included in the second category.[155] The third category covers principles that address "fundamental rights and freedoms". Examples in the third category include equality of treatment and principles upholding recognised human rights.

Jowell and Lester's proposed second and third categories align with a view that English law should reflect European Community law and the statutory influence of the Human Rights Act (UK). However, much of the terrain covered by those categories are also represented, at least to some extent, in New Zealand jurisprudence.

B New Zealand authorities

In *Lab Tests Auckland Ltd v Auckland District Health Board* Hammond J suggested the basis for judicial intervention can be arranged under a functional schema to "transcend unhelpful semantic or terminological quibbles".[156] His first functional area covers "procedural grounds addressing the conduct of the decision maker".[157] The second covers "reasoning processes" such as misapplication of the law and exercise of discretion, which is described as "the stuff of legality".[158] The third area covers "grounds … relat[ing] to the decision itself".[159]

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[151] Jowell and Lester, above n 148, at 870.
[152] At 862.
[153] At 863.
[154] At 863.
[155] At 863–865.
[156] *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [381] per Hammond J.
[157] At [382].
[158] At [383].
[159] At [384].

The substantive ground is the most contentious and may be engaged "even where a decision maker has assiduously followed all required procedures and has made no errors of reasoning".[160] Hammond J aligns his analysis with the ultra vires doctrine, whereby the role of the court is to police the bounds of decision-making within the statutory limits imposed by Parliament.[161] He identifies the legality principle as "the most important limb of judicial review".[162] Hammond J bemoans the absence of principles to guide when a court will intervene in substantive review cases, identifying *Wednesbury* as the "the only long-stop for challenging the decision itself, as opposed to what led to it".[163] To intervene, Hammond J suggests there must be more than a judicial "concern about the decision".[164] He suggests "the most obvious candidate is the concept of abuse of power, which lies at the very heart of administrative law".[165] A decisionmaker acting outside their lawful authority is identified as the majority of abuse of power occurrences.[166] Beyond that, Hammond J identified, non-exhaustively, two other recognised areas of abuse of power. One when human rights are at issue and "an otherwise lawful response must still be a proportionate one".[167] A second when a decision is grossly unfair.[168] Glazebrook J also identifies that a basis for more intensive review has been substantive unfairness, where the quality of reasons is scrutinised.[169] The ground was identified in *Thames Valley v NZFP Pulp and Paper Ltd*.[170]

Hammond J's three-fold list of decisionmakers acting outside their lawful authority, disproportionate infringements of human rights, and grossly unfair decisions is non-exhaustive. Knight suggests that Hammond J "seems to anticipate that substantive grounds would have many threads", which could also develop over time.[171] Several leading scholars "embrace the power of the courts to fashion… the principles of judicial review", and this is reflected in scholarship promoting new grounds, such as proportionality.[172]

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160 At [384].
161 Ruiping Ye "The Demise of Ultra Vires in New Zealand: To be? Not to be!" (2010) 8 NZJPIL 287 at 303.
162 *Lab Tests Auckland Ltd,* above n 156, at [363].
163 At [364] and [380].
164 At [386].
165 At [386].
166 At [386].
167 At [391].
168 At [391] referring to *Pharmac*, above n 23, at 66.
169 Susan Glazebrook "To the Lighthouse: Judicial Review and Immigration in New Zealand" (paper presented to the Supreme Court and Federal Court Judges' Conference, Hobart, 24–28 January 2009 at 37.
170 *Thames Valley*, above n 24, at 652
171 Knight, above n 143, at 106.
172 At 116 identifying Paul Craig, Michael Taggart, and Tom Hickman.

C Requirements for other tests

Two of the potential sources of substantive error that are identified by Hammond J are disproportionality and substantive unfairness. Inquiries into either of these potential errors require tests that are materially different to the *Hu* formula.

