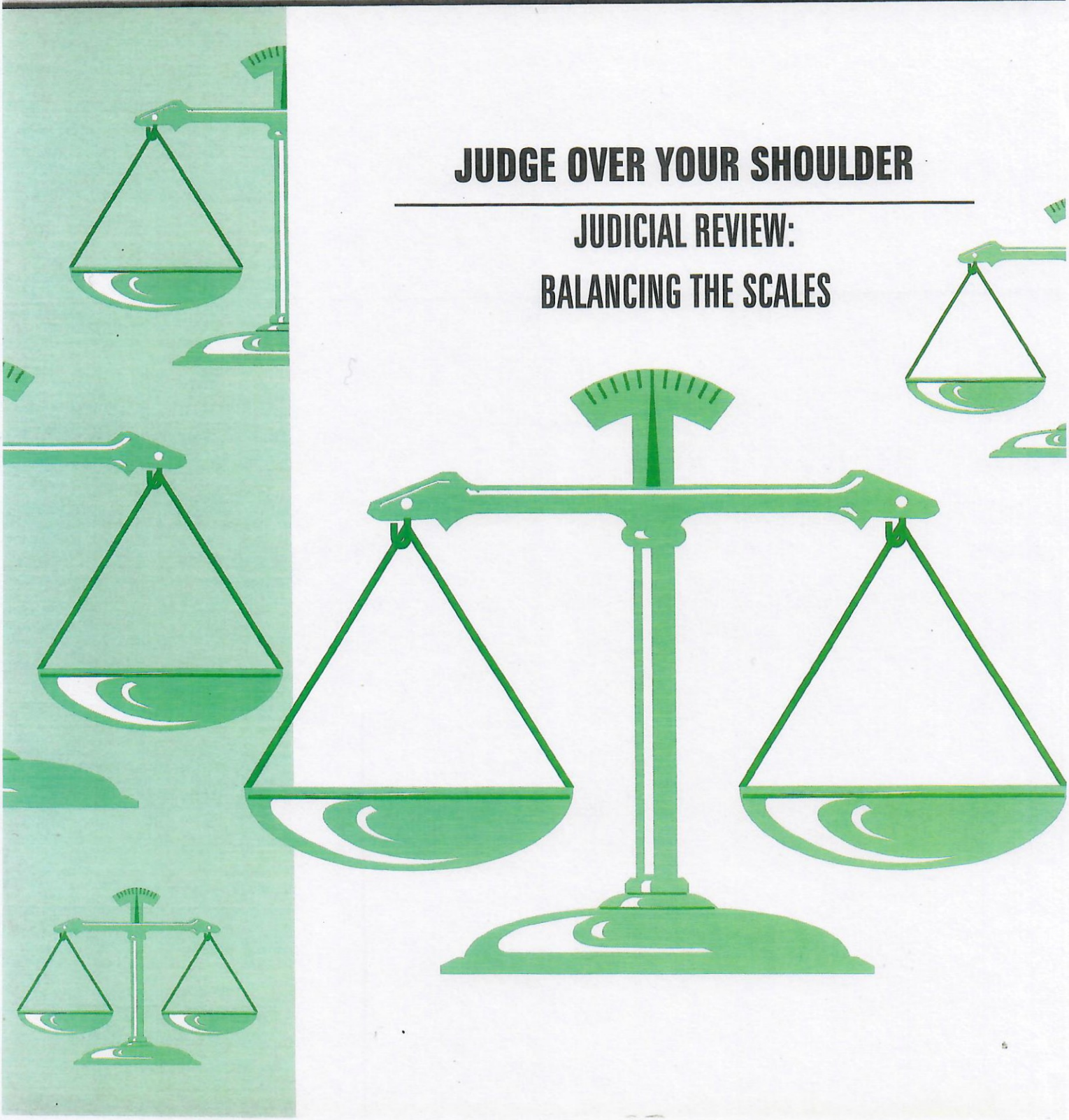
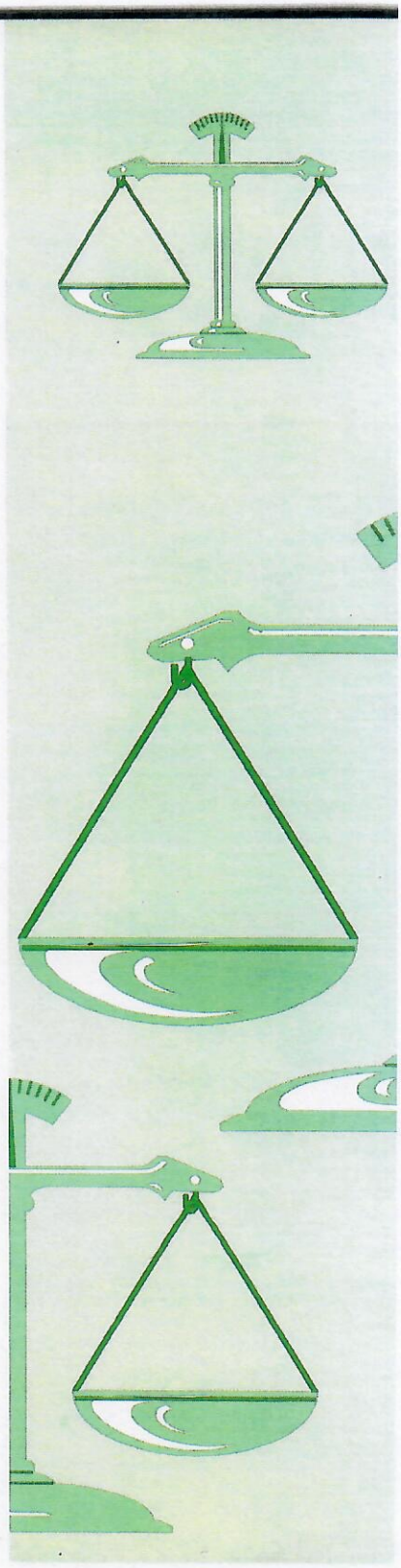
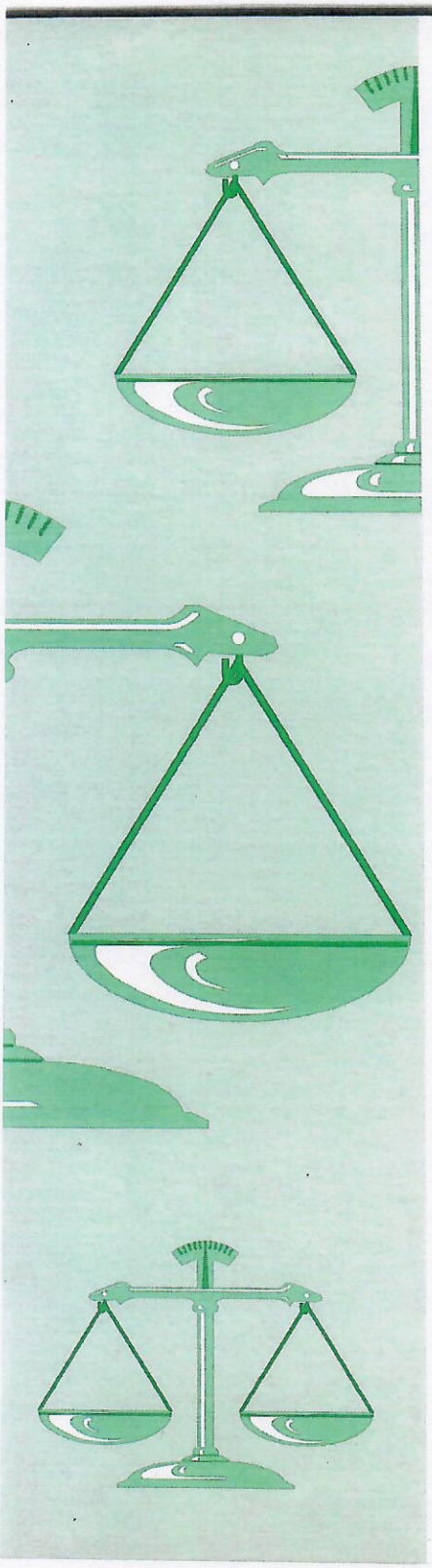
JUDGE OVER YOUR SHOULDER

JUDICIAL REVIEW:
BALANCING THE SCALES



..... Judicial Review is about allowing us to carry out the job Parliament has given to us by using the powers Parliament has entrusted to us, but ensuring that we do so fairly and not in an over-zealous or wrong-headed manner .....





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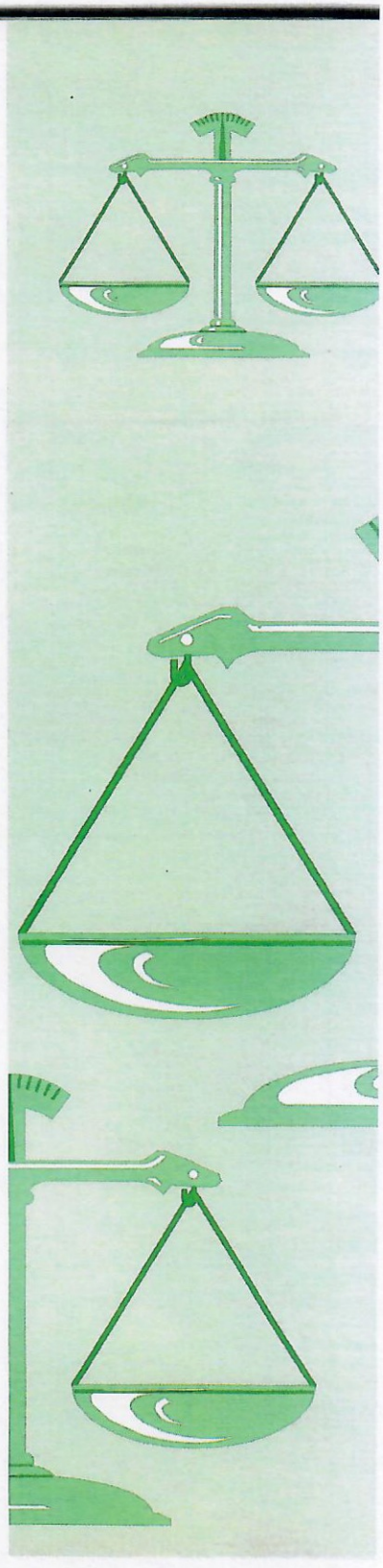
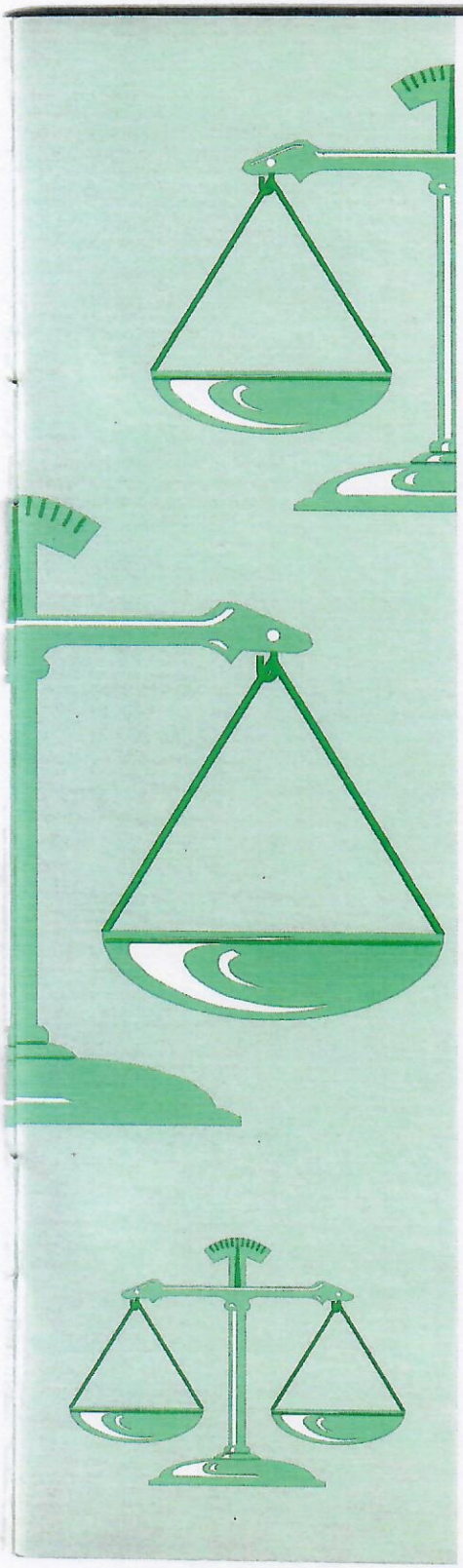


