

CHAPTER ELEVEN

ADMINISTRATIVE AND PUBLIC LAW

Constitutional and Administrative Law

JUDICIAL REVIEW : ADMINISTRATIVE / PUBLIC LAW

INTRODUCTION

Public or Administrative Law deals with complaints mechanisms and legal mechanisms designed to regulate the relationships between citizens and state organisations carrying out government business that directly affects the interests of the individual. The principal areas discussed below are Judicial Review and the various Commissioners such as The Parliamentary Commissioner for England and Wales (The Ombudsman) and the Equal Opportunities Commissioners.

JUDICIAL REVIEW

Judicial review is a very large topic. What follows is a mere summary of the issues, which inevitably will result in over simplification. Application of the general principles is not straight-forward. The attitude of the courts towards Judicial Review has been far from consistent, alternating between strict and liberal interpretations of the principles of judicial review and when judicial review should be available, resulting in some very fine distinctions and a degree of contradiction, which makes the subject difficult for the student to deal with. The judiciary has been faced with the problem of dealing with subject matter, which often carries a considerable amount of political content.

The role of Judicial Review is as the legal control of the use of power by the executive. To the extent that the executive uses power for political purposes, control by the courts of such action means that the courts have to enter the political arena, purportedly as non-partisan referees, applying objective criteria regarding the legal use of power. The courts should not adopt a moral or political position regarding the use of such powers. However the dividing line between objectivity and political leanings is very grey. The fact that the judiciary were traditionally drawn from a particular section of society meant that such decisions were arguably tinged with a sociologically conservative bias. Recently a strong liberal bias appears to have overtaken the bench.

In the *Fares Fair Case* involving the **Bromley Borough Council v G.L.C.**¹ the court held that the underground transport system had to be operated on an economic basis preventing local authorities from subsidising the system. As a criteria this was one of many in the enabling Act of Parliament and it has been suggested that a conservative capitalist ideology influenced the selection of this criteria whereas a court could have equally centred on the sociological desirability of providing a good service and the infra structure of road and transport systems for society independent of the profitability of the venture. A Social Welfare view asserted that more rail use would reduce the council's maintenance and development costs for road systems and would therefore ultimately save the council money. The court refused to look at the larger picture. The subsidy was held to be ultra vires.

Where judicial review concerns relatively small issues or issues of a localised nature whilst a decision that is adverse to the government or local authority may be slightly embarrassing on times, political impact is minimal. However, many of the cases heard over the last decade have had serious financial implications for The Government, especially if compensation is involved for large numbers of people and major government policies can be overturned. The fiasco over the way that pre-trial remand time is taken into account in respect of concurrent sentences is such an example. If the notion that the government has incorrectly interpreted the provisions for 30 years is correct, at the current rate of £90 per day compensation, the bill could run to almost £1 B and the sentencing policies over the past 30 years will be undermined. The decisions regarding dismissals for pregnancy in the armed forces produced an expensive bill. The decision regarding the right of visa applicants to Social Security has implications for immigration policy. Legal challenges to the armed services rules on homosexuals have resulted in a major restructuring of human resource management in the armed forces. All there are highly political issues. In **Nottinghamshire County Council v Secretary of State for the Environment ex parte Bradford Metropolitan C.C.**² whilst environmental guidelines were held to be lawful by the court it also considered the degree to which Wednesbury reasonableness rules may be applied to political judgments.

¹ **Bromley Borough Council v G.L.C.** [1982] 1 All E.R. 129 H.L.

² **Nottinghamshire County Council v Secretary of State for the Environment sub nom: R v Secretary of State for the Environment, ex p Nottinghamshire CC; Same v Same, ex p Bradford Metropolitan CC** (1986) AC 240 HL

Constitutional and Administrative Law

LORD GREENE : WEDNESBURY REASONABLENESS

*“ It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters, which he is bound to consider. He must exclude from his considerations matters, which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in **Short v Poole Corporation** [1926] Ch. 66 gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”*³

Wednesbury Reasonableness relates to the decision that a decision maker could, reasonably, in all the circumstances of the case, have reached. It is about the competence of the decision maker, judged by objective standards. It does not enable a reviewer to strike down a decision because that particular reviewer felt that it was wrong and hence subjectively felt that it was an ‘unreasonable’ decision. More subtle than questions of jurisdiction as to who can decide and about what, or the prerequisites to reaching a decision, it addresses the mental processes involved in decision making. The test lies at the very heart of Judicial Review and the control of the exercise of administrative discretion and the supervision of judicial decision making.

