

The Judge Over Your Shoulder



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Foreword

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"You are sitting at your desk granting licences on behalf of your Minister. Your enabling statutory powers are in the widest possible terms: 'The Secretary of State may grant licences on such conditions as he thinks fit'. With power like that you might think that there could be no possible ground for legal challenge in the courts whatever you do. But you would be wrong."

These are the opening words of the first edition of *The Judge Over Your Shoulder*. I am sure that this paragraph would have caught the reader's eye and I have no doubt that he or she would have read on to find out just why someone might take the Minister to court. Since these words were published in 1987, many administrators will have read the Treasury Solicitor's valuable guide as edition succeeded edition. In doing so, they will have gained a good understanding of the legal environment in which decisions are made and an ability to assess the impact of legal risk on their work. This skill has become ever more important as we seek to ensure that we design and deliver effective services for the 21st Century. It is a skill which takes its rightful place within the Professional Skills for Government framework. And the National School of Government recognises the value of *The Judge Over Your Shoulder*, having used it as course material for many years.

This 4th Edition of JOYS (as this publication is affectionately known) reflects important developments since the last Edition (March 2000), particularly the impact of the Human Rights Act. It maintains the tradition of addressing mainly junior administrators, paying particular attention to the practical application of legal principles, but may well be useful at a more senior level too.

I welcome this new edition of JOYS and commend it to you as a key source of guidance for improving policy development and decision-making in the public service.



Sir Gus O'Donnell KCB

Gus O'Donnell

Preface

The last (3rd) edition of this book was produced in March 2000. The Human Rights Act 1998 was not yet in force, though another important constitutional change, devolution, had recently taken place. It was necessary that a new edition be produced to take account of these changes and to anticipate the new decision-making framework which we should face after the HRA came into force in October 2000.

The predictions contained in the March 2000 edition have turned out to be fairly accurate but, now that the HRA has been in force for more than five years, we can get a much clearer picture of its impact on administrative decision-making in practice and of the new approach of the Courts. In this 4th edition we have up-dated the case citations and you will see how many of the cases cited include human rights points, and how closely human rights issues have become integrated with the traditional grounds for judicial review.

We have always kept in mind the purpose and target audience of this book. Its purpose is not "How to survive Judicial Review", but rather to inform and improve the quality of administrative decision-making – though, if we are successful, that should have the incidental effect of making decisions less vulnerable to Judicial Review. The target audience consists of reasonably well-informed and interested junior administrators* whose task is to make decisions affecting members of the public, or to prepare the material to enable others to make such decisions.

We have therefore tried to keep the guidance simple and practical. In the section which describes the Judicial Review procedure, for example, we have added or extended sections on the pre-action stage and how to settle a claim, and how to handle the evidence where a Minister has made the decision personally. We have tried always to emphasise what is best practice in administrative decision-making, rather than what you can get away with: see for example on the recording and giving of reasons.

We try to introduce this well-informed and interested audience to the basic principles and language of administrative law and Judicial Review, but our limited aim means that this is not a legal text-book. We are well aware that it treats some weighty and absorbing subjects, such as EU Law, in a perfunctory fashion (though we have included a list of books and other sources at the end). This is inevitable in a book of this scope. Yet some complain that the book is too long. All we can say in answer to that is that it is not expected that the audience, however well-informed and interested, should read it at one sitting.

* both male and female: we hope we may be excused for using only the masculine pronoun – for the sake of brevity.

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1. Good Administration – and Administrative Law

- 1.1 All public bodies should aim to practise "good administration": they should aim to perform their public duties speedily, efficiently and fairly. But this is not a book about what "good administration" is, or how to achieve it. Rather, it approaches the subject from the opposite direction: it describes the body of law which has been developed by the courts to supervise public bodies in carrying out their public functions. Because of the need to reduce law to a set of more or less standard rules, administrative law is not identical with the principles of good administration. But a keen appreciation of the requirements of good administration will often give a pretty good idea of what administrative law will say on the point. Administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful and effective method of ensuring that the **improper exercise of power** can be checked.

What is "Administrative Law"?

- 1.2 "Administrative law" is the branch of law which governs public bodies in the exercise of their public functions. Public bodies range from Government Departments and their agencies, to "non-departmental public bodies" (NDPBs), such as the Committee on Standards in Public Life and the Independent Police Complaints Commission. The term includes the very large number of tribunals and commissions exercising public (usually statutory) functions¹. "Administrative law" is part of "Public Law": the two terms are more or less synonymous². "Public Law" is contrasted with "Private Law" which governs the relationships between private individuals or private bodies (such as companies) acting in their private capacity. The law of contract and of tort (civil wrong), for example, is private law.

Administrative Law Can Apply to Private Bodies Too

- 1.3 However, there is no clear dividing line between public law and private law. The activities of private bodies too may be governed by public law when they are carrying out public functions. Generally, bodies, including private bodies, are said to be performing public functions (and are thus governed by administrative law) when they act, and have the authority to act, for the collective benefit of the general public.
- 1.4 Sometimes, too, bodies which are obviously public bodies, like Government Departments, engage in activities which are governed by private law. For example, if a Government Department enters in a contract for the provision of IT equipment, or of transcription services, the contract with the successful supplier will be governed by the terms of the contract (and by the law of contract). But the decision of the Department to put the contract out to tender, or some aspect of the tendering procedure, may well be governed by public law. It is not always easy to see where private law ends and public law begins, but the Court will examine each case to see how far public law functions are involved (for example where a process is provided for in Regulations³, it is more likely that managing the process is a public law function).
- 1.5 The Human Rights Act 1998 is part of administrative law because it governs the exercise of statutory powers by public authorities. For example, the Act has an important bearing on the way in which those powers are to be interpreted. The devolution legislation is part of administrative law for the same reason. Likewise European Community (EC) law may be relevant to the exercise of statutory powers. We discuss these in more detail later.

¹ A comprehensive list of "Public Authorities" for the purposes of the Freedom of Information Act 2000 is contained in Schedule 1 to that Act, read with Section 6 of the Act.

² "Public Law" includes constitutional law.

³ Regulations, normally in the form of a Statutory Instrument.

2. Making a Decision – What Constitutes a "Decision"

- 2.1 Administrative law (and the Court procedure called Judicial Review) is said to govern the making of "decisions" by public authorities, and the application of decision-making procedures. "Decisions" typically relate to a particular matter actually affecting an individual person or group. Examples are: the grant of a planning application to an individual or company; the determination of a person's immigration status; the allocation of a school place; assigning a prisoner to a particular security category. The scope of administrative law does however go wider than "decisions" of this direct kind: the Courts have held that Judicial Review extends to subordinate legislation⁴, and things like policies (of general application), reports and recommendations, and advice or guidance.

Case Example

In introducing the Community Charge, the DoE issued an explanatory leaflet entitled "The Community Charge (the so-called poll tax): How it will work for you". Greenwich argued that the leaflet was misleading in that it omitted to state that married and cohabiting couples were liable for one another's tax. The Court held that there could be only a selection of information to be included in the leaflet and that it was not literally inaccurate. Judicial Review of "the decision to issue" the leaflet was therefore refused – but there was no doubt that it was a "decision" which the Court could review. *R v Secretary of State for the Environment ex parte Greenwich London Borough Council* The Times 17 May 1989.

- 2.2 When a Department issues such guidance it is obliged to observe the same high standards as it does when making a decision on, for example, the level of tax to be paid by an individual person. They are each "an action in relation to the exercise of a public function", so bringing them within the scope of Judicial Review⁵.

Decisions – the Exercise of Discretion

- 2.3 When a Minister or a Department decides to act, or to act in a particular way, or not to act, they are "exercising a discretion". The discretion may appear to be unlimited ("unfettered") – for example, the statutory provision conferring the discretion may say "the Secretary of State shall grant or refuse the application", without any qualification. But however unlimited the decision-maker's discretion may appear to be, there are legal limits on the exercise of that discretion.
- 2.4 Some limitations on the exercise of the discretion may be **express**: the purposes for which a particular power was given, or the criteria to be applied in exercising it, may actually be set out in the legislation. Other limits will be **implied** by the statutory scheme. But others may be derived from the principles of administrative law, or from rights recognised under the European Convention on Human Rights⁶. It is an axiom that public law powers must be exercised for the purpose for which they were conferred, not for any extraneous or ulterior purpose. At the same time, those purposes do continue to evolve or be re-interpreted in the light of constitutional and democratic developments – such as the Human Rights Act.

⁴ See, as an illustration, the Spath Holme case at 2.11.

⁵ Civil Procedure Rules ("CPR") 54.1(2)(a)(ii)

⁶ that is, the rights given effect in domestic law by the Human Rights Act. These rights are known as "the Convention Rights".

- 2.5 Administrative law has developed a series of tests for measuring the lawfulness of an exercise of public law powers:
- Legality** – acting within the scope of any powers and for a proper purpose;
 - Procedural fairness** – so as for example to give the individual an opportunity to be heard;
 - Reasonableness or Rationality** – following a proper reasoning process and so coming to a reasonable conclusion;
 - Compatibility** with the Convention rights and EC law.
- 2.6 Suppose therefore that your Department wants to make a decision which will result in some action affecting the general public. To act lawfully, the Department must have the legal power to do what it intends to do. If it does not, it will be acting *ultra vires*, or outside its powers. It will be acting illegally. Where the power does exist, it will usually be found in
- Primary legislation** (an Act of Parliament); or
 - Subordinate or secondary legislation** (a statutory instrument etc)
- It will obviously be necessary to study the legislation to learn the limits and purposes of the power.
- 2.7 Sometimes the Department will derive its power to act from a contract, or from "the Prerogative". Prerogative powers are powers of the State, exercised by the executive, which are derived from the residual authority of the Sovereign. Examples of prerogative powers are the power to make treaties, the defence of the realm and the grant of honours. Such powers do not lie outside the scope of administrative law, but, as explained later⁷, the Court may feel reluctant to interfere with the exercise of such powers.
- 2.8 If the power is contained in legislation, you will need to look at its words to work out what the Department can and cannot do. Usually, words in a statute are given their plain English meaning. Where the words can support different interpretations, the Courts will apply formal "rules of construction" to try to determine what the intention of the legislature was. Either way, you will need to understand the general purpose of the statute, as well as the particular provision. This can sometimes justify looking at Notes on Clauses, or at Hansard.
- 2.9 The Human Rights Act adds an important dimension to interpreting legislation: so far as it is possible to do so, legislation must be read and given effect to in a way which is compatible with the Convention rights⁸.

Case Example

M committed suicide in custody. Article 2 of the Convention (Right to Life) imposed a procedural duty on the State to carry out a thorough investigation of events surrounding the death, which an Inquest might satisfy. However the Coroners Act and Rules prevented an inquest verdict from appearing to attribute criminal guilt or civil liability, and limited the verdict to a finding of "how, when and where" the deceased came by his death. The Coroner ruled that, since "how" was to be interpreted narrowly as "by what means", the jury might not refer to neglect in their verdict. The House of Lords held that if the holding of an Inquest were to comply with the State's procedural duty under Article 2 to carry out a thorough investigation, the question "how the deceased met his death" must in such cases be interpreted more widely so as to mean "by what means and in what circumstances", and that the jury should have been permitted to express their conclusion on the central factual issues. *R (Middleton) v West Somerset Coroner and Secretary of State for the Home Department* [2004] 2 AC 182.

⁷ See 2.67 ff

⁸ Section 3 HRA 1998. The HRA also imposes the important requirement on public authorities not to act in a way which is incompatible with the Convention rights.

2.10 *The Middleton* case is a case where the Court has re-interpreted a statutory provision so as to make it compliant with the Convention rights. It is still unsettled how far the Court will be prepared to go in "reading down" a statutory provision in this way. Statutory interpretation can be difficult – and has become more difficult because of the impact of the Human Rights Act. Your Department may have procedural guidance on the application of the statutory scheme with which you are particularly concerned, but you should not hesitate to seek advice from your Departmental lawyers when you need help in finding out what your statutory or other powers are.

Is the Power Being Exercised for a Lawful Purpose?

2.11 As well as having the power to act, the Department must use its power for a lawful purpose. Its action will be *ultra vires*⁹ and an abuse of power if:

- It uses the power to achieve a purpose which the power was not created to achieve

Case Example

The Secretary of State made an Order under section 31 of the Landlord and Tenant Act 1985, which imposed a maximum limit to fair rent increases which could be registered for **regulated tenancies**. The Order was challenged by landlords, on the grounds that the original power (from which the power in section 31 was derived) had been conferred only to counter general inflation, rather than to benefit one particular class of tenants. The Court of Appeal held that the purpose of the power was indeed counter-inflationary only, and that the exercise of the power for an extraneous purpose was *ultra vires*. The Court quashed (ie cancelled) the Order. The Secretary of State appealed to the House of Lords, who held that the purpose of the power was not so limited and that the exercise of the power in these circumstances was after all lawful. Appeal allowed. *R v Secretary of State for the Environment ex parte Spath Holme Ltd* [2001] 2 AC 349

2.12 Legislation may expressly set out the purposes for which a power may be exercised, or they may be implied from its objectives. The Court has accepted that a public body may undertake tasks "conducive to" or "reasonably incidental to" a defined purpose. If for example a decision-maker has the power to hold a public hearing to assist him in making his decision, he will also have the power to hire accommodation, engage shorthand-writers and the like, as being "reasonably incidental" to that purpose.

