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Rylatt, J.W. and Tomlinson, J.P. orcid.org/0000-0002-7385-3085 (2016) *Something New in Substantive Review: Keyu v Secretary of State for Foreign and Commonwealth Affairs*. *Judicial Review*, 21 (3). pp. 204-208. ISSN 1085-4681

<https://doi.org/10.1080/10854681.2016.1238608>

This is an Accepted Manuscript of an article published by Taylor & Francis in *Judicial Review* on 31/10/2016, available online:
<http://www.tandfonline.com/10.1080/10854681.2016.1238608>.

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Something New in Substantive Review: *Keyu v Secretary of State for the Home Department*

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1. Over the past few decades, the question of substantive review has provided one of the liveliest debates in public law. However, despite a myriad of contributions from courts and legal commentators, we are still left with little certainty as to substantive review's nature, scope, and structure. As we near 70 years since Lord Greene's landmark decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, and despite some interesting and innovative recent additions to the debate,¹ a distinct sense of fatigue has begun to set in. Such weariness is evident in important recent contributions to the debate, with Paul Craig, for instance, bemoaning in 2010 that:

“It is over 60 years since *Wednesbury*, and over 250 years since the advent of some form of rationality review in the UK. The bottom line remains that we cannot produce a modern definition of rationality review which is legally authoritative and where the mode of application coheres with the legal test.”²

Despite this weariness, the question remains as important as ever, with the answer ultimately defining the level of control possessed by the courts, and subsequently the executive, *vis-à-vis* the balancing of competing interests of stakeholders affected by decisions of public authorities. Since Paul Craig's statement in 2010, the Supreme Court has been asked to grapple with the issue on a number of occasions, including in the recent judgment in *Keyu v Secretary of State for the Home Department* [2015] UKSC 69, which provides the subject of this article.

2. *Keyu* concerned a decision by the Secretary of State for Foreign and Commonwealth Affairs not to hold a public inquiry into a series of events that took place in December 1948, when a Scots Guards patrol shot and killed 24 unarmed civilians in the village of Batang Kali in Selangor (at the time a British Protected State in the Federation of Malaya).
3. The appellants contended that a public inquiry into these events, which they characterized as unjustified murder, was required on three different grounds:

(1) Under the ‘procedural obligation’ to investigate suspicious deaths pursuant to Article 2 European Convention on Human Rights (‘ECHR’);

(2) Under the common law, which has incorporated a duty under customary international law to investigate suspicious deaths; and

¹ For instance, see the contributions in Hannah Wilberg and Mark Elliott (eds.), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015).

² Paul Craig, “Proportionality, Rationality and Review” [2010] NZLR 265, 284. For further fatigue with the debate around substantive review see Lord Carnwath, “From judicial outrage to sliding scales—where next for *Wednesbury*?” (ALBA Lecture, 12 November 2013).

(3) Under the common law, since the decision not to investigate was irrational and/or disproportionate under recognized principles of judicial review.

Ultimately, the Supreme Court dismissed the appeal, unanimously on grounds (1) and (2) and by a majority of 4-1 on ground (3) (with Lady Hale dissenting). While the four judgments between the five Justices in *Keyu* raise a range of interesting questions of both domestic and international law in relation to each of the grounds, this article will focus on ground (3). Specifically, it will be shown how the judgment of Lord Neuberger injects novel analysis into the debate on substantive review.

Novelty One: Classification Of Judicial Review Grounds

4. The oft-cited modern classification of the grounds of judicial review—consisting of “illegality,” “irrationality,” and “procedural impropriety”—was famously set out by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 (*GCHQ*). Bearing this in mind, the characterization of the law of judicial review provided by Lord Neuberger (at para. 127) in *Keyu* makes for interesting reading:

“The area covered by judicial review is so great that it is impossible to be exhaustive, but the normal principle is that an executive decision can only be overruled by a court if (i) it was made in excess of jurisdiction, (ii) it was effected for an improper motive, (iii) it was an irrational decision, or, as it is sometimes put, a decision which no rational person in the position of the decision-maker could have taken, or (iv) the decision-maker took into account irrelevant matters or failed to take into account relevant matters. An attack on an executive decision based on such grounds is often known as a *Wednesbury* challenge (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223). If one or more of these grounds (which often overlap to some extent) is or are satisfied, the court may (but need not in every case) quash the decision. If none of these grounds is satisfied, then the decision will almost always stand.”

This may be considered a novel characterization of the law of judicial review, for two primary reasons.