1 Disproportionality

Finding disproportionality entails impugning a substantive decision on the basis that it disproportionately favours public interests over an affected person's human rights, fundamental rights, or some other important interests. The proportionality approach takes rights as the starting point, requiring the justification of any limitations placed on that right, not simply balancing the right alongside other matters to be considered.[173] Elliot and Wilberg describe this as "constitutional methodology".[174] It aligns with the approach taken in Canada, where human rights are established in a constitutional statute in the Canadian Charter of Rights and Freedoms. The approach can be extended to fundamental common law rights, though there is not broad judicial acceptance beyond statutory rights.[175]

New Zealand courts have been cautious to apply proportionality approaches outside the context of statutory New Zealand Bill of Rights Act review. It has been applied to penalties in *Institute of Chartered Accountants of New Zealand v Bevan* as well as wider application in *Ye v Minister of Immigration* and *Lab Tests Auckland*.[176] But support has been far from universal with the Supreme Court rejecting the approach in *Zaoui v Attorney-General*.[177] Taggart suggested proportionality as a ground in and of itself in cases involving human rights.[178] For Craig, the principle of proportionality should be engaged in all cases of substantive review.[179]

In practice, assessing disproportionality involves addressing weight and balance between different factors, together with ensuring the limits placed on any rights are justified. Contextual factors govern the intensity of the inquiry with discretionary policy

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[173] Mark Elliott and Hanna Wilberg "Modern Extensions of Substantive Review: A survey of Themes in Taggart's Work and in the Wider Literature" ch 2 in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (1st ed, Hart Publishing, Oxford, 2015) at 21 and 29.

[174] At 20–21.

[175] At 22 and 26.

[176] *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA); *Ye,* above n 39; *Lab Tests Auckland,* above n 156.

[177] *Zaoui v Attorney-General* (No 2) [2005] NZSC 38, [2006] 1 NZLR 289 at 309 where a proportionality approach was rejected when assessing factors under art 33.2 of the United Nations Convention Relating to the Status of Refugees.

[178] Knight, above n 143, at 117.

[179] At 121.

choices lying at one end of the intensity spectrum and fundamental human rights at the other.[180] A decisionmaker charged with a discretionary policy choice will be afforded a high level of deference and their decision only be impugned if it can be shown to be manifestly disproportionate.[181] When fundamental rights are an issue, then that requires "a more searching inquiry" into whether the limitation on the rights is reasonable and necessary.[182] The nature of this proportionality analysis has a wholly different character compared to the *Hu* test that focusses on errors of reasoning or on a search for supporting evidence. It follows that *Hu* will not be an appropriate test when the source of unreasonableness is disproportionality.

2 Substantive unfairness

Another situation requiring an inquiry of a completely different character to *Hu* is when an unreasonable decision outcome may have been caused by substantive unfairness.

Lord Cooke identified substantive fairness as a legitimate ground of review in *Thames Valley v NZFP Pulp & Paper Ltd*, with the ground "shading into but not identical with unreasonableness".[183] A legitimate expectation may impose both procedural and substantive obligations of fairness, with the "quality of an administrative decision as well as the procedure … open to a degree of review".[184] Lord Cooke drew a connection between unfairness and the innominate ground of review. He identified that in some circumstances although "surviving challenge if viewed separately" the procedure and substantive decision "were in combination so questionable" that might raise the possibility "something had gone wrong of a nature and degree that required the intervention of the Court".[185] Joseph suggests "substantive unfairness allows courts to chronical the cumulative effect of errors in the decision-making".[186] The modern English doctrine of substantive unfairness, based on *ex parte Coughlan*, centres on the legitimate expectation of a person in reliance on some representation that they will either receive or continue to receive a benefit.[187] The focus shifts from assessing a decision in terms of irrationality to a subjective determination of whether there has been

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[180] Paul Craig "Proportionality, Rationality and Review" [2010] NZ L Rev 265 at 268.
[181] At 269.
[182] At 269–270.
[183] *Thames Valley*, above n 24, at 652:22.
[184] At 652:43.
[185] At 652:51 and 653:2 citing Lord Dondaldson in *R v Panel on Takeover and Mergers, ex parte Guinness plc*; Knight, above n 146, at 157.
[186] Joseph, above n 13, at 866.
[187] Cameron Stewart "The doctrine of substantive unfairness and the review of substantive legitimate expectations" in Matthew Groves and H P Lee *Australian Administrative Law, Fundamentals, Principles and Doctrines* (1st ed, Cambridge University Press, Melbourne, 2007) at 282 and 297; *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, [2000] 3 All ER 850.