2.13 It will often be incidental to the exercise of a statutory power that the public body enter into a **contract** with a partner from the private sector, indeed there may be express power to do so. The contract will be governed by the (private) law of contract, though the public body should not agree to a contractual term which will conflict with its statutory duties. However the procedure by which the public body selects its contracting partner, and the criteria applied in awarding the contract will be governed by public law.

Case Example

Lewisham LBC refused to do business (ie enter into contracts) with Shell on the grounds that Shell had interests in South Africa. Shell challenged this decision on the grounds that the decision had **not** been taken simply for the purpose of improving race relations in the Borough (which would have been a legitimate purpose) as had been alleged, but to penalise the company for its business interests. The Court held that it was undoubtedly a motive of the Council to exert pressure on the Company to sever all links with South Africa. The company's interests were not unlawful, and it followed that the Council's decision had been influenced by an extraneous and impermissible purpose. The Court ruled the decision unlawful. *R v Lewisham London Borough Council ex parte Shell UK Ltd* [1988] 1 ALL ER 938.

⁹ *Ultra vires* means "beyond its powers"

The Convention Rights and Other Legal Limits

- 2.14 The use of a power may be unlawful if the effect of the decision is to contravene the subject's Convention rights, or his rights under EC law. Under the Human Rights Act it is unlawful for a public authority to act in a way which is incompatible with one of the Convention rights (unless your duty under primary legislation means that you cannot do otherwise).¹⁰

Case Example

H was a serving prisoner and wished, under certain conditions, to speak on the telephone with the press on matters of legitimate public interest. Prison Rules, made under section 47 of the Prison Act 1952, provided that permission for such calls would be granted only in exceptional circumstances. The Governor exercised his discretion on what constituted "exceptional circumstances" in accordance with a Prison Service policy in which telephone communication was seen as a method of last resort. H complained that this interfered with his right under Article 10 of the Convention (freedom of speech). The Court held that although the Rule itself ("exceptional circumstances") was not open to criticism, the policy, and its application to H did contravene his Article 10 rights in a manner which was disproportionate. *Hirst v Secretary of State for the Home Department* [2002] 1 WLR 2929

In the case example just cited, the Rule (and the policy) were within the express terms of the power conferred by section 47 of the Prison Act 1952, but the particular exercise of the power was incompatible with a Convention right.

- 2.15 The *Hirst* case is a good illustration of the subtle way in which the Human Rights Act has impinged upon, and modified, pre-existing law, and has required existing policies to be reviewed.
- 2.16 You will note that *Hirst's* case was based upon Article 10, which protects the right to freedom of speech. This is a "qualified" right¹¹, which means that the right is subject to such restrictions etc

" as are prescribed by law and are necessary in a democratic society, in the interests of national security,....., for the prevention of disorder and crime, for the protection of health or morals "

The restriction on the use of the telephone in *Hirst's* case certainly affected his Article 10 rights, and the Court therefore had to be satisfied that the restriction was no greater than was necessary for the legitimate aims of preventing disorder and crime etc. For this purpose, the Court was entitled to look at all the facts to see whether the restriction was "proportionate". This is however not an exercise which the Court is entitled to undertake outside the field of human rights (and EC law) when deciding whether a decision is "reasonable". "Reasonableness" and "proportionality" are separate concepts, though as we shall see from the *Daly*¹² case they sometimes produce the same result.

¹⁰ Section 6 HRA 1998. A Minister or a Department will be acting ultra vires if they make subordinate legislation which is incompatible with a Convention right, unless primary legislation requires the subordinate legislation to take that form.

¹¹ A classification of the Convention Rights is contained in Appendix 1 below.

¹² *Daly* is mentioned at 2.29.

What Factors should Inform the Decision?

2.17 The principles we have discussed above have already suggested several answers to this question, but we can add that, for the decision to be lawful, the Department

- must not have exercised its discretion on the basis of irrelevant factors; and
- must have taken into account factors which it is under a duty to consider.

Failure to follow either rule will usually lead to a decision being held to be invalid.

Case Example

The Secretary of State, in exercise of his power under section 35 of the Criminal Justice Act 1991, had fixed the tariff element in a sentence imposed upon two boys convicted of murder. In setting the tariff he had taken account of public petitions and opinion about the case in the media. The House of Lords held that the Secretary of State was exercising a judicial function, and although he might take into account as relevant the general need to maintain public confidence in the administration of justice, public petitions and media campaigns in relation to a particular case were irrelevant. *R v Secretary of State for the Home Department ex parte Thompson and Venables* [1998] AC 407

2.18 If a decision-maker is exercising statutory powers, the statute may set out the matters which the decision-maker should take into account. For example, section 133 of the Criminal Justice Act 1988 provides the machinery for assessing compensation payable for a miscarriage of justice:

"In assessing so much of any compensation payable ... to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to –

- (a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction;
- (b) the conduct of the investigation and prosecution of the offence; and
- (c) any other convictions of the person and any punishment resulting from them."

You will note however that these are matters which the assessor shall have regard to "in particular": the statute does not try to give an exhaustive list, and there may be other relevant matters arising from the particular facts of the case.

2.19 If the statute is silent, you will have to deduce what is relevant from its purpose or objects. But if the decision is challenged, the Court will decide what factors should have been taken into account, and it will be enough to show that the decision was influenced by an irrelevant consideration for the decision to be held invalid. The decision of the Secretary of State in *Thompson and Venables* (paragraph 2.17) was held to be invalid on a number of grounds, but taking into account an irrelevant consideration was enough for it to be quashed.

2.20 The Human Rights Act has, as already explained, introduced new matters of relevance which go beyond what is contained in the text of the primary or secondary legislation, and increased the importance of old ones. If you think that your decision or action will touch on a Convention right, you will need to consider whether what you propose may be incompatible with that right. If it is, you will be acting unlawfully unless your duty under primary legislation means you cannot act differently. If you fail to recognise that the Convention right is affected, that may itself be failure to take account of a relevant factor.

2.21 Whatever factors you decide are relevant, you need to be sure that the facts on which you base your decision are accurate and up to date. You also need to be sure that the factors that influenced your decision are recorded.

Making a "Reasonable" Decision

- 2.22 Your decision must be "reasonable". This is not the same as saying that your decision must be absolutely correct or that the Court would necessarily have made the same decision. It means that in making the decision you must apply logical or rational principles. If a decision is challenged, the Court will examine the decision to see whether it was made according to logical principles, and will often expressly disavow any intention to substitute its own decision for that of the decision-maker. The Court will bear in mind that where Parliament has conferred the discretion on a particular decision-maker, the discretion remains his, and it is not for the Court to exercise that discretion in his stead. The practical effect of this approach is that, where the Court finds that the decision was unreasonable (on any of the grounds explained below) and that it has to be remade, the Court will not put in its place a more reasonable decision, but will simply cancel (or "quash") the unreasonable one, leaving none in its place. The decision-maker (perhaps a different individual) will then be required to make a fresh decision, taking into account the guidance given by the Court, this time applying logical principles.
- 2.23 There are sound practical, as well as legal/constitutional, reasons for the Court adopting this "hands-off" approach: the decision-maker may be aware of policy implications or other aspects of the public interest which are not obvious to the Court; or he may have access to technical information which is not available to the Court and which must inform the decision.

"The Wednesbury Principles"

- 2.24 What then are these "logical principles" according to which decisions have to be made? We have in fact already seen one of them in operation, in the *Thompson and Venables* case cited at paragraph 2.17 above: in that case the Secretary of State had taken account of public petitions, in circumstances in which the Court decided that he was not entitled to do so. His reasoning process was flawed because he had taken into account an "irrelevant consideration", and his decision was quashed.
- 2.25 Secondly, and conversely, the decision-maker must make sure that he does take account of all the relevant considerations. He must be in possession of accurate and up-to-date information; where he lacks information, he must seek input from those who have it; where representations have been made he should take account of them; he should consult and follow any points of reference or guidance.

Case Example

C was charged with murder, but the charges against him and others were dismissed as an abuse of process, the Court finding that evidence had been withheld by the police from the Defence. C made a complaint against the officers in the case, which could lead to criminal or disciplinary proceedings against them. One of the officers under investigation was eligible to retire shortly, but could do so only while not suspended, and with the approval of the Chief Constable.

Home Office Guidance advised that in deciding whether to suspend, Chief Officers should have regard to the **public interest in requiring officers to face disciplinary proceedings**, and that retirement should not be a means of avoiding disciplinary action. The officer had been suspended but was reinstated, and was permitted to retire, thus putting him beyond reach of disciplinary proceedings.

The Court held that in deciding whether to reinstate the officer and permit him to retire, the Chief Constable had (as was apparent from his written decision) **failed to take any account of a material matter**, namely the Home Office Guidance as to the public interest. The Chief Constable's decision was therefore flawed and unlawful, regardless of whether, had he had regard to the Guidance, he would still have come to the same conclusion. *Coghlan and Others and Chief Constable of Greater Manchester* [2005] 2 All ER 890.

Two practical points are worth noting about the Coghlan case.

- First, the Court rejected the contention that express consideration of the Guidance would "have made no difference": there had been a serious weakness in the reasoning process, and the decision was therefore fatally flawed. The Court admitted the possibility that even if the Guidance had been taken into account, the Chief Constable might still lawfully have decided to lift the suspension.
- Secondly, the Court did not **quash** the decision to re-instate, but gave a "declaration" instead: to have quashed the decision, in an attempt to put the officer back in the position he was in before the decision was made (and to "un-retire" him), was impracticable and pointless.

2.26 The third logical principle is that, even if the decision-maker has followed the first and second principles, he may still have come to a decision which is so wildly unreasonable or perverse that it cannot have been within his discretion to make it, and it was therefore unlawful. He may have had before him all the relevant information and none that was irrelevant, but he may nonetheless have attached wholly disproportionate weight to a particular factor or made some other logical blunder, which turned his whole reasoning process awry. In the *Coghlan* case, cited above, the decision to lift suspension was attacked as being "unreasonable" in this sense too, but it was unnecessary for the Court to decide that issue because it had already found that the reasoning process was flawed by the neglect of a relevant factor.

2.27 The Courts have recognised that, when two reasonable persons are faced by the same set of facts, it is perfectly possible for them to come to different conclusions, so that a range of lawful decisions may lie within the discretion of the decision-maker. At the same time, the Courts have defined a category of decisions which lie outside that range of discretion:

- "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it";
- "beyond the range of responses open to a reasonable decision-maker".

Although these definitions of unreasonableness (or "irrationality") are expressed in extreme terms, particularly the first, so that it might be thought that the Court would hardly ever find Ministers to have acted "unreasonably", in fact the Court will adjust the threshold according to the circumstances and context of the case. The threshold will obviously be lower in any case involving fundamental or human rights, and according to the importance of the right concerned.

2.28 There are thus three "logical principles" to be followed in making a decision:

- to take into account all relevant considerations
- not to take into account an irrelevant consideration
- not to take a decision which is so unreasonable that no reasonable person properly directing himself could have taken it.

They are called the "*Wednesbury* principles", after the licensing case in which they were formulated¹³.

¹³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

Proportionality

2.29 As already mentioned the Court has always been prepared to adjust the threshold of unreasonableness according to the importance of rights involved, and it is sometimes said that the Court applies a "greater intensity of review" where (in particular) the Convention rights are engaged; in other words, the Court lowers the threshold. This is particularly so because Convention jurisprudence has imported the principle of "proportionality" into decision making. As explained above at 2.16 proportionality is separate from "*Wednesbury* reasonableness" and is applied only in cases involving the Convention Rights (or EC law).

Case Example

Following serious breaches of security at HMP Whitemoor, the Secretary of State introduced a new policy on cell searches. A feature of the policy was that searches should take place in the absence of the prisoner, and should include an examination (without reading) of the prisoner's correspondence with his legal advisers, to ensure that nothing had been written or secreted in it which endangered security. D sought judicial review of the decision to examine his legally privileged correspondence in his absence.

The House of Lords held that the possibility that prison officers might read D's correspondence with his legal adviser was indeed an infringement of the legal privilege which he enjoyed at common law, and the application of the blanket policy to him without evidence of misconduct on his part was an intrusion into privileged correspondence greater than was justified, and was unlawful on common law principles.

Moreover, the policy also constituted a breach of D's rights under Article 8 of the Convention. Article 8 (right to private life) was not an absolute right but any interference was required to be no greater than was necessary in the interests of public safety and the prevention of disorder or crime. The interference was in this case "disproportionate". *R v SSHD ex parte Daly*

On either basis the Prison Rule which incorporated the policy was unlawful and was quashed. *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

2.30 There are several interesting things about this celebrated decision of the House of Lords:

- You can see the application of traditional ("*Wednesbury* unreasonableness") and modern ("proportionality") principles being applied in parallel, and producing the same result. The interference with the Convention right was disproportionate because it was greater than was necessary in the interests of public safety and the prevention of disorder and crime.
- The Court said that although the same result was arrived at in this case, that would not always be so, because the intensity of review was somewhat greater under the proportionality approach. That approach might for example require the Court to review the balance which the decision maker had struck (that is, look at the merits), rather than just check that the decision lay within the range of reasonable decisions.
- The Court stressed that their decision in this case did not mean that there had been a shift to "merits review"¹⁴. This approach – the proportionality approach – was nevertheless appropriate in human rights cases: "In law context is everything".

¹⁴ that is, examination by the Court of the actual merits or facts of the decision, as opposed to scrutiny of the rational principles which the decision-maker had applied.