5. First, while it may be “impossible to be exhaustive” in describing the vast terrain covered by judicial review within the parameters of a judgment, it is difficult to understand why, for instance, legitimate expectations—a significant judicial innovation of recent decades—has no explicit place here. A further notable omission is the ground of, what Lord Diplock called, procedural impropriety, which is neither explicitly referenced nor implicit in the four grounds identified.
6. Second, the “standard” classification of grounds of judicial review set out in *GCHQ* considers *Wednesbury* unreasonableness (under the banner of “irrationality”) as horizontally related to the grounds of “illegality” and “procedural impropriety”. Conversely, Lord Neuberger appears to conceive of a vertical relationship between the grounds of judicial review, using “*Wednesbury* challenge” as an overarching, umbrella term, beneath which are a number of ‘grounds’ such as the decision being made in excess of jurisdiction. An alternative, less revolutionary, reading would be that Lord Neuberger is merely using “*Wednesbury* challenge” as convenient shorthand for any judicial review challenge. However, this usage of the term “*Wednesbury*” as general shorthand conflicts with other aspects of Lord Neuberger’s own judgment, where (at para. 129) he states: “for reasons which are individually defensible and relevant, and which cumulatively render it impossible to characterise their conclusion as unreasonable, let alone irrational”. As pointed out by Mark

Elliott, the implication here seems to be that the *Wednesbury* reasonableness test and irrationality are different,³ a position that departs from the classification of grounds in *GCHQ* and risks further contributing to the proliferation of labels for facets of substantive review that have emerged in recent years.

Novelty Two: Rewriting *GCHQ* on Proportionality

7. A second point of novelty arose when Lord Neuberger discussed existing judicial support for the introduction of proportionality as a replacement for *Wednesbury* unreasonableness. There Lord Neuberger stated (at para. 131) that the “possibility of such a change was judicially canvassed for the first time in this jurisdiction by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*”. In fact, Lord Diplock did not canvass that proposition at all. While Lord Diplock canvassed the potential introduction of the proportionality standard in that case, he did not state or even imply that this was necessarily to the exclusion of *Wednesbury* unreasonableness. In fact, a more accurate reading would be that proportionality was envisaged as necessarily in addition to *Wednesbury*. After setting out the three grounds of “illegality”, “irrationality” and “procedural impropriety”, he stated:

“That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community.”

8. This is hardly a trifling point as the way in which this dictum is read has consequences that resonate in the substantive review debate. For instance, some commentators advocate a “structured” public law approach to substantive review, where *Wednesbury* review sits alongside other standards and the different standards are applied dependent on the particular type of case.⁴ For such commentators (and many other commentators, too), this is an important distinction for the Supreme Court to simply gloss over.

Novelty Three: Authority in Numbers

9. The two points of novelty raised above pale when compared to Lord Neuberger’s ultimate answer (at para. 132) to the *Wednesbury*/Proportionality dilemma facing the Court, which merits recounting in full:

“It would not be appropriate for a five-Justice panel of this court to accept, or indeed to reject, this argument, which potentially has implications which are profound in constitutional terms and very wide in applicable scope. Accordingly, if a proportionality challenge to the refusal to hold an inquiry would succeed, then it would be necessary to have this appeal (or at any rate this aspect of this appeal) reargued before a panel of nine Justices. However, in my opinion, such a course is unnecessary because I consider that the appellants’ third line of appeal would fail even if it was and could be based on proportionality.”

The suggestion that it would not be appropriate for a five-Justice panel to decide this issue, which drew quite broad support from other members of the court, is novel at the Supreme

³ Mark Elliott, “Q: How many Supreme Court Justices does it take to perform the *Wednesbury* doctrine’s burial rites? A: More than five” (Public Law for Everyone, 27 November 2015) <<https://publiclawforeveryone.com/2015/11/27/q-how-many-supreme-court-justices-does-it-take-to-perform-the-wednesbury-doctrines-burial-rites-a-more-than-five/>> accessed 22 July 2016.

⁴ For instance, see Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) Ch 9.

Court level. In 2003, the Court of Appeal famously said in *R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473 (paras. 34-35) that it was no longer apparent “what justification there now is for retaining the *Wednesbury* test” but “it is not for this court to perform its burial rites”. That demonstration of deference to a superior court is wholly defensible yet it is more of a stretch to characterize the Supreme Court’s obvious reluctance to answer the question in *Keyu* as a sincere act of judicial deference to higher (or more plentiful) judicial authority.