an abuse of power because the decision arrived at is unfair based on an assessment of the balance of individual and public interests.[188]

It is possible that the substantive unfairness ground in New Zealand has been overtaken by the development of variable intensity review.[189] Knight describes a standard of "simple reasonableness".[190] Lying within this category are grounds based on errors of reasoning or analysis, including substantive unfairness as well as various approaches that implicitly involve "assessment of relative weight".[191] The methods entail "broad, unstructured assessment of a public body's action against general standards of (substantive) propriety, fairness, or justice".[192]

Impugning a decision as unreasonable because it appears unfair will not necessarily involve pointing to an illogicality or a decision unsupportable on the facts. The evaluation will require a court to assess factors such as cumulative errors, abuse of power, legitimate expectations, and the balance of interests. The nature of this type of inquiry into substantive unfairness is substantially different to the test provided by *Hu*.

D Not a unified unreasonableness standard

The scope of the *Hu* test is limited to the circumstances where an error of law can be inferred to have led to the unreasonable or irrational outcome. This section has shown that a broad range of errors can lead to unreasonableness. The *Hu* test will not be appropriate in situations where unreasonableness has been caused by capriciousness, disproportionality, unfairness, or procedural errors. These other types of errors require different approaches. The nature of these other inquiries may be quite unique in character, with any test for potential error leading to unreasonableness needing to be aligned to the likely source of error. This has two implications for the courts. The first is a requirement for analytical rigour in determining the appropriate test to apply according to the facts of each case. The second implication is that the courts will need to continue to develop other tests for unreasonableness to complement *Hu* in order to cover circumstances that differ from an error of law.

The following section turns back to situations where the *Hu* test has been applied, revealing issues arising when the context calls for a heightened intensity of review.

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188 Stewart at 297.
189 Joseph, above n 13, at 901.
190 Knight, above n 146, at 150.
191 At 155.
192 At 157.

VII Intensity of review

The final issue this essay examines is how well *Hu* is able to support requirements for variable intensity review. A shortcoming of the *Hu* judgement was Palmer J's lack of engagement with the concept of variable intensity. This represents a lost opportunity to provide guidance on how to deploy the new method in a way that supports variable intensity approaches.[193] It also leaves open the more fundamental question of how a *Hu* type analysis allows for requirements of different levels of scrutiny when the standard for inferring an error appears to be strict and relatively inflexible.

A Rejecting Hu because of deference

Several judges have rejected the *Hu* test in situations that have called for a high degree of deference, instead favouring the *Wednesbury* standard. In most of these cases the court has not fully engaged with the question of whether *Hu* might be able to be applied in a way that is consistent with a deferential approach. There has simply been an acceptance of the appropriateness of *Wednesbury* to the case at hand or it has been a situation where the court has simply applied the law as set out by the Court of Appeal. Rejection of *Hu* may also reflect a preference for a standard of *Wednesbury* unreasonableness because of "democratic principles" or "expert specialisation" of the decision-making body.[194] Council rating decisions such as *Woolworths* are the classic example of the former. The *Unison Networks* case provides an example of the latter.[195]

The democratic principle as a reason for rejecting *Hu* was apparent in *CP Group Ltd v Auckland Council* where Moore J rejected an invitation to apply the new test.[196] For Moore J, the context of political decision-making in rating decisions required a "higher threshold".[197]

The statutory context also led to a deferential standard being adopted in several immigration decisions. In *Devi v Minister of Immigration* Courtney J noted *Hu* but did not express a view on it.[198] She applied *Wednesbury* noting that the approach has been "consistently applied in New Zealand".[199] Likewise, in *AH v Immigration and Protection Tribunal* Muir J noted the body of authority supported the *Wednesbury* standard.[200] In *Singh v Associate Minister for Immigration and Border Protection* Muir

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193 Rodriguez Ferrere, above n 70, at 69.
194 Glazebrook, above n 169, at 36.
195 At 36.
196 *CP Group Ltd,* above n 80, at [147]–[149].
197 At [164].
198 *Devi v Minister of Immigration* [2017] NZHC 728 at [17].
199 At [15].
200 *AH v Immigration and Protection Tribunal* [2017] NZHC 1880 at [46].