Having a "Policy"

- 2.31 Where a statute has conferred a discretionary power on a Minister to issue, say, licences, or to decide applications for some benefit, he will potentially have to deal with hundreds, or thousands of cases. The statute may spell out the criteria for the grant of the licence/benefit in general terms, but the Minister may be left with – on the face of it – a wide discretion. In order to ensure consistency and indeed to promote administrative efficiency, the Minister (or more likely his officials) will probably develop a standard way of dealing with such cases: they will try to apply the same criteria, attaching the same weight in each case. They will, in short, develop a "policy" for dealing with cases.
- 2.32 However a very important theme runs through administrative law, that, where statute confers a discretion on an individual, he must not surrender or abdicate that discretion – to another person, or to a set of rules, or to a "policy". He must keep an open mind and consider each case on its own merits: otherwise he is failing to exercise his discretion. The Court has held that it is lawful for the Minister to have a policy as to the way in which discretion should be exercised – indeed, to achieve consistency in decision-making (which is a virtue), it is essential that he **should** have a policy – but that he should nevertheless direct his mind to the facts of the particular case and be prepared to make exceptions. This is particularly important in cases involving human rights. Equally, where the Minister does have a policy, then he should not depart from it without giving an explanation. The line is not always an easy one to draw. The *Daly* case is an example of these principles being applied. Here is another, again in the prison context.

Case Example

P had been convicted of a serious assault upon a child and sentenced to a term of imprisonment. The Secretary of State had a policy that persons convicted of such serious offences, and who were judged still to be dangerous, should be detained in Category A conditions, which was reserved for "prisoners whose escape would be highly dangerous to the public..., no matter how unlikely that escape might be and for whom the aim must be to make escape impossible".

One practical effect of the strict application of this policy to P was greatly to restrict the range of treatment available to him. In fact P had never shown any propensity to escape and was in such poor health that there was no realistic prospect of his escaping. The Court held that in itself the policy of making escape impossible for prisoners such as P was not unlawful, but since the Secretary of State had failed to have regard to P's particular circumstances and to exercise any discretion in relation to his case, the application of the policy to P was unlawful. *The Queen on the application of Pate v Secretary of State for the Home Department* [2002] EWHC 1018.

Although a "policy" on the way in which a discretion is to be exercised is usually essential, the decision-maker must keep an open mind and consider the facts of the particular case – and make it clear that he has done so by the terms of his decision. Such an approach is also more likely to be proportionate, in Convention terms, since it will allow a proper assessment of whether any interference with the Convention rights is necessary on the facts of the particular case.

Is it Discretion? Or Is It Rather a Duty to Act?

- 2.33 Although the words in the statute may indicate that a **discretion** is being conferred – that the Secretary of State "may" do something – there are cases where that must be interpreted as "shall", ie as imposing a **duty** to act. For example, a public body with the power to grant licences may be obliged to do so where an applicant fulfils all the prescribed requirements. In order to determine what the draftsman meant when he said "may" (or for that matter "shall") you have to look at the statute and its purposes as a whole.

Case Example

The Immigration Act 1971 gave the Secretary of State power to make decisions to deport certain categories of people under the Act, and provided appeal rights against deportation. Section 18 of the Act said "The Secretary of State may by regulations provide for written notice to be given to a person of any such decision...". Did this section give the Secretary of State a **discretion** to make regulations, or did it impose a **duty**? The Court noted that if the appeal rights were to be effective then the persons concerned must, where possible, be given notice of the decision. It followed that despite the use of the word "may" the Secretary of State did not have a discretion as to whether he should make regulations, but a duty, and that is what Parliament must have intended. *Pargan Singh v Secretary of State for the Home Department* [1992] 1 WLR 1052

In *Pargan Singh* the Court looked at the context in which the power was to be exercised and concluded from that context that "may" nevertheless laid a duty on the Secretary of State, and meant "shall".

Who Must Make the Decision? – Delegation

- 2.34 The general rule is that where legislation confers a power on a specified individual or body, the power must be exercised by that individual or body and must not be delegated or "given away" to another person or body. It is another illustration of the theme running through public law that a discretion conferred upon a particular individual may not be surrendered by him. If the rule were strictly applied it would of course cause much administrative inconvenience, and there are many exceptions to it. In particular, so far as Departments of central Government are concerned, the Court accepts that Ministers cannot possibly make personally every decision which is made in their name, and that officials may act on their behalf. This is known as "the *Carltona* principle" after the leading case¹⁵. The theory is that, legally and constitutionally, the acts of officials **are** the acts of their Ministers, and that there is no true delegation.
- 2.35 Whatever the correct explanation of the doctrine, a decision may still only be taken on a Minister's behalf by an official of appropriate seniority and experience. And there will always be some cases where the special importance of the decision, or its consequences, mean that the Minister must exercise the power personally. Sometimes specific statutory provisions require that the Minister make the decision personally. If the power can be delegated, you need to check whether there are limitations on the seniority of officials who can exercise it on the Minister's behalf.

Case Example

deportation under the Immigration Act 1971 was a two stage process: 1) the giving of a Notice of Intention to deport (which attracted a right of appeal), and 2) the signing of the Deportation Order. Under the 1971 Act, both functions were conferred on "the Secretary of State". The Secretary of State delegated the first of these functions to Immigration Officers. The delegation was challenged at judicial review on the grounds that, although it was accepted that the power could be exercised on the Secretary of State's behalf by members of his Department (ie the Home Office), Immigration Officers had functions under the Act separate from the Secretary of State. The House of Lords held that despite the distinct functions conferred on Immigration Officers under the Act, they were capable of exercising the power under the responsibility of the Secretary of State. But it remained his personal responsibility, after reviewing each case, to sign the Deportation Order at the end of the process: *R v Secretary of State for the Home Department ex parte Oladehinde* [1991] 1 AC 254.

- 2.36 Sometimes, before you can make your decision, you will need information or even a policy input from another Department or public body. If so, it is important to remember that the decision is one for you to take on behalf of your Minister, having regard to all the circumstances, including the advice or recommendation of that other body. You should not merely rubber-stamp the advice or recommendation which you receive from the other Department.

Does the Power Have to Be Exercised in a Particular Way? Procedure.

2.37 Having discussed the test for the legality of a decision, we now turn to the requirements for the way in which a decision is to be made. We are now talking about **procedure**. Obviously this is different from the substance of a decision - whether a decision is reasonable or within the terms of the statute. But correct procedure (or "due process") is vitally important in public law, because there are some tried and tested procedural mechanisms which are likely to secure a just outcome and demonstrate the rule of law. The so-called "Rules of natural justice" are rules of procedure.

2.38 Legislation can impose express procedural conditions or requirements which must be satisfied before a power can be exercised. For example, "The Secretary of State must:

- Consult with Local Authority representatives;
- Publish his decision in draft;
- Make due inquiry;
- Consider any objections before making a decision".

These are called "mandatory" requirements, and failure to comply with them will usually make a decision invalid. The decision-maker will need to fulfil them (and be able to show he has fulfilled them) in spirit, as well as literally.

2.39 A statutory requirement will be presumed to be "mandatory". Occasionally, if the requirement is trivial or technical, or breach of the required procedure does not defeat the purpose of the statute or damage the public, this presumption can be rebutted, and the requirement will be described as "directory". In that case, a failure to satisfy it will not necessarily be fatal to the decision. It might be for example that the statute required a public body to carry out a function within a certain time limit: If the public body performed the function, but was a bit late, the Court might hold that there had been substantial compliance so that the breach could be overlooked. (Such breaches of procedure normally occur through maladministration, and it is better practice, as well as safer, to comply with the time limit, "directory" or otherwise). But the categories are not rigid, and it is not the labels "mandatory" and "directory" which matter, but the Court's view of the effect of non-compliance.

Procedural Fairness – Can Other Limits Be Implied?

2.40 As well as acting within the limits of its powers, the decision-maker will also need to come to a decision in a procedurally "fair" way. Without such procedural fairness, even if the decision-maker is not acting *ultra vires*, the decision may still be unlawful.

2.41 The common law recognises procedural fairness, or the existence of "due process", as a key principle of just decision-making. Fairness is a concept drawn from the:

- "constitutional principle of the rule of law, which requires **regularity**, and **predictability** and **certainty** in government's dealings with the public".¹⁶

It is a feature of a fair procedure or of a decision-making process that the person affected by it will know in advance how it will operate, and so how to prepare for it and participate in it. That is the importance of due process.

¹⁶ DeSmith Woolf and Jowell, *Judicial Review of Administrative Action* (5th Edition 1995) para 8-038 p 417

- 2.42 The same principle is also reflected in rights contained in the Convention. The Human Rights Act has added statutory requirements to the requirements of fairness that exist in common law, because it incorporates the Convention rights. For example, if you are taking decisions which will determine a person's civil rights and obligations¹⁷, you will need to ensure that the procedural requirements of Article 6 of the Convention (the right to a fair trial) are met.

Case Example

Article 6 requires that "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Under the Housing Act 1996, housing authorities might grant "introductory tenancies" for a probationary period of 12 months, to enable them to deal more effectively with rent arrears or antisocial behaviour. In order to gain possession against such a tenant within the 12 months, the Council had to serve a Notice, upon which the tenant could request a "review" by another more senior Council official. If the Council still went ahead and sought possession, the County Court had no discretion, provided that the Notice procedure had been complied with. The Council served Notice on M, and were granted possession. M sought JR arguing that the procedure did not comply with Article 6, because she had not had a fair trial. The Court held that the "review" procedure, coupled with the tenant's right to ask the County Court to adjourn, pending an application for JR, meant that the procedure **as a whole** was compliant with Article 6. *R(McLellan) v Bracknell Forest Borough Council* [2002]QB 1129.

It was essentially the availability of Judicial Review which in this case made the "introductory tenancy" procedure compatible with Article 6, though this may not always be sufficient: the safest thing is to ensure that your initial procedures are compliant with Article 6.

- 2.43 The Court may find that in the interests of fairness additional conditions should be placed on the exercise of statutory or other executive powers. For example, the Court may insist that, **before** a decision is made, any of the following is required:
- Disclosure of the reasons the decision-maker intends to rely on;
 - An opportunity for consultation or making representations.
 - An oral hearing where appropriate.
- And **after** the decision:
- Disclosure of material facts, or the reasons for the decision.

Case Example

Under section 6(2) of the British Nationality Act 1981, the Secretary of State may ("if he thinks fit") grant a certificate of naturalisation. He has to be satisfied of, among other things, the good character of the applicant. The Secretary of State refused a certificate to F, and declined to give any reason for his decision; nor was there any process of consultation, or representations. There were no procedural requirements in the Act, and section 44 (2) provided that the Secretary of State was not "required to assign any reason for the grant or refusal of any application", and section 44(3) that decisions should not be subject to appeal or review in any Court. Nevertheless, and in the face of express statutory words, the Court of Appeal held that, particularly in view of the requirement of good character, fairness obliged the Secretary of State to notify F of the matters causing him concern. *R v Secretary of State for the Home Department ex parte Al Fayed* [1998] 1 WLR 763 CA.

¹⁷ "Civil rights and obligations" is a complicated concept, but broadly it includes personal, private or economic rights and obligations.

"Hear the Other Side's Case"

2.44 The *Al Fayed* case, which pre-dated the coming into force of the Human Rights Act, is a good illustration of the principle that a decision-maker must allow the person who is the subject of a decision to know the case against him. Otherwise he cannot properly defend himself, and cannot effectively persuade the decision-maker that his information is inaccurate or exaggerated, or at any rate does not justify an adverse decision. The operation of this principle can be seen in situations as far apart as:

- the practice (prescribed in Rules) of disclosing the parole dossier to prisoners seeking release on licence;
 - notifying in advance persons likely to be criticised by a public inquiry of the area of criticism,
- in each case so that they know the substance of the case against them. The principle is now fortified by the Human Rights Act and the requirements of Article 6 which protects the right to a fair trial¹⁸.

Consultation

2.45 Consultation, with the persons likely to be affected by the decision, is very often part of the decision-making process, being an aspect of "Hearing the other side's case". It helps to make the process a fair one. (It also helps to ensure that the decision-maker is in possession of all the relevant information, so that the decision is a "rational" one as well). Where consultation is undertaken, whether or not it is strictly required, it has to be conducted properly, if it is to satisfy the requirement for procedural fairness. Four conditions have to be satisfied:

- Consultation must be undertaken when proposals are still at a **formative stage**;
- Sufficient **explanation** for each proposal must be given, so that those consulted can consider them intelligently and respond;
- Adequate **time** needs to be given for the consultation process;
- Consultees' responses must be conscientiously **taken into account** when the ultimate decision is taken¹⁹.

Case Example

The Secretary of State for Social Services was empowered to make regulations setting up a housing benefit scheme. Before doing so, the Minister was required to "consult with organisations appearing to him to be representative of the [local] authorities concerned." The Association of Metropolitan Authorities was granted a few days 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. Sufficient **information** had to be given to the consultee to enable him to give helpful advice, and enough **time** allowed to enable him to do that. *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1 QB

Again, when you have consulted before making a decision and have given proper weight to the representations received, you will need to make it clear in your decision that you have done so. This does not mean that you have to recite all representations word for word, but you will have to show that you have grasped the points being made and taken them into account.

¹⁸ Section 44 (2) of the BNA 1981 was repealed in 2002, partly as a result of the *Al Fayed* case, and IND now normally give reasons.¹¹

¹⁹ These principles, which are taken from case-law, have been codified for Government Departments and their agencies, in the Cabinet Office Code of Practice on Written Consultation, revised January 2004 at www.cabinetoffice.gov.uk/regulation/consultation/index.asp

"It Wouldn't Have Made Any Difference!"