Principal aspects of Judicial Review : Grounds, Remedies and Practice

Judicial Review can be divided into three parts.

- 1). The principles under which the courts are prepared to investigate administrative action e.g. Ultra Vires
- 2). The remedies that the courts may apply if an administrative body is found wanting by the courts
- 3). The method of applying for judicial review and the criteria used to decide when judicial review is available.

ADMINISTRATIVE ACTION AND THE CITIZEN

- 1). **Civil Law** : Actions of administrative bodies may result in civil wrongs which give rise to actions in tort for negligence and nuisance etc, or for breach of contract, subject to limitations imposed by the Crown Proceedings Act 1949. The traditional private law remedies of damages, declaration and injunction may be sought. Tort actions include breach of statutory duty, which includes E.C. duties. Thus for example in **Pamela Helen Phelps v Hillingdon London BC**.⁴ a local education authority could be vicariously liable for the negligent acts and omissions of its employees, including educational psychologists and teachers, that caused loss, injury or damage to their students. Appeals in the cases of Phelps, Anderton and Jarvis allowed. Appeal in the case of Gower dismissed.
- 2). **Public Law** : If an administrative body exceeds its statutory authority or its jurisdiction, or refuses to fulfil its statutory duties, the decision may be challenged on the grounds of ultra vires. The public law remedies of prohibition, enforcement order and quashing order may be sought.
- 3). **Habeas corpus** may be used to obtain release from detention or to challenge the legality of detention.⁵ Thus in **R v Louise Collins, HS Trust & St. George’s Health Services Trust, ex p (No.2)**⁶ a pregnant mother who rejected medical advice as to treatment necessary to protect her and her unborn child was unlawfully admitted and detained under the Mental Health Act 1983 and unlawfully forced to have a caesarean section by the order of a court.

³ **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223, Lord Greene at 229

⁴ **Pamela Helen Phelps v Hillingdon London BC: Rhiannon Anderton (by her mother) v Clwyd CC: Gower V Bromley London BC: Marcus Lee Jarvis v Hampshire CC** (2000) 3 WLR 776 HL : Lords Slynn, Jauncey, Lloyd, Nicholls, Clyde, Hutton and Millett

⁵ **St. George’s Healthcare NHS Trust v Secretary for State** (1998):

⁶ **R v Louise Collins, HS Trust & St. George’s Health Services Trust, ex p (No.2)** [1998] CA per Butler-Sloss LJ, Judge LJ, Robert Walker LJ. 7/5/98

Constitutional and Administrative Law

- 4). **Declaration** : A request to the courts for a declaration is used to seek clarification of the law.
- 5). **Ultra Vires** : Ultra vires may be used as a defence to an action against a citizen for breaching a bye law, on the basis that the bye-law was ultra vires the power of the body purporting to make the bye-law. Decisions of bodies acting in a judicial manner may be challenged for breach of the rules of natural justice or if a decision was based on an error, which is contained on the face of the record.

Categories of Ultra Vires and Breach of Due Process / Procedural Impropriety

This Public Law commentary aims to provide a basic overview of an area, which is a topic worthy of study in its own right. The extremely wide and diverse grounds for judicial review can be categorised in a many ways and what is presented here is a basic categorisation that will enable the reader to grasp the fundamentals. The complexity of the topic has led to far more detailed categorisations which go beyond present purposes. Authors in the field have produced a variety of different methods of categorisation.

In **Council for Civil Service Unions v Minister of State for Civil Service**,⁷ (GCHQ) the House of Lords took the opportunity to offer a rationalisation of the grounds for judicial review and ruled that the *bases* for judicial review could be subsumed under three principal heads, namely, illegality, irrationality and procedural impropriety.

Lord Diplock further elucidated these concepts. GCHQ principally concerned the exercise of the Royal Prerogative. It may be that the Royal Prerogative is today to be governed by the ordinary rules of ultra-vires as applied to statute law, in which case Lord Diplock's judgement is of general application. However, it is arguable that this is not the case.

R v Secretary of State for the Home Dept., ex p Mohammed Al Fayed.⁸ Cash for questions: Safety Deposit Boxes. An appeal from the decision that the Secretary of State for the Home Department had not been biased, irrational or disproportionate by his refusal to naturalise the appellant as a UK citizen was dismissed.

