THE STATUTORY IMPLICATION OF REASONABLENESS AND THE SCOPE OF *WEDNESBURY* UNREASONABLENESS

Paper presented by Justice Chris Maxwell to the ANU Public Law Weekend, Canberra, 28 October 2016

Introduction

Unsurprisingly, the decision of the High Court in *Minister for Immigration and Citizenship v Li*[1] has provoked much commentary. And it continues unabated. Since I delivered a version of this paper in February (to a joint Supreme Court of Victoria/Melbourne Law School seminar), I have come across at least three further articles on the subject.

As I hope to illustrate, this topic raises questions of doctrinal significance, relating both to judicial review of administrative discretion and to appellate review of judicial discretion.

What I will seek to do, in the light of the decision in *Li's case* and my experience over more than a decade of deciding sentence appeals, is to demonstrate the convergence of those two categories. In the process, I will argue that our focus as public lawyers should be on simplification, and on the identification of unifying principles. The need for certainty in the law demands nothing less.

In his illuminating commentary on *Li*, Associate Professor Leighton MacDonald of the ANU pointed out that this was the first time in many years that the High Court had invalidated an administrative decision on account of its unreasonableness.[2] The decision in question was a procedural one, the Migration Review Tribunal having refused to adjourn its hearing to enable the visa applicant to obtain further material.)

Associate Professor MacDonald commented:

> *Li's case* thus provides administrative lawyers with a sighting of the 'rare bird' of unreasonableness in solo flight. More importantly, the plurality in *Li* did not merely apply the unreasonableness ground of review; they reformulated it.[3]

I will return to the question of reformulation later. One purpose of this paper is to suggest that, properly understood, the unreasonableness ground is neither as rare a bird as it has been conventionally understood to be, nor as broad as the plurality in *Li* might be taken to suggest.

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1 (2013) 249 CLR 332 ("*Li*").

2 The last occasion was said to have been *Council of the City of Parramatta v Pestell* (1972) 128 CLR 305.

3 Leighton MacDonald, "Rethinking Unreasonableness Review" (2014) 25 Public Law Review 117, 117.

The six propositions which I will seek to make good are as follows:

1. *Wednesbury*[4] unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably.

2. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorises, that is, outside the "range" within which reasonable minds may differ.

3. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision-maker" could have made it.

4. *Wednesbury* unreasonableness is encompassed within the "residuary" category of error in *House v The King*.[5] It amounts to a conclusion that there was an error in the making of the decision, even though no specific error can be identified.

5. There is no difference in principle between appellate review of judicial discretion and judicial review of administrative discretion.

6. In an appeal from an exercise of the sentencing discretion, the conclusion that a sentence is "manifestly excessive" (or "manifestly inadequate") is a conclusion that the sentencing decision was both–

   (a) unreasonable in the *Wednesbury* sense; and

   (b) unreasonable or manifestly unjust in the *House* sense.

The statutory implication of reasonableness

All three judgments in *Li* cite with approval the following statement by Brennan CJ in *Kruger v The Commonwealth:*

> [W]hen a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.[6]

As Gageler J pointed out, the first of the two authorities which Brennan CJ cited for this proposition was the *Wednesbury* decision itself.[7] Earlier, in *Attorney-General (NSW) v Quin*, Brennan J had explained that the ground of *Wednesbury* unreasonableness rested on the implication of reasonableness:

> Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the

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4 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*").

5 (1936) 55 CLR 499.

6 (1997) 190 CLR 1, 36. See *Li* (2013) 249 CLR 332, 351 [29], 362 [63], 370 [88].