2.46 Failures of consultation (and indeed other lapses in due process) usually occur through inadvertence on the part of the decision-maker; because he is in a hurry; and so on. When such a lapse forms the basis of a challenge to the decision, the decision-maker may be tempted to say: "But it was an open and shut case. Consultation [or an oral hearing; or full disclosure of reasons] would have made no difference. The decision would inevitably have been the same." That may well be true, but the Court is unlikely to be sympathetic to such a response. And for good reason: the principle is that only a fair procedure will enable the merits to be determined with confidence, and must therefore come first.

Bias, Impartiality and Independence

2.47 The rule against bias on the part of the decision-maker is a manifestation of the other rule of natural justice, that: "no man shall be the judge in his own case". If the decision-maker has a financial, or other, interest in the outcome of the case, then he cannot be, or be seen to be, impartial. The rule helps to ensure that the decision-making process is not a sham because the decision-maker's mind was always closed to the opposing case. It does not deal only with actual bias, but with the **appearance** of bias: hence the saying: "Justice must not only be done, but be seen to be done". Nobody should be able to allege that the decision was a fix because the decision-maker was biased, whether or not there was any truth in that allegation. The rule must be observed strictly to maintain public confidence in the decision-making process.

2.48 Impartiality is the opposite of bias. Its importance is recognised in the Convention: Article 6 (Fair trial) requires that a tribunal be impartial and independent. The rule against bias applies in the field of administrative decision-making (where there may be no "tribunal" as such) just as it does in relation to courts, and it is prudent to have procedures available so as to avoid bias, or any appearance of bias. If, for example, an applicant for some benefit is known personally to the decision-maker, or the decision-maker has dealt with the applicant before and had decided against him, or has expressed a view adverse to the applicant in other circumstances, indicating that his judgment is affected, then it may be appropriate to refer the application to a different, or more senior, official.

2.49 The principle can have practical implications for the process by which a decision is made. Very often, when statute requires that the "Secretary of State" make a decision on an application, he (or the officials acting in his name) will require some sort of technical input, or it may be necessary to ask inspectors to carry out an investigation. In order to ensure as much impartiality as possible, it may be necessary to have structures in place so that there is a **separation** between the people providing the technical input/carrying out the investigation, and the officials taking the decision or submitting the matter to the Secretary of State (when his personal decision is required). This will reduce the risk of an unsuccessful applicant claiming that the decision-maker was not impartial because he had got too involved in the case, or had pre-determined the application.

2.50 The "independence" of a decision-maker is different from, though closely linked to, his impartiality. It means, the independence of the decision-maker from external pressure or influence. It has much more direct relevance to judges (by reason for example of the way they were appointed) or the Courts themselves than it has to administrative decision makers who will often be civil servants appointed to carry out Government policy: they can scarcely be "independent" in this sense. As already explained, even when a decision-maker is obliged to carry out a policy, he must keep an open mind, and the lack of independence should be curable by the availability of judicial review by a fully independent court.

2.51 Actual bias is rare: most cases are concerned with the appearance of bias. The test is whether, in all the circumstances, the court considers that there has appeared to be a "real danger of bias": that is, not a remote or insignificant risk. If it does, the decision will be set aside. Not only do you need to be sure that you are free of actual bias before making a decision, you also need to consider not acting as decision-maker if there is a real danger that your impartiality might be open to question.

Case Example

An Urban Development Corporation had granted outline planning permission for the redevelopment of rugby club land as a retail site. A local campaign group sought Judicial Review on the grounds that some members of the UDC had undeclared financial interests in the scheme. The Court found on the facts that there was no real danger of bias or appearance of bias. But the principle that a person was disqualified from participation in a decision if there was a real danger that he would be influenced by a financial or personal interest in the outcome was of general application in public law, and was not limited to judicial bodies or proceedings. It was likely that persons elected to a UDC would be people who were familiar with the locality who might well have publicly stated their views beforehand. The Court would have to distinguish between legitimate prior stances and experience, and illegitimate ones. Where a member of a planning authority had a financial or personal interest in a planning decision, he should declare that interest and not participate in the decision, unless the interest were too remote or insignificant. *R v Secretary of State for the Environment ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304

If it had been established that the decision-maker(s) in the Kirkstall case did indeed have a financial or "proprietary" interest in the decision, then the Court would not have inquired whether they were in fact biased: their disqualification would have been automatic, on the basis that they could not be "judge in their own case".

- 2.52 If parties know of a decision-maker's interest or previous participation (because, for example, he tells them), they can agree to waive the objection. If you are aware of any reason why you might be thought to be biased, it is wise to declare it at the outset. If the objection is waived, then it is very unlikely that there could be any objection taken later.
- 2.53 In some rare circumstances, a decision-maker who might otherwise be disqualified can still act, if the decision needs to be made, and cannot be made without him. You should not decide to act in these circumstances without seeking advice on whether there is some way round the difficulty.

"Legitimate Expectation"

- 2.54 We have already seen that it is a principle of public law that the decision-maker must act within his powers; that he must not close off (or "fetter") the exercise of his discretion, but that he may exercise that discretion in accordance with a "policy", provided that he operates that policy consistently but not too rigidly; and that he must act fairly. Sometimes a tension arises between these principles in practice. Suppose for example the decision-maker operates a policy or a procedure consistently, but a change of circumstances, or a fresh appraisal of where the "public interest" lies, mean that he needs to modify the policy or procedure. Or suppose that the decision-maker misunderstands the extent of his legal powers and offers to an applicant a benefit (for example, confirmation of nationality or a planning permission) for which the applicant is not qualified under statute. It is in this kind of situation that reliance may be placed on **legitimate expectation**, that is, an expectation that because the policy or procedure has been operated in such a way in the past, it will continue in the future; or that, because the decision-maker promised a benefit, it would be unfair for him to break his promise, even if there are public interest grounds for his breaking it.

- 2.55 The key to resolving these tensions is to strike a balance between the public interest, for example in changing the policy, and the private interest in maintaining it. Where a legitimate expectation has arisen, a public authority can still frustrate that expectation if any over-riding public interest requires it. Whether a legitimate expectation has arisen, and whether it can be overridden, will depend upon a number of factors, such as:
- Were the words or conduct (the "promise/representation") which gave rise to the expectation clear and unequivocal?
 - Did the person promising the benefit have the legal power to grant it, or was it *ultra vires*?
 - Who made the promise and how many people stood to benefit by it?
 - Did the person(s) to whom the promise was made take action in reliance upon it which has placed them in a worse position than they would have been in if they had not taken that action?
- 2.56 These are some of the factors which the Court will take into account in deciding whether a legitimate expectation has arisen and whether it is fair, or would be an abuse of power, to allow the public interest to override it. If the decision-maker had no legal power to make the promise/representation, this will almost certainly be fatal to a claim for legitimate expectation. Otherwise, these factors are not generally decisive on their own, though the need for a clear and unequivocal promise/representation is very important.

Case Example

The Secretary of State for Defence acceded to pressure to set up a scheme to compensate British groups who had been interned by the Japanese during World War II. Those eligible would receive an ex gratia payment of £10,000. The Minister announced to Parliament that "British civilians who were interned" would benefit. However the eligibility criteria were later refined, so as to benefit only "British subjects whom the Japanese interned and who were born in the UK, or had a parent or grandparent born here". The effect was to exclude some classes of internee, who sought JR on the grounds that earlier announcements had led them to **expect** that they would benefit. The Court considered the text of the earlier announcement and the circumstances in which it was made and concluded that it did not contain a clear and unequivocal representation on which those excluded could now rely. *Association of British Civilian Internees – Far Eastern Region (ABCIFER) v Secretary of State for Defence* [2003] QB 1397

- 2.57 The need for clarity in the representation is obvious where the benefit claimed is the sum of £10,000 from the tax-payer and the potential beneficiaries are numerous. On the facts the Court found that the words used were **not** clear. It is obvious that any preliminary announcement should be tightly drawn, to minimise the risk that it can later be said to have given rise to an expectation. This is not always possible (and the decision in ABCIFER to exclude certain classes would still have been challengeable on other grounds, such as unreasonableness), but you should bear in mind that any unofficial practice, or decision, or statement of intention may, if expressed in loose or imprecise terms, give rise to unintended consequences.
- 2.58 Where it is intended to change a policy or a procedure (for example, to change a practice of accepting late applications), practical steps can also be taken to meet potential claims of legitimate expectation that the policy or procedure would continue – by careful explanation why the change is necessary, or by consultation with regard to the timing of any change or to the new procedure to be adopted.
- 2.59 There are also indications that the Courts are prepared to give some effect to expectations even where the public body who made the promise or representation was acting unlawfully (*ultra vires*), at least where the Convention rights (such as the right to enjoy property) are in play. The law is still developing in this area, but it is another reason to take care when exercising public law powers.

Notifying Your Decision: Do you have to Give Reasons?

- 2.60 When you have made your decision – hopefully in accordance with the above principles - you will need to notify it to the person affected by it. In notifying him, do you have to support your decision with your reasoning, and if so how comprehensive does your account of that reasoning have to be?
- 2.61 Why should you give any reasons unless statute or regulation requires it? Well, there may exist an established practice of giving reasons in this type of case, and failure to give reasons may disappoint a "legitimate expectation". Your decision itself may appear to be inconsistent with previous policy, or with other decisions in similar cases, so that a decision unsupported by reasons may appear irrational, and it may be necessary to explain why there has been a departure from previous policy. The subject matter of the decision may be of such importance – it may affect human rights – that fairness requires that a decision be supported by reasons.

Case Example

M died in custody while under restraint by prison officers. An inquest jury returned a verdict of unlawful killing. The case was considered by the CPS who decided not to prosecute and declined to give their reasons to the family, beyond saying that there was insufficient evidence. The Court held that, although there was no absolute obligation on the DPP to give reasons for a decision not to prosecute, in a case involving Article 2 of the Convention (right to life), a death in custody resulting from force applied by agents of the state, where an identifiable person was implicated and the inquest jury had delivered a verdict of unlawful killing, the DPP would be expected to give full reasons (though skill and care would be required in drafting such reasons in order to protect public and third party interests). *R v Director of Public Prosecutions ex parte Manning and Another* [2001] QB 320.

Note that in this case the DPP had given an explanation ("insufficient evidence"), but that was not nearly detailed enough to enable the family to understand the decision and if necessary challenge it: they would be left without an effective remedy.

- 2.62 Although then it may still be true that there is no general rule requiring that reasons be given for administrative decisions, the circumstances where they are not required are becoming rare, and indeed the general availability of judicial review as a remedy makes it inevitable that in most cases fairness now requires that reasons should be given. The law was developing in this direction even before the Human Rights Act incorporated the Convention, but that (in particular Article 6 – right to a fair trial) has accelerated the process, because decisions involving human rights are likely to be scrutinised more intensely, and that means that they will have to be more fully reasoned.
- 2.63 There is one other important factor which should now encourage the giving of detailed reasons with the decision. On 1 January 2005, the Freedom of Information Act 2000 came into force. Section 1 provides that "any person making a request for information to a public authority is entitled –
- a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - b) if that is the case, to have that information communicated to him."
- 2.64 So, assuming that, in making his decision, the decision-maker had his reasons and recorded them, any person will be entitled to request that "information" under the Freedom of Information Act, and (unless an exemption applies) that information will have to be disclosed. There are exemptions in respect of certain categories of information, and one or more of them may be relevant to your decision, but the presumption will be in favour of disclosure. The Act should therefore be a salutary incentive to careful reasoning and good record-keeping.

2.65 This does not mean that every decision must be accompanied by copious reasoning: it will depend upon the subject matter and the importance of the interests at stake. Moreover there will be some cases where the issue to be decided does not lend itself to logical analysis, but is more a matter of subjective judgment.

Case Example

Asha Foundation were a charitable organisation wishing to found a museum celebrating cultural diversity in Britain. They applied for funding to the Millennium Commission who were disposing of grants totalling £19M for this kind of project. The Commission received several applications for grants (including Asha's) which met the eligibility criteria. Asha were applying for £10M. The Commission rejected the application on the grounds that although Asha met the eligibility criteria, other applicants were preferred. Asha challenged the decision for inadequacy of reasons.

The Court held that the reasons were sufficient in the circumstances: fuller reasons would have required the views of each Commissioner on each of the applications to be set out and that would be impracticable as a matter of good administration. The Commission had been required to exercise their judgment, having to make a selection from eligible applications, and in that context the reasons given were all that should be required. *Asha Foundation v Millennium Commission* [2003] EWCA Civ 88. [2003] ACD 50

2.66 The need to record reasons when the decision is made with a view to their disclosure may be onerous, but it encourages careful decision-making. The record should show that the decision-maker addressed his mind to the relevant issues and followed the principles of good administration. There is no uniform standard for the quality or lay-out of recorded reasons, but they must at least be intelligible and address the substance of the issues. The following provides a useful outline:

- the record should be clear about what the applicant is applying for and that you understand the application;
- it should set out material findings of fact;
- it should show that all relevant matters have been considered and that no irrelevant ones have been taken into account;
- it should cite and apply any relevant policy statements or guidance;
- it should note any representations or consultation responses as having been considered and taken into account.
- It should show by what process of reasoning issues were resolved, and how the various factors were weighed against each other.

