O'Reilly v Mackman ; Millbanks v Secretary of State for the Home Office

House of Lords before Lord Diplock; Lord Fraser of Tullybelton; Lord Keith of Kinkel; Lord Bridge of Harwich; Lord Brightman. 25th November 1983.

Lord Diplock : my lords,

1. At the time of the commencement by the appellants of the actions in which these consolidated appeals are brought each of the appellants was serving a long sentence of imprisonment which even now has not expired. By those actions, which were commenced in 1980, in the case of the appellant Millbanks, by originating summons and, in the case of the other appellants, by writ, each appellant seeks to establish that a disciplinary award of forfeiture of remission of sentence made by the Board of Visitors of Hull Prison (" the Board ") in the exercise of their disciplinary jurisdiction under Rule 51 of the Prison Rules 1964 is null and void because the Board failed to observe the rules of natural justice. Millbanks in the indorsement to his originating summons alleges bias on the part of the member of the Board who presided over the hearing of the disciplinary proceedings against him. The other appellants in their statements of claim allege that they were not given by the Board a fair opportunity to present their respective cases.

2. The Board applied to the High Court (Peter Pain J.) that all the actions be struck out as being an abuse of the process of the court. The judge refused the applications but, on appeal to the Court of Appeal (Lord Denning M.R., Ackner and O'Connor L.JJ.), the actions were struck out.

3. My Lords, it is not contested that if the allegations set out in the originating summons or statements of claim are true each of the appellants would have had a remedy obtainable by the procedure of an application for judicial review under Order 53 of the Rules of the Supreme Court; but to obtain that remedy, whether it took the form of an order of certiorari to quash the Board's award or a declaration of its nullity, would have required the leave of the court under Order 53 rule 3 of the Rules of the Supreme Court. That judicial review lies against an award of the Board of Visitors of a prison made in the exercise of their disciplinary functions was established by the judgment of the Court of Appeal (overruling a Divisional Court) in ***Reg. v. Hull Visitors, Ex parte St. Germain*** [1979] Q.B. 425—a decision that was, in my view, clearly right and has not been challenged in the instant appeals by the respondents.

4. In the *St. Germain* case, the only remedy that had been sought was certiorari to quash the decision of the prison visitors; but the alternative remedy of a declaration of nullity if the Court considered it to be just and convenient would also have been available upon an application for judicial review under Order 53 after the replacement of the old rule by the new rule in 1977. In the instant cases, which were commenced after the new rule came into effect (but before the coming into force of section 31 of the Supreme Court Act 1981), certiorari would unquestionably have been the more appropriate remedy, since Rule 5 of the Prison Rules 1964, which provides for remission of sentence up to a maximum of one-third, stipulates that the *" rule shall have effect subject to any disciplinary award of forfeiture . . . ".* Prison Rule 56, however, expressly empowers the Secretary of State to remit a disciplinary award and, since he would presumably do so in the case of a disciplinary award that had been declared by the High Court to be a nullity, such a declaration would achieve, though less directly, the same result in practice as quashing the award by certiorari.

5. So no question arises as to the "*jurisdiction"* of the High Court to grant to each of the appellants relief by way of a declaration in the terms sought, if they succeeded in establishing the facts alleged in their respective statements of claim or originating summons and the court considered a declaraion to be an appropriate remedy. All that is at issue in the instant appeal is the procedure by which such relief ought to be sought. Put in a single sentence the question for your Lordships is: whether in 1980 after Order 53 of the Rules of the Supreme Court in its new form, adopted in 1977, had come into operation it was an abuse of the process of the court to apply for such declarations by using the procedure laid down by the Rules for proceedings begun by writ or by originating summons instead of using the procedure laid down by Order 53 for an application for judicial review of the awards of forfeiture of remission of sentence made against them by the Board which the appellants are seeking to impugn?

6. In their respective actions, the appellants claim only declaratory relief. It is conceded on their behalf that, for reasons into which the concession makes it unnecessary to enter, no claim for damages would lie against the members of the Board of Visitors by whom the awards were made. The only claim was for a form of relief which it lies within the discretion of the court to grant or to withhold. So the first thing to be noted is that the relief sought in the action is discretionary only.