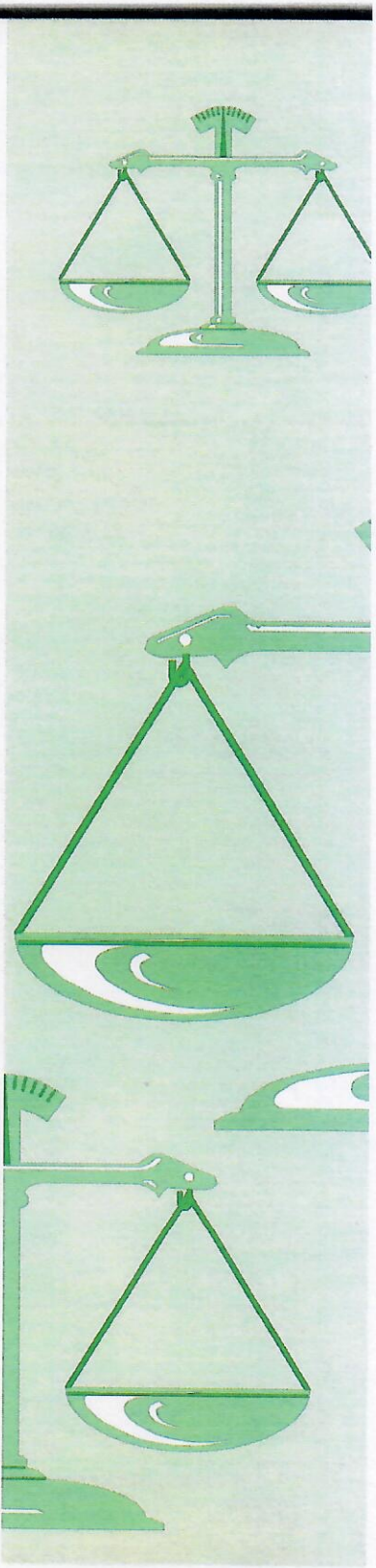


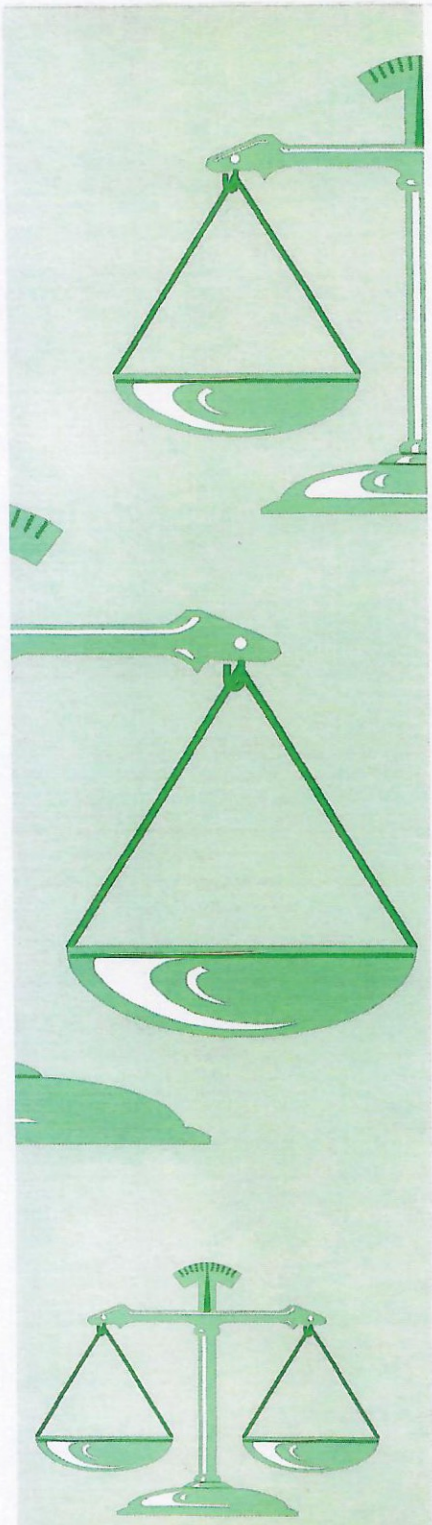
FOREWORD

It is now some seven years since "The Judge Over Your Shoulder" first appeared and drew attention to the dramatic rise in the number of judicial review challenges. That trend continues. At the same time, awareness of administrative law has greatly increased amongst civil servants. They will welcome, as I do, this revised and expanded second edition of "The Judge Over Your Shoulder". Like its predecessor, it is intended to give administrators at all levels an introduction to the current state of the law and to draw attention to the principles of good administration which the Courts will expect of us. I am sure it will prove as useful and popular as the first edition.

Robin Butler

Sir Robin Butler



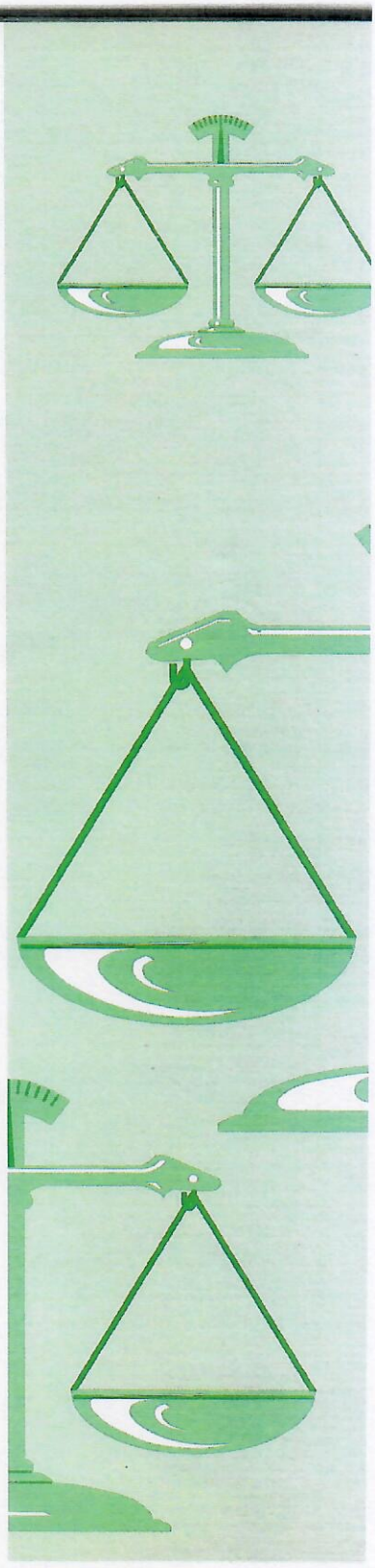


Introduction

1. Most, if not all, civil servants have heard of "Judicial Review": it commonly features in the Press, usually with headlines such as "Minister acted illegally" or "Minister was perverse, says Court". There has been a considerable rise in the number of such challenges in recent years. The procedure by which such challenges are normally made is known as "Judicial Review" and the law which the Courts apply in such cases is known as administrative law. In 1974 there were only 160 applications for leave to seek Judicial Review in England and Wales. When **The Judge Over Your Shoulder** was first published in 1987 the annual figure was 1,529. In 1993 there were 2,886 - and that excludes appeals under specific provisions such as the Town and Country Planning Acts[1]. In Scotland the number of applications for Judicial Review has increased from 27 in 1986 when the procedure was first introduced to 78 in 1991. Judicial Review is reaching new areas all the time, and departments which have not been the subject of legal challenge before have had to defend their decisions in the Courts. The increase is probably due in the main to the following factors:

   - The simplification of the Judicial Review procedure coupled with a requirement by the Courts that this procedure to challenge administrative action or inaction rather than any other Court procedure should be used.
   - "Nothing succeeds like success". A few well publicised cases have alerted individuals and pressure groups to the possibilities of Judicial Review as a means of achieving their objective.

[1] **While this booklet concentrates on Judicial Review, in a large number of cases where a statute creates a power to be exercised by someone, it also provides for the way in which that exercise of power can be challenged in the Courts. Unlike Judicial Review, leave is usually not required for such an appeal, which is commonly referred to as a "statutory appeal" or "statutory challenge". Most, if not all, the principles of law which govern the grounds on which Judicial Review may be sought are equally applicable to these cases.**



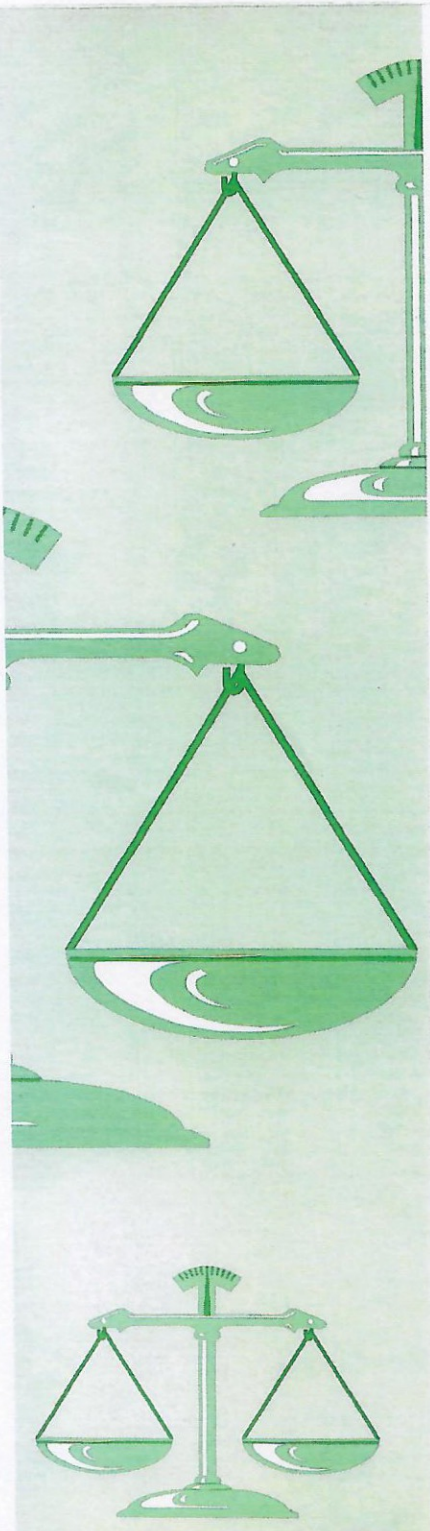
- This is coupled with an increasing awareness among lawyers that Judicial Review may offer a way to appeal a decision, particularly in the absence of a statutory right of challenge.
- An increasing willingness on the part of the judiciary to intervene in the day-to-day business of Government and public authorities, coupled with a move towards liberal interpretation of statutes.

2. You may have attended lectures on the principles of administrative law, or have read the first **The Judge Over Your Shoulder**. This revised and expanded second edition, like its predecessor, is written to demystify the subject for non-lawyers and to answer two basic questions:
   - What is "Judicial Review"?
   - What does it mean for me in my daily work as a civil servant?

   This booklet is not, and cannot be, a substitute for seeking legal advice. Nor can it be a comprehensive guide to administrative law. But we hope that it will give you sufficient guidance to enable warning bells to ring so that you can take legal advice at the right time.

Good administration

3. Judicial Review is, as the name implies, how the Courts in England and Wales supervise the way in which Ministers, Government departments, agencies, local authorities or other public bodies exercise their powers or carry out their duties. It is therefore merely a means (although a very powerful one) by which improper exercise of power can be remedied. It would be jumping the gun to proceed directly to an examination of Judicial



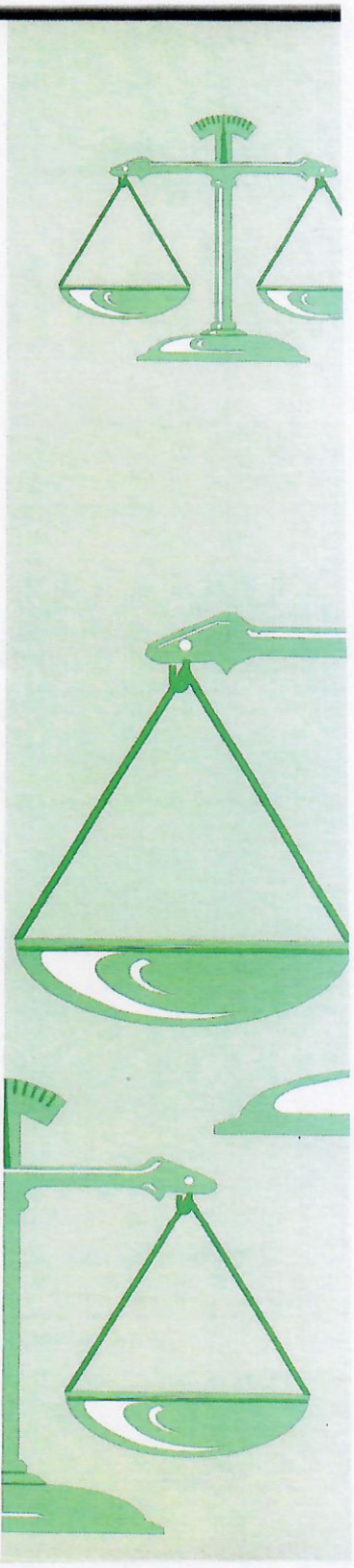
Review and the principles of administrative law that underlie it before appreciating that it is a part of the whole process of good administration [2].

In what follows, we seek to give some guidance on the way in which the Courts will expect powers to be exercised, whether by Ministers, public bodies or officials, and to show that the Judge is there to ensure that those affected by your decisions are treated fairly: there are no shortcuts or magic formulae to evade the Court's supervision and to attempt to give any would not be in the spirit of the principles of good administration that the citizen has the right to expect from us.

What is administrative law?

4. In very general terms administrative law is the law governing public administration. It governs the exercise of public functions and thus applies primarily to central and local Government and public bodies **when exercising statutory or other powers or performing public duties**. Administrative law therefore extends to "non-departmental public bodies" ("quangos") and Next Steps Agencies and may even extend to some private sector bodies such as the Securities and Investment Board. The functions described above are called "public law functions". It is necessary to distinguish these from "private law activities" which are performed by private individuals as well as public bodies, for example entering into a contract. It will be private law rather than public law which will operate where a person claims damages for breach of contract or as a result of being injured by someone else. A claim for damages as a result of a factory accident will be a matter of private law even if the factory is operated by the Crown: a dispute about a contract

[2] In Scotland, although there is no substantial difference between English law and Scots law as to the grounds on which the process of decision making may be open to review, Judicial Review is not confined to those cases which English law has accepted as amenable to Judicial Review, nor is it solely a public law remedy: see paragraphs 34-36 below.



is not generally a public law matter even if one of the parties is a Government department [3].