J determined the standard for reviewing an absolute discretion decision is *Wednesbury*.[201]

Recognition of the expert specialisation of a tribunal is evident in *Bosson v Racing Integrity Unit Ltd*. In that case Walker J rejected *Hu*, instead adopting a form of the *Wednesbury* standard that emphasised giving weight to the competence of specialist sporting bodies charged with the responsibility of making disciplinary decisions.[202]

The adoption of the *Wednesbury* standard in these cases could be argued to reflect various requirements for deference. However, the rejection of *Hu* may simply reflect stare decisis rather than indicating any rationalisation by the judges that the test is unsuitable because it reflects a lower standard. Where deference is required, there seems no reason why *Hu* might could not be capable of being substituted for the traditional *Wednesbury/Woolworths* formula, provided the factual matrix indicates that an error of law analysis is appropriate in the circumstances of the given case.

B Human rights

Several judges have seen *Hu* as an inappropriate test in cases where more intense review is called for because human rights or important interests arise.

Hu was rejected in favour of a contextual approach in *Kim v Minister of Justice.* This case involved explicit rejection of not only the *Hu* test, but also rejection of other categorical methods. Formalistic approaches were seen as inconsistent with the open-ended approach required in situations involving human rights. A fixed standard did not provide Mallon J with a sufficient framework to calibrate intensity of review. Given human rights issues arising in Mr Kim's extradition, Mallon J considered the case required heightened scrutiny, accepting that the test for reasonableness would be whether the decision made "was open to a reasonable decisionmaker".[203] Mallon J's contextual approach involved "step[ping] back" and, after being satisfied a proper process had been followed, assessing whether "a reasonable decisionmaker would not have made this decision". That assessment did not require "set specific criteria".[204]

Zhang v Minister of Immigration is another heightened scrutiny case. *Hu* was invoked in name but not in substance. Applying *Hu,* but without formal adherence to the strictness of the test, illustrates problems that arise when applying the error of law analysis while heightening the intensity of review. In *Zhang,* Gwyn J reviewed a

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[201] *Singh,* above n 82, at [38].
[202] *Bosson,* above n 81, at [39] citing Eichelbaum CJ in *Le Roux,* above n 81.
[203] *Kim,* above n 79, at [18].
[204] At [20].

decision of the Minister of Immigration under s 190(5) of the Immigration Act to decline a residence visa. [205] The application was an exception to Immigration Instructions as Ms Zhang's husband was deemed an ineligible sponsor, having previously sponsored the applications of two former partners.[206] The couple had a New Zealand born child and Ms Zhang was pregnant with their second child.[207] Gwyn J's assessment of the law began with assessing the degree of scrutiny the application required. She acknowledged Wild J's statement in *Wolf* addressing the importance of context.[208] The contextual factors that Woodhouse J had identified in *Matua v Minister of Immigration* required a "rigorous appraisal". [209] The Court of Appeal in the extradition case of *Kim v Minister of Justice* determined "heightened scrutiny" was needed in a case involving fundamental human rights.[210] Gwyn J noted that heightened scrutiny could be seen as inconsistent with *Wednesbury*, which the Court of Appeal had indicated as the approach required for immigration cases.[211] Instead, Gwyn J adopted Palmer J's formulation in *Hu*.[212] She noted the formulation provided "operational content" to understand unreasonableness, but stated it did not lower the standard.[213]