Illegality :

The decision-maker must understand correctly the law that regulates his decision-making power and give effect to it. A failure to do so renders it susceptible to challenge. Whether he had or not *is par excellence* a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

R v (1) Special Adjudicator (2) Immigration Appeal Tribunal (3) Secretary of State for the Home Dept., ex p Asifa Saleem.⁹ Rule 42(1)(a) Asylum Appeals (Procedure) Rules 1996 was ultra vires, since it was neither expressly nor impliedly authorised by s.8(6) and Sch.2 Asylum and Immigration Appeals Act 1993 or s.22 Immigration Act 1971. Alternatively the rule was outside the reasonable range of responses which Parliament could have intended the Lord Chancellor to make to the grant of the rule-making power.

R v Secretary of State for Health, ex p C.¹⁰ It was within the power of the Secretary of State for Health to maintain the Consultancy Service Index, (an index of names of persons about whom there were doubts regarding their suitability to work with children), and to disseminate the names on that index to prospective employers.

Hyde Park Residences Ltd v Secretary of State for the Environment, Transport & The Regions.¹¹ A change of use of residential premises within the Greater London area from the provision of permanent accommodation to the provision of temporary sleeping accommodation was unlawful under s.25 Greater London Council (General Powers) Act 1973 (as amended), which was unaffected by the Town and Country Planning (Use Classes) Order 1987. Leave to appeal to the House of Lords refused.

⁷ **Council for Civil Service Unions v Minister of State for Civil Service** [1985] 374

⁸ **R v Secretary of State for the Home Dept., ex p Mohammed Al Fayed** (2000) CA 26/7/2000 TLR 7/9/2000

⁹ **R v (1) Special Adjudicator (2) Immigration Appeal Tribunal (3) Secretary of State for the Home Dept., ex p Asifa Saleem** (2000 CA (Roch LJ, Mummery LJ, Hale LJ) 13/6/2000

¹⁰ **R v Secretary of State for Health, ex p C** (2000) CA (Lord Woolf MR, Hale LJ, Lord Mustill) 21/2/2000

¹¹ **Hyde Park Residences Ltd v (1) Secretary of State for the Environment, Transport & The Regions (2) Westminster CC** (2000) CA (Henry LJ, Robert Walker LJ, Scott Baker J) 26/1/2000

Constitutional and Administrative Law

R v Secretary of State for the Environment, Transport & The Regions, ex parte Spath Holme Ltd.¹² The Rent Acts (Maximum Fair Rent) Order 1999 was unlawful, since it was ultra vires the counter-inflationary purposes of s.31 **Landlord and Tenant Act 1985**. Leave to appeal granted.

Irrationality / 'Wednesbury' unreasonableness.

It applies to 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 to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer.

R v Secretary of State for the Home Dept., ex p Myra Hindley.¹³ Reasonableness and whether a decision was infra/ultra-vires the common law. It was lawful for a secretary of state to impose or uphold a "whole-life" tariff on someone sentenced to life imprisonment for murder. There was no reason, in principle why a crime or crimes, if sufficiently heinous, should not be regarded as deserving life-long incarceration for the purposes of pure punishment.

It may be impossible to establish irrationality if the decision maker does not provide a reasoned decision. However, in **R v Secretary of State for the Home Department ex parte Pegg**,¹⁴ the House of Lords decision suggests (contrary to earlier law) that there is a duty to give reasons for decisions.

Procedural Impropriety

This covers more than and is wider than just a failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe the procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Jackson Stansfield v Butterworths¹⁵ concerned an effective challenge where the statutory procedures were not followed to the letter. A Borough Surveyor was permitted to grant planning permission, but such permission had to be in writing and not merely oral, as in the instant case.

In the leading case of **A.H.F.I. Training Board v Aylsbury Mushrooms Ltd.**¹⁶ a minister had a statutory power to make training orders for an industry, but only provided he first engaged in consultations with organisations representative of the industry. Since he had not consulted with the mushroom growers his training scheme was invalid.

Proportionality – a new European Community test.

In **GCHQ** an indication was given that further grounds for review, such as 'proportionality' might emerge in due course on a case-by-case basis. The doctrine of proportionality is one which confines the limits of the exercise of power to means which are proportional to the objective to be pursued. It is a powerful tool to limit the use of power and prevent abuse, introducing a requirement of necessity.

The doctrine has taken firm roots in the jurisprudence of, for example, the United States of America, Canada and the law of many European countries. It is also a concept, which is becoming increasingly adopted under European law. Both the European Court of Justice of the European Community (ECJ) and the European Court of Human Rights are increasingly adopting proportionality as a test against which to measure the legality of actions of authorities.