Acting illegally? Me?

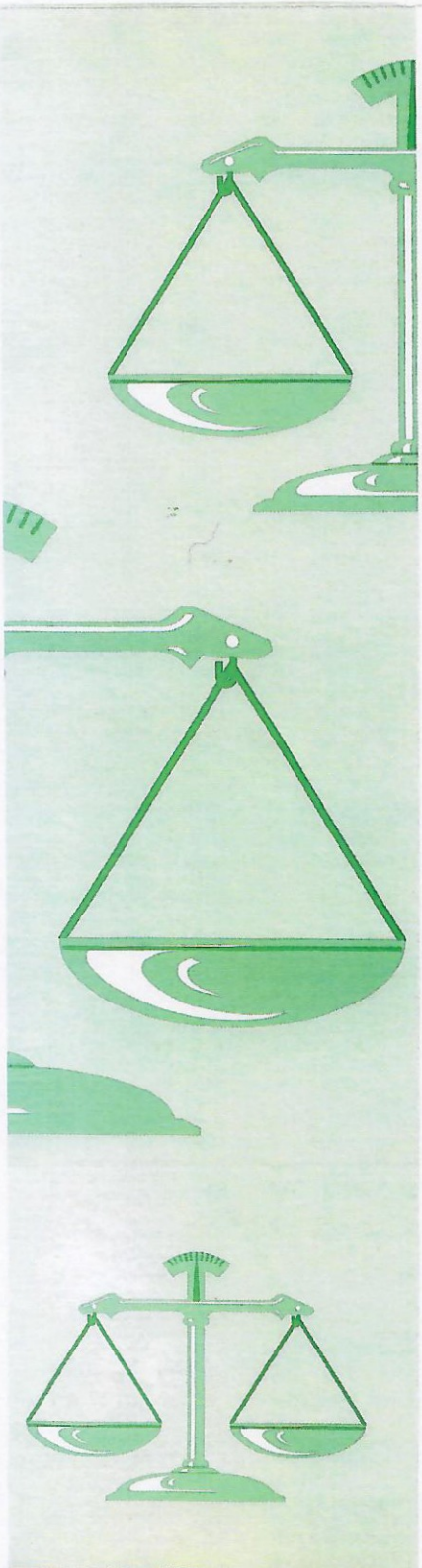
5. Let us suppose therefore that you are sitting at your desk considering applications to your Minister for licences. Your enabling statutory powers are in the widest possible terms: "The Secretary of State may grant licences upon such conditions as he thinks fit". With powers like that you might think there could be no possible grounds for legal challenge in the Courts whatever you do. But you would be wrong.

What powers are you exercising?

6. It may seem an unnecessary question to ask yourself, and you may well think that you understand what powers you are exercising. Unfortunately, there have been many cases where those exercising powers have failed to understand the limit, scope or effect of the powers under which they act or to appreciate who may exercise those powers.

7. Where statutory powers are being exercised the starting point is usually the interpretation of the words of the enabling legislation. Few such cases will reach Court in which there are not competing arguments about the correct meaning of the words in the legislation and, therefore, the correct scope of the power or discretion conferred by them. Sometimes there is no obvious ambiguity or lack of clarity and the wording may appear to make sense and apply in a particular way. However, circumstances may subsequently show that a different interpretation is possible - and the Courts are now prepared, in certain circumstances, to look at Hansard and other sources to decide what Parliament intended when enacting the legislation

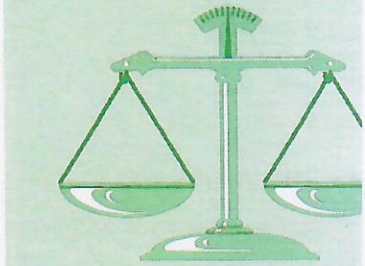
[3] See paragraphs 34 - 36 for the position in Scotland.



under dispute. Sometimes a case can be determined by statutory interpretation alone as a recent case illustrates:

Example: The Secretary of State had power to "specify the maximum number of occasions on which aircraft ... may be permitted to take off or land" at an airport. He purported to do so by a Notice which assigned a Quota Count to each aircraft type: the noisier the aircraft, the higher the Count. Each airport was then assigned a maximum number of points, so that aircraft movements which would produce an excess were prohibited. Aircraft operators could therefore choose to operate a greater number of quieter aircraft or a lesser number of noisier ones. The Court quashed the Notice: the means of control allowed by the Act was by reference to numbers of aircraft movements and the Secretary of State could not define limits on the use of the airports by reference to some other characteristic. *(R. -v- Secretary of State for Transport ex parte London Borough of Richmond*, The Times, 12 October 1993).

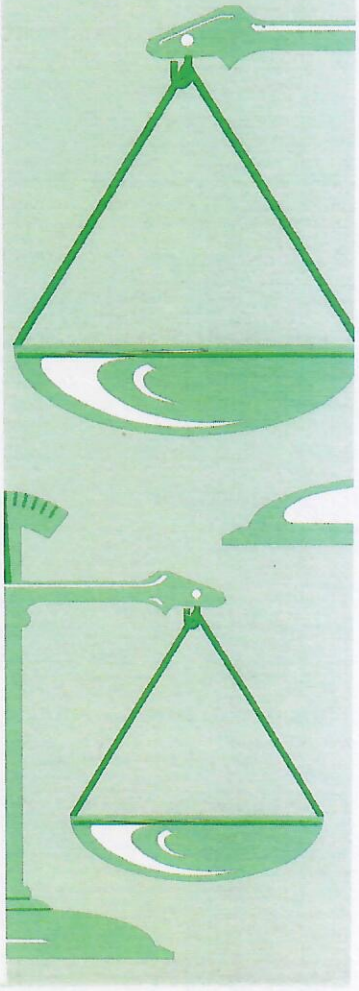
8. So the first principle of good administration is to ensure that you understand the legal basis for the action that you wish to take, and are satisfied that the statute or statutory instrument under which you intend to act in fact gives you the power to do what you want. In many cases, your department will have developed procedural guidance, often drafted in collaboration with the department's legal advisers, to assist you in performing the work. In any case of doubt, however slight, you should seek advice either from your line manager or, if it is appropriate, directly from your legal adviser.

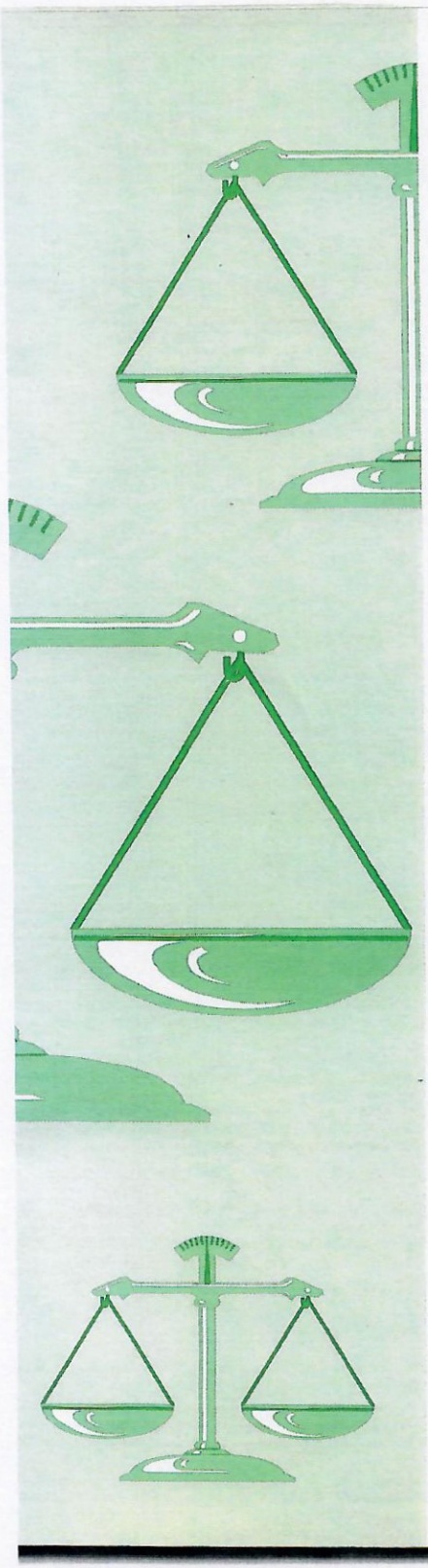


Is it your decision?

9. The Courts accept that Ministers cannot personally make every decision which bears their name. This is known as the *Carltona* principle from the leading case of that name. Thus the Courts have held that where the relevant legislation provided that breathalysing apparatus had to be approved by the Secretary of State it was perfectly lawful for an Assistant Secretary (Grade 5) in the Home Office to approve the apparatus on behalf of the Secretary of State. Whilst such 'vertical' delegation is allowed, you must be careful to avoid delegating the decision-making to an outside body (and merely rubber-stamping that decision) or allowing another department to take the decision for you, unless the legislation expressly permits this.

   Example: The Secretary of State for Trade exercised his powers under the Import, Export and Customs Powers (Defence) Act 1939 to restrict by licence the importation of bananas. Unfortunately the only people who knew about bananas in Whitehall were in the Tropical Fruit division of the Ministry of Agriculture. Accordingly it was the Minister of Agriculture who actually made the decision as to how the licences were to be allocated and the Secretary of State for Trade merely endorsed this decision. It was held that the Secretary of State for Trade, who was entrusted with the decision, had to consider the matter properly through his own officials. He and his officials could of course consult with their colleagues but it was they who had to make the decision, which in this case they had failed to do. The decision was accordingly set aside. (*Ex parte Chris International* (unreported)).



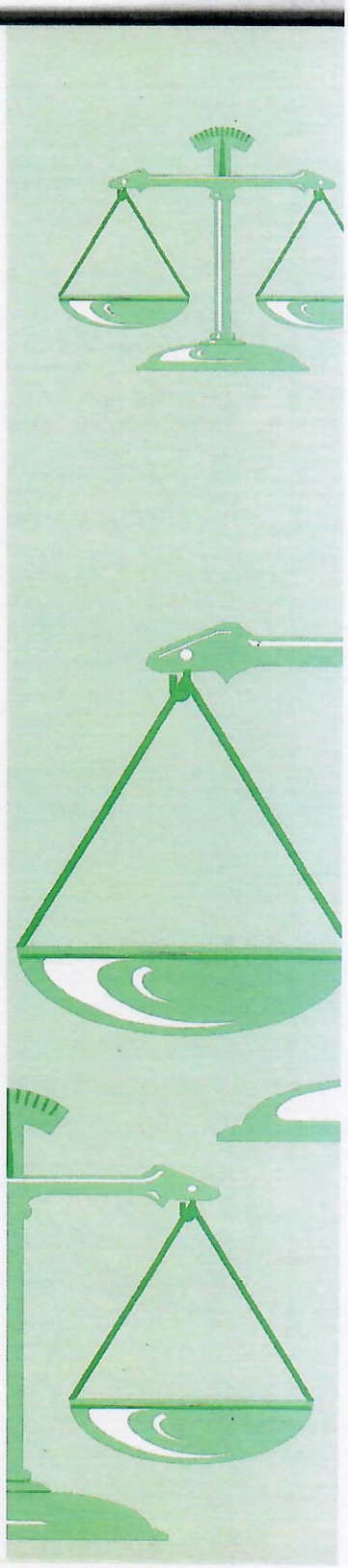


Are you exercising the power to achieve the purposes Parliament intended?

10. "Abuse of power" is an emotive phrase and you may feel that it could have no application to your work. But a statutory provision may set out the purposes for which a power may be exercised, or those purposes may be implicit, to be ascertained by considering the statute as a whole. To use the power to achieve some other purpose is an abuse of that power - however good your motives for acting may seem.

Example: A city council which had a policy of discouraging sporting links with South Africa had allowed a rugby club to use a recreation ground under its control for training and matches. Three members of the club were selected for an England team to tour South Africa. The council passed a resolution banning the club from using the ground for 12 months. The council defended its action by reference to the need to promote good race relations expressed in Section 71 of the Race Relations Act 1976. The House of Lords held that the decision was a misuse of the council's statutory powers concerning the recreation ground: their intention was to punish the club, even though it had done nothing unlawful. (*Wheeler v. Leicester City Council* [1985] AC 1054).