Section 190(5) is not framed as an absolute discretion. However, s 190(6) states the Minister is not required to give reasons for their decision, nor did the Minister give reasons in Ms Zhang's case.[214] The Minister's affidavit directed the Court to the tribunal decision. It was from the tribunal's report that the Court had to infer the basis of the Ministers decision.[215] The report revealed special circumstances existed with the impact on Ms Zhang's children and, apart from the technical ineligibility of her sponsor, she would have qualified for a visa.[216] Gwyn J inferred that the Minister did not invoke any wider policy considerations.[217] In the absence of any wider policy reasons, the sole fact against the grant of a visa was Ms Zhang's sponsor's ineligibility. Applying the *Hu* formulation Gwyn J addressed the question "was the … Minister's decision … so unsupportable or untenable that proper application of the law requires a different answer?".[218] She answered in the affirmative, finding the decision was unreasonable.[219]

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[205] *Zhang,* above n 74, at [1]–[3].
[206] At [4]–[9].
[207] At [4] and [12].
[208] At [82].
[209] At [83] citing *Matua v Minister of Immigration* [2018] NZHC 2078.
[210] At [84] citing *Kim v Minister of Justice* [2019] NZCA 209.
[211] At [85].
[212] At [86]–[87].
[213] At [87].
[214] At [15].
[215] At [90]–[92].
[216] At [89]–[91].
[217] At [92].
[218] At [88].
[219] At [94].

Several factors in the reasoning indicate looseness in the way the *Hu* standard was applied. Counsel for the Crown submitted that "more than one outcome [was] reasonably available", but that assertion was not directly refuted in the judges reasoning.[220] Gwyn J did consider that the reason for the sponsor's ineligibility was "technical rather than substantive in nature". She did not state that the absence of sponsorship was irrelevant, which perhaps speaks to a lesser weight the ineligibility should have carried rather than whether it could have been relied on at all by the Minister.[221]

Elsewhere the reasoning blurs the error of law test from *Hu* with an additional justification requirement, identifying that a heightened scrutiny standard "will require the court to: 'ensure the decision has been reached on sufficient evidence and has been fully justified'".[222] Divergent language carries through into the conclusion that application of the Immigration Policy resulted in "consequences for the applicant and her family which are harsh, oppressive and unjust". The concluding reasoning does not make any reference to finding an error of law. Instead, what seems to be apparent are a focus on weight and justification. The approach seems to reflect more of a contextual character rather than one that is doctrinally anchored in the *Hu* formula.

Notably the outcome of the case did not solely hinge on the unreasonableness ground. The Minister failed to consider New Zealand's obligations under the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child.[223] This amounted to a failure to consider a mandatory relevant consideration.[224] The substantive impacts on the family's children that underly those treaty obligations go more directly to why the decision was unreasonable due to a failure to consider relevant factors.

Knight criticises the type of contextual review used by Mallon J in *Kim* and more covertly by Gwyn J in *Zhang* because the style "emphasises an unstructured, normative and discretionary approach".[225] That contrasts with Joseph, who views categorical approaches, such as reflected by *Hu*, as a "pedagogical morass' of rules".[226] Joseph's views are symbolic of the approach to reasonableness review seen in the Supreme Court, which could rebuff the categorical formality of *Hu*.

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[220] At [79].
[221] At [91].
[222] At [84] citing *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [7].
[223] At [71].
[224] At [94].
[225] Dean R Knight "Contextual Review: The Instinctive Impulse and Unstructured Normativism in Judicial Review of Administrative Action" (2020) 40 LS 1 at 3.
[226] At 3 citing Philip Joseph "Exploratory questions in administrative law" (2012) 25(1) NZULR 75.

C Varying intensity inside the unreasonableness standard

Palmer J has seen *Hu* as being capable of being applied alongside a variable intensity approach where increased scrutiny is called for. His cases, described below, reveal difficulties with how an externally applied approach to intensity can affect the strict error of law analysis. In particular, an externally oriented approach introduces uncertainty into the analysis and may be doctrinally inconsistent with the *Hu* test.