7. It is not, and it could not be, contended that the decision of the Board awarding him forfeiture of remission had infringed or threatened to infringe any right of the appellant derived from private law, whether a common law right or one created by a statute. Under the Prison Rules remission of sentence is not a matter of right but of indulgence. So far as private law is concerned all that each appellant had was a legitimate expectation, based upon his knowledge of what is the general practice, that he would be granted the maximum remission, permitted by Rule 5(2) of the Prison Rules, of one-third of his sentence if by that time no disciplinary award of forfeiture of remission had been made against him. So the second thing to be noted is that none of the appellants had any remedy in private law.

8. In public law, as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the Board on

the ground that in one way or another the Board in reaching its decision had acted outwith the powers conferred upon it by the legislation under which it was acting; and such grounds would include the Board's failure to observe the rules of natural justice - which means no more than to act fairly towards him in carrying out their decision-making process, and I prefer so to put it.

9. The power of H.M. Boards of Visitors of a prison to make disciplinary awards is conferred upon them by subordinate legislation: the Prison Rules 1964 made by the Secretary of State under sections 6 and 47 of the Prison Act 1952. The charges against the appellants were of grave offences against discipline falling within Rule 51. They were referred by the governor of the prison to the Board under Rule 51(1). It thereupon became the duty of the Board under Rule 51(3) to inquire into the charge and decide whether it was proved and if so to award what the Board considered to be the appropriate punishment. Rule 49 is applicable to such inquiry by the Board. It lays down expressly that the prisoner "*shall be given*" a full opportunity of hearing what is alleged against him and of presenting "*his own case*". In exercising their functions under Rule 51 members of the Board are acting as a statutory tribunal, as contrasted with a domestic tribunal upon which powers are conferred by contract between those who agree to submit to its jurisdiction. Where the legislation which confers upon a statutory tribunal its decision-making powers also provides expressly for the procedure it shall follow in the course of reaching its decision, it is a question of construction of the relevant legislation, to be decided by the Court in which the decision is challenged, whether a particular procedural provision is mandatory, so that its non-observance in the process of reaching the decision makes the decision itself a nullity, or whether it is merely directory, so that the statutory tribunal has a discretion not to comply with it if, in its opinion, the exceptional circumstances of a particular case justify departing from it. But the requirement that a person who is charged with having done something which, if proved to the satisfaction of a statutory tribunal, has consequences that will, or may, affect him adversely, should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civilised legal system that it is to be presumed that parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement. What is alleged by the appellants other than Millbanks would amount to an infringement of the express Rule 48; but even if there were no such express provision a requirement to observe it would be a necessary implication from the nature of the disciplinary functions of the Board. In the absence of express provision to the contrary parliament whenever it provides for the creation of a statutory tribunal must be presumed not to have intended that the tribunal should be authorised to act in contravention of one of the most fundamental rules of natural justice or fairness: *audi alteram partem*.

10. In Millbanks's case, there is no express provision in the Prison Rules that the members of the Board who inquire into a disciplinary offence under Rule 51 must be free from personal bias against the prisoner. It is another fundamental rule of natural justice or fairness, too obvious to call for express statement of it, that a tribunal exercising functions such as those exercised by the Board in the case Millbanks should be constituted of persons who enter upon the inquiry without any pre-conceived personal bias against the prisoner. Failure to comply with this implied requirement would likewise render the decision of the tribunal a nullity.

11. So the third thing to be noted is that each of the appellants, if he established the facts alleged in his action, was entitled to a remedy in public law which would have the effect of preventing the decision of the Board from having any adverse consequences upon him.

12. My Lords, the power of the High Court to make declaratory judgments is conferred by what is now Order 15 rule 16 of the Rules of the Supreme Court. The language of the rule which was first made in 1883 has never been altered, though the numbering of the rule has from time to time been changed. *"No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."*

13. This rule, which is in two parts separated by " *and* ", has been very liberally interpreted in the course of its long history, wherever it appeared to the court that the justice of the case required the grant of declaratory relief in the particular action before it. Since "*action*" is defined so as to have included since 1938 an originating motion applying for prerogative orders, Order 15 rule 16 says nothing as to the appropriate procedure by which declarations of different kinds ought to be sought. Nor does it draw any distinction between declarations that relate to rights and obligations under private law and those that relate to rights and obligations under public law.

14. Indeed the appreciation of the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system. It is a consequence of the development that has taken place in the last thirty years of the procedures available for judicial control of administrative action. This development started with the expansion of the grounds upon which orders of certiorari could be obtained as a result of the decision of the Court of Appeal in ***R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*** [1952] 1 K.B. 338; it was accelerated by the passing of the Tribunals and Inquiries Act 1958, and culminated in the substitution in 1977 of the new form of Order 53 of the Rules of the Supreme Court which has since been given statutory confirmation in section 31 of the Supreme Court Act 1981.