7 The other was *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 ("*Browning*").

> power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action.[8]

In *Re Refugee Review Tribunal; Ex parte Aala*,[9] Gaudron and Gummow JJ affirmed the connection between *Wednesbury* unreasonableness and the statutory implication of reasonableness. The previous year, in *Abebe v Commonwealth*, Gaudron J had expressed the view (obiter) that

> [If] a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should … be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably, at least in a way that no reasonable person could exercise it.[10]

According to Gageler J in *Li*, it is this link with the statutory implication of reasonableness which "explains the nature and scope of *Wednesbury* unreasonableness in Australia". Moreover, his Honour said, it is an explanation "that is well understood by legislatures and Courts alike and that has stood the test of time."[11]

I must confess that this analysis commended itself to me immediately, not only for its logical and analytical force but because it vindicated a view I had expressed — in a minority judgment — in *Mastwyk v Director of Public Prosecutions*![12]

In that case, the question was whether the decision of the police officer to require the taking of a breath test was unreasonable (such that the driver's refusal to take the test did not constitute an offence). I expressed the view that, given the implied assumption of reasonableness in the exercise of the power, it was for the person challenging the decision to show that it was unreasonable in the *Wednesbury* sense. My colleagues in the majority concluded that — in the particular statutory context — an affirmative requirement of reasonableness should be implied and that, as a result, the onus was on the prosecution to satisfy that requirement.[13]

All of the judgments in *Li* affirm the cardinal notion that, within the parameters defined by the statute (as to relevant and irrelevant considerations and as to the purpose for which the power is conferred), there is "an area of decisional freedom within [which] reasonable minds may reach different conclusions about the correct or preferable decision".[14]

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8 (1990) 170 CLR 1, 36 ("*Quin*").

9 (2000) 204 CLR 82, 100–101 [40].

10 (1999) 197 CLR 510, 554 [116] (emphasis added). This statement was cited with approval by Crennan and Bell JJ in *Minister v SZMDS* (2010) 240 CLR 611, 645 [123].

11 *Li* (2013) 249 CLR 332, 370 [89].

12 (2010) 27 VR 92, 97 [19]–[22].

13 Ibid [70]–[75].

14 *Li* (2013) 249 CLR 332, 350 [28], 363 [66], 375 [105]. See, for example, *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473; *Browning* (1947) 74 CLR 492, 504–5; *Quin* (1990) 170 CLR 1, 35–36. And see now *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, 171 [62] ("*Eden*").

Any decision made within that area of decisional freedom will satisfy the statutory implication of reasonableness.

The question for consideration is how the limits of that area are to be defined. First and last, the question is one of construction of the statute conferring the power. As the plurality in *Li* said:

> The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.[15]

How is "unreasonableness" to be defined?

In *Wednesbury* itself, the test of invalidity was expressed to be whether the decision was "so unreasonable that no reasonable authority could ever have come to it".[16]

In *Li*, Gageler J said that judicial determination of *Wednesbury* unreasonableness was constrained by two principal considerations:

> One is the stringency of the test that a purported exercise of power is so unreasonable that no reasonable repository of the power could have so exercised the power. The other is the practical difficulty of a court being satisfied that the test is met where the repository is an administrator and the exercise of the power is legitimately informed by considerations of policy.[17]

I pause to point out that, given the use of words of emphasis ("so unreasonable that …"), it is hardly surprising that the test has been viewed as applicable only to extreme cases. I will attempt to show the error in that view.

The approach of the plurality in *Li* was rather different. In their Honours' view:

> The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it …[18]

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15 *Li* (2013) 249 CLR 332, 364 [67]; *Eden* 171 [63].
16 *Wednesbury* [1948] 1 KB 223, 230.
17 *Li* (2013) 249 CLR 332, 376 [108].
18 Ibid [68].

Instead, their Honours said, the judgment of Lord Greene MR in *Wednesbury*

> may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.[19]

This approach was said to be "recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in Australia by *House v The King*, before *Wednesbury* was decided".[20]

Rather more radical, in my view, was the following statement in the plurality judgment:

> *The more specific errors in decision-making, to which the courts often refer, may also be seen as encompassed by unreasonableness.* This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that 'all these things run into one another'. Further, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[21] Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is 'manifestly unreasonable'. Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, *the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense*.[22]

In a 2015 paper, the former Commonwealth Solicitor-General, Justin Gleeson SC, suggested that this part of the plurality judgment had very wide implications indeed. He said:

> Legal unreasonableness now comprises any or all of:
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> 1. specific errors of relevancy or purpose;
> 2. reasoning illogically or irrationally;
> 3. reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or

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19 Ibid.
20 Ibid.
21 (1986) 162 CLR 24 at 41 ("*Peko-Wallsend*").
22 *Li* (2013) 249 CLR 332, 365–6 [72] (emphasis added).

4. giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[23]

Ultimately, however, the plurality's conclusion — that the decision under review was unreasonable — was more narrowly based. After noting what Mason J in *Peko-Wallsend*[24] described as "the close analogy between judicial review of administrative action and appellate review of a judicial discretion", their Honours returned to the subject of inferred unreasonableness, in these terms:

> As to the inferences that may be drawn by an appellate court, it was said in *House v The King*[25] that an appellate court may infer that in some way there has been a failure properly to exercise the discretion 'if upon the facts [the result] is unreasonable or plainly unjust'. The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. *Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification*.[26]

Importantly for present purposes, the plurality here equated *Wednesbury* unreasonableness — as a ground of review of *administrative* decisions — with the "unreasonably or plainly unjust" category of error (the "residual category") in *House*, which is concerned with appellate review of *judicial* discretion. And it was this last category of error — inferred error — which in *Li* led to the Tribunal's decision being set aside.[27]

The position post-*Li* was, in my respectful view, accurately summarised by the Full Federal Court in *Minister for Immigration and Border Protection v Singh*.[28] The Court (Allsop CJ, Robertson and Mortimer JJ) said that the judgments in *Li* identify "two different contexts" in which the concept of unreasonableness is used:

> Legal unreasonableness can be a conclusion reached by a supervising court after the identification of an underlying jurisdictional error in the decision-making process. However, legal unreasonableness can also be outcome focused, without necessarily identifying another underlying jurisdictional error. The latter occurs in what French CJ calls 'an area of decisional freedom'. It has the character of a choice that is arbitrary, capricious or without 'common sense'. … The plurality in *Li* described

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23 Justin Gleeson, "Taking stock after *Li*", in Debbie Mortimer (ed) *Administrative Justice and its Availability* (Federation Press, 2015) 37.

24 Ibid 41–42.

25 (1936) 55 CLR 499, 505.

26 Ibid 367 [76] (emphasis added).

27 (2013) 249 CLR 332, 369 [85].

28 (2014) 231 FCR 437.

> this as an inference to be drawn because the court cannot identify how the decision was arrived at. In those circumstances, the exercise of power is seen by the supervising court as lacking 'an evident and intelligible justification'.[29]

It seems clear enough that the Court in *Li* did not intend that the categories of jurisdictional error be subsumed under an umbrella ground of unreasonableness. It must be assumed that unreasonableness in the second, outcome-focused, sense will continue to be a discrete and distinctive ground of judicial review.

Restating the test: "not reasonably open"

The *Wednesbury* test ("no reasonable decision-maker") has been described as the "lunatic" standard[30] or as limited to "what is in effect an irrational, if not bizarre decision".[31]

In my view, these epithets are based on — and have tended to perpetuate — a misapprehension of what is meant by "unreasonableness" in this context of discretionary powers. My contention is that to describe a decision as being one to which *no reasonable person* in the position of the decision-maker could have come is no different from saying that the decision was *not reasonably open* to the decision-maker.

The point may be illustrated by the developing jurisprudence of the Victorian Court of Appeal on what is known as the "manifest excess" ground of appeal against sentence. Traditionally, the label "manifestly excessive" has been applied to a sentence which falls outside the permissible sentencing range for the offender and the offence.[32]

As the majority in *R v MacNeil-Brown*[33] pointed out, the notion of "range" is a familiar one in the field of appeals from the exercise of judicial discretion.[34] It means, quite simply, the area of decisional freedom referred to earlier, within which reasonable minds may differ as to the correct conclusion.

My early experience of the "manifest excess" ground of appeal was that it was being used as a pretext for rearguing the plea in mitigation on its merits. So, in order to emphasise the stringency of this ground of appeal, I said in *The Queen v Abbott*:[35]

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29 Ibid [4]; see also *Minister for Immigration and Border Protection v Stretton* [2016] 237 FCR 1 [6]–[7] ("*Stretton*"), and *Eden* 171 [60].

30 Mark Aronson, "The Growth of Substantive Review: The Changes, their Causes and their Consequences" in John Bell, Mark Elliott, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 9.

31 (2013) 249 CLR 332, 364 [68].