In *Chamberlain v Attorney General* Palmer J addressed intensity of review and intimated that calibrating intensity is a question that is external to the *Hu* test and that such an approach can be applied alongside that test. He identified "the standard of review for unreasonableness may be provided by legislation and may vary with context".[227] In *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* he similarly applied *Hu* while applying a heightened intensity of review to a decision involving climate change.[228] *Sweeney* also involved applying increased scrutiny, which Palmer J identified as required because of the employment implications of the prison manager's decision on the applicant.[229]

If the *Hu* test poses a strict question of establishing whether there is a logical connection between facts and findings, then it is unclear what the increased intensity requires. It may require a decisionmaker to provide detailed and clear reasons. Alternatively, it may look towards justification for their decision. To use *Sweeney* as an example, it was open to the prison manager to reject explanations given by Mr Sweeney for his visit to the self-care unit. Palmer J looked past the bare availability of that conclusion and appears to have sought justifiable reasons for why Mr Sweeney's explanation was rejected. Moving towards requiring reasons, or justification, or coming to an independent view on the correct outcome blurs the boundary of the error of law doctrine. Having an unstated and unclear externally applied intensity analysis seems to be inconsistent with the hard-edged *Hu* formula.

The contrary argument is that while a traditional unreasonableness review standard is narrow, decisions of the courts "do not necessarily reflect the severity of the test".[230] Rather than seeing the traditional unreasonableness standard as monolithic and rarely awakened, Sir John Laws describes it as relevant to "everyday cases" and able to vary

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[227] *Chamberlain (By His Litigation Guardian Carrigan) v Attorney General* [2017] NZHC 1821, [2017] NZAR 1271 at [66] citing *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 and *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332.

[228] *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228, [2021] NZRMA 22, [2021] 3 NZLR 280 at [50]–[51].

[229] *Sweeney*, above n 126127, at [61].

[230] Glazebrook, above n 169, at 33.

according to the subject matter. Meeting a strict unreasonableness test does not necessitate that a decision-maker has lost their senses, but simply requires evidence that they have "failed to take proper account of the material before [them]".[231] The court's focus situates on whether a decision falls within "a range of responses open to a reasonable decisionmaker".[232]

D Lessons from Dunsmuir v New Brunswick

Palmer J's approach to varying the intensity of review bears some similarity to the approach adopted in Canada to assessing unreasonableness. The Supreme Court of Canada in *Dunsmuir v New Brunswick* established an external approach to intensity superimposed on a single standard of unreasonableness.[233] *Dunsmuir* reduced the number of substantive review standards, eliminating patent unreasonableness and leaving unreasonableness at one end and correctness review at the other. A categorical "standard of review analysis" was created to select between the two standards.[234] Once unreasonableness was selected then the question remained regarding how to address requirements for variable intensity within the unreasonableness standard.

David Mullan suggests *Dunsmuir* simply "postpone[d] the complexity" to "where, on a spectrum of reasonableness, the reviewing court should locate itself".[235] The consequence of introducing contextual factors means the balancing exercise needs to determine the level of intensity becomes "nuanced and variegated", introducing uncertainty.[236] Paul Daly observes that the intensity question, requires the selection of an "appropriate degree of deference", which means complexity is shifted to the unreasonableness analysis.[237] Gerald Heckman identifies that unreasonableness analysis retains complexity when variable intensity needs to be superimposed, with the focus falling onto determining the acceptable range of outcomes based on contextual factors.[238] This creates an "unstructured (and sometimes instinctive) overall judgement about whether to intervene according to the circumstances of the case".[239] Addressing

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231 Sir John Laws, above n 117, at 68.
232 At 69 citing *Smith & Ors v Ministry of Defence* [1996] QB 517.
233 *Dunsmuir,* above n 100.
234 David Mullan "*Dunsmuir v New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 CJALP 117 at 120.
235 At 125.
236 At 134–135.
237 Paul Daly "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62(2) McGill LJ 527 at 552 citing Gerald Heckman.
238 Gerald Heckman "Substantive Review in Appellate Courts since *Dunsmuir*" (2009) 47 Osgoode Hall LJ 751 at 784.
239 Edward Clark "Reasonably Unified: The Hidden Convergence of Standards of Review in the Wake of Baker" (2018) 31(1) CJALP 1 at 16 citing Dean Knight "Vigilance and Restraint in the Common Law of Judicial Review: Scope, Grounds, Intensity, Context" (PhD Thesis, London School of Economics, 2014).