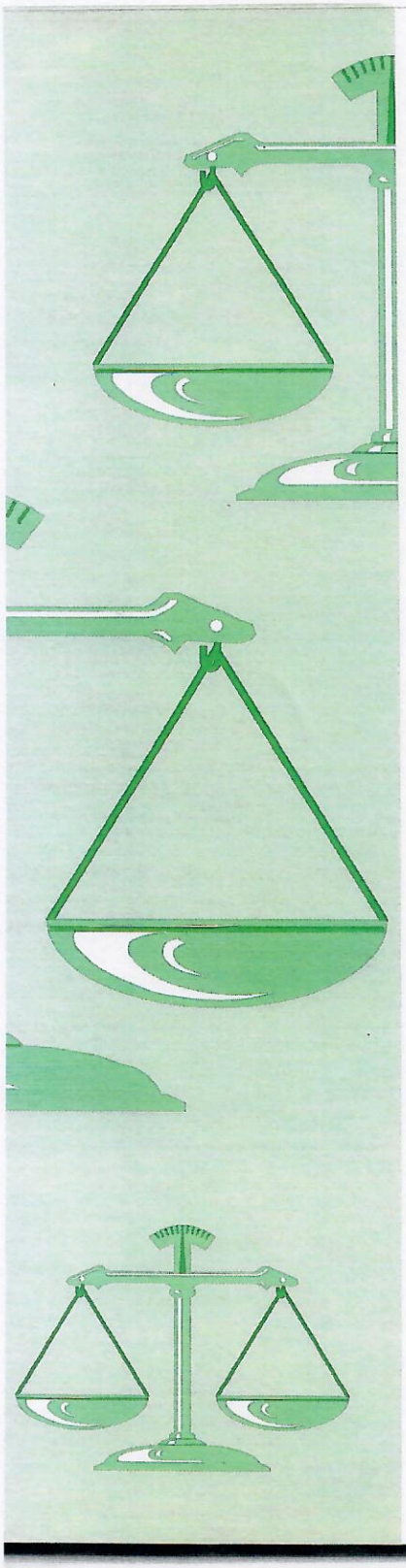
Example: A local authority, under a statutory duty "to provide a comprehensive and efficient library service", refused to provide certain newspapers in their public libraries because they wished to show support for former employees of the newspapers' proprietors who were involved in a long-running industrial dispute (the move to Wapping). The Court held the council had exercised its statutory powers for an improper ulterior purpose. (*R v. Ealing London Borough Council ex parte The Times Newspapers Ltd* [1986] 85 LGR 316.)



How may you exercise these powers?

11. It is essential to understand what powers you have, and to ensure that the purposes for which you wish to use them are lawful, before you seek to exercise them. There may be other things to consider. In many cases, the legislation will impose restrictions or require you to have satisfied preconditions before you may exercise the power. For example, can the power be exercised in relation to anyone, or does it only affect those falling into a particular group? If so, are all those likely to be affected by your action members of that group? Are there any express or implied restrictions on the extent of your exercise of power? Are you required by the enabling legislation to consult before you exercise the powers? If so, you must be satisfied that you have not only approached the appropriate consultees but have also given them a reasonable opportunity to give their views. And how long is a "reasonable opportunity" may vary dramatically from one legislative provision to another or even between individual cases involving the same provision.

Example: The Secretary of State for Social Services was empowered to make regulations setting up a housing benefit scheme. Before doing so he was required to "consult with organisations appearing to him to be representative of the [local] authorities concerned". The Association of Metropolitan Authorities was granted 8 days and 5 days respectively to comment on various proposed amendments, the actual wording of some of which was not sent to them. The Court held that the essence of consultation was the communication of a genuine invitation to give advice and a genuine consideration of that advice. To achieve consultation sufficient information must be supplied to the consulted party to enable it to tender helpful advice, and sufficient time must



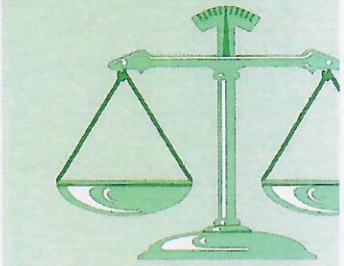
be given to the consulted party to do that. (*R v. Secretary of State for Social Services ex parte Association of Metropolitan Authorities*, [1986] 1 WLR 1.)

What factors will inform your decision?

12. If you are making a decision under statutory powers, those powers may not expressly require you to give reasons (see paragraph 15). Nevertheless, **you** should always know why you have made the decision: a time may come when you have to swear an affidavit explaining your actions! It is also helpful to make a note of your reasons on the file, even if they are not given publicly, so that others (who may have to defend the action in your absence) know what was in your mind.

13. Having identified the factors that inform your decision, are you sure they are relevant? Are you sure that the facts on which you based your decision are accurate? Are you sure that you are not overlooking other relevant factors?

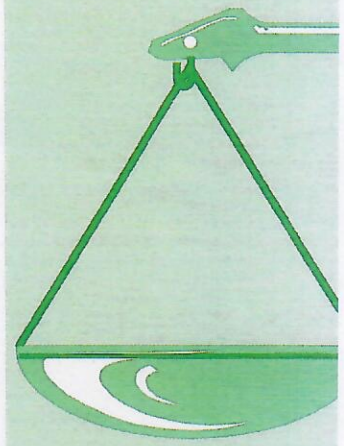
Example: A prospective immigrant was temporarily admitted to the UK pending a decision upon his application for leave to enter as a visitor from Kenya. When his application was refused, he applied for asylum as a refugee from Uganda. His advisers informed the Secretary of State that he would be unlikely to be allowed to re-enter Kenya and would be sent to Uganda: he claimed that if he was returned to Uganda he would be killed. The Secretary of State did not seek to verify this and refused the application on the grounds that he was not a genuine refugee. The House of Lords accepted that the question whether the asylum seeker's removal to Kenya would put him at risk of being returned to Uganda was



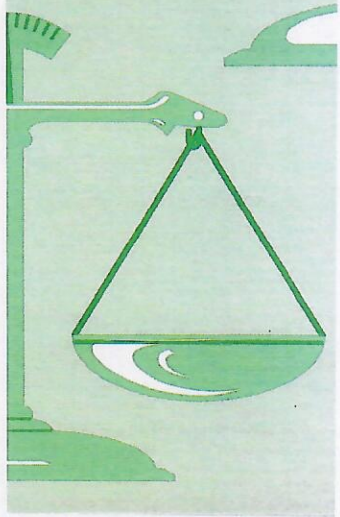
exclusively for the Secretary of State. Nevertheless that question had not been adequately considered by the Secretary of State and the decision had been taken without considering the evidence. The decision to deport him was therefore quashed (*Bugdacay v. Home Secretary* [1987] AC 514).

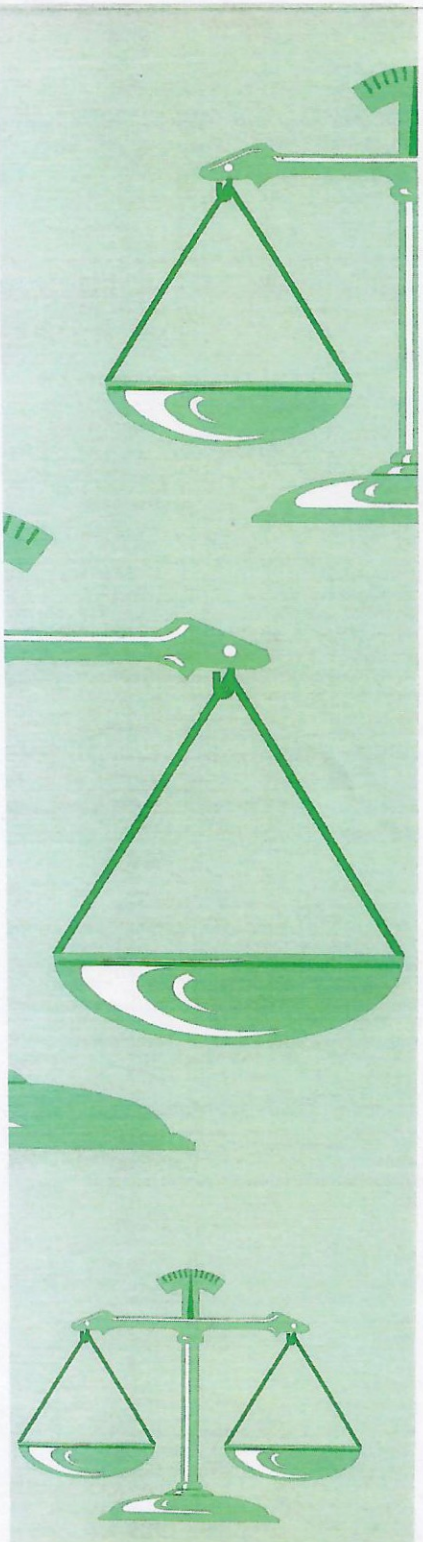
What about Wednesbury?

14. All powers and duties must be exercised reasonably. The Courts will not however substitute their own view of what is reasonable for that of the decision-maker - to do so would be to usurp the decision-maker's position and to blur the separation of functions between the executive and the judiciary. The Courts will only intervene "if no reasonable Minister properly directing himself could have reached the impugned decision ..... To seek the Court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the Minister has made, is to invite the Court to adjudicate as if Parliament had provided a right of appeal against the decision, that is to invite an abuse of power by the judiciary". (Lord Ackner in *Brind v. Home Secretary* [1991] 1 AC 696). The level of irrationality or unreasonableness that needs to be shown before the Courts will intervene is often referred to as "Wednesbury unreasonableness". The name comes from a leading (if somewhat elderly) case:



Example: Under the Sunday Entertainment Act 1932, a local authority had power to grant cinemas consent for Sunday performances "subject to such conditions as the authority thinks fit". A local authority granted a cinema consent subject to the condition that no children under fifteen years of age should be admitted, irrespective of whether they were





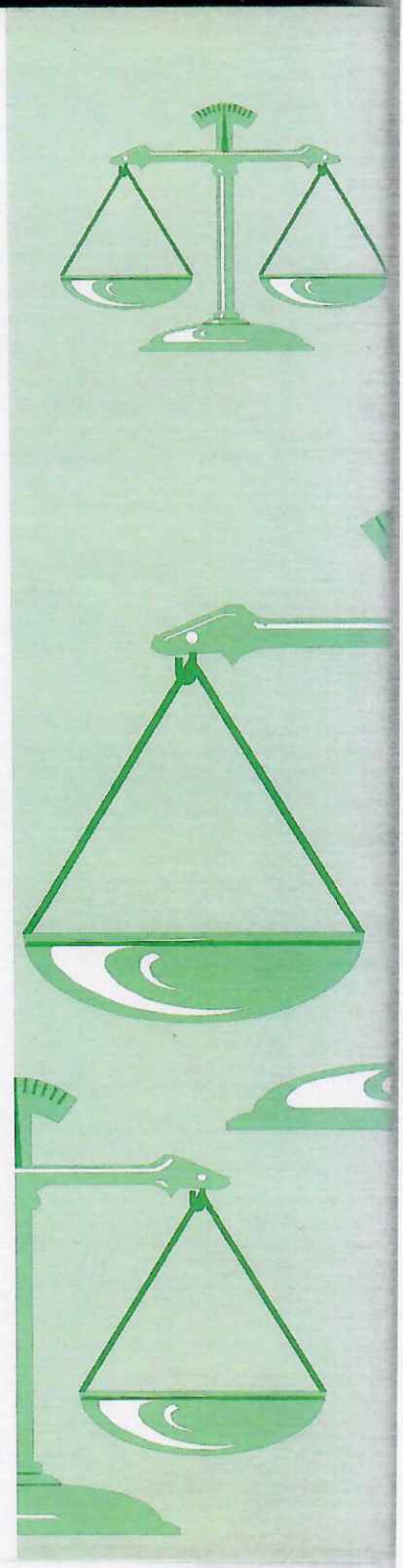
accompanied by an adult. The cinema operators challenged the condition: dismissing their application for judicial review, Lord Greene, the Master of the Rolls, summarised the principles as follows:-

> ".... it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case I think the Court can interfere. The power of the Court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them." (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223).

The Wednesbury test appears a very stiff one but decisions are quashed in practice more frequently than the quotation would suggest. The test is applied with hindsight, and may on occasions lead to results which may seem surprising. It is necessary to stop and think how reasonable and fair your actions will appear to an outsider after the event.

Do you have to give reasons?

15. There is no general principle of law that reasons should be given for decisions, although the relevant legislation may provide that reasons should be given. However, those affected by it may not be persuaded that you acted lawfully when reaching your decision if you do not give reasons for it.

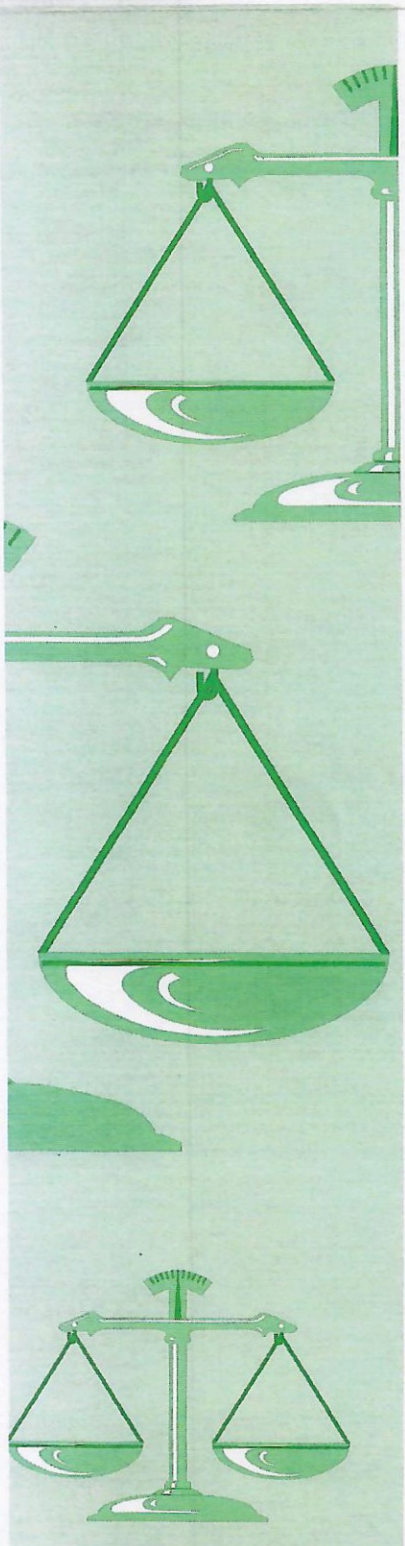


Although the Courts have not (yet) ruled that a failure to give reasons when there is no requirement to do so raises sufficient doubt about the legality of a decision to quash it in the absence of any other evidence, there are many circumstances in which the Court will find a requirement to give reasons arising out of the particular facts of a case.