15. The importance of the ***Northumberland Compensation Appeal Tribunal*** case is that it re-established, largely as a result of the historical erudition of Lord Goddard displayed in the judgment of the Divisional Court ([1951] 1 K.B. 711) a matter that had long been forgotten by practitioners and had been overlooked as recently as 1944 in a judgment, *Racecourse* ***Betting Control Board v. Secretary for Air*** [1944] Ch. 114, given *per incuriam* by a Court of Appeal of which Lord Goddard had himself been a member. What was there re-discovered was that the High

Court had power to quash by an order of certiorari a decision of any body of persons having legal authority (not derived from contract only) to determine questions affecting the rights of subjects, not only on the ground that it had acted outwith its jurisdiction but also on the ground that it was apparent upon the face of its written determination that it had made a mistake as to the applicable law.

16. However, this re-discovered ground on which relief by an order of certiorari to quash the decision as erroneous in law could be obtained, was available only when there was an error of law apparent " on the face of " the record " and so was liable to be defeated by the decision-making body if it gave no reasons for its determination.

17. In 1958 this lacuna, so far as statutory tribunals were concerned, was largely filled by the passing of the first Tribunals and Inquiries Act, now replaced by the Tribunals and Inquiries Act 1971. This Act required the giving of reasons for their determinations by the great majority of statutory tribunals from which there is no express statutory provision for an appeal to the Supreme Court on a point of law. But boards of visitors of prisons have never been included among those tribunals that are covered by that Act. The Act also in effect repealed, with two exceptions, what had become to be called generically *" no certiorari "* clauses in all previous statutes, by providing in section 14(1) as follows: -

> *" 14.(1) As respects England and Wales any provision in an Act passed before the commencement of this Act that any order or determination shall not be called into question in any court, or any provision in such an Act which by similar words excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus: . . . ."*

18. The subsection, it is to be observed, says nothing about any right to bring civil actions for declarations of nullity of orders or determinations of statutory bodies where an earlier Act of Parliament contains a provision that such order or determination *" shall not be called into question in any " court."* Since actions begun by writ seeking such declarations were already coming into common use in the High Court so as to provide an alternative remedy to orders of certiorari, the section suggests a parliamentary preference in favour of making the latter remedy available rather than the former. I will defer consideration of the reasons for this preference until later.

19. Fortunately for the development of public law in England, subsection (3) contained express provision that the section should not apply to any order or determination of the Foreign Compensation Commission, a statutory body established under the Foreign Compensation Act 1950, which contained in section 4(4) an express provision:

> *" 4. (4) the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law ".*

20. It was this provision that provided the occasion for the landmark decision of this House in ***Anisminic Ltd. v. Foreign Compensation Commission*** [1969] 2 A.C. 147, and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that ***Anisminic*** made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, *i.e.* one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported *"determination",* not being a *"determination"* within the meaning of the empowering legislation, was accordingly a nullity.

21. ***Anisminic*** was an action commenced by writ for a declaration, in which a minute of the Commission's reasons for their determination adverse to the plaintiff company did not appear upon the face of their determination, and had in fact been obtained only upon discovery: but, as appears from the report of my own judgment when ***Anisminic*** was in the Court of Appeal [1968] 2 Q.B. 862 at p.893), the case had been argued up to that stage as if it were an application for certiorari in which the minute of the Commission's reasons formed part of the *"record"* upon which an error of law appeared.

22. In the House of Lords the question of the propriety of suing by writ for a declaration instead of applying for certiorari and mandamus played no part in the main argument for the Commission. It appears for the first time in the report of the Commission's counsel's reply, where an argument that the court had no *" jurisdiction "* to make the declaration seems to have been put forward upon the narrow ground, special to the limited functions of the Commission, alluded to at pp.910/911 of my own judgment in the Court of Appeal that the House overruled; but I did not purport to decide the question because, in the view that I had (erroneously) taken of the effect of section 4(4) of the Act, it appeared to me to be unnecessary to do so.