the consequences of such an approach, Mullan suggests that if contextual factors govern intensity then that provides opportunities for "more intrusive scrutiny of administrative decision-making".[240] This is something he describes as "disguised correctness review".[241] When analysis is untethered from a doctrinal framework that can create inconsistency and undermine legitimacy.[242]

The Canadian approach changed in 2019 following *Minister of Citizenship and Immigration v Vavilov*.[243] The Supreme Court established a presumption that the reasonableness applies, except in cases of statutory review, and narrowed the categories for selecting correctness.[244] Within the reasonableness standard, a methodology was established starting with a court examining the reasons for a decision.[245] However, contextualism remains a dominant factor as "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review".[246]

Similar criticisms of a lack of structure leading to uncertainty and variability have been levelled at contextual approaches in New Zealand.[247] John Hopkins laments the New Zealand courts inconsistent approaches to variable intensity as "expos[ing] a lack of structure and coherence".[248] Michael Taggart and Dean Knight similarly argue for more structure to govern how judicial discretion should be applied to vary intensity of review according to a coherent framework.[249] However, it is a reality that contextualism is accepted by leading judges and has some scholarly support.[250] A sliding scale of intensity of review is already present within the ground of unreasonableness.[251] Circumstances allowing more intensive review include where human rights are in issue and where the interests of individuals are affected by decisions as opposed to policy decisions where a decision might impact more broadly on the wider community as a

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[240] David Mullan "Reasonableness Review Post-*Vavilov*: An 'Encomium for Correctness' or Deference as Usual?" (2021) 23 Can Lab & Emp LJ 189 at 190.
[241] At 192.
[242] Matthew Lewans "Deference and Reasonableness Since *Dunsmuir*" (2012) 38(1) Queen's LJ 59 at 98.
[243] *Minister of Citizenship and Immigration v Vavilov* [2019] 4 SCR 653.
[244] Paul Daly "The *Vavilov* Framework and the Future of Canadian Administrative Law" (January 15, 2020) Ottawa Faculty of Law Working Paper 2020-09 <www.ssrn.com/abstract=3519681> at 5.
[245] At 13–14; *Vavilov*, above n 243, at [81].
[246] *Vavilov*, above n 243, at [90].
[247] W John Hopkins "The Dreadful Truth and Transparent Fictions: Deference in New Zealand Administrative Law" in Guobin Zhu (ed) *Deference to the Administration in Judicial Review* Ius Comparatum - Global Studies in Comparative Law vol 39 (Springer, Switzerland, 2019) at 360.
[248] At 356.
[249] At 357; Knight, above n 143, at 234–235.
[250] Dean R Knight "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" [2016] NZ L Rev 63 at 83–85; Elias, above n 45, at 65.
[251] Knight, above n 143, at 165.

whole.[252] Uncalibrated approaches provide flexibility and bring the curial focus onto providing justification and reasons, rather than on to adhering to rules.[253] The downside is the approach introduces uncertainty, running counter to qualities such as clarity and uncertainty.[254]

When it comes to *Hu*, the High Court has shown a range of approaches across the spectrum of review. There has, in the main, been reluctance to turn away from applying the traditional unreasonableness standard in a variety of situations calling for a high degree of deference. *Hu* has also been rejected, either explicitly or in practice, in favour of contextual approaches in cases raising human rights or important interests that have demanded higher intensity. Palmer J on the other hand has applied variable intensity approaches alongside *Hu*, effectively using the test with an external variable intensity standard. That approach does however raise doctrinal questions associated with potential straining of the error of law analysis. The approach also introduces uncertainty. Unsurprisingly, the eclectic approach to *Hu* being variously applied or rejected mirrors the diversity of the High Court's approach to adopting different standards of unreasonableness more generally depending on context.