32 See, eg, *AB v The Queen* (1999) 198 CLR 111, 160 [130]; *Hili v The Queen* (2010) 242 CLR 520, 538–9 [59]–[60] ('*Hili*'); *Kentwell v The Queen* (2014) 252 CLR 601, 615 [35].

33 (2008) 20 VR 677.

34 Ibid 679–80 [7]–[8]. See, for example, *Norbis v Norbis* (1986) 161 CLR 513, 518, 540.

35 (2007) 170 A Crim R 306, 309 [14] (emphasis added).

> The 'range' for this purpose is the range within which it would have been reasonable for a sentencing judge to sentence this appellant for this offence in these circumstances. *It follows that the ground of manifest excess will only succeed if it can be shown that no reasonable sentencing judge could have imposed this sentence on this offender for this offence in these circumstances.* That is a stringent requirement, difficult to satisfy. It reflects the oft-repeated policy that sentencing is for judges and magistrates at first instance. Sentencing is not the task of appellate courts, except where clear error is shown. Where the ground of appeal is manifest excess, error will only be shown where it can be demonstrated that the sentence is obviously wrong in the sense I have described, that is, *it is a sentence which no reasonable judge could have imposed in the circumstances*.

My Court of Appeal colleague, Mark Weinberg, subsequently pointed out to me that the phrase "no reasonable sentencing judge" was much more pejorative than we meant to be. So we reconsidered the formulation and concluded that the same point could be made, without in anyway detracting from the stringency of the test, by expressing it as a conclusion that the sentencing decision was "not reasonably open in the circumstances of the case".

That has now become the accepted criterion in our Court both for manifest excess[36] and — on a Crown appeal — for manifest inadequacy.[37] (The position is the same in South Australia.[38]) We have developed an equivalent test in relation to the issue of parity of sentences between co-offenders: was it reasonably open to the judge to (fail to) differentiate between the co-offenders in that way?[39]

In their 2015 joint judgment in *Pham*, which was a sentence appeal, Bell and Gageler JJ accepted the Victorian formulation as a correct statement of the issue which the manifest excess ground raises.[40]

At first blush, to say that a decision was "not reasonably open" does not appear to be nearly as drastic a conclusion as that "no reasonable judge" or "no reasonable decision-maker" could have come to that decision. But analytically, in my view, they are indistinguishable.

The key lies in the notion of the area of decisional freedom. As I have said, in the field of sentence appeals this is referred to as "the sentencing range", that is, the range within which reasonable minds may differ. That range encompasses every decision to which a decision-maker acting reasonably — a "reasonable decision-maker" —

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36 *R v Clarkson* (2011) 32 VR 361, 384 [89]; *Boulton v The Queen* (2014) 46 VR 308, 333 [102]; *Greatorex v The Queen* [2016] VSCA 136 [38].

37 *DPP v Karazisis* (2010) 31 VR 634, 662–3 [127]; and see *McPhee v The Queen* [2014] VSCA 156 [10]–[11].

38 *R v Peake* (2002) 37 MVR 354, 357[28].

39 *Teng v R* (2009) 22 VR 706, 710 [17]; *Ryan v R* [2016] VSCA 255 [50]–[52].

40 *R v Pham* (2015) 90 ALJR 13, 24 [56].

could have come, having proper regard to the statutory framework and to the relevant features of the case under consideration.[41]

A decision which falls outside that area can therefore be described, interchangeably, as:

- a decision to which no reasonable decision-maker could have come; or
- a decision which was not reasonably open in the circumstances.

This interchangeability of terminology is well illustrated by the Victorian Court of Appeal's 2015 decision in *R and M v Independent Broad-Based Anti-Corruption Commission*.[42]

The terms are, in short, synonymous. Interestingly, the criterion of "reasonably open" was used by at least one member of the High Court on the last occasion pre-*Li* when the unreasonableness ground succeeded.[43]

If this is right, of course, it means that *Wednesbury* unreasonableness is not — and was never intended to be — applicable only to the irrational or the capricious or the bizarre.[44] At the same time, as the judgments of the Victorian Court of Appeal have emphasised, the "not reasonably open" test remains a stringent one, fully respecting the scope of the judge's discretion.