23. My Lords, *Anisminic* was decided by this House before the alteration was made to Order 53 in 1977. The order of the Supreme Court dealing with applications for the prerogative orders of mandamus, certiorari and prohibiion in force at the time of *Anisminic* was numbered Order 53 and had been made in 1965. It replaced, but in substance only repeated, the first twelve rules of what had been Order 59 and which had in 1938 itself replaced the former Crown Office Rules of 1906. The pre-1977 Order 53, like its predecessors, placed under considerable procedural disadvantage applicants who wished to challenge the lawfulness of a determination of a statutory tribunal or any other body of persons having legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals. It will be noted that I have

broadened the much-cited description by Atkin L.J. in ***R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co.*** *(1920) Ltd.* [1924] 1 K.B. 171 of bodies of persons subject to the supervisory jurisdiction of the High Court by prerogative remedies (which in 1924 then took the form of prerogative writs of mandamus, prohibition, certiorari, and *quo warranto)* by excluding Lord Justice Atkins's limitation of the bodies of persons to whom the prerogative writs might issue, to those " having a duty to act "judicially." For the next forty years this phrase gave rise to many attempts, with varying success, to draw subtle distinctions between decisions that were quasi-judicial and those that were administrative only. But the relevance of arguments of this kind was destroyed by the decision of this House in ***Ridge v. Baldwin*** [1964] A.C. 40, where again the leading speech was given by Lord Reid. Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz. to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made. In ***Ridge v. Baldwin*** it is interesting to observe that Lord Reid said (at p.72) " *We do not have a developed system of administrative law" perhaps " because until fairly recently we did not need it."* By 1977 the need had continued to grow apace and this reproach to English law had been removed. We did have by then a developed system of administrative law, to the development of which Lord Reid himself, by his speeches in cases which reached this House, had made an outstanding contribution. To the landmark cases of ***Ridge v. Baldwin*** and ***Anisminic*** I would add a third, ***Padfield v. Minister of Agriculture, Fisheries and Food*** [1968] A.C. 997, another case in which a too-timid judgment of my own in the Court of Appeal was (fortunately) overruled.

24. Although the availability of the remedy of orders to quash a decision by certiorari had in theory been widely extended by these developments, the procedural disadvantages under which applicants for this remedy laboured remained substantially unchanged until the alteration of Order 53 in 1977. Foremost among these was the absence of any provision for discovery. In the case of a decision which did not state the reasons for it, it was not possible to challenge its validity for error of law in the reasoning by which the decision had been reached. If it had been an application for certiorari those who were the plaintiffs in ***Anisminic*** would have failed; it was only because by pursuing an action by writ for a declaration of nullity that the plaintiffs were entitled to the discovery by which the minute of the Commission's reasons which showed that they had asked themselves the wrong question, was obtained. Again under Order 53 evidence was required to be on affidavit. This in itself is not an unjust disadvantage; it is a common feature of many forms of procedure in the High Court, including originating summonses; but in the absence of any express provision for cross-examination of deponents, as your Lordships who are familiar with the pre-1977 procedure will be aware, even *applications* for leave to cross-examine were virtually unknown - let alone the grant of leave itself—save in very exceptional cases of which I believe none of your Lordships has ever had actual experience. Lord Goddard, whose experience was at that time unrivalled, had so stated in **R. v. Stokesley, Yorkshire, Justices, Ex parte Bartram** [1956] 1 W.L.R. 254 at 257.

25. On the other hand as compared with an action for a declaration commenced by writ or originating summons, the procedure under Order 53 both before and after 1977 provided for the respondent decision-making statutory tribunal or public authority against which the remedy of certiorari was sought protection against claims which it was not in the public interest for courts of justice to entertain.

26. First, leave to apply for the order was required. The application for leave which was *ex parte* but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, *inter alia,* the grounds on which the relief was sought and by affidavits verifying the facts relied on; so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of *uberrima fides,* with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new Order 53 of 1977. The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. In contrast, allegations made in a statement of claim or an indorsement of an originating summons are not on oath, so the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity. There was also power in the court on granting leave to impose terms as to costs or security.

27. Furthermore, as Order 53 was applied in practice, as soon as the application for leave had been made it provided a very speedy means, available in urgent cases within a matter of days rather than months, for determining whether a disputed decision was valid in law or not A reduction of the period of suspense was also effected by the requirement that leave to apply for certiorari to quash a decision must be made within a limited period after the impugned decision was made, unless delay beyond that limited period was accounted for to the satisfaction of the judge. The period was six months under the pre-1977 Order 53; under the current Order 53 it is further reduced to three months.