In **R v Home Secretary ex parte Brind**¹⁷, the House of Lords was not prepared to accept that the concept yet represented a separate and distinct head of judicial review. Whilst recognising that proportionality was a distinctive head for review under the European Convention on Human Rights, Lord Ackner ruled that

¹² **R v (1) Secretary of State for the Environment, Transport & The Regions (2) Secretary of State for Wales, ex parte Spath Holme Ltd.** (2000) CA (Stuart-Smith LJ, Aldous LJ, Mance LJ) 20/1/2000

¹³ **R v Secretary of State for the Home Dept., ex p Myra Hindley** (2000: HL (Lords Browne-Wilkinson, Nicholls, Steyn, Hutton and Hobhouse) 30/3/2000

¹⁴ **R v Secretary of State for the Home Department ex parte Pegg** [1993] See Student Law Review March 95.

¹⁵ **Jackson Stansfield v Butterworths** [1948] 2 AER 558

¹⁶ **A.H.F.I. Training Board v Aylsbury Mushrooms Ltd** [1972] 1 WLR 190

¹⁷ **R v Home Secretary ex parte Brind**[1991] 1 AC 696

Constitutional and Administrative Law

unless and until Parliament incorporates the Convention into domestic law ... there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country. With the passage of the Human Rights Act 1998, that time has since arrived.

The judges appear to adopt differing approaches to the doctrine. Whether or not it is now part of English law, proportionality has been utilised as a way of determining whether a decision has been irrational or not.

Proportionality, along with subsidiarity, from the EU and the European Convention standpoint is a significant development and must be used as a test, even by UK judges of public law challenges to the application of European Community actions, since it is the test used by the ECJ and under s3 European Communities Act 1972 the English Courts must follow ECJ rulings. Note also that unlike the UK Courts, the European Community provides monetary compensation for public law breaches of Community Law. Thus the UK appears to be out of step. In view of the drive towards harmonisation both proportionality and the provision of damages are likely to eventually become part of UK Public Law, whether by way of judicial development or by statute.¹⁸

Ultra Vires and The Royal Prerogative.

Since the **Case of Proclamations 1610**¹⁹ it has been clear that the courts can examine the royal prerogative to see if a particular prerogative exists. Traditionally however the courts could not examine the manner in which the prerogative was exercised. In **Laker v Department of Trade**²⁰ the court indicated that it might be prepared in certain instances to investigate the issue as to whether or not the prerogative had been exercised in the public interest. **G.C.H.Q** further developed this idea.

Ultra Vires, Statutory Powers and Discretionary Powers.

The courts will not challenge parliament's power to legislate but the court will interpret statutory provisions to see if a particular power claimed by the executive actually exists. The courts interpret ouster clauses, which purport to remove jurisdiction of the courts with regard to judicial review in a very strict manner in favour of jurisdiction. The courts will allow clauses, which state that tribunals should be used to challenge administrative decisions, but the courts will reserve the ability to supervise the lower courts etc when they exercise judicial functions. Even statutory discretion to exercise powers as the administrative body thinks fit will still render the exercise of discretion subject to judicial review in certain circumstances.

Thus exercise of a power or discretion is limited to the scope and subject matter of the enabling legislation, as demonstrated in the following cases.

It was held in **Daymond v Plymouth City Council / Southwest Water Authority**,²¹ that a local authority could charge what it wished for public sewage services under the terms of the legislation, but could not charge someone who was not connected to the public system.

A.G. v Fulham Corp.²² concerned legislation for the provision of provide public wash-houses. The court held that this did not permit the local authority to open up a private laundry business.

In **R v Minister of Transport ex parte Upminster Services**²³ the court held that a minister empowered to hear licensing appeals did not have the power under the statute to lay down conditions for the holding of licences.

Chester v Bateson,²⁴ concerned defence legislation, which gave the minister the power to establish regulations regarding when the owners of war-requisitioned property could go to the courts to reclaim their properties. The minister attempted to make access to the courts subject to his consent. The court held that he could only impose reasonable restrictions and not an outright bar on litigation.

¹⁸ See Hood Phillips on the scope of Judicial Review and sufficiency of interest p690 and pages 714-717 Bradley and Ewing. See also Bradley and Ewing pages 673-4 for a discussion of **R v Richmond ex parte McCarthy**, **Hazell v Hammersmith** and **R v Barnet ex parte Johnson**.

¹⁹ **Case of Proclamations 1610**

²⁰ **Laker v Department of Trade** [1977] QB 643

²¹ **Daymond v Plymouth City Council** [1976] AC 609

²² **A.G. v Fulham Corporation** [1921] 1 Ch 442

²³ **R v Minister of Transport ex parte Upminster Services** [1934]

²⁴ **Chester v Bateson** [1920] 1 KB 829

Constitutional and Administrative Law

It was held in **Commissioners of Customs & Excise v Cure & Deeley 1962** that simply because the administrative body is exercising legislative provisions does not mean the body can escape judicial control in the exercise of the provisions - and the provisions themselves can be examined to ensure that the correct legislative procedures have been followed.