Example: The Applicant appealed to the Civil Service Appeal Board (CSAB) against his dismissal. The Home Office declined to accept the CSAB's recommendation to reinstate him. The CSAB awarded him £6,500 compensation but did not explain how it had reached this figure, which the Applicant considered inadequate. He sought Judicial Review, and two questions arose. First, whether there was an obligation upon the CSAB to give reasons for its decision, and secondly, whether, if the CSAB declined to give reasons, the Court should infer that there was no good reason or that the CSAB had acted perversely or had taken into account immaterial considerations.

The Court of Appeal held that there was a duty to give reasons. The CSAB took decisions which in practice determined rights as between the Crown and its employees. It should have given outline reasons sufficient to show to what it was directing its mind and thereby indirectly showing not whether its decision was right or wrong, which is a matter solely for it, but whether its decision was lawful.

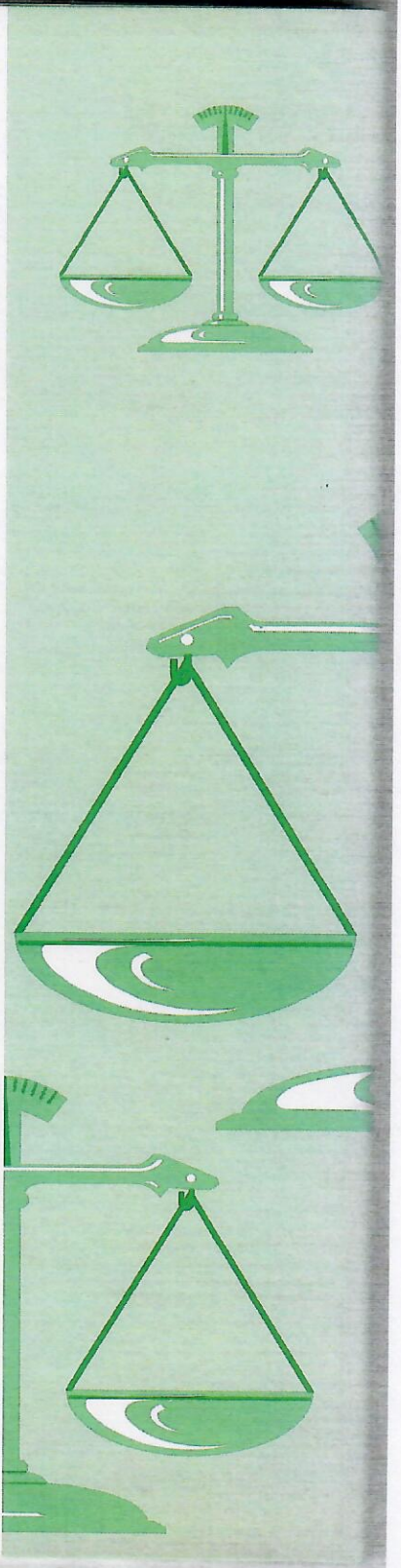
The Court also considered that the award of £6,500 was so low that it should be regarded as irrational in the absence of any explanation from the CSAB as to how it was arrived at. (*R v. Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310.)



16. If you do give reasons it is important to see that the reasons are good in law, in other words that they are within the four corners of the power or duty conferred upon you. It is necessary to show that you have directed your mind to all the right issues and none of the wrong ones and that all reasons given hold up to scrutiny. Do not use "make weight" reasons if they do not hold up under close examination. It is also important that all representations are considered and taken into account and that the fact that they have been is clearly reflected in any written decision. Although the Courts will recognise that you are giving reasons **for the decision** and not reasons for dismissing every argument urged on the Minister - however specious - you should nevertheless consider all the major planks of the arguments put forward by interested parties and make it clear that you have done so. A Judge once described phrases at the end of a written decision like "I have considered all other arguments you have raised but they are not sufficient to affect the decision I have reached", as being "ritual incantations". Your decisions will affect people: they are entitled to feel that they have been given a fair crack of the whip and that their arguments have been considered. If you use an expression like this, you must be sure that you mean it - you may be called upon to justify it to the Courts!

Fettering of discretion

17. A Minister or department is entitled to have a pre-determined policy on how a discretion will usually be exercised: this generally acts in the interests of those affected, as it leads to consistency of approach. However, such a policy must not be allowed to become so rigid that it blinds the decision-maker to the possible merits of individual cases. If this does happen, discretion has been fettered - the policy has closed the decision maker's mind to the possibility that a case might prove to be an exception from the policy - or, indeed, that the policy itself should be changed.

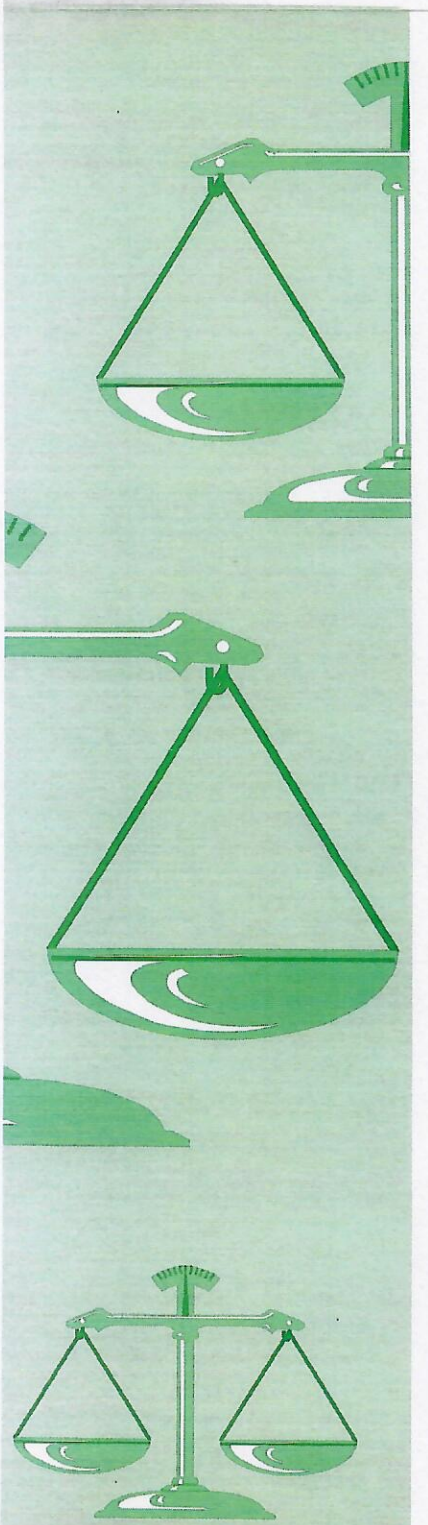


Example: Under the Industrial Development Act 1966, the Board of Trade had a discretion to make grants towards capital expenditure incurred by a person in providing new machinery or plant. The Board had a policy of not making a grant in respect of items costing less than £25. British Oxygen applied for grant for gas cylinders which cost £20 each - but they had purchased more than 200,000 and their outlay exceeded £4 million. They were refused grants and challenged the decision on the basis that the Board had fettered its discretion. British Oxygen lost in the House of Lords on other grounds, but Lord Reid's summary of the principle is worth noting: "A Ministry ... may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to this, **provided the authority is always willing to listen to anyone with something new to say**." (*British Oxygen Co. v. Board of Trade* [1971] AC 610, emphasis added).

Bias

18. Obviously you must not be biased against one party or in favour of another when reaching your decision: if you are, the Court will quite properly set the decision aside. Such cases of "real" bias are rare, however, and most cases that reach the Court are concerned with the **appearance** of bias: the question to ask yourself is not "am I biased?" but "would any of the parties have reasonable cause to think I favoured one party or disfavoured another?"

Example: The inquest following the "Marchioness" tragedy was adjourned pending the outcome of criminal proceedings. Owing to a misunderstanding, a bereaved mother, L, was



denied sight of her son's body before burial. She applied unsuccessfully for an exhumation order. The coroner expressed the view that she was not acting rationally and described some of the relatives and survivors as being "mentally unwell": he was also alleged to have referred to L as "unhinged". The coroner refused either to stand down or to resume the adjourned inquest. L applied for judicial review. The Court of Appeal held that there was a real possibility, judging by the remarks attributed to the coroner, that he had unconsciously allowed himself to be influenced against the applicants by a feeling of hostility towards them and had therefore undervalued the strength of their case to resume the inquest. The coroner's decisions was quashed. (*R v Inner West London Coroner ex parte Dallaglio* [1994] 4 All ER 139)

Pecuniary interest

19. A further type of bias is "pecuniary interest". Although you are unlikely to come across it, it should be mentioned. The mere fact of a direct pecuniary interest - however slight - in the outcome of a decision is enough to disqualify someone from acting. If the parties know of the decision-maker's interest, however, they can agree to waive the point: this is why a judge may announce at the outset of a hearing that he or she has 2,000 shares in X Co Ltd, if the outcome of the hearing may affect the value of those shares. If no objection is made, he or she can continue with the case. The classic example is over a century old, but it well illustrates both the point and the fact that no one is above the law:

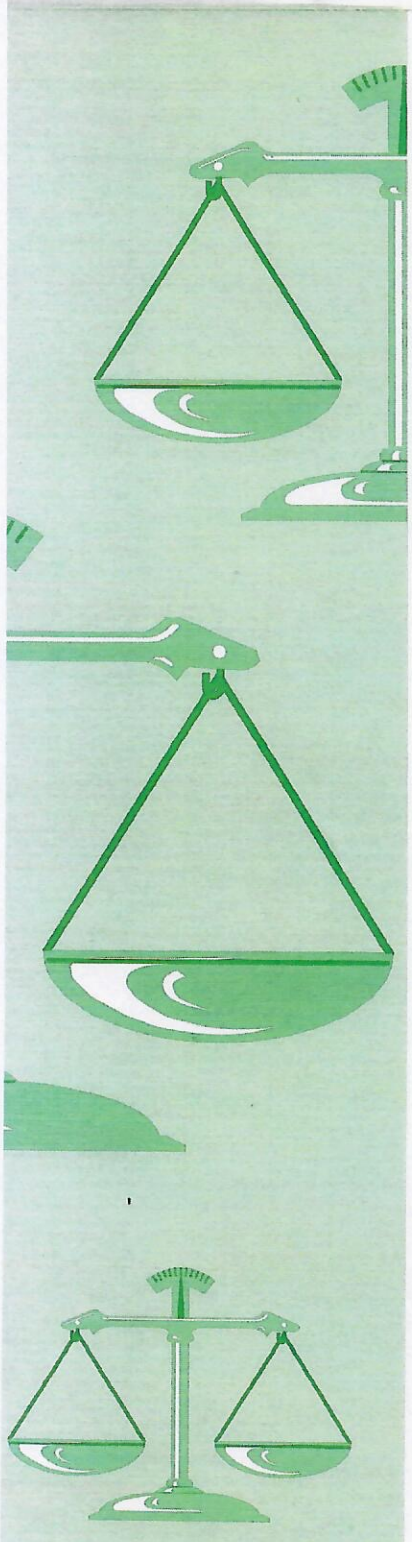
Example: A canal company was in dispute with a landowner across whose land the canal ran, and sought an injunction preventing him interfering with their use of the canal (the landowner

had blocked the canal by dumping bricks in it). The Vice-Chancellor granted them the injunction and the Lord Chancellor, on appeal, upheld the order. Unknown to the landowner, the Lord Chancellor was a substantial shareholder in the canal company. The House of Lords set aside the Lord Chancellor's decision - he was disqualified on the grounds of pecuniary interest. (*Dimes v. Grand Junction Canal* [1852] 3 HL Cas 759.)

Legitimate expectation

20. The expression "legitimate expectation" is one which is frequently encountered but which is often misunderstood. What is a legitimate expectation, how is it created, and what benefits does it confer on those entitled to it? The Government Communication Headquarters (GCHQ) case answers some of these questions.