And, if "not reasonably open" were adopted as a test of general application, we might be able to dispense with the various expressions identified by the Full Federal Court in *Eden*.[45]

I turn to consider the convergence between appellate review of judicial discretion and judicial review of administrative discretion.

Review of judicial and administrative discretions

In *Li*, both the plurality and Gageler J drew attention to what Mason J had said in *Peko-Wallsend*, about the "close analogy" between judicial review of administrative decisions and appellate review of decisions in the exercise of a judicial discretion. In that case, Mason J also said:

> … Both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given

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41 See *R v Ministry of Defence, Ex parte Smith* [1996] QB 517, 554.

42 [2015] VSCA 271 [46]–[48], [73]. See also *Stretton v Minister* (2016) 237 FCR 1, 8 [21]: "The correct question … is whether the decision-maker could reasonably have come to the conclusion".

43 *Parramatta City Council v Pestell* (1972) 128 CLR 305, 323 (Menzies J).

44 See *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, 749, 751, 765; *R v Chief Constable; Ex parte ITF Ltd* [1999] 2 AC 418, 452; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 533, 549 [32].

45 (2016) 240 FCR 158, 172 [65].

> excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'. This ground of review was considered by Lord Greene MR in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it.

In *Li,* Gageler J went on to say that, in judicial review of administrative action, there was:

> … a close analogy with the settled principle that an appellate court will review the exercise of a judicial discretion 'if upon the facts it is unreasonable or plainly unjust', or if 'failure to give adequate weight to relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court'. It is therefore fair to say that '[i]f a discretionary power is exercised in a way in which a reasonable repository of the power might exercise it, the exercise of the power is supported by the statute which confers it, whether the discretion is judicial or administrative in nature'.[46]

The phrase "unreasonable or plainly unjust" used here is taken from the classic statement in *House v The King* of the principles governing appeals from judicial discretions:

> It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, *if upon the facts it is unreasonable or plainly unjust*, *the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance*. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[47]

Some five years before *Li*, in the *Macedonian Orthodox Church* case,[48] the High Court confirmed the overlap between *House* and *Wednesbury* in the field of appeals from

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46 *Li* (2013) 249 CLR 332, 376–7 [110].

47 (1936) 55 CLR 499, 505 (emphasis added).

48 *Macedonian Orthodox Community Church St Peka Incorporated v His Eminence Petar the Diocesan Bishop of the Macedonia Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 112 [138].

judicial discretion. The Court was there dealing with an appeal from an exercise of the judicial discretion to give advice to a trustee. The plurality (Gummow ACJ, Kirby, Hayne and Heydon JJ) said:

> The question is what the particular statute or rule of law conferring the discretion contemplates as relevant or irrelevant factors. If it mandates that particular weight be given to one factor, that mandate must be obeyed. But, in the absence of any such mandate, the question of what weight the relevant factors should be given or what balance should be struck among them is for the person on whom the discretion is conferred, provided no error of law is made, no error of fact is made, all material considerations are taken into account and no irrelevant considerations are taken into account, *subject to the possibility of appellate intervention if there is a plain injustice suggesting the existence of one of the four errors just described even though its nature may not be discoverable, or if there is present what has come to be known as 'Wednesbury unreasonableness'*.[49]

That appellate reviews of judicial and administrative discretions should fall within the same analytical framework is hardly surprising. The essential character of the discretionary decision is the same. Thus, in *Tameside,*[50] Lord Diplock said:

> The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for different people to hold differing opinions as to which is to be preferred.

This statement bears an obvious similarity to what was said by Mason and Deane JJ in *Norbis v Norbis*,[51] about *judicial* discretion:

> Because these assessments [of what is 'just and equitable'] call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends. The principles enunciated in *House v The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined.

My convergence thesis finds support in what was said by Brennan J in *Norbis*. His Honour was addressing what was said by the House of Lords in *G v G*,[52] in relation to an appeal from an exercise of judicial discretion. The House there confirmed that

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49 Ibid 112 [138] (emphasis added).

50 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1064.

51 (1986) 161 CLR 513, 518 ("*Norbis*").