VIII Conclusion

This paper has assessed Palmer J's 2017 test of unreasonableness in *Hu v Immigration and Protection Tribunal* in light of recent case law and in light of the principles underlying doctrine of unreasonableness that it seeks to support.

The essay has characterised the *Hu* test and examined whether the approach is legitimate. The *Hu* test examines whether there is a logical connection between the evidence in front of a decisionmaker and the conclusion they reached. That approach is based on inferring the presence of an error of law. It can be argued that the test can be classified as falling under either an illegality head of review or under unreasonableness. This essay concludes that there appears to be no doctrinal difficulty associated with applying the test under the unreasonableness head, though it is clearly confined only to circumstances where a detectable error of law can be properly inferred. Such a source of illegality was recognised in the original English unreasonableness cases. Accordingly, the essay has shown that *Hu* is consistent with the original doctrine.

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[252] For example: *Lovelock*, above n 7, at 403 per Thomas J and *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [50] per Hammond J).
[253] Knight, above n 143, at 183.
[254] At 184.

What is less consistent with the original doctrine is applying *Hu* in a way that might infringe on the process-merits review boundary. The essay has shown that the way *Hu* has been applied has occasionally challenged that constitutional boundary. Courts risk substituting their own view for that of the original decisionmaker if *Hu* is not strictly applied. The High Court's supervisory role addresses decision-making flaws, not merits review. Intervention is justified under either the ultra vires or the common law constitutionalism doctrines when an illegality can be inferred according to the strict *Edwards v Bairstow* standard. However, *Hu* has been applied in a way that suggests the process-merits review boundary may have shifted. Giving prominence to fundamental human rights and important interests may provide the courts with a normative justification for these developments. However, where lesser rights are addressed, a more general acceptance of merits review needs to be resisted as that would be inconsistent with constitutional principles.

This essay also examined the scope of the *Hu* test and examined its limits. The scope of the *Hu* test is narrow. It only covers situations where there is an illegality leading to an unreasonable decision or action. An error of law is only one of many potential sources of unreasonableness. This means *Hu* is not a universal test for all potential sources of error. An error of law analysis will be unsuitable for many situations. To make an appropriate inquiry, the source of the potential error must be correctly identified, otherwise the wrong type of analysis will be deployed. Errors such as disproportionality, substantive unfairness and other procedural errors require tests of a different character. This has two implications. The first being a requirement for analytical rigour in determining the appropriate test in the circumstances. The second being that tests for unreasonableness must continue to be developed to cover circumstances beyond those caused by an error of law. Deploying *Hu* to test for unreasonableness will not always be appropriate.

Finally, this essay examined the application of *Hu* across the spectrum of intensity of review. Some difficulties clearly arise. *Hu* has been rejected in favour of the traditional unreasonableness standard in situations calling for deference. In some other cases involving human rights *Hu* has also been rejected, with judges favouring a more flexible contextual approach. Palmer J himself has applied *Hu* together with a variable intensity approach that lies external to the *Hu* standard. Applying more intensive review raises questions of doctrinal consistency with the strict *Hu* test. For instance, if a court seeks justification for a decision that was open to the original decision-maker on the facts, then that approach raises questions of whether making an error of law inference becomes doctrinally dubious. Canada's experience with a single unreasonableness standard also shows having an external approach to variable intensity introduces problems with uncertainty, inconsistency, and raises questions of legitimacy.

The conclusion of this essay is that courts need to take care applying *Hu*. The approach does not represent a universal test for unreasonableness. It is a useful and simple test for unreasonableness caused by an error of law. But *Hu* is not a method that can be universally deployed to address causes of unreasonableness such as unfairness, disproportionality, or capriciousness. There needs to be further development of unreasonableness standards to cover these other types of situations. There is also a need for appellate guidance on how to apply *Hu* across the spectrum of review in a consistent and predicable way. Unstructured contextual approaches applied alongside the *Hu* test present a problem. That type of flexible approach undermines the strict standard required for indirectly inferring the presence of an error of law. Particular care is needed to avoid inferring an error or law too readily, or there is a risk of crossing the process-merits review boundary.

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The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 13,362 words.

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