Example: There was a well-established practice of consultation between the official and trade union sides at the GCHQ about important alterations in the terms and conditions of service for staff. The Minister for the Civil Service directed an immediate variation in these terms and conditions to the effect that staff would no longer be permitted to belong to trade unions. There was no consultation with the trade unions or the staff beforehand. The Minister's direction was challenged on the ground that she had been under a duty to act fairly by consulting those concerned before issuing it. The House of Lords held that the Applicants would, apart from considerations of national security, have had a legitimate expectation that there would have been prior consultation and the decision would, in the absence of national security



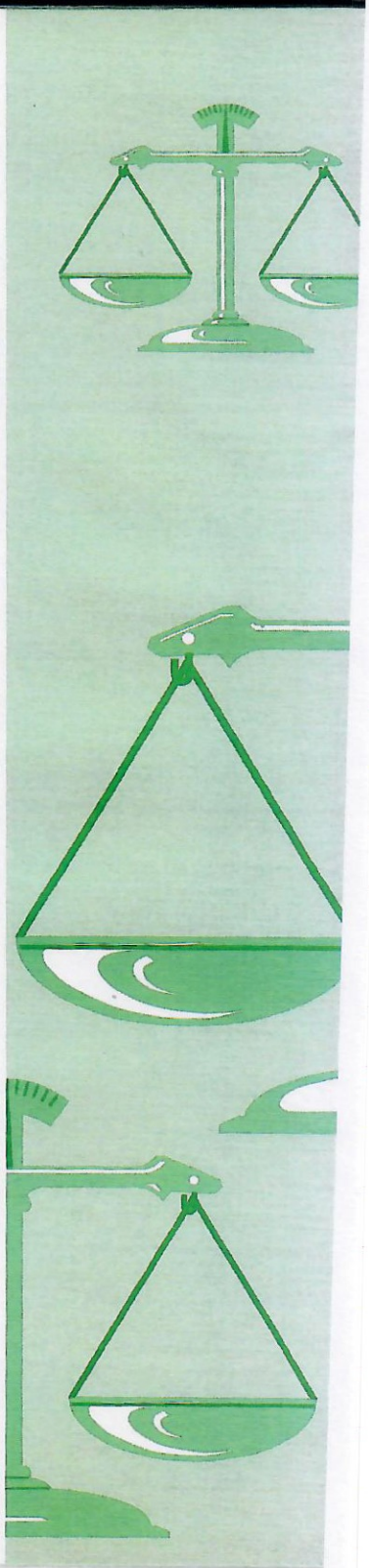
considerations, have been amenable to Judicial Review (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374).

21. We can see from this example that "legitimate expectation" describes rights to which the Court will give effect in the administrative or public law context and which exist in addition to rights arising out of express statutory provisions or contractual terms. The right to consultation was not conferred in a statute, nor did it appear in any contract or terms of employment: the Courts were prepared to recognise its existence as arising out of the existence of a regular practice of consultation. In the words of Lord Diplock in the GCHQ case, it is:

> "a benefit which .... [a person] had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do so until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment."

22. What exactly is the benefit conferred on the person with the legitimate expectation? A line of cases after GCHQ seemed to suggest that it actually has a **substantive** effect - in other words, that once Ministers have indicated by statement of policy or by conduct that they would proceed in a certain way, then they are bound to do so unless it would conflict with their statutory duty. An important recent case, however, suggests that the Courts may adopt a more restrictive line in some circumstances:

Example: The Applicants had, after discussion with the DTI and the Industry Department for Scotland, set up (with Government encouragement and Government grant) a factory in Scotland for the production of oral snuff under the name of "Skoal



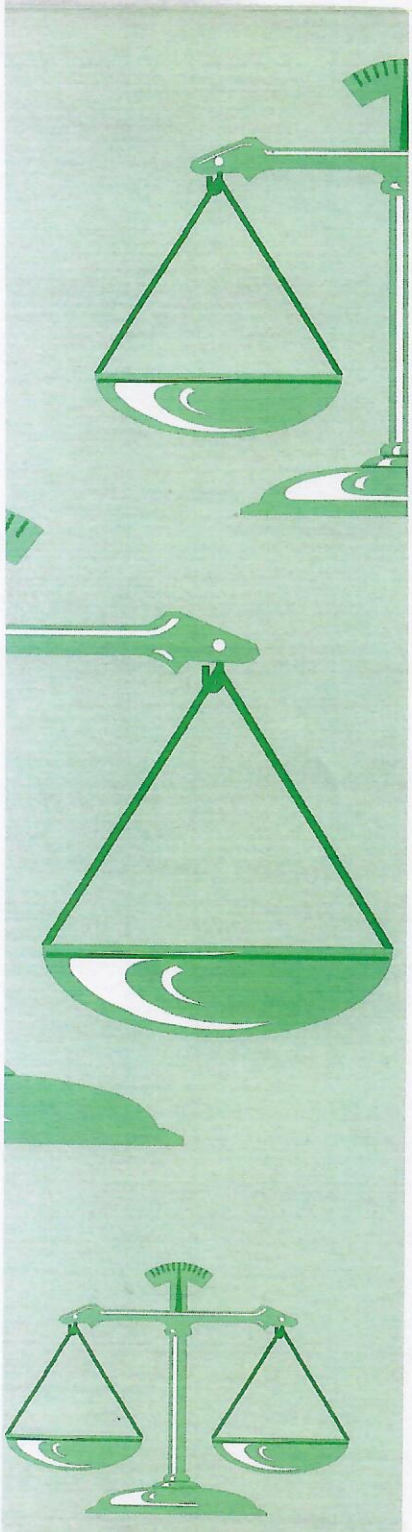
Bandits". Subsequently, the Secretary of State announced a proposal to make Regulations banning oral snuff, and the Applicants were invited to make representations. The Applicants subsequently challenged the making of the Regulations.

On legitimate expectation, Lord Justice Taylor said that the Applicants were understandably aggrieved that, after leading them on, the Government should then strike them a mortal blow by totally banning their product. However, he felt that if the Secretary of State concluded on rational grounds that policy change was required and that oral snuff should be banned in the public interest, his discretion could not be fettered by moral obligations to the Applicants derived from his earlier favourable treatment of them. It would be absurd to suggest that some moral commitment to a single company should prevail over the public interest (*R v. Secretary of State for Health ex parte United States Tobacco Inc* [1992] 1 All ER 212).

The Skoal Bandits case was unusual in that serious public health concerns had to be weighed in the balance against commitments to the company. The Courts may follow a different line if there were not such an overriding general public interest on one side of the scales.

What about Europe?

23. As a member of the European Community, the United Kingdom is obliged, by Article 5 of the EEC Treaty, to take all appropriate measures to ensure fulfilment of the obligations arising out of that Treaty or resulting from action taken by the institutions of the Community. Community law is incorporated

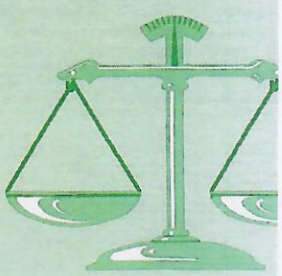


into UK domestic law by the European Communities Act 1972. Individuals may enforce in the UK Courts Community law rights which arise under the EEC Treaty (for example rights to equal pay under Article 119) or under regulations (for example, rights ensuring free movement of European Community workers under Regulation 1612/68). In some circumstances, where directives (another type of Community legislation) have not been given full effect in UK law, individuals may rely directly upon the rights created by directives as against the State or public bodies. When there is a conflict, Community law takes precedence over inconsistent national legislation and measures may be struck down which are inconsistent, or which are considered to hamper the attainment of the objectives of the Treaty.

24. How likely is it, however, that problems concerning rights under EC law will affect you in your everyday duties? This brief summary cannot hope to cover the vast topic of Community law in any detail. You should be aware, however, of the fundamental freedoms protected under Community law. These are:-

Freedom of movement of capital;
Freedom of movement of goods;
Freedom of movement of persons; and
Freedom of movement of services.

In particular, attention should be drawn to the areas of sex and race discrimination. Community law contains a number of provisions designed to remove discrimination on the grounds of sex. It is also contrary to Community law to discriminate against a national of another member state of the Community on the grounds of nationality in the areas covered by the EEC Treaty. In any case which raises such questions, you should seek immediate legal advice.

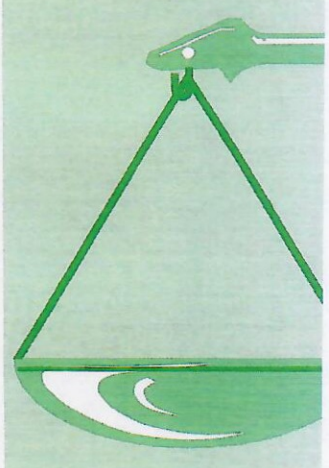


What happens in a typical Judicial review case?

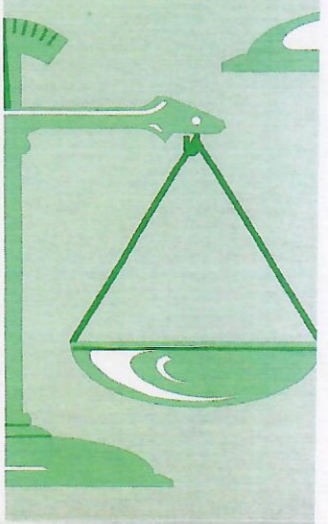
25. This section sets out to explain what happens in a typical Judicial Review case in England and Wales, and what you might expect as the civil servant involved in a Ministerial decision subject to challenge. (The procedure in Scotland is significantly different; the case will normally be heard much sooner than in England since there is no requirement to obtain the leave of the Court to bring the application. Early consultation with your Scottish legal adviser (usually the Scottish Office Solicitor) is therefore essential).

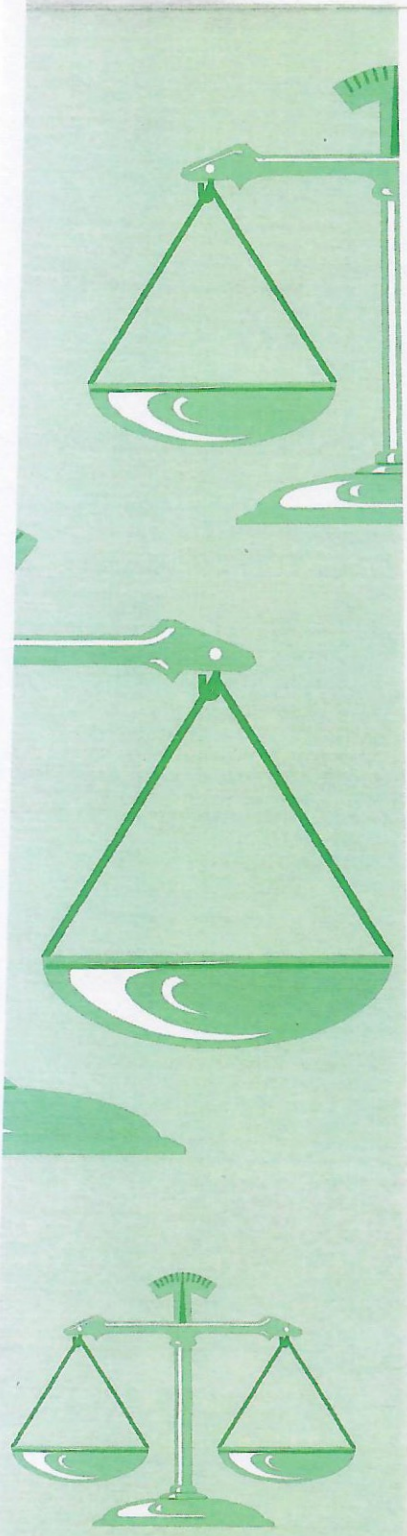
Leave

26. Someone who wishes to challenge a decision by Judicial Review cannot simply issue proceedings against the Minister. An application for leave has to be made to the High Court, which will only grant leave if it considers that there is an arguable case and that the Applicant has not unduly delayed in seeking leave. The time-limit laid down in Court Rules requires an application for leave to be made expeditiously and in any event within three months of the decision complained of, but the Court does have power to extend that period. Conversely, the Court has on occasions refused leave on the ground of delay even when an application has been made within three months.



27. Applications for leave are usually considered on paper by a Judge, but Applicants can ask for an oral hearing. The Minister does not have the right to be represented at such a hearing, but the Court will allow representation if it considers that justice requires it. Applicants who are refused leave may renew their application to the Court of Appeal, but cannot appeal to the House of Lords. In exceptional cases where leave is granted without hearing argument on behalf of the person whose action is to be challenged, an application can be made to set the leave aside. This will only be where





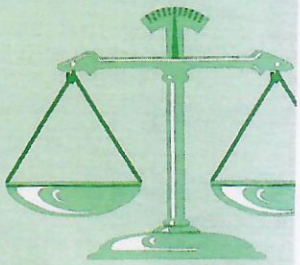
the case is hopeless but the Judge was not made aware of all the relevant facts or all the applicable law.

Evidence

28. If leave is granted, the papers are served on the Minister's Solicitors. The Notice of Motion (the document formally setting out the Applicant's case) will be supported by an Affidavit (a sworn statement of the facts). The department's legal advisers will take a view on whether the challenge can be defended and may seek the advice of Treasury Counsel. If the legal advice is that the challenge cannot properly be defended, and the department accepts that advice, the proper course is for the case to be conceded so that the matter can be considered afresh. It would be improper to seek to defend the challenge on purely presentational grounds. You will be expected to assist in the consideration of the strengths of the case against the department by directing the lawyers to the relevant papers in your files, explaining any policy considerations that affected your actions, and generally helping them to understand why and how the decision under challenge was reached. If the case is to be defended, you may well be asked to swear an affidavit setting out the department's side of the case and attaching all relevant documents from your files. The actual drafting of the affidavit will usually be carried out by the lawyers after discussions with you, but you must satisfy yourself that it is accurate, complete and frank about the action under challenge.

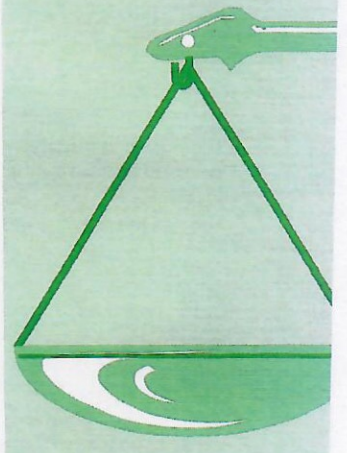
Witnesses

29. A Judicial Review challenge is aimed at the legality - in administrative law terms - of the decision. The facts are usually not in dispute, and it is wholly exceptional for evidence to be given orally by witnesses.