52 [1985] 2 All ER 225, 230.

appellate intervention was not confined to the case where the appellate court concluded that:

> the course followed by the judge is one that no reasonable judge having taken into account all the relevant circumstances could have adopted.

Their Lordships said that, while that test was applicable to judicial review of administrative discretion, it was "not the appropriate test" on an appeal from an exercise of judicial discretion.

Brennan J commented as follows:

> I would respectfully agree that there is a difference between the review of a judicial discretion and the review of an administrative discretion, but I venture to say that there is no distinction in principle. If a discretionary power is exercised in a way in which a reasonable repository of the power might exercise it, the exercise of the power is supported by the statute which confers it, whether the discretion is judicial or administrative in nature.

There was, however, a qualification:

> But in practice the comparative familiarity of an appellate court with judicial discretions and the usual confines of a judicial discretion make the appellate court more sensitive to an unreasonable exercise of discretion and more confident of its ability to detect error in its exercise. It is harder to be satisfied that an administrative body has acted unreasonably, particularly when the administrative discretion is wide in its scope or is affected by policies of which the court has no experience.

This is a question for further investigation: is there, and should there be, any difference in the "intensity of scrutiny" depending on whether the discretion under review is judicial or administrative?

Interestingly, the latest edition of Wade and Forsyth's *Administrative Law* advances the opposite view to that of Brennan J, saying that courts tend to

> lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behaviour.[53]

Appeals from the sentencing discretion

It is now well-established that, in sentence appeals, the ground of "manifest excess" (and in a prosecution appeal, "manifest inadequacy") invokes the last category in *House*. In *Markarian v The Queen*, the High Court said:

> As with other discretionary judgments, the inquiry on an appeal against

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53 9th edition, p 304. See also *R v Lord Saville; Ex parte A* (1999) 1 WLR 1855, 1866 [32].

> sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v R*, itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as 'manifest excess', or in a prosecution appeal, as 'manifest inadequacy'.[54]

In *Wong v The Queen*, Gaudron, Gummow and Hayne JJ noted the two different types of errors discussed in *House*:

> First, there are cases of specific error of principle. Secondly, there is the residuary category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.[55]

Appellate intervention is thus justified either when specific error is shown or when the case falls into "the residuary category of error". The latter might be described as the "unreasonableness" or "implicit error" category.

It is clear from *Markarian* and *Wong* that manifest excess in sentencing is regarded, by the present High Court, as an instance of implicit error. That is, the conclusion that a sentence is "manifestly excessive" is a conclusion that:

> there must have been some misapplication of principle, even though here and how is not apparent from the statement of reasons.[56]

In other words, "unreasonable or plainly unjust" in the *House* sense is equivalent to "not reasonably open", that is, *Wednesbury* unreasonableness. The following passage from the judgment of Redlich JA in *Ashdown v The Queen*[57] illustrates the convergence of the two:

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54 (2005) 215 ALR 213, 221 [25] (emphasis added). See now *DPP v O'Neill* [2015] VSCA 325 [104].

55 (2001) 207 CLR 584 at [58] (emphasis added); see also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (Dixon J), and *Hili* (2010) 242 CLR 520, 538 [58].

56 *Wong v The Queen* (2001) 207 CLR 584, 605-506 [58].

57 (2011) 37 VR 341, 402 [177] (emphasis added); and see *DPP v Cartwright* (2015) 45 VR 168, 177 [32]–[34].

An appeal against the exercise of the sentencing discretion is governed by established principles … Thus the requirement that the appellate court identify or infer error in the manner in which the discretion was exercised. The principles applicable are those stated in *House v R*. Appellate intervention cannot be justified unless either specific error can be identified in the manner in which the discretion was exercised *or a failure to properly exercise the discretion can be inferred because the decision arrived at was plainly unjust or unreasonable* … In the case of an unjust or unreasonable decision, though the error is not discoverable, the exercise of the discretion may be reviewed on the ground that a substantial wrong has occurred. Where such a wrong is alleged, it is usually described as a sentence that is manifestly excessive or inadequate. *To infer error in the latter case, it must be demonstrated that the sentence imposed was beyond the range of sentences that was reasonably open in a sound exercise of the sentencing discretion*.