28. My Lords, the exclusion of all right to discovery in applications for certiorari under Order 53, particularly before the passing of the Tribunals and Inquiries Act 1958, was calculated to cause injustice to persons who had no means, if they adopted that procedure, of ascertaining whether a public body, which had made a decision adversely affecting them, had done so for reasons which were wrong in law and rendered their decision invalid. It will be within the knowledge of all of your Lordships that, at any rate from the 1950s onwards, actions for declarations of nullity of decisions affecting the rights of individuals under public law were widely entertained, in parallel to applications for certiorari to quash, as means of obtaining an effective alternative remedy. I will not weary your Lordships by reciting examples of cases where this practice received the express approval of the Court of Appeal, though I should point out that of those cases in this House in which this practice was approved. ***Vine* v. *National Dock Labour Board*** [1957] A.C. 488 and ***Ridge* v. *Baldwin*** [*ubi supra*] involved, as well as questions of public law, contracts of employment which gave rise to rights under private law. In *Anisminic* the procedural question was not seriously argued, while **Pyx Granite Ltd. v. Ministry of Housing and Local Government** [1960] A.C. 260, which is referred to in the notes to Order 19 appearing in the current White Book as an instance of the approval by this House of the practice of suing for a declaration instead of applying for an order of certiorari, appears on analysis to have been concerned with declaring that the plaintiffs had a legal right to do what they were seeking to do without the need to obtain any decision from the Minister. Nevertheless I accept that having regard to disadvantages, particularly in relation to the absolute bar upon compelling discovery of documents by the respondent public authority to an applicant for an order of certiorari, and the almost invariable practice of refusing leave to allow cross-examination of deponents to affidavits lodged on its behalf, it could not be regarded as an abuse of the process of the court, before the amendments made to Order 53 in 1977, to proceed against the authority by an action for a declaration of nullity of the impugned decision with an injunction to prevent the authority from acting on it, instead of applying for an order of certiorari; and this despite the fact that, by adopting this course, the plaintiff evaded the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law.

29. Those disadvantages, which formerly might have resulted in an applicant being unable to obtain justice in an application for certiorari under Order 53, have all been removed by the new Order introduced in 1977. There is express provision in the new rule 8 for interlocutory applications for discovery of documents, the administration of interrogatories and the cross-examination of deponents to affidavits. Discovery of documents (which may often be a time-consuming process) is not automatic as in an action begun by writ, but otherwise Order 24 applies to it and discovery is obtainable upon application whenever, and to the extent that, the justice of the case requires; similarly Order 26 applies to applications for interrogatories; and to applications for cross-examination of deponents to affidavits Order 28 rule 2(3) applies. This is the rule that deals with evidence in actions begun by originating summons and permits oral cross-examination on affidavit evidence wherever the justice of the case requires. It may well be that for the reasons given by Lord Denning in ***George* v. *Secretary of State for the Environment*** (1979) 77 L.G.R. 689, it will only be upon rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review. This is because of the nature of the issues that normally arise upon judicial review. The facts, except where the claim that a decision was invalid on the ground that the statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed by the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness, can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in ***Edwards* v. *Bairstow*** [1956] A.C. 14 at p.36; and to allow cross-examination presents the court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament. Nevertheless having regard to a possible misunderstanding of what was said by Geoffrey Lane L.J. in ***Reg.* v. *Hull Visitors Ex parte St. Germain (No, 2)*** [1979] 1 W.L.R. 1401 at 1410 your Lordships may think this an appropriate occasion on which to emphasise that whatever may have been the position before the rule was altered in 1977 in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents upon applications for judicial review is governed by the same principles as it is in actions begun by originating summons; it should be allowed whenever the justice of the particular case so requires.

30. Another handicap under which an applicant for a prerogative order under Order 53 formerly laboured (though it would not have affected the appellants in the instant cases even if they had brought their actions before the 1977 alteration to Order 53) was that a claim for damages for breach of a right in private law of the applicant resulting from an invalid decision of a public authority could not be made in an application under Order 53. Damages could only be claimed in a separate action begun by writ; whereas in an action so begun they could be claimed as additional relief as well as a declaration of nullity of the decision from which the damage claimed had flowed. Rule 7 of the new Order 53 permits the applicant for judicial review to include in the statement in support of his application for leave a claim for damages and empowers the court to award damages on the hearing of the application if satisfied that such damages could have been awarded to him in an action begun by him by writ at the time of the making of the application.

31. Finally rule 1 of the new Order 53 enables an application for a declaration or an injunction to be included in an application for judicial review. This was not previously the case; only prerogative orders could be obtained in

proceedings under Order 53. Declarations or injunctions were obtainable only in actions begun by writ or originating summons. So a person seeking to challenge a decision had to make a choice of the remedy that he sought at the outset of the proceedings, although when the matter was examined more closely in the course of the proceedings it might appear that he was not entitled to that remedy but would have been entitled to some other remedy available only in the other kind of proceeding.