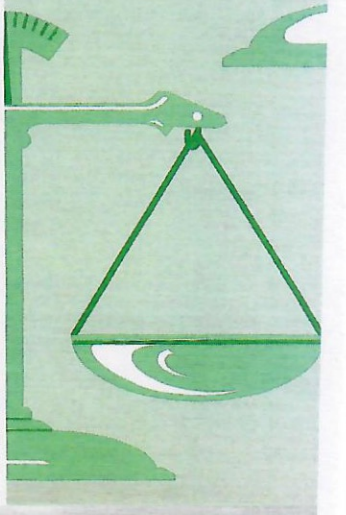
At the hearing

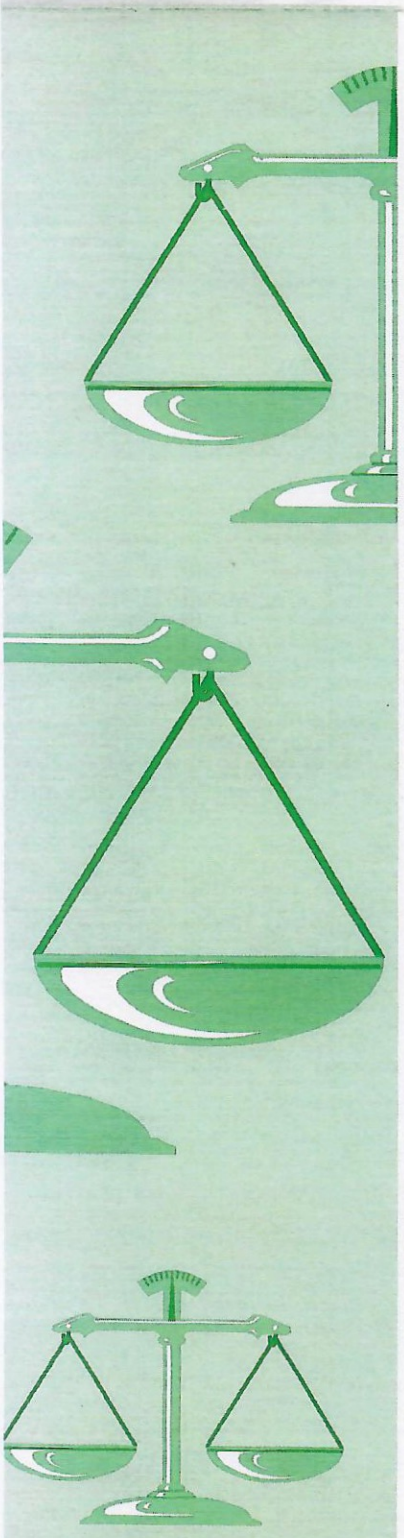
30. It is possible for a case to come on for hearing very quickly - even within 24 hours if the issues are sufficiently urgent. Unfortunately, however, the Courts are so busy that non-urgent cases may have to wait for over a year. You will usually be expected to attend the hearing to offer guidance to your legal advisers on points that may come up during the hearing. The procedure in Court is quite simple. The barrister appearing for the Applicant introduces the case, refers to the affidavits, and addresses the judge about the law. Frequently, reference will be made to cases previously decided by the Courts which concern similar points and which the barrister considers support the Applicant's case (what lawyers call "precedents" or "authorities"). Then it is the turn of the department's barrister to present the case in answer to the Applicant. Finally, the Applicant's barrister may address the Court again on any points arising from the department's case. The Judge then considers the rival arguments and delivers a decision - either immediately or after taking time for consideration. (A judgment delivered later is called a "reserved judgment".)



The Powers of the Judge

31. It is important to appreciate that the powers of the Judge are not limitless and that it is for the person entrusted with the decision making power to make the decision, not the Court. While the Judge can quash the Minister's decision (that is to say declare it unlawful and set it aside), the Judge usually cannot put him or herself in the Minister's place and re-make the decision on the Minister's behalf. A decision which is quashed is sent back to the Minister for reconsideration in the light of any guidance **as to the legal issues** given by the Court, but the Court cannot tell the Minister what decision to reach. It can therefore happen that the same decision is reached second time round without taint of illegality.





Interim relief

32. The difficulties caused by delay in obtaining a hearing date often lead Applicants for judicial review to seek interim relief - usually to preserve the current position until a full hearing of the case is possible. Until recently, it was thought that the Court did not have the power to grant injunctions against the Crown - that is to say, orders requiring the Crown to take (or to refrain from taking) specified action. If interim relief were sought in judicial review proceedings, the former practice was that the Government department concerned would usually be prepared to indicate that it would not disturb the status quo until the application for judicial review was finally determined. Recently, however, the question has been considered by the House of Lords which reached a different conclusion. The facts of *M. -v- Home Secretary* [1993] 3 WLR 433 are complicated, and the following is only a very brief summary:

Example: M, a citizen of Zaire, sought political asylum in the United Kingdom. This was refused, and he applied for leave to seek judicial review of that decision. Leave was initially refused, but M made a fresh application. The Judge adjourned that application, but in the course of the hearing understood Counsel for the Home Office to have undertaken that M would not be removed from the UK until the case had finally been determined. Counsel had not intended to give such an undertaking, however, and had not believed that he had done so. M was, in fact, deported. When the Judge was informed of this later that night, he made an order over the telephone to the effect that M should be returned to this country. The Home Secretary, on legal advice, considered that the order was outside the powers of the Judge, being a mandatory injunction against the Crown, and did not bind him.

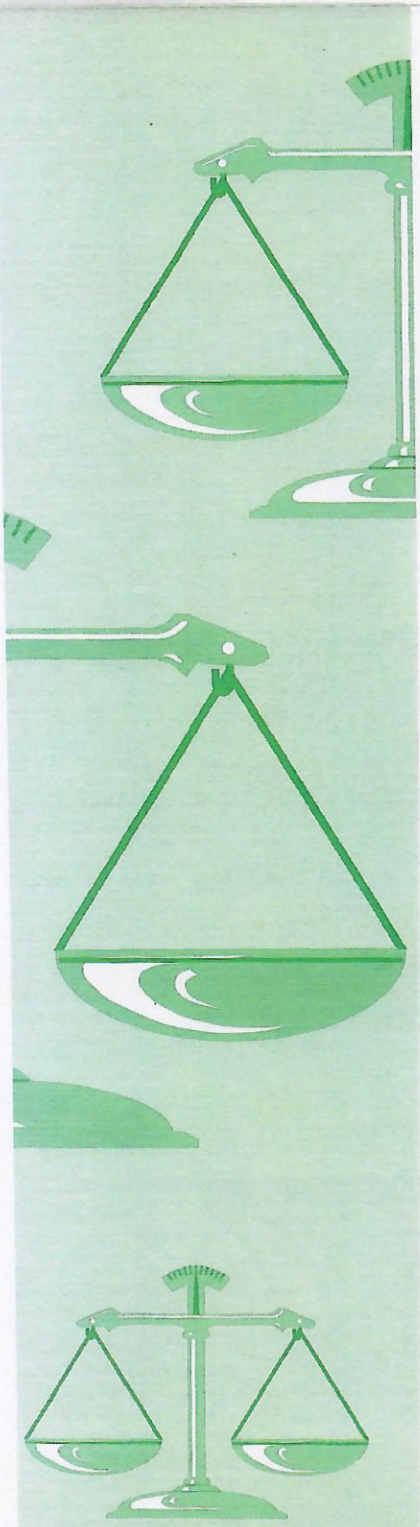
Accordingly, the Home Secretary did not comply with it. The House of Lords was unanimous in ruling that injunctions, including interim injunctions, were available against the Crown and Ministers and other officers of the Crown. Further, a Minister or his department would be liable to proceedings for contempt of Court if they breached the terms of an injunction made against them and the Home Secretary was accordingly in contempt of Court for not complying with the Judge's order to return M. Lord Templeman said that:-

> "The argument that there was no power to enforce the law by injunction or contempt proceedings against a Minister in his official capacity would, if upheld, establish the proposition that the executive obeyed the law as a matter of grace, not of necessity, a proposition that would reverse the result of the [English] Civil War."

It is too early to assess what effect, in practice, the decision in *M. -v- Home Secretary* will have, but it would be surprising were it not to make judicial review even more attractive to prospective Applicants. It is likely therefore that departments will be faced not only with an increasing number of applications for interim injunctions at the same time as the Applicant applies for leave, but also that the existence of the relief will in itself lead to an increase in applications for judicial review. This will in turn put even greater pressure on the Courts hearing such cases.

Appeals

33. Recent amendments to Court Rules require a dissatisfied party to obtain leave to appeal to the Court of Appeal. An appeal to the House of Lords from the Court of Appeal also requires leave - from the Court of Appeal or the House of Lords itself.



Judicial Review in Scotland

34. The distinction drawn in paragraph 4 between public and private law is not applicable in Scotland. The test to be applied to discover whether the Court in Scotland will judicially review an action is if there is what has been described as a tripartite relationship between the person or body to whom a jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised.

35. The grounds on which Judicial Review may be sought in Scotland are substantially the same as those described for England and Wales in paragraphs 6 to 23 and English case law on these points will be considered by the Scottish Courts.

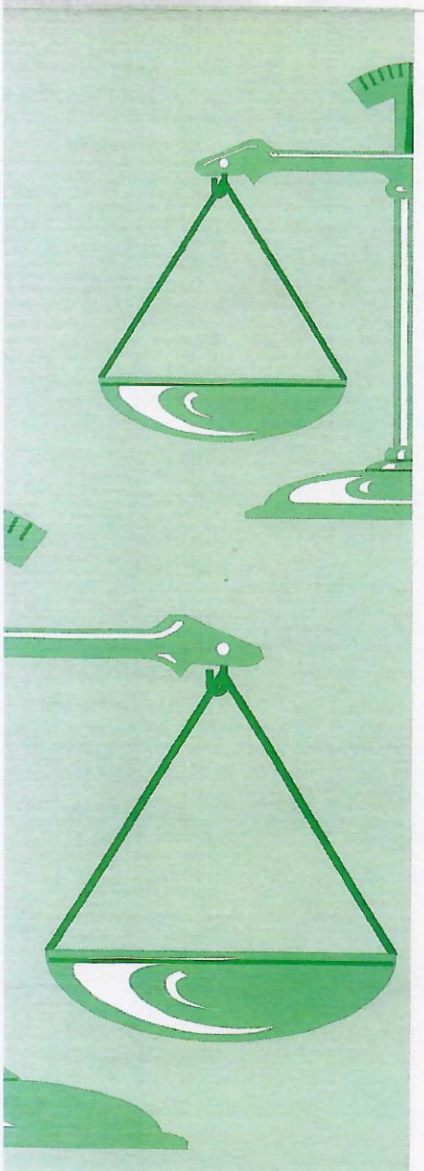
36. The mechanics of Judicial Review in Scotland are significantly different. All applications for Judicial Review must be made to the Court of Session. There is no application for leave and in most cases there will be only one hearing which will be at least 7 days (but generally no longer than a few weeks) after the application (or petition) has been made. Nor is there any fixed time limit within which proceedings must be raised although it is open to the Court to rule that the raising of proceedings has been left for too long. The petition will describe the facts and circumstances of the decision complained of and the Minister will have an opportunity to submit written answers to the claims made by the petitioner. As in England, there will generally not be oral evidence. The procedure at the hearing is much as described in paragraph 30 except that the lawyer presenting the case is known in Scotland as an "advocate". Paragraph 31 as to the powers of the Judge is equally applicable to Scotland, although the Inner House of the Court of Session has recently held that *M -v- Home Secretary* is not binding

in Scotland and that interim interdict (the Scottish equivalent of an injunction) is not available against the Crown.

Summary

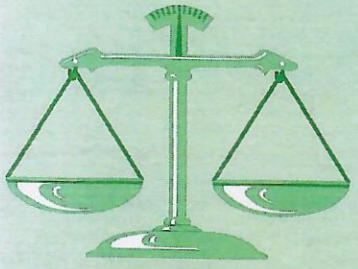
37. • Judicial Review is the way in which the Courts ensure we use our powers properly (see paragraph 3).