White & Collins v Minister of Health,²⁵ concerned a power to compulsorily purchase land, other than park land. The minister purported to compulsorily purchase part of a park.

Secretary of State for Social Services v Elkington,²⁶ Regulations issued by the Ministry for Social Services held ultra vires regulations as to adjudication of claims by minister under the Board & Lodging Regulations 1984 SI.2034

R v Secretary of State for Social Services, ex p Camden London BC: & ex p Nelson,²⁷ challenged the validity of subsidiary Supplementary Benefit legislation made by a Minister:

General Mediterranean Holdings SA v Ramanbahi Manibahi Patel.²⁸ In an application for a direction that privileged documents be disclosed to the court, CPR 48.7(3) was held ultra vires.

R v The Legal Aid Board, ex p David Righton Fraser Burrows.²⁹ Cost limitations could lawfully be imposed on legal aid for representation under s.15(4) Legal Aid Act 1988. An application for judicial review.

Unreasonable use of powers

In **Secretary of State for Education v Tameside M.B.C.**³⁰ : the Secretary of State had the power to approve reasonable education schemes and reject unreasonable schemes. She used to power to reject an application to run a grammar school system on the grounds that it was not a reasonable education system. The decision was held to be unreasonable on the basis that the grammar school system had a proven track record and was thus evidently a reasonable system of education.

It may be difficult to establish that the exercise of a discretionary power is unreasonable unless the decision maker provides reasons. Whether the discretion is absolute or subject to reasonableness and explained by reasons depends upon the wording of the empowering statute as demonstrated by **R v Secretary of State for Home Dept., ex p Stitt**.³¹ The Home Office refused to revoke and order. In the circumstances the court held that reasons need not be given by Home Secretary Court:

Abuse of Powers

If a power is used for an unauthorised purpose or if irrelevant considerations are taken into account, or relevant considerations disregarded then the court can, declare that the administrative act in question is void.

Padfield v Min of Agriculture,³² : The minister refused to exercise a statutory power to investigate a milk marketing scheme without providing reasons for his refusal. He had a discretion, as to whether or not he would carry out such an investigation. The court held he had to give a reason, which would demonstrate that he had dealt with the request, to investigate in a proper manner.

Congrieve v Home Office 1976 A minister with power to revoke T.V. licences purported to revoke the licences of persons who had pre-empted a rise in licence fees by buying a licence just before the budget at the old rate, even though their old licences had not yet expired. Held : His power to revoke could not be used to raise revenue. Therefore power used for the wrong purpose.

²⁵ **White & Collins v Minister of Health** [1939] 2 KB 838

²⁶ **Secretary of State for Social Services v Elkington** [1987]

²⁷ **R v Secretary of State for Social Services, ex p Camden London BC: & Nelson** [1987]

²⁸ **General Mediterranean Holdings SA v (1) Ramanbahi Manibahi Patel (2) Kirit Kumar Ramanbhai Patel** (2000) QBD Commercial Court (Toulson J) 19/7/99

²⁹ **R v The Legal Aid Board, ex p David Righton Fraser Burrows** (T/A David Burrows (a firm)) (2000) QBD Crown Office List (Stanley Burnton J) 28/7/2000.

³⁰ **Secretary of State for Education v Tameside M.B.C.** [1977] AC 1014

³¹ **R v Secretary of State for Home Dept., ex p Stitt** QBD. Per (Watkins LJ & Macpherson J)

³² **Padfield v Min of Agriculture** [1968] AC 997

Constitutional and Administrative Law

Hanson v Radcliffe U.D.C.³³ : An attempt to dismiss a teacher as surplus to requirements was invalid : There was only a power to dismiss for misbehaviour and incompetence etc.

Ouster Clauses and Time Bars

Certain statutes give citizens rights of appeal whilst others have attempted to prevent the courts from considering certain matters at all i.e. to exclude or restrict the jurisdiction of the courts. These attempts have not been too successful since the courts seek to retain jurisdiction wherever possible and will adopt a narrow meaning of ouster clauses. The presumption unless clearly stated to the contrary is that an ouster clause prevents appeals mechanisms but does not prevent judicial review.

s14 Tribunals & Inquiries Act 1971 : Any provision in a statute passed before 1st August 1958 which said that an order or determination (decision of an administrative body) could not be called into question would not exclude the making of orders of mandamus or certiorari. Since 1958, statutes attempting to exclude judicial review have been examined by the courts.