If all this (or as much as suits the case) is recorded on the file, then it will provide a framework for your decision letter. The reasons given in the decision letter will of course correspond with those recorded on file: although there is some scope for elaborating or explaining your reasons in the decision letter (or subsequently), it is bad practice – and unlawful – to make your decision first and construct your reasons only when challenged, a practice sometimes known as "*ex post facto* rationalisation".

Are Any Kinds of Decision Immune from Judicial Review?

- 2.67 If the decision or action falls within the field of "public law" as described above, then in principle the Court is entitled to review it – "in principle", because there are still a handful of types of decision with which the Court is reluctant to concern itself – the making of treaties, and the award of honours are two examples. Even these categories are increasingly restricted, and it can be imagined that if, say, the honours system were placed upon a statutory footing, with procedures, consultation and the like, then the Court would no doubt be entitled to supervise at least procedural aspects. We have moreover already seen (the *Al Fayed* case at paragraph 2.43) that even where statute has attempted to place a category of decision beyond the reach of effective review, the Court still found a means of reviewing it.
- 2.68 There remains a class of decision where the Court accepts that, because of the subject matter of the decision, the decision-maker is better qualified than the Court to make a judgment. So for example the Court is likely to "defer" to, or recognise a "demarcation of functions" with, the decision-maker in the field of
- foreign affairs, in judging how to negotiate with foreign governments;
 - ordering financial priorities, in deciding to spend public money in one way rather than another;
 - assessing the needs of national security and public order;
 - setting policy on immigration and deportation.

Case Example

CND sought an advisory declaration from the Court as to the true meaning of Resolution 1441 of the UN Security Council of 8 November 2002, as to whether it authorised states to take military action in the event of non-compliance by Iraq with the terms of the Resolution. This was the ultimatum in respect of disarmament which led to the return of the weapons inspectors to Iraq. Held that in any event the Court would decline to embark upon the determination of an issue if that were damaging to the public interest in the field of international relations, national security or defence. That was the position here. The substantive question raised by this application was "non-justiciable", that is, the Court was not in a position to determine it. The application was dismissed. *CND v Prime Minister, Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for Defence* [2002]EWHC 2759 QB.

- 2.69 The list could go on (and could be broadened to include any topic requiring specialist knowledge or experience), but what the above topics have in common is that they all concern policy, and require a "political" judgment to be made. In the demarcation of functions, that political judgment should be left to the decision-maker, who understands the policy and has the experience of its operation to inform his decision. In this kind of area, the Court should "defer" to the decision maker, or recognise the demarcation of functions between the Executive and the Judiciary; the Court should allow him a "margin of discretion" or "discretionary area of judgment".

Case Example

F, an American citizen, was leader of a religious, social and political group called the "Nation of Islam". He wished to come to UK to address his followers. The Secretary of State in a personal decision made an exclusion order against F under the Immigration Act 1971, on "public good" grounds, because he thought his presence would pose a threat to community relations. F sought JR on the grounds that the exclusion order breached his rights under Article 10 (Freedom of expression) and was unjustified.

The Court held that the Secretary of State should be given a wide margin of discretion in such a case; taking into account the very limited restriction of F's freedom of expression, the Secretary of State had provided sufficient explanation for a decision which turned on his personal, informed, assessment of risk, to show that his decision did not involve a disproportionate interference with freedom of expression. The Secretary of State was far better placed to reach an informed decision as to the likely consequences for public order of admitting F than was the Court. *R (Farrakhan) v Home Secretary* [2002] QB 1391.

What carried weight with the Court was that the decision called for a judgment on the part of the Home Secretary as to the likelihood of public disorder if F were admitted: that was a political judgment for which the Home Secretary was democratically accountable, and the Court was not prepared to substitute its own judgment for that of the Home Secretary. Although the decision affected F's human rights, it was proportionate because F's freedom of expression was restricted only to a limited extent.

- 2.70 It is possible that your decision too will have an element of this kind of political judgment in it: you should identify that element and be prepared to protect it. The decision-maker will usually be allowed a discretionary area of judgment, but this cannot be taken for granted. And, where human rights are involved, the Court is likely to be very careful to ensure that what the decision maker is seeking to protect is genuinely an area of policy, and that the decision is "proportionate", which was a calculation the Court made in *Farrakhan*²⁰. Great tact and care are therefore required in formulating a plea for deference, and for preparing the evidence in support of it, to show that the decision was not only one in which deference was appropriate, but that the decision was proportionate, that is, that it went no further and was no more drastic in its effects than was necessary to secure the legitimate aim.

²⁰ But not the calculation made by the House of Lords in *A v Secretary of State for the Home Department* see 3.39.

3. A Typical Judicial Review Case

3.1 This section sets out to explain what happens in a typical judicial review case in England, Wales and Northern Ireland, and what you might expect as a civil servant involved in a Ministerial or departmental decision under challenge. The procedure in Scotland is different from other parts of the UK and is dealt with separately.

Standing – Can Anyone Challenge a Decision?

- 3.2 To be entitled to apply for judicial review of a decision, in principle a person must have a "sufficient interest" (sometimes called "standing") in the decision²¹. A person is not entitled to challenge a decision which does not affect them personally, simply because they disagree with it. They will have "sufficient interest" if they have :
- a direct, personal interest in the decision or action under challenge (for example, they are a prisoner whose application for release on parole has been refused).
- 3.3 Because "person" includes legal persons, organisations like trade unions, which represent people who may be affected by a decision or policy, may have sufficient interest.

Case Example

The Government introduced a modified scheme of criminal injuries compensation, the effect of which was in many cases to reduce the amount of compensation payable to victims. The decision was challenged by an alliance of trade unions. Their members were potential victims of crimes of violence and so the unions had standing to challenge the new scheme. *R v Secretary of State for the Home Department ex parte Fire Brigades Union and Others* [1995] 2 AC 513.

3.4 Groups protecting or campaigning for a particular public interest may well have standing to challenge a decision, on the basis that they, too, represent the interests of the persons directly affected.

Case Example

Amnesty International UK and the Redress Trust (represented by Mr Bull) applied for Judicial Review of the decision of the DPP not to prosecute two persons for the possession of electric-shock batons, contrary to the Firearms Act 1968. They claimed an interest in ensuring the proper enforcement of laws relating to weapons of torture, including an interest in any particular case in which a decision was taken as to whether or not to prosecute for breach of such laws. The batons were alleged to be used in some countries for repressive purposes including riot control. The Court held that the Applicants had standing as they represented potential victims of repression who were unlikely to have the opportunity to challenge the decision personally. *R v DPP ex parte Bull and Another* [1998] 2 All ER 755 QBD.

Both the Fire Brigades Union and the Amnesty International cases were "representative" cases, that is cases in which the applicants were not individuals "with a direct, personal interest in the decision under challenge", and the rule that a person must have a sufficient interest is one that the Court applies liberally. If the person challenging the decision can say that he is affected by it and there is no more appropriate challenger, and there is substance in his challenge, the court will not usually let technical rules on whether he has sufficient interest stand in its way. A claim for judicial review based on the breach of a Convention right must be brought by a "victim", for which the test is more restrictive than for "standing" in Judicial Review.

²¹ Supreme Court Act 1981 section 31 (3)

Judicial Review – the Pre-action Stage

- 3.5 The procedure which governs Judicial Review is set out in the Civil Procedure Rules: CPR Part 54, and we shall explain the more important stages in that procedure later. But applications for Judicial Review do not usually come out of the blue – without warning. The actual formal challenge under CPR Part 54 will often have been preceded by weeks of correspondence in which the person affected by the decision will have tried to persuade the decision-maker not to make the decision, or, if he has already made it, to withdraw it or to change it. This pre-action stage is very important because it should provide the parties, if they are reasonable, with opportunities to resolve the dispute without the necessity of costly litigation, which should be regarded as a last resort.

The Pre-Action Protocol

- 3.6 The Court regards the pre-action stage, and the opportunities it offers for avoiding litigation, as so important that it has been made the subject of a code or "Protocol", which prescribes the steps that should be taken before commencing an application for Judicial Review. The Protocol includes standard forms of a model "letter before action", and a model reply. The letter before action (or "letter before claim") should for example clearly identify the decision being challenged, and any particular documents which are relied upon. The letter in reply should for example specify what aspects of the claim are conceded (if any) and which are disputed. Whether or not this pre-action correspondence actually leads to a resolution (and it often does), it is very valuable in making the parties focus on the issues and exchange information, which will save time and effort later on.
- 3.7 The letter before action should identify the defects in reasoning or procedure which will form the basis of the application for judicial review, and you will now have an opportunity to consider whether any of these have substance. If it strikes you that there is some substance in the proposed challenge, one practical course which may be open to you is to reconsider the decision, and make a fresh one, at this stage, whether or not the flaw would have been fatal. Provided that the decision-making process is repeated (without the flaw), it may be that you will come to the same decision as before.
- 3.8 The Protocol also makes it clear that a person wishing to challenge a decision should do so by judicial review only when he has tried any other remedies that may be available to him. There may be a right of appeal to a tribunal, a complaints scheme, or some more informal review process which he has overlooked in the rush to challenge. The Court will seldom permit him to use Judicial Review when there is some other more immediate form of appeal or review which he has failed to explore; if one exists, it should be quickly pointed out to him.

Alternative Dispute Resolution ("ADR")

- 3.9 You should also consider at this stage (and at any later stage) whether the challenge can be dealt with by some form of ADR. ADR can come in all shapes and sizes, but generally it is a more informal process, often involving mediation (usually by an independent mediator), by which the parties can resolve their differences. It avoids confrontation, encourages reconciliation and cooperation. It may also be cheaper and less public than Judicial Review. The Pre-Action Protocol says this:

Where alternative procedures have not been used the judge may refuse to hear the judicial review case. However, his or her decision will depend on the circumstances of the case and the nature of the alternative remedy. Where an alternative remedy does exist a claimant should give careful consideration as to whether it is appropriate to his or her problem before making a claim for judicial review.

Whether mediation or some other form of ADR is appropriate to the case will depend on the nature of the decision being challenged, whether there is any room for manoeuvre, what other parties are affected and so on: where for example a tribunal has made a decision after a hearing according to statutory procedures, there may be no scope for voluntary concessions at all. The point to remember however is that the Pre-Action Protocol is intended to offer opportunities, including ADR, for settling disputes without recourse to litigation, and it will be to your advantage as decision-maker to grasp these opportunities²².

²² A party may even risk a penalty in costs if ADR is offered and he does not take up the offer.

The Timing of an Application for Judicial Review

3.10 Someone wishing to challenge an administrative decision must however get on with it. The decision maker may have made other decisions consequential upon the first e.g. in the allocation of limited school places; other persons may have been affected by it and relied upon it. In other words, the world may have moved on, and a late challenge may be "detrimental to good administration". What the Rules (CPR Part 54.5) say is this:

- (1) The claim form must be filed –
 - (a) promptly; and
 - (b) in any event not later than three months after the grounds to make the claim first arose...

Claimants sometimes think that "you have three months to start a claim for judicial review". This is not correct: the claimant must do it "promptly", and that may, in all the circumstances of the case, be less than three months. However, the Court has power under the Rules to extend time where "good reason" is shown and applies this Rule liberally, particularly where there appears to be a strong case on the merits and there is no detriment to any other person. As with decisions on standing (see paragraph 3.3 above) decisions on delay, which is primarily a procedural matter, are mixed up with the merits of the case. The Claimant should not have allowed compliance with the Pre-Action Protocol to interfere with his time-table, although exploration of "alternative procedures" may strike the Court as a "good reason" to extend time.

3.11 To sum up, there are already several questions which you should ask yourself when facing the prospect of an application for Judicial Review:

- Does the claimant have "standing" (is he in human rights terms "a victim")?
- Has the claimant brought his challenge promptly?
- Has the Claimant tried all alternative remedies?
- Can the matter be settled without the need for litigation?
- Is ADR appropriate for the case?

Duty of Candour

3.12 There is another feature of Judicial Review procedure which is worth mentioning here because it too extends to the pre-action stage. The points at issue in Judicial Review are not usually issues of fact. In this respect too public law is different from private law litigation, in that in Judicial Review the Court will not normally embark upon a fact-finding exercise: the Court is rather concerned with matters such as legality, fairness, and procedure. Although the machinery for the compulsory disclosure of documents, oral evidence and cross-examination exists in Judicial Review as it does in private law litigation, it is not used very often. The Court therefore has to take the facts more or less for granted – that is, as they are presented by the parties. If the procedure is to work efficiently, the parties – all of them – have to be straightforward with the Court and with each other. Moreover, when the Claimant has launched his application, this may have very serious consequences for good administration – it may for example be necessary in the light of his challenge to suspend making decisions of a similar nature. There is therefore a heavy obligation on the Claimant at all stages to be open and honest about his case: he must not withhold any information known to him which suggests weaknesses in his case. If he does wilfully present an incomplete or misleading case, then this in itself may be a reason for rejecting his claim (though as always this will depend on the circumstances). This obligation of candour starts when he first notifies his claim.

- 3.13 This obligation is however upon **all** parties, and the duty of candour lies if anything even more heavily on the public body (which after all will be in possession of the information showing why the decision was made) in responding to the challenge. First, the public body is representative of the public interest and it cannot be in the public interest for the Court to be presented with an incomplete or inaccurate account of the facts. Secondly, the task of everybody concerned in Judicial Review is made a great deal easier if the Court knows that it can trust public authorities. When a public authority is found wanting in this respect, the criticism is correspondingly greater.