10. The broader question resulting from the statement of Lord Neuberger regards the procedures of the Supreme Court for the allocation of Justices to cases, particularly in cases involving matters of great constitutional importance. Specifically, two questions arise: (1) in what circumstances will an enlarged panel of 7 or 9 be utilized; and 2) who makes the decision to utilize an enlarged panel?
11. With regards to the first question, no guidance is provided in the Constitutional Reform Act 2005 (which addresses the cognate question of when the Supreme Court will be considered duly constituted),⁵ or the Supreme Court Rules of Court and Practice Directions. However, guidance is identified on the Supreme Court website as follows:

“Criteria to be used when considering whether more than five Justices should sit on a panel:

- If the Court is being asked to depart, or may decide to depart from a previous decision.
- A case of high constitutional importance.
- A case of great public importance.
- A case where a conflict between decisions in the House of Lords, Judicial Committee of the Privy Council and/or the Supreme Court has to be reconciled.
- A case raising an important point in relation to the European Convention on Human Rights.”⁶

Beyond this brief statement, no further information is provided by the Court. Consequently, the only guidance on panel composition is provided in a statement of questionable legal status that is populated by undefined and somewhat vacuous terms such as “high constitutional importance” and “great public importance.”⁷

12. With regards to the second question, little information is available, with no procedures identified in any of the aforementioned sources, including the Supreme Court website. However, Alan Paterson notes, in his study of the Supreme Court, that the panels are “largely selected by the Registrar” and subsequently proposed to the President and Deputy President at a “horses for courses” meeting, who retain ultimate authority for approving the composition of each panel.⁸
13. Considering these answers in the context of the instant case, it is apparent that nine Justices could have been allocated to *Keyu*; it is less apparent why this was not the case. It seems reasonably clear that Lord Neuberger considered the *Wednesbury*/Proportionality question

⁵ Sections 42-43, Constitutional Reform Act 2005.

⁶ “Panel Numbers Criteria” (The Supreme Court, 2016) <<https://www.supremecourt.uk/procedures/panel-numbers-criteria.html>> accessed 22 July 2016.

⁷ Andrew Burrows, “Numbers sitting in the Supreme Court” [2013] L.Q.R. 305.

⁸ Alan Paterson, *Final Judgment* (Hart Publishing, 2013) 72.

as one of ‘high constitutional importance’, reflected in his statement that a decision resolving this issue ‘potentially has implications which are profound in constitutional terms’ (para 132). Equally, the prospect of a decision on the *Wednesbury*/Proportionality issue might satisfy further aspects of the guidance, for example if the Supreme Court was asked or minded to take up the aforementioned task of performing the ‘burial rites’ of *Wednesbury*. Furthermore, beyond the *Wednesbury*/Proportionality issue, *Keyu* also raised an ‘important point in relation to the European Convention on Human Rights’, namely the question of whether, and if so how, Article 2 ECHR provides an obligation to investigate suspicious deaths occurring prior to the entry into force of the ECHR.

Conclusion

14. Beyond Lord Neuberger’s judgment, reading the varied judgments of each Justice in turn leaves an unsettling feeling: even if nine Justices would have been allocated to the case, and the question would have been addressed, would the answer have been clear? There is good reason to think the answer would be “no” as, while speaking in the language of *Wednesbury* and proportionality, it was clear that the terms each had different meanings to the different members of the Court. For example, Lord Neuberger stated that proportionality is distinct from *Wednesbury* in requiring the courts to consider the balance the decision-maker has struck between competing interests, and yet this is arguably what Lady Hale did in her application of *Wednesbury*. Unless unanimity between the Justices emerges on at least some of the myriad questions arising from the distinction between *Wednesbury* and proportionality, having nine Justices providing opinions on such a divisive issue may just open Pandora’s Box.
15. In any case, Lord Kerr, who supported Lord Neuberger’s view, acknowledged (at para 271) that the question not addressed in *Keyu* would not disappear as a result of the judgment: “I suspect that this question will have to be frankly addressed by this court sooner rather than later”. Indeed, an opportunity to consider the issue arrived soon after *Keyu*, in the case of *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3. In that case, the claimant argued on appeal that a decision of the Secretary of State that resulted in his subjection to an asset freeze by the UN Sanctions Committee should have been subject to ‘a “full merits review”, or at least one involving a “proportionality analysis”’ (para 14). However, while later rejecting the argument that a “full merits review” was necessary in the present case (para 58), therefore narrowing the issue once more to the question of *Wednesbury*/proportionality, Lord Carnwath was clear from the outset that the ultimate question would be deferred to another day. Citing the dicta of Lord Neuberger in *Keyu* that an enlarged court would be necessary to properly address the issue, he stated (at para 55) that:

‘It is to be hoped that an opportunity can be found in the near future for an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions. Such a review might aim for rather more structured guidance for the lower courts than such imprecise concepts as “anxious scrutiny” and “sliding scales”.’

If the question of substantive review is ever frankly addressed, *Keyu* is a decision that is likely to be seen, with hindsight, as representative of the conceptual confusion within the Courts at this time.