In **Smith v East Elloe R.D.C.**,³⁴ a time limitation clause of 6 weeks for applying for judicial review was upheld by the court. The normal period under the CPR 1998 is three months.

Annismenic v Foreign Compensation Commissioners³⁵ is the leading case on ouster clauses. The FCC was appointed by the government to distribute £50m provided by the Egyptian government to compensate British firms and individuals who had lost property bordering the Suez Canal, after it had been compulsorily acquired by the Egyptian Government. The court held :-

- 1) That Judicial review is possible despite an ouster clause where there had been an excess of jurisdiction rather than a mere challenge of the decision i.e. ultra vires actions would be permitted but not a challenge as to the quality of the decision. Difficulties here hinge on unreasonableness, i.e. Ultra vires as opposed to the merits of the applicant's situation.³⁶
- 2) **East Elloe** was distinguished leaving the law in some doubt.

Re Racal Communications³⁷ further complicated the law as to whether ouster clauses work for administrative bodies - tribunals etc but not for lower courts - and presents classification problems regarding subject matter.

R v The Lord Chancellor, ex p Witham,³⁸ Whether Art.3 of the Supreme Court Fees (Amendment) Order 1996 was ultra vires as abrogating citizen's constitutional right of access to the courts.

Natural Justice and Due Process

Natural justice applies wherever a public body e.g. courts or administrators, exercise judicial functions. **R. v. S of S, ex parte the Jockey Club, ex p the Aga Khan**,³⁹ demonstrates that it also applies to any other private body that makes judicial decisions affecting the legal rights of individuals, such as the Welsh Rugby Union, and statutorily empowered disciplinary bodies and regulators such as the Law Society and the Bar Council. The Human Rights Act is enforced by Judicial Review and thus extends to such quasi-public authorities. The Rules of Natural Justice are part of the common law. Certiorari is the most common remedy and is used to undo the decision of any judicial body, including the House of Lords post **Pinochet**,⁴⁰ by the Queens Bench Division of the High Court. Two major principles are involved.

Bias : "*Nemo iudex in causa sua.*" No man can be a judge in his own cause.

In **R v Gough**,⁴¹ the House of Lords laid down a test for bias, namely that there was a real possibility of bias on the part of a justice or member of a tribunal, which is somewhat less than set out in **Dimes v Grand**

³³ **Hanson v Radcliffe U.D.C.** [1922] 2 Ch 490

³⁴ **Smith v East Elloe R.D.C.** [1956] AC 736

³⁵ **Annismenic v Foreign Compensation Commissioners** [1969] 2 AC 147

³⁶ see Lord Greene's definition in **Associated Picture House v Wednesbury**. [1948] 1 KB 223

³⁷ **Re Racal Communications** [1980]

³⁸ **R v The Lord Chancellor, ex p Witham** (1997) Rose LJ, Laws J. 7/3/97

³⁹ **R. v. S of S, ex parte the Jockey Club, ex p the Aga Khan**

⁴⁰ **R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2)** (2000) 1 AER 577

⁴¹ **R v Gough** [1993]

Constitutional and Administrative Law

Junction Canal,⁴² : Lord Chancellor Cottenham granted an injunction to a company which unknown to him he was a shareholder in under a portfolio out together for him by a broker. The court held that despite the integrity of the judge the decision was void since '*Justice must not only be done, but must be seen to be done.*' There must be no hint of bias in the judicial system.

R v Sussex Justices ex parte McCarthy,⁴³ : A clerk to the justice involved in a conviction for a motoring offence (he retired with the lay magistrates to give them advice) worked for a firm of solicitors representing the victim of the offence in civil proceedings.

R v Bristol Betting & Gaming Licensing Committee, ex p O'Callaghan.⁴⁴ Considers the basis on which judges could or should disqualify themselves from sitting on grounds of bias and the issues concerning judges who were solicitors, authors and non-executive directors of family companies. The court would regard as undesirable any extension of the present rule on automatic disqualification beyond the bounds set by existing authority, unless such extension were plainly required to give effect to the important underlying principles upon which the rule was based. The court held :-