Case Example

B was a cattle farmer. The Department had imposed a Movement Restriction Order preventing movement of his cattle, on the grounds that illegal cattle feed had been found on his farm. B sought Judicial Review of that decision arguing that there was no evidence or inadequate evidence of the existence of the feed, and that there had been a breach of natural justice in that the Department had failed to disclose to him the evidence on which it relied.

The Department withdrew the MRO before the hearing, but the Court allowed the claim on the grounds that the decision had been procedurally unfair. In addition the Court held that the Department had, in the course of the Judicial Review, failed to disclose a relevant e-mail. The Court accepted that the Department had not deliberately set out to mislead the Court, but as a mark of its displeasure awarded indemnity costs against the Department:

"The underlying duty is one of candour...Frank disclosure of the decision making process does not mean referring to so much of the truth as assists the public body's case. It means presenting the whole truth, including so much of the truth as assists the applicant for judicial review". *Banks v Secretary of State for Environment Food and Rural Affairs* [2004] EWHC 1031

- 3.14 But the duty of candour is not the same as "disclosure" in the sense in which it has traditionally applied in private law litigation, in which (though attempts have been made to curtail disclosure even there) a party will prepare a list of all "relevant" material with a view to its disclosure. Although the machinery to order disclosure exists in Judicial Review, the parties normally rely upon each other to produce the relevant information. The traditional disclosure exercise has taken place only exceptionally in Judicial Review: that is why the duty of candour is so important. This position may be about to change under the influence of the Freedom of Information Act 2000.

The Freedom of Information Act 2000

- 3.15 We mentioned at paragraph 2.63 above (in the context of the need to give reasons) that the Freedom of Information (Fol) Act came into force on 1 January 2005, quoting its main provision. Where a person wishes to challenge a decision of a public body, there is nothing to prevent him from making an application under the Fol Act seeking production of all the information which he believes relevant: he can cast his application as widely as he likes²³. It is not yet known how frequently this will arise but we expect that it will occur in at least some high profile Judicial Review cases. For example, where a Department awards, say in the regulatory field, a valuable licence or franchise, unsuccessful bidders may preface their challenge by an application under the Fol Act, so putting themselves in possession of much of the decision-maker's information before they launch their challenge. Or, if they are dissatisfied with the evidence put in by the decision-maker, they may make a parallel application under the Fol Act, where before that Act came into force they might have made an unsuccessful application for disclosure.
- 3.16 It is possible that the Freedom of Information Act will have a profound effect on the practice of Judicial Review, but it is obvious that the existence of the right to call for information, without having to justify the request, provides another salutary reminder to the decision-maker of his duty of candour²⁴.

²³ Subject of course to the Exemptions contained in Part II of the Act.

²⁴ Disclosure under the Fol Act is of course subject to its own regime and is dealt with here only in the most general terms: see Appendix 2. Disclosure may also be sought under the Environmental Information Regulations 2004.

Judicial Review Procedure – Resumed

3.17 In the preceding paragraphs we have discussed the steps which take place before formal Judicial Review begins, and the duty of candour. We now look at what happens if your attempts to persuade the Claimant that the decision was the right one (or at least one which you were entitled to take) have failed, and there appears no prospect of settling the proceedings by way of Alternative Dispute Resolution (though those options remain open even after litigation has commenced). You will need to remain closely involved in the handling of the case, even though it is now in the hands of the lawyers. Detailed Rules of Procedure are set out in the Civil Procedure Rules (CPR) Part 54 and the associated Practice Direction²⁵. We attempt only a summary here of the main steps.

The Permission Stage

3.18 We have already commented upon the disruption to administration which may be caused by the commencement of an application for Judicial Review. To mitigate this, the CPR provide that before a claimant may proceed, he has to obtain the permission of the Court. This gives the Court an opportunity (with the help of the Defendant decision-maker) to filter out those claims which have no prospect of success. The Claimant is required to issue and "serve" upon the Defendant a Claim Form, accompanied by a "detailed statement of the claimant's grounds for bringing the claim for judicial review", and the evidence on which he relies. The Claimant should at this stage place before the Court as full an account of his case as he is able, in accordance with his duty of candour, although he will not be prevented from putting in further evidence if more information comes to light or becomes relevant. All this material must be served upon the Defendant – and upon any "interested parties" whose interests may be affected by the challenge. (For example, in the *Coghlan* case mentioned in paragraph 2.25 above, the challenge was brought against the Chief Constable as decision-maker, but the claim was also served upon the retired officer, as "interested party").

Service on the Defendant

3.19 In the preceding paragraph we said that the Claimant must issue "and serve upon the Defendant" his application for permission. "Serve" means to send the Notice of Claim formally (i.e. in accordance with standard procedure) to the Defendant, so as to fix him with notice of the proceedings and involve him in them. Where the Defendant is a Government Department, "service" is usually effected by sending or delivering the Claim Form (and any supporting documents) to the particular Department's lawyers: in most cases this will be Treasury Solicitor, but some Departments²⁶ have their own in-house Solicitor, on whom the Claim Form may be served. In cases where the National Assembly for Wales is a party the Claim should be served on the Counsel General. In Northern Ireland, papers are served on the Crown Solicitor. Service of the Claim Form will set "time running".

3.20 Sometimes the Claimant, particularly where the Defendant (though a public body) is not a Government Department, will serve his Claim Form direct upon the Defendant: he is entitled to do so. You may find the Claim Form arriving on your desk. When a Claim Form is received at your desk, it is imperative to react to it by passing it to your lawyers. Too often, accidents happen because Claim Forms lie neglected in somebody's in-tray.

²⁵ CPR 54 and 54PD

²⁶ Defra, HM Revenue & Customs, and Department of Health/Department for Work and Pensions

- 3.21 If the Pre-Action Protocol has operated as it should (but the Claim has not been resolved), then it is probably inevitable that the Claim will have to be contested, though the Defendant can at this, or any other, stage concede or settle the case or suggest mediation. If the Defendant decision-maker resolves to contest the claim, he must within 21 days answer the Claim, in an Acknowledgement of Service, containing "a summary of his grounds for doing so". The Rules require only a "summary" of the Defendant's grounds for opposing the Claim, and it is a matter of tactics and practicalities how much effort should be devoted to meeting the Claim at this preliminary stage. If the Claim has substance and it is likely that permission to proceed will be granted, then probably a "summary" of your grounds is sufficient. If however the Claim is obviously misconceived or presents an incomplete or misleading picture, then it may be worthwhile putting in a more detailed defence, in the hope that the Court will refuse permission. Moreover, many claims will be publicly funded and there is an obligation on Claimants (or their legal advisers) to draw any new information bearing on the continuation of funding to the attention of the Legal Services Commission. The LSC Funding Code also allows Defendants and others to make representations to the LSC that funding should be discontinued. If therefore it is plain from the Claim Form and your Acknowledgement of Service that the Claim is without foundation, there may be scope for asking the Claimant or his legal advisers if he has drawn the contents of the Acknowledgement of Service to the attention of the LSC; and, if he has not, yourself making representations to the LSC.
- 3.22 After the Claim Form and all the Acknowledgements of Service (there may be more than one Defendant/Interested party) plus supporting documents have been received by the Administrative Court Office, they are passed to an Administrative Court Judge for consideration on the papers. The Judge will grant permission to proceed, or refuse permission, or grant permission only on certain grounds or on conditions; you, or your legal adviser, will receive a copy of his Order.

Permission Refused

- 3.23 If the Judge refuses permission (or grants it upon certain grounds only, or upon conditions), he will give his reasons, and the Claimant is entitled to seek (within seven days) that the matter be reconsidered at an oral hearing. Once again, it is a matter of judgment how much effort should now be put into meeting the Claim at the oral hearing, but since permission will by now have been refused once, it will normally be worthwhile attending the oral hearing through Counsel to oppose the Claim. If at the oral hearing the Judge again refuses permission, the Claimant will have a right to apply for permission to appeal to the Court of Appeal against that refusal.

Permission Granted

- 3.24 If permission is granted, either initially on the papers, or at an oral hearing, the Defendant is now required to respond fully and formally. Up to this point he will probably have relied upon "Summary grounds of opposition". He must now set out the decision-maker's position in full, providing evidence in the form of witness statements explaining the history of the case, the procedure followed, the reasoning process and so on. We have already mentioned the coming into force of the Freedom of Information Act: it is possible that by the time the case reaches this stage, some or all of the information will have been disclosed under the FoI Act²⁷, and that is something you should bear in mind when preparing the evidence.

Witness Statements

- 3.25 Sometimes it will be obvious who should be the witness (and sign the witness statement): where a decision has been made by an expert assessor, for example, the decision will have been his and his alone, and only he can be a witness in its defence. Usually however the situation is more complex, because several people will have been involved in the decision-making and there will be questions of seniority and responsibility to consider. Generally speaking, the most senior responsible official who is able to speak to the issues concerned from his own knowledge would be the appropriate witness. Sometimes it will be appropriate for someone more junior to sign the statement; sometimes it may be necessary to take statements from more than one official. It should always be borne in mind that a person who makes a witness statement in Judicial Review may have to give oral evidence and be cross-examined on his statement.

²⁷ Or the Data Protection Act 1998

Evidence Where the Decision Was Taken by the Minister Personally

- 3.26 The great majority of administrative decisions are taken below Ministerial level, often by very junior officials. There are however some instances where the Minister will have taken the decision personally, because he is required by statute to do so, or because officials have referred a particular decision to him on account of its sensitivity. Where the Minister has made the decision personally, it may still be acceptable for the witness statement to be signed by an official on his behalf, but special care is required in the preparation of the evidence. The Minister may have made his decision on the back of a detailed submission prepared for him by officials, and it may be necessary to show that submission to the Court, in order to demonstrate that the Minister was properly briefed, so that when he took his decision he was in possession of all relevant information. However the Minister's reasons for making the decision – whether he accepted all the arguments presented to him, accepted only some of them, or had other reasons – may not be recorded. Again, it may be difficult to gain access to the Minister to take him through the case, both because of his continuing commitments and because his officials may wish to protect him from the business of litigation. It is a mistake to think that the Minister who made the decision need not personally get involved in defending it at Judicial Review, or that his reasoning or documents recording it are immune from disclosure under some principle of confidentiality. Whether the Minister, or one of his officials, sign the witness statement, it is imperative that the Minister be thoroughly acquainted with all the information in the case and approve what is being said in evidence by him or on his behalf – and that that evidence is supported by the documents in the case. These warnings also apply when the decision-maker was a very senior official, and the witness statement is being made below that level.
- 3.27 Preparation of the evidence will always be a collaborative process between departmental officials and their lawyers, and it essential that officials ensure that the lawyers are given early access to all the relevant documentation. It is however the lawyer handling the litigation for the Department who will be responsible for the presentation of the evidence to the Court and he must receive support and cooperation so that nothing is withheld from him. This applies in Ministerial cases, as in all other cases. The Defendant must normally file his evidence within 35 days after service of the Order giving permission (although in cases of urgency the Court may have abridged this time when granting permission). In view of the interests which may have to be consulted, there is no time to be lost.
- 3.28 When the evidence has been assembled and served on the Claimant (and filed with the Court), it will again be appropriate for the Defendant, with his legal advisers, to review the case and the prospects of defending it. You should indeed have been doing this from the outset, and not allowed short-term pressures to prevent you from taking the long view. The Judicial Review timetable can be very tight and the case may acquire a momentum of its own; and sometimes there may be a perceived political imperative to be seen to be fighting the case. You should however not lose sight of the fact that an adverse judgment after a contested hearing may do far more lasting damage to Departmental policy than an early concession in the particular case. (The Pate case, mentioned at paragraph 2.32 is an illustration of that). It is debatable how far it is proper to defend a challenge for purely presentational reasons, but it is usually counter-productive. If the case is to be conceded (and, if necessary, the decision quashed by consent), then the sooner this is done, the better.
- 3.29 There is a tight time-table for Judicial Review. On average, after permission has been granted, cases can be listed for "substantive hearing" within six months, though in urgent cases, the substantive hearing can take place much more quickly than that. As decision-maker, or as one who contributed to the decision-making process, you will be expected to attend the hearing to offer guidance on factual and policy matters to the lawyers. As in any litigation, it will be necessary to have good communication arrangements with your office, in case you yourself need to obtain further guidance, information or documents.

Procedure at the Hearing

3.30 Procedure at the substantive hearing is very simple:

- The Case will normally be heard by a single Judge from the Administrative Court Panel, that is Judges appointed to a panel because of their experience, and he will have read the papers beforehand
- Counsel appearing for the Claimant introduces the case, refers to the witness statements and addresses the Court about the law. Counsel will often refer to cases previously decided by the Courts which concern similar points of law (called "precedents" or "authorities").
- The Department's Counsel will then present the case in answer to the Claimant.
- Finally the Claimant's Counsel will have the last word and will address the Court again on any points arising from the Department's case.
- The Court 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").

3.31 All parties are required to prepare in advance an outline ("skeleton") argument for the use of the Court at the substantive hearing. This is part of a tendency to encourage parties to reduce their case as much as possible to writing, though the Court will still be anxious to let everybody have their say. So far as witnesses are concerned, remember that the aim of Judicial Review is to examine the legality of a decision, and to ensure that proper procedure is followed: the Court is not well equipped to carry out a fact-finding exercise and will not normally embark upon one. For that reason it is rare for the witnesses who have made statements to be called to give oral evidence or to be cross-examined on their statements²⁸. There is power in the Court to order it, but it is rarely exercised. That is another reason why the duty of candour has to be observed.