32. This reform may have lost some of its importance since there have come to be realised that the full consequences of ***Anisminic*** in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void *ab initio* provided that its validity was challenged timeously in the High Court by an appropriate procedure.

33. Failing such challenge within the applicable time limit, public policy, expressed in the maxim *omnia praesumuntur rite esse acta,* requires that after the expiry of the time limit it should be given all the effects in law of a valid decision.

34. Nevertheless, there may still be cases where it turns out in the course of proceedings to challenge a decision of a statutory authority that a declaration of rights rather than certiorari is the appropriate remedy. ***Pyx Granite*** [*ubi supra*] provides an example of such a case.

35. So Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under rule 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. There is no such converse power under the Rules of the Supreme Court to permit an action begun by writ to continue as if it were an application for judicial review; and I respectfully disagree with that part of the judgment of Lord Denning M.R. which suggests that such a power may exist; nor do I see the need to amend the rules in order to create one.

36. My Lords, at the outset of this speech, I drew attention to the fact that the remedy by way of declaration of nullity of the decisions of the Board was discretionary - as are all the remedies available upon judicial review. Counsel for the plaintiffs accordingly conceded that the fact that by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under Order 53 (from which there have now been removed all those disadvantages to applicants that had previously led the courts to countenance actions for declarations and injunctions as an alternative procedure for obtaining a remedy for infringement of the rights of the individual that are entitled to protection in public law only) the plaintiff had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making public authorities by Order 53, and which might have resulted in the summary, and would in any event have resulted in the speedy, disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration; but, it was contended, this he may only do at the conclusion of the trial.

37. So to delay the judge's decision as to how to exercise his discretion would defeat the public policy that underlies the grant of those protections: viz. the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law. An action for a declaration or injunction need not be commenced until the very end of the limitation period; if begun by writ, discovery and interlocutory proceedings may be prolonged and the plaintiffs are not required to support their allegations by evidence on oath until the actual trial. The period of uncertainty as to the validity of a decision that has been challenged upon allegations that may eventually turn out to be baseless and unsupported by evidence on oath, may thus be strung out for a very lengthy period, as the actions of the first four appellants in the instant appeals show. Unless such an action can be struck out summarily at the outset as an abuse of the process of the court the whole purpose of the public policy to which the change in Order 53 was directed would be defeated.

38. My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does section 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case-to-case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.

39. The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under 0.53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Order 53 provided.

40. Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

41. My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis—a process that your Lordships will be continuing in the next case in which judgment is to be delivered to-day.

42. In the instant cases where the only relief sought is a declaration of nullity of the decisions of a statutory tribunal, the Board of Visitors of Hull Prison, as in any other case in which a similar declaration of nullity in public law is the only relief claimed, I have no hesitation, in agreement with the Court of Appeal, in holding that to allow the actions to proceed would be an abuse of the process of the court. They are blatant attempts to avoid the protections for the respondents for which Order 53 provides.

43. I would dismiss these appeals.

Lord Fraser of Tullybelton : my lords,
I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with it and for the reasons stated in it would dismiss these appeals.

Lord Keith of Kinkel : my lords,
I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with it and for the reasons stated in it I would dismiss these appeals.

Lord Bridge of Harwich : my lords,
I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. I entirely agree with it and for the reasons he gives I would dismiss these appeals.

Lord Brightman : MY LORDS,
I also would dismiss these appeals for the reasons given by my noble and learned friend. Lord Diplock.

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Upon Report from the Appellate Committee to whom was referred the Cause O'Reilly and others (Assisted Persons) against Mackman and others. That the Committee had heard Counsel as well on Monday the 11th as on Tuesday the 12th and Wednesday the 13th days of October last upon the Petition and Appeal of Christopher Noel O'Reilly of 6 Emneth Close, Wells Road, Nottingham, Alexander Vernon John Derbyshire currently detained at H.M. Prison, Longlartin and David Martin Dougan of 50 Kennishead Avenue, Glasgow G46 83H praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 30th day of June 1982 might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Case of E. W. Mackman, J. A. Rundle and C. Brady lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 30th day of June 1982 complained of in the said Appeal be, and the same is hereby, **Affirmed** and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further Ordered, That the Appellants' Costs be taxed in accordance with the provisions of Schedule 2 to the Legal Aid Act 1974.