- 1 The principle that "one should not be a judge in one's own cause", or act as a judge where there was a real possibility of bias, was deeply entrenched in law and there was no doubt that it applied to police disciplinary proceedings. The principle was most recently examined in **R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte**,⁴⁵ and **Locabail (UK) v Bayfield Properties Ltd**.⁴⁶ There was no indication, in the Regulations, of a statutory intention that the principle should itself be whittled down in disciplinary proceedings or that the court's supervisory power should be more restricted than in ordinary circumstances.
- 2 The outcome of the disciplinary proceedings could have related to B's credibility and, had she been acquitted, to her complaint of victimisation before the employment tribunal. By virtue of s.17(1) Sex Discrimination Act 1975, M was deemed to be vicariously liable for the acts that B complained about at the employment tribunal. Section 17(4) of the 1975 Act provided an indemnity for M in respect of any damages awarded against him. Therefore he did not have a personal pecuniary interest. However, whilst extensions to the judicial impartiality doctrine should be made with the utmost caution, M was involved or was liable to be involved, by virtue of his office, in the defence of B's complaint to the employment tribunal. Accordingly, the application for leave to appeal would be granted.

R v CC of Merseyside Police, ex p Carol Anne Bennion.⁴⁷ A Chief Constable's decision to hear disciplinary charges against the applicant when they were opposing parties in pending employment tribunal proceedings would be quashed on judicial review because "one could not be a judge in one's own cause".

Right to a hearing : "Audi alteram partem."

There is a right to reasonable notice of hearings and the opportunity to state one's case and to provide a response to arguments put against one.

Cooper v Wandsworth Board of Works.⁴⁸ A builder whose property was constructed without having first registered a statutory notice of intention to build was granted redress by way of damages when the local Board of Works demolished the property without first giving him notice of their intentions and affording him an opportunity to explain (if possible) why he had not given them notice before constructing it.

Ridge v Baldwin,⁴⁹ Brighton Watch Committee dismissed the Chief of Police without giving him an opportunity to speak out on his own behalf. This case is seen as the start or a period of judicial activism and expansionism in regard to judicial review.

⁴² **Dimes v Grand Junction Canal** [1852] 3 HLC 759

⁴³ **R v Sussex Justices ex parte McCarthy** [1924] 1 KB 256

⁴⁴ **R v Bristol Betting & Gaming Licensing Committee, ex p O'Callaghan** (2000): CA (Bingham LCJ, Lord Woolf MR, Sir Richard Scott V-C) 17/11/99 : see also **Margaret Timmins v Timothy Gormley: Mrs. D Williams v HMIT:**

⁴⁵ **R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte** (No.2) (2000) 1 AER 577

⁴⁶ **Locabail (UK) Ltd v Bayfield Properties Ltd** (2000) 2 WLR 870.

⁴⁷ **R v CC of Merseyside Police, ex p Carol Anne Bennion** (2000) QBD Crown Office List (Toulson J) 29/6/2000

⁴⁸ **Cooper v Wandsworth Board of Works** [1863]14 CB (NS) 180

⁴⁹ **Ridge v Baldwin** [1964] AC 40

Constitutional and Administrative Law

Mallock v Aberdeen Corporation.⁵⁰ : A school teacher who is dismissible at pleasure should nonetheless be afforded an opportunity to speak in his or her defence before dismissal.

Kane v Board of Governors British Columbia University.⁵¹ : A university professor suspended in his absence was reinstated.

R v Secretary of State for Education, ex p Prior.⁵² A teacher's asserted that the Secretary of State had failed to correct dismissal procedures to ensure that they were constitutionally intra-vires and that there had consequently been a breach of the rules of natural justice rendering a teacher's dismissal unlawful.

The problem with such applications is that today they would cross the divide between public and private law, contracts of employment being governed by civil or private law. Furthermore, unless the regulations or guidelines issued by the Education Department breached the Education Acts they would be perfectly lawful. Even the Ombudsman's ability to investigate poorly badly drafted regulations is severely limited.

R v Hull Board of Visitors.⁵³ : Prisoners have a right to a proper hearing before the Board of Visitors if the Board can punish them.

Note that since then, it has been held that a Board of Visitors is not an appropriate judicial body to punish prisoners or to extend their sentences for misbehaviour in prison, this being reserved for the criminal courts, though it would appear that a Board of Visitors can still exercise jurisdiction over the granting of parole.

Schmidt v SS of Home Affairs.⁵⁴ : The dividing line between administrative and judicial functions is not always clear cut : If a person has a right interest or legitimate expectation then they may be entitled to an undefined variety of rights such as to be present, to hear, to present written evidence, to answer or to ask questions, unless such rights would not be in the national interest. It was held that Scientology, not being a recognised religion covered by the blasphemy laws the Secretary of State was entitled to refuse to extend his entry permit because he was an undesirable alien.