3.32 Claimants in Judicial Review, as in any other form of litigation, are entitled to make their application (both for permission and at the substantive hearing) without Counsel or other legal representative, and sometimes do so. They are then said to be "acting in person". The Court will permit this, although the Court will usually encourage them to seek legal advice before proceeding. Where the Claimant is acting in person, the Court will expect the Defendant public authority not to take advantage of its much stronger tactical position; on the contrary, the Court will expect the Defendant to assist both the Claimant and the Court by explaining the case, by ensuring that everybody has been properly served, that there are sufficient copies of documents and so on. Dealing with a litigant in person imposes a greater obligation on the Defendant public authority, not less.

3.33 It may be helpful to set out in summary form the principal time limits set by the Rules.

- Claimant required to file his Claim Form "promptly and in any event not later than three months after the grounds to make the claim first arose": CPR 54.5
- Claimant must serve Claim Form on the Defendant within seven days after date of issue: CPR 54.7
- Defendant must file Acknowledgement of Service not later than 21 days after service of the Claim Form: CPR 54.8
- If permission refused on the papers, the Claimant may within 7 days request reconsideration at oral hearing: CPR 54.12
- If permission granted, the Defendant must file and serve his written evidence within 35 days after service of the order giving permission: CPR 54.14

No special allowance is made in the above timetable for compliance with the Pre-Action Protocol: it has to be fitted in to the initial "promptly and in any event not later than three months".

3.34 The party who is unsuccessful at the substantive hearing again has the right to apply for permission to appeal to the Court of Appeal. The appeal process too is subject to a strict timetable.

²⁸ The risk of cross-examination, though small, is something which should be taken into account when deciding who should be the witness.

The Powers of the Court – Interim relief

- 3.35 Once a decision has been taken, the commencement of an application for Judicial Review challenging that decision does not, of itself, prevent the public authority from going ahead and implementing it. By the time the Judicial Review comes to a substantive hearing, the decision may have been implemented and may be practically irrevocable: the school place may have been allocated to another pupil; the licence may have been awarded to a competitor. When a Claimant commences his claim, he is therefore required to set out what remedy he is seeking, "including any interim remedy": that is, what remedy (usually in the form of an injunction preventing the decision being implemented) he is seeking immediately, before the substantive hearing takes place²⁹. To use the examples given, he will seek an interim injunction preventing the allocation of the school place or the award of the licence. If the Court thinks there is sufficient importance in the Claim, then it may well be appropriate to grant an injunction pending the substantive hearing, and even before Permission is granted. If the Claimant is unsuccessful at the substantive hearing, the injunction can then be discharged and the decision finally implemented.
- 3.36 In practice it is seldom necessary for the Court to grant an interim injunction, because once Permission has been granted (and even before), the Defendant public authority, recognising the authority of the Court and indeed bowing to the inevitable, will be prepared to give an "undertaking" not to implement the decision. The undertaking which the Defendant gives will probably be "on terms" that is, it will have strings attached e.g. as to the timetable to be followed by the Claimant in pursuing his Claim. Whether or not to give an undertaking (and on what terms) is something you may have to consider at the beginning of the case as a matter of urgency. It is a decision you should make with the assistance of your legal advisers. Where an interim injunction is likely to be granted, it is generally considered preferable to give an undertaking: it signals the Defendant's co-operation in the process, and it gives the Defendant more control over the terms of what is not to be done. In cases of great urgency (deportation, for example) the Court may be prepared to grant interim relief even before Permission has been granted.

Remedies following a Successful Challenge

- 3.37 All the remedies available to the Court are "discretionary": that means that a successful Claimant has no absolute right to a remedy, though in practice the Court will usually grant at least a declaration. Matters which the Court will take into account when deciding whether to grant a remedy include:
- Any prejudicial delay by the Claimant in bringing the case;
 - Whether the Claimant has suffered substantial hardship;
 - Any impact the remedy may have on third parties;
 - Whether a remedy would have any practical effect or the matter has become academic;
 - The merits of the case;
 - Whether the remedy would promote good administration.

²⁹ An injunction is available against the Crown in Judicial Review.

3.38 The remedies which the Court may grant following a successful Judicial Review are:

- A quashing order, by which the Court sets aside or cancels a decision (or subordinate legislation) found unlawful;
- A prohibiting order, by which the Court forbids the public authority to perform an act found unlawful;
- A mandatory order, by which the Court instructs the public authority to perform a public duty;
- A declaration, by which the Court declares what the law is, for example that a decision is unlawful;
- An injunction, usually an Order not to do something, but it can be positive;
- Damages, by which (in limited circumstances) the Court can award financial compensation.

In practice by far the most common order given by the Court to a successful Claimant is the quashing order on its own, even if the Claimant has sought, say, a prohibiting order with it. Where the Court has quashed a decision and remitted the matter to the decision-maker to make a fresh decision in accordance with the judgment of the Court, it will be unnecessary for the Court to add a prohibiting order as well. You will remember that where Parliament has given the discretion to make a decision to a particular person, the general rule is that no other person may take the decision. It is fundamentally for this reason that the Court normally abstains from making the decision itself, although "where the Court considers that there is no purpose to be served in remitting the matter to the decision-maker it may, subject to any statutory provision, take the decision itself"³⁰. The Court has made use of this recent power, but very sparingly.

Declarations of Incompatibility

3.39 A power which could have been included among those listed in paragraph 3.38 as a power of the Administrative Court, but which deserves a paragraph to itself, is the power to grant a Declaration of Incompatibility. Section 4 of the Human Rights Act gives the Court (that is any senior Court, including the Administrative Court) the power to declare a "provision of primary legislation" incompatible with a Convention right. Such a declaration does not have the effect of making primary legislation invalid, but the Government may take remedial action to remove the incompatibility.

Case Example

Section 23 of the Anti-Terrorism, Crime and Security Act 2001 gave the Secretary of State power to detain indefinitely, without charge or trial, non-British nationals whom he suspected of international terrorist activity, but whom he could not deport. The House of Lords granted a declaration of incompatibility in these terms:

"Section 23 of the Anti-Terrorism, Crime and Security Act 2001 is incompatible with Articles 5 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status".

A and Others v Secretary of State for the Home Department House of Lords [2005] 2 WLR 87

The Anti-Terrorism, Crime and Security Act 2001 continued in force despite this declaration, while the Government considered means of amending it. Subordinate legislation declared incompatible can be quashed by a higher court³¹. The Court will exercise its interpretive power to "read down" the incompatible provision (see paragraph 2.9), if that is possible, before making a declaration of incompatibility.

³⁰ CPR 54.19 (3)

³¹ unless primary legislation required it to take that form, in which case a senior court could declare the primary legislation incompatible.

When Can the Court Award Damages

3.40 A Claimant may include a claim for damages in his Claim for Judicial Review, but breach of a public law right does not of itself give rise to a right to financial compensation. So to take one of the examples used above, if an applicant for a licence were successful in his challenge to the decision refusing the licence, that would not of itself entitle him to damages, even if the decision had caused him loss. A Claimant may be entitled to damages only when he could have made a claim in private law (that is, using a private law cause of action, such as negligence or false imprisonment) or a claim under section 8 of the Human Rights Act for breach of a Convention right. Moreover, in an application for Judicial review a claim for damages can only be secondary to one of the other main remedies – to a quashing order etc.: it cannot stand alone.

Damages under Section 8 of the Human Rights Act

3.41 The Human Rights Act has added an important head of damages to what was already available in Judicial Review. The Act gives the Court the power to award damages where it has found that a public authority has acted in a way which is incompatible with a Convention right. Unlike the position in tort (civil wrong), not every breach of a Convention right will entitle the Claimant victim to damages, but only where "the court is satisfied that the award is necessary to afford just satisfaction". For sometimes the mere finding that there has been a breach of a Convention right will be enough to vindicate the right. On the other hand where the breach has caused actual financial loss to the victim, an award of damages is more likely. The approach of the Court has so far been fairly cautious.

Case Example

G was serving a term of imprisonment, and was charged under Prison Rules with an offence against prison discipline (drugs). The charge was heard by the Deputy Controller of the prison who refused G legal representation at the adjudication, and found the charge proved. He awarded G 21 additional days. It was subsequently accepted by the Home Office that the proceedings did involve the determination of a criminal charge, that the Deputy Controller was not independent and that G was entitled to legal representation, so that a breach of Article 6 (right to a fair trial) had occurred. G claimed damages for breach of the Convention right.

The House of Lords noted that the focus of the Convention was on the protection of human rights and not on the award of compensation. The Court reviewed thoroughly the facts of the case - and the adjudication – and was not prepared to speculate on what the outcome might have been if the breach had not occurred. The Court concluded that there was no special feature in the case which warranted an award of damages.

R (Greenfield) v Secretary of State for the Home Department. House of Lords [2005] 1WLR 673

Private Law Damages in Judicial Review

3.42 We said above that "breach of a public law right does not of itself give rise to a claim for financial compensation". This remains the position, though it has now to be seen both in the light of section 8 of the Human Rights Act and of the increasing awareness of human rights issues, and has often been described as an "evolving area of the law". Except in cases involving breaches of EC law and claims under section 8 of the Human Rights Act, damages (i.e. financial compensation) cannot be awarded against public bodies in Judicial Review, unless the Claimant can show a recognised cause of action in tort (civil wrong). There is no restriction on the kinds of tort which can be used. But we will mention particularly two important and developing areas, Negligence and Misfeasance in public office.

Negligence

- 3.43 Public authorities have no general immunity from claims in negligence. But problems of public policy arise when a Claimant alleges that a public authority has been negligent in the exercise of its public law duty to him. There is a strong public interest in ensuring that public authorities are free to carry out their duties in the public interest, without the fear that they may be liable in damages if it is found that they could or should have exercised their discretion in a different way. In accordance with this line of thinking, the Court has for example held that the police are immune from negligence claims in their investigation of crime. The Court also recognises that the public purse is finite and financed by the tax-payer. The Court has therefore been reluctant to impose the burden of paying compensation for private financial loss, resulting from the necessary exercise of public duties, unless it can be inferred from the statute that Parliament intended to create that right alongside the statutory duty. The Court has therefore been cautious in finding that a "duty of care" exists (which has to be established in a claim in negligence), if the claim is in respect of the negligent breach of a public law duty.
- 3.44 However, for the Court to find that there is no private law "duty of care" in the performance of a public law function is to confer a kind of immunity on the decision-maker, and although there are legal arguments in support of this, the practical considerations mentioned in the previous paragraph (that public officials would always opt for the risk-free course; that it would be a drain on the public purse) are considerations of policy rather than legal theory. The Court has said that in this developing area of law it would proceed cautiously ("incrementally"), but for various reasons – particularly the pervasive effect of the Human Rights Act – it is likely that the Court will in the future subject any claims for immunity to closer examination, and that such considerations of policy may carry less weight. The requirement that, for a duty of care to arise, the Court has to be satisfied that it is "fair just and reasonable", enables the Court to take account of considerations of policy. The Court may, in the light of the circumstances of the case decide that it is able to interpret and apply policy so as to effect an incremental extension of the law.

Misfeasance in Public Office

- 3.45 Where it can be shown that the decision-maker was not merely negligent, but acted with "malice", a private law action for damages is possible for the tort of "misfeasance in public office". An example might be where a prison officer unjustifiably penalised a prisoner out of spite, or an official rejected a claim for welfare benefit because he disliked the applicant.
- 3.46 Although proof of spite or ill-will may make a decision-maker's act unlawful and provide the basis for a claim for misfeasance in public office, actual malice (in the sense of an act intended to do harm to a particular individual) is not necessary to prove the tort. It will be enough that the decision-maker knew he was acting unlawfully and that this would cause injury to some person, or was recklessly indifferent to that result.

Case Example

D was an illegal entrant with a record of violence, and known to the police. He was picked up in the course of a police operation and was liable to deportation. Instead he was allegedly offered a deal by the police and immigration service whereby he might remain in the UK at liberty while providing information on criminal associates. While at liberty he murdered a family member of the Claimant. It was argued on behalf of the Claimant that, having regard to D's record, the only reasonable and lawful course was to detain D pending his deportation, and that to permit him to remain at liberty for the purpose of providing information was an unlawful use of the power. It was foreseeable that a man with D's record would commit further acts of violence even though it could not be foreseen whom he would harm.

The Court held that, assuming the facts to be correct as stated, the tort of misfeasance in public office was made out: it was arguable that there had been an illegal use of the power to permit D to remain at liberty and that the official exercising that power must have known that it was illegal, and that having regard to D's record the official must at least have been reckless as to the consequences. Moreover it was not necessary that it should be predictable that D should harm the deceased: it was enough that it should be predictable that he would harm somebody. The Court declined to strike out the claim. *Akenzua v Secretary of State for the Home Department and Metropolitan Police Commissioner* [2003] 1 WLR 741.

The Ombudsman

3.47 You will have seen from the preceding paragraphs that there are some situations in which a person may have been badly affected by some administrative error or abuse, yet have no remedy, or the remedy may be disputed or doubtful. In some circumstances the Parliamentary Commissioner for Administration (the Ombudsman) may be able to carry out an investigation and may recommend that a Department pay compensation, despite the fact that there may be no (or disputed) legal liability. The Ombudsman can intervene where there has been a complaint by a "member of the public who claims to have sustained injustice in consequence of maladministration in consequence" of an action taken by a Department. "Maladministration" is not defined in the Parliamentary Commissioner Act 1967, but has been interpreted to cover a wide range of bureaucratic bad practice³². But the Ombudsman is not entitled to "question the merits of a decision taken without maladministration in the exercise of a discretion vested in" a Department or authority. There is a separate Welsh Administration Ombudsman who deals with complaints against the Welsh Assembly and certain bodies dealing with matters devolved to Wales, and a corresponding Scottish Public Services Ombudsman.