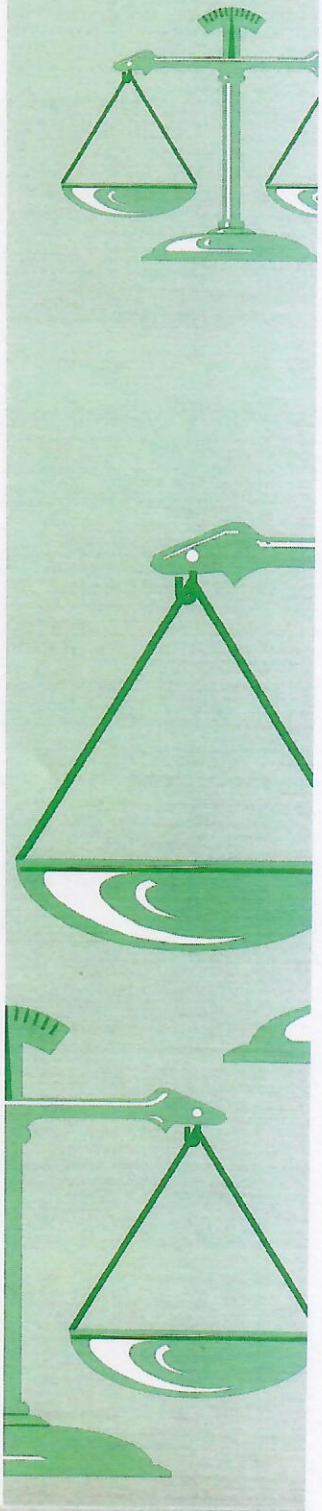
- Regard it as part of a system of judicial supervision designed to ensure good administration (see paragraph 3).
- It affects all staff in all departments, agencies and public bodies (see paragraph 4).
- Before you exercise powers that affect the citizen, make sure you know
  - what powers you have
  - that you are exercising them for the right purpose (see paragraphs 6-10).
- Are there any procedural steps you need to take first? Have those likely to be affected the right to be consulted? If so, have you given them sufficient information to understand your proposals, and adequate time to make representations? (see paragraph 11).
- Ask yourself whether you have taken into account all the relevant factors - and whether you have discounted all irrelevant factors (see paragraphs 12-13).
- Make a judgement whether there is any chance that your proposed action may be regarded as an abuse of power or as "Wednesbury unreasonable" (see paragraph 14).

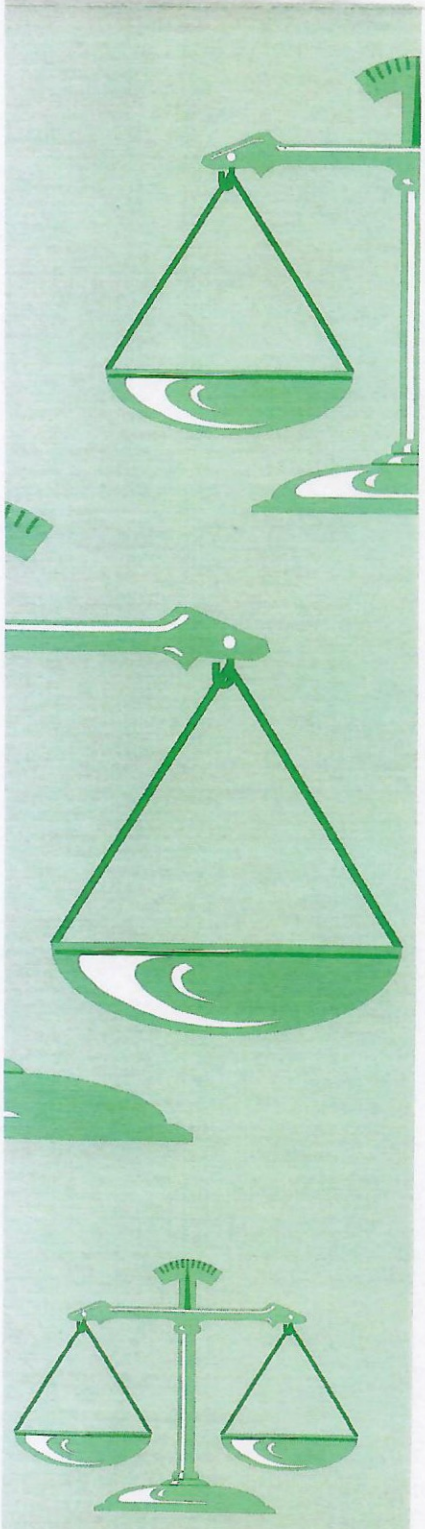


- Should you give reasons? If so, are they adequate? (see paragraphs 15-16).
- Consider whether you have pre-judged the issue by blindly following a departmental policy without deciding whether a particular case is an exception (see paragraph 17).
- Ensure that neither you nor anyone involved in making the decision has any conflicting interest which might lead someone to suppose there is bias (see paragraphs 18-19).
- Is there any possibility that anyone likely to be affected has a legitimate expectation that you will act in a particular way? (see paragraphs 20-22).
- Is there a European element? (see paragraphs 23-24).

39. The best way of avoiding Judicial Review is to follow the principles of good administration. This involves administrators working closely with lawyers. We hope that this booklet will encourage you to take legal advice before committing your Minister or your department to a particular decision if there is any doubt in your mind whether about any of the points listed above or about any other aspect of what you propose to do.







ANNEX 1

Legalese and Latin maxims

Any specialised subject has its own jargon, and the law is no exception. This short glossary may help you with some unfamiliar terms:

certiorari: Literally meaning "to be made certain", it refers to the legal process by which decisions are brought before the Court for their legality to be examined, and for them to be quashed if they are found to be illegal. An application for *certiorari* will usually be coupled with an application for *mandamus* or *prohibition* (see below).

Divisional Court: The Divisional Court hears applications for Judicial Review: it usually comprises one High Court Judge sitting alone, but may comprise two or even three Judges.

ex parte: Literally "on behalf of", the phrase is found in the title of many Judicial Review cases which, for historical reasons, are often entitled "R (for "Regina" - "The Queen") v. The Secretary of State for ....., ex parte Jones": Jones is the Applicant for Judicial Review, the Secretary of State the Respondent whose decision is under challenge. It also denotes any proceedings - for example for the grant of leave to apply for Judicial Review - where only one party appears before the Court.

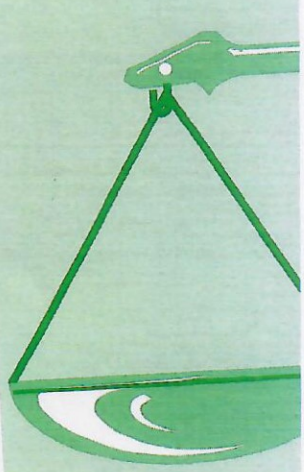
interim (or interlocutory) relief: These expressions are used almost interchangeably to describe relief given by the Court pending the final outcome of a case - usually to preserve the existing position.

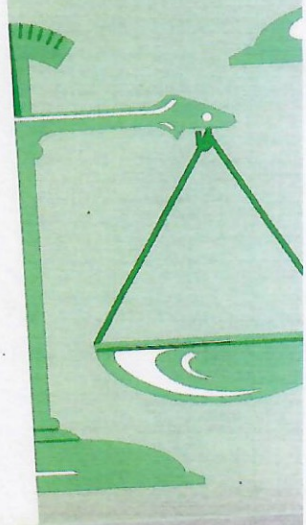
locus standi: Literally "a place of standing": lawyers say that people have *locus* if they have a right to be heard, in other words a right to bring a complaint before the Court. Normally a person applying for Judicial Review must have some real interest in the outcome. Mere busybodies cannot complain about matters that do not affect them.

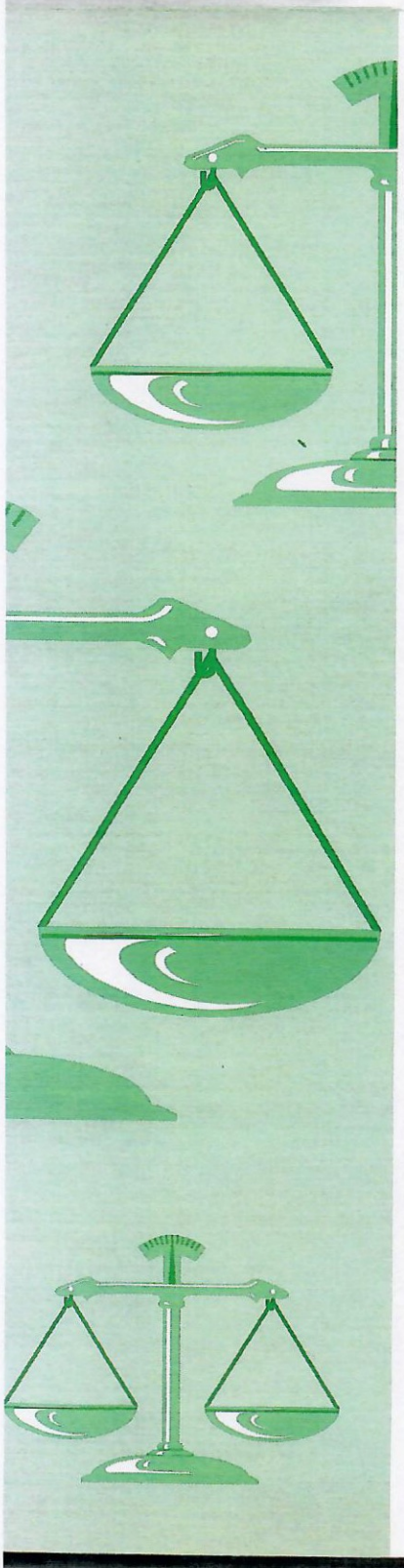
mandamus: Literally "we command": an order of *mandamus* commands a body to perform a public duty.

prohibition: An order of *prohibition* commands a person or body subject to public law remedies **not** to carry out a particular function - for example, to prevent Magistrates from carrying on with invalid proceedings.

ultra vires: Literally "outside the powers": the phrase describes action taken by a body which is outside its legal powers.







ANNEX 2

Further information about administrative law

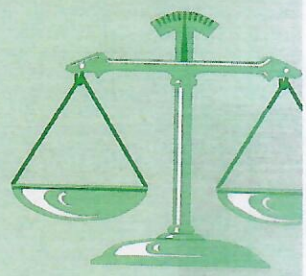
As we said at the beginning, this booklet can only scratch the surface of a large topic. If you wish to learn more about administrative law and the principles of Judicial Review, or about questions of European Community law, there are a number of courses organised either within departments or on a central basis by the Civil Service College which you may wish to consider attending. Your training section will be able to supply you with details.

Most of the books on Judicial Review and administrative law are written for lawyers or legal students: often they are heavy going for the non-lawyer. The following is a short-list of books which you may find slightly more accessible:-

An Introduction to Administrative Law -
Peter Cane, Clarendon Press (1992)

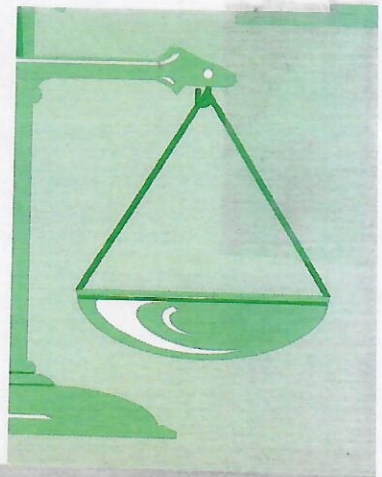
Constitutional and Administrative Law -
S A de Smith, 6th Edition, Penguin Books (1989)

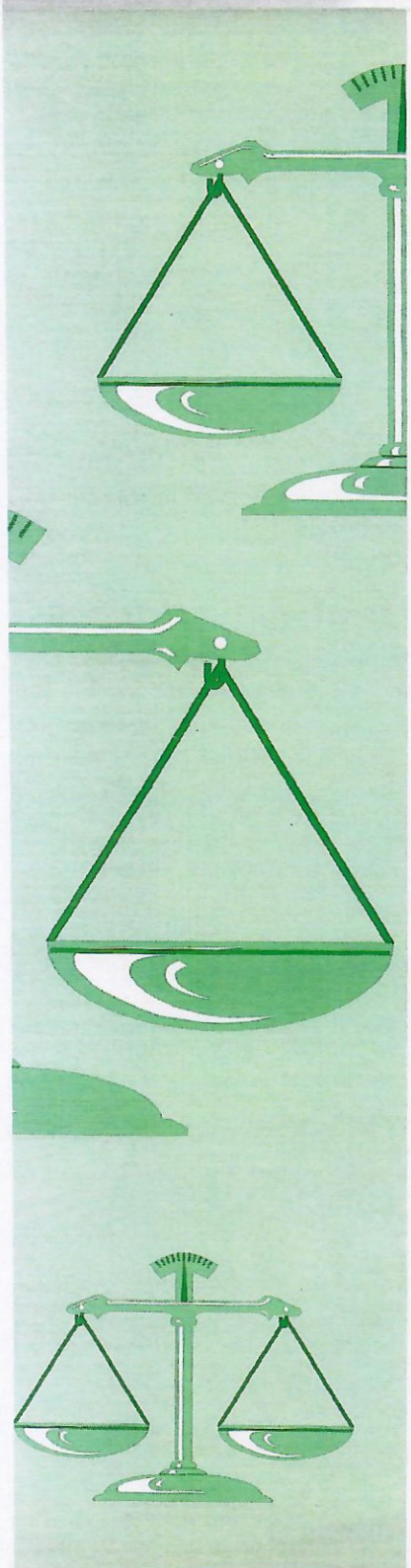
Garner's Administrative Law -
B L Jones, 7th Edition, Butterworths (1989)



ADDENDUM

The case of ex parte Cooper, used as an example on page 17, was subsequently overruled by the Court of Appeal on the grounds that licensing judges are in a unique position and the general rule should not apply to them. While the example therefore remains valid for all other classes of hearings, and while the general principle which it illustrates has not been altered by the Court of Appeal's judgment, a different example will be substituted in future prints to avoid the possibility of any confusion.





This pamphlet, which has been prepared by the Treasury Solicitor's Department in conjunction with Cabinet Office (OPSS) Development Division, gives administrators at all levels an introduction to the basic principles of administrative law and judicial review. Enquiries about the content should be addressed to the Treasury Solicitor's Department (Telephone 0171-210 3091). Requests for additional copies should be made through Cabinet Office (OPSS) Development Division (Telephone 0171-270 6228).

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