Fairness and natural justice

Whether or not fairness affords grounds for relief has become an important issue in recent years. Certainly some form of relief can be afforded by the courts today though it is of a more limited scope than that of the traditional remedies. This topic has generated a massive amount of case work centring on the rights of individuals regarding extradition and entry permits, the rights of applicants for licences etc where the individual does not have a personal interest at stake but merely an expectation of an interest. Care must be taken here to distinguish between litigants who do not have sufficient interest or Locus Standi to be entitled to judicial review at all and those who have sufficient interest for judicial review but insufficient to insist on the full requirements of natural justice.

A person who applies for a licence is entitled to a reasonable expectation that a application will be treated fairly. The application will be read and the decision maker will make his decision whether or not to grant the licence by applying the criteria for making such decisions set out in the enabling statute or by following such rules as established by those given the power to make such rules. Clearly a failure to follow procedures would be amenable to judicial review for procedural impropriety. However, the applicant would not be entitled to a full hearing in order to present evidence as to why the licence should be granted or to cross question officials.

It is of paramount importance in such situations that an unsuccessful applicant is given reasons for the rejection if judicial review of the decision is to be sought. There is now a growing jurisprudence on the duty of decision makers to provide reasons though in general in order to trigger this duty the applicant should request the reason for the decision in advance.

⁵⁰ **Mallock v Aberdeen Corporation** [1971] 1 WLR 1578 - Wilberforce

⁵¹ **Kane v Board of Governors British Columbia University** [1980] 110 DLR 3D 311

⁵² **R v Secretary of State for Education, ex p Prior** [1994] QBD

⁵³ **R v Hull Board of Visitors** [1979] QB 425 :cf Leach v Parkhurst PDG [1988] AC 533

⁵⁴ **Schmidt v Secretary of State for Home Affairs** [1969] 2 Ch 149

Constitutional and Administrative Law

R v Uxbridge Magistrates Court & Anor, ex p Chouki Adimi,⁵⁵ Asylum seekers who entered the country using false documentation had a legitimate expectation that the provisions of Art.31 UN Convention Relating to the Status of Refugees 1951 would be followed, and no such person could be convicted of an offence without consideration of whether he was protected by the Covenant.

R v Sheffield Magistrates Court, ex p Benson Ojo.⁵⁶ The magistrates' court had acted unlawfully by committing the applicant to the Crown Court for sentencing contrary to a legitimate expectation that had arisen at a previous hearing that the magistrates' court would pass sentence.

Delegation.

Delegatus non potest delegare : Unless a person who has power delegated to him is granted the power to further delegate his statutory functions then he must administer such powers himself.

In **Allingham v Minister of Agriculture**.⁵⁷ the Minister of Agriculture delegated powers to a War Commissioner for Agriculture, who in turn purported to delegate his powers to an executive officer. The court held that this was an invalid delegation.

R v Secretary of State for the Home Dept., ex p Oladeheinde,⁵⁸ Power can be exercised by appointed inspectors with no involvement in the particular case. Power to delegate to responsible officials Court. Appeal by immigrants against decision reversing grant of judicial review of decision to deport

Estoppel

What happens when an administrative officer acts beyond his powers and permits an individual to act in a particular way thus committing himself to a course of action involving expenditure if the permission is later revoked to the detriment of the individual? Is the authority estopped from denying the permission? A complicated body of law has developed where estoppel has been successfully used in a limited number of special cases but estoppel is not generally permitted. Compare where a university offer has been treated as a binding contract even if mistakenly given because the contract is governed by private law.

Error of law on the face of the record

Where an inferior judicial decision making body reaches a decision on the basis of an erroneous application of law the decision is subject to judicial review and may be quashed by an order of certiorari. Certiorari is granted in respect of decisions by such bodies which are ultra vires the decision maker's powers. However, in both situations the existence of a record may be essential to the discovery of and proof of the basis of the decision. Whilst tribunals are now subject to statutory requirements for the applicant to be provided with reasons for the tribunal's decision a general requirement for all other public decision makers to provide reasons for their decisions, whilst perhaps desirable and essential to enable an applicant to mount a successful challenge to the legality of the decision is not so easy to establish.

Gordon & Barlow claim in '*Reasons for life : solving the Sphinx's riddle*'⁵⁹ that the HL decision in **R v Secretary of State for the Home Department ex pt Pegg, Smart & Doody**⁶⁰ now establishes a general duty to give reasons into English administrative law.

Judicial Review and the Human Rights Act 1998

The Human Rights Act 1998 