Judicial Review in Scotland

- 3.48 The grounds on which Judicial Review may be sought in Scotland are substantially the same as those described for the rest of the UK. The Scottish Court will consider relevant case law from the Courts of England, Wales and Northern Ireland – and vice versa.
- 3.49 The distinction still drawn between public and private law in England, Wales and Northern Ireland is not recognised in the same way in Scotland. The test to be applied to discover if the Scottish Court can judicially review an act is to ask whether there has been what has been described as a "tripartite relationship". The tri-partite relationship means a relationship between the decision-maker, the legislature and the applicant for whose benefit a jurisdiction, power or authority is to be exercised.
- 3.50 The procedure for Judicial Review in Scotland is different from elsewhere in the United Kingdom: it is much more akin, procedurally, to private law proceedings between private individuals. In addition the devolution legislation has given the Court additional remedies to deal with acts that are *ultra vires* the Scottish Ministers. *Ultra vires* acts include acts incompatible with EC law or with the Convention rights. (This does not apply to the acts of the United Kingdom Government in Scotland).
- 3.51 All applications for Judicial Review must be made to the Court of Session. There is no permission stage, and in most cases there will be only one hearing which will take place as soon as possible after the application (or petition) has been commenced. There are no fixed time limits within which proceedings must be commenced, although it is open to the Court to rule that proceedings have been commenced too late.
- 3.52 The petition will describe the facts and circumstances of the decision which is being challenged, and the Minister will have the opportunity to submit written answers to the claims made by the Petitioner. As in England and Wales, there will not normally be any oral evidence. Procedure at the hearing is much as described for the rest of the United Kingdom.
- 3.53 In paragraph 3.38 above we described the remedies available to the Court in England and Wales. Broadly the same powers are available to the Court in Scotland, including an injunction (called in Scotland an "interdict").

³² A list of examples is given in the Appendix to the Cabinet Office Guide "The Ombudsman in Your Files" at www.cabinetoffice.gov.uk/propriety_and_ethics

4. Devolution³³

4.1 The United Kingdom now has four "legislatures":

- Parliament in Westminster
- The Scottish Parliament
- The Northern Ireland Assembly³⁴
- The National Assembly for Wales

Devolution transferred some areas of legislative competence to the new legislatures, though key areas (such as defence and foreign policy) remained with the UK Government. The exact boundaries of legislative competence differ within the three devolution settlements, and Ministers and civil servants, whether they work in Whitehall or one of the devolved administrations, need to ensure that their acts do not stray into areas that remained with or were devolved to other executive or legislative bodies. Any act that does so is *ultra vires*, and both referable to the Privy Council as a "devolution issue" as well as being susceptible to judicial review. EC law binds all the executive and legislative bodies.

4.2 The Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 all contain provisions to ensure that the devolved bodies do not act incompatibly with the Convention rights. Under the three Acts, challenges to acts of the devolved bodies on grounds of incompatibility with the Convention rights can be brought only by "victims" (i.e. the same test of standing as under the Human Rights Act). An exception to the rule is that the Law Officers may bring a challenge even if they are not "victims". Any damages awarded will also be on the basis set out in the Human Rights Act.

4.3 The Northern Ireland Act contained an important additional provision, making it *ultra vires* for devolved bodies in Northern Ireland to act in a way which discriminates against anyone on the grounds of religious belief or political opinion.

4.4 The National Assembly for Wales has power only to make *subordinate legislation*. However when the Assembly makes legislation which is incompatible with a Convention right because:

- UK primary legislation requires it to act in this way, or
- UK primary legislation offers only options for subordinate legislators that are incompatible with the Convention,

the Assembly will not have acted *ultra vires*.

4.5. However, the legislation of *all* the devolved bodies can be quashed by a higher court if declared incompatible with the Convention rights. This is because, *for the purposes of the Human Rights Act*, all their legislative acts are treated in the same way as subordinate legislation.

4.6 The Scotland, Government of Wales and Northern Ireland Acts all contain the same procedures for dealing with *ultra vires* actions. A court or tribunal may:

- Make an order removing or limiting any retrospective effect the *ultra vires* decision may have, or
- Suspend the effect of the decision to allow any defect in it to be corrected.

³³ Detailed Guidance on the theory and practice of devolution is set out in a series of Guidance Notes issued by DCA – see Appendix 2

³⁴ The Northern Ireland Assembly was suspended on 14 October 2002 and remains suspended as at January 2006. The Secretary of State for Northern Ireland has assumed responsibility for the direction of Northern Ireland Departments.

4.7 The devolution legislation does not make the decisions of the devolved bodies the less susceptible to judicial review; it merely provides additional remedies. For example, challenges that allege acts are unlawful because they are incompatible with Community law can be brought in the courts of Scotland, Wales and Northern Ireland, just as they could before devolution.

4.8 Acting incompatibly with EC law or the Convention rights may also raise a "devolution issue" under the devolution Acts. Devolution issues are questions that can be put to the Judicial Committee of the Privy Council for a ruling. Cases may reach the Judicial Committee:

- On appeal, or
- By referral from a lower court or tribunal or the House of Lords.

Cases may also be brought directly in the Judicial Committee by:

- A UK Law Officer³⁵
- The Lord Advocate in Scotland;
- The First Minister and deputy First Minister of the Northern Ireland Executive, acting jointly;
- The National Assembly for Wales.

Because an act infringing a victim's human rights is *ultra vires*, every human rights claim against a devolved body could give rise to a "devolution issue". There are however only a handful of reported cases raising "devolution issues", all in the criminal field.

³⁵ A new UK Law Officer post of "Advocate General" was established to deal with this role in relation to acts of the Scottish Parliament. This Law Officer also advises the UK Government on questions of Scots law.

5. EC Law in Domestic Cases

- 5.1 Community (or "EC") law derives from the EC treaties, and is incorporated into the law of the United Kingdom by the European Communities Act 1972. In some circumstances provisions of the EC Treaty or of Directives made under the Treaty confer rights on individuals. Individuals may rely on such provisions in national courts even where the provisions have not been implemented in national legislation³⁶. These rights are described as having "direct effect". In addition:
- All EC Regulations are directly applicable and enforceable without the need for any national measures to implement them.
 - Binding Decisions adopted by the Council of Ministers or the EC Commission bind those to whom they are addressed. If addressed to a Member State, they may have direct effect, giving rise to rights which are enforceable in national courts, provided their terms are clear and precise.
- 5.2 The 1972 Act requires that questions as to the validity, meaning and effect of Community provisions have to be determined according to the principles of EC law, including proportionality. If there is a conflict between EC law and the national law, directly enforceable EC rights and obligations take precedence over inconsistent national law. Domestic measures which are inconsistent with EC law, or which are considered to hamper the attainment of the objectives of the EC Treaty, may be found unlawful.
- 5.3 In Community law cases, the Court has jurisdiction to grant interim relief: for example:
- An interim injunction against a Minister or Department;
 - An order to disapply legislation (including primary legislation).

The domestic Court can also seek an authoritative opinion on an issue of EC law from the European Court of Justice ("ECJ") by way of a preliminary reference, sometimes called an "Article 234 reference". After the ECJ has given its ruling, the matter is referred back to the domestic Court to decide accordingly:

Case Example

B, a French national, moved to the UK in August 1998. In September 2001 he enrolled at University College London and applied to Ealing LBC for a student loan. There were two qualifications for a student loan: 1) three years' residence; 2) "settled" status. Ealing refused the student loan because B was not "settled" in the UK. B sought judicial review of that decision on the grounds that the requirement that he be settled discriminated against him on grounds of nationality, prohibited by the EC Treaty.

The Administrative Court made a preliminary reference to the ECJ under Article 234.

The ECJ held that it was permissible for a Member State to ensure that the grant of maintenance to students from other Member States did not become an unreasonable burden which would limit the overall level of assistance available. It was therefore legitimate for the host Member State to grant such assistance only to students who demonstrated a certain degree of integration into the society of that state; the three years' residence ensured such integration.

UK immigration law however precluded the national of any other Member State from acquiring settled status as a student, even if he was lawfully resident in the UK and had received a substantial part of his education in the UK (as B had). The settlement requirement was therefore incompatible with Community law.

The case would be remitted to the UK Court to decide accordingly.

The Queen (on the application of Bidar) v London Borough of Ealing and Secretary of State for Education and Skills. C-209/03 15 March 2005. [2005] 2WLR 1078

³⁶ Treaty provisions have to be sufficiently complete, clear and concise to be enforceable by a court. Provisions in Directives must be unconditional and sufficiently precise. Directives which have direct effect can only be enforced against the state or emanations of the state (so-called "vertical direct effect"). Directly effective Treaty provisions also apply as between individuals.

- 5.4 The decisions of the ECJ on matters of EC law form part of the national law of Member States. Because the EC recognises the Convention as a source of general principles of law, Convention rights too can be enforced in the Court of the United Kingdom as part of an action based upon EC law³⁷.
- 5.5 A failure by the Government to give proper effect to EC law conferring rights on individuals may give rise to a claim for damages. Community law will confer a right to compensation where three conditions are met:
- The rule of law infringed must be intended to confer rights on individuals;
 - The breach must be sufficiently serious (manifest and grave disregard by the Member State of the limits of its discretion);
 - There must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the Claimant.

Liability for such damages is one of the exceptions to the principle that, in general, damages are not awarded for a breach of public law. Damages of this type are often called *Francovich* or *Factortame* damages after two leading EC law cases.

- 5.6 A basic principle of Community law is that when the liability of a Member State is considered, all its organs of Government are treated as being a single entity. A significant internal change in the UK, arising under the devolution settlements, is that the Scottish Executive and the National Assembly for Wales³⁸ are now responsible for implementing EC obligations relating to devolved matters, and will be liable for any financial penalty from a failure to implement a relevant provision.
- 5.7 Any acts of the devolved bodies which are incompatible with Community law are ultra vires, and can be challenged under the devolution legislation.

³⁷ Proportionality is a key principle of EC law too.

³⁸ And the Northern Ireland Executive when its suspension is lifted

Appendix 1

A Classification³⁹ of Convention Rights in the Human Rights Act 1998

Unqualified Rights

A. Absolute Rights (no restriction)

- Right to life (Article 2) (except in case of death from lawful act of war)
- Prohibition of torture (Article 3)
- Prohibition of slavery and forced labour (Article 4.1 only; 4.2 is limited)
- No punishment without law (Article 7)

B. Limited Rights (restricted only to the extent indicated in the Convention)

- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- Right to marry (Article 12)
- Prohibition of discrimination (Article 14)
- Protection of property (Article 1 of the First Protocol)
- Right to education (Article 2 of the First Protocol)
- Right to free elections (Article 3 of the First Protocol)

Qualified rights (restriction if within "margin of appreciation" and "proportionate")

- Right to respect for private and family life (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to property (Article 1 of First Protocol)

³⁹ The above is only one of several classifications that might be attempted, but it contains the main Convention Rights and their outline characteristics

Appendix 2

How to find more information

Useful Reference Books

De Smith, Woolf & Jowell: *Judicial Review of Administrative Action* (6th Edition December 2005)
 Wade & Forsyth: *Administrative Law* (9th Edition 2004)
 Michael Fordham: *Judicial Review Handbook* (4th Edition 2004)
 Francis Bennion: *Statutory Interpretation* (4th Edition 2002)
 Lester & Pannick (Editors): *Human Rights Law and Practice* (2nd Edition 2004)
 Clayton and Tomlinson: *The Law of Human Rights* (Updated to 2003)
 Wyatt and Dashwood: *European Union Law* (4th Edition 2000)

Official Publications

Applying for Judicial Review – The Administrative Court - Guidance on applying for judicial review January 2005 – www.hmcourtservice.gov.uk/cms/1220.htm
 The Human Rights Act 1998: Guidance for Departments 2nd Edition – DCA – www.humanrights.gov.uk/guidance.htm
 Human Rights Act: Core Guidance for public authorities: a new era of rights and responsibilities – DCA – www.dca.gov.uk/hract/coregd.htm
 Human Rights in Scotland – The Scottish Office 1999 – www.scotland.gov.uk/library/documents-w9/huri-00.htm
 Freedom of Information – DCA Guidance: www.dca.gov.uk/foi/guidance/index.htm
 Devolution – DCA Guidance: www.dca.gov.uk/constitution/devolution/guidance.htm

Official Internet Websites

Her Majesty's Court Service	www.courtservice.gov.uk
Department of Constitutional Affairs	www.dca.gov.uk
Home Office	www.homeoffice.gov.uk
Treasury Solicitor	www.tsol.gov.uk
National Assembly for Wales	www.wales.gov.uk
Northern Ireland Assembly	www.ni-assembly.gov.uk
Northern Ireland Court Service	www.courtsni.gov.uk
Scottish Parliament	www.scotland.gov.uk
Scottish Court Service	www.scotcourts.gov.uk
European Court of Justice	www.curia.eu.int
European Court of Human Rights	www.echr.coe.int
Council of Europe, Human Rights Directorate	www.coe.int/T/Ehumanrights/

Training Courses

There are frequent courses organised either within Departments or on a central basis by the Civil Service College on administrative law, Judicial Review, EC law, devolution and human rights law. Your training section will be able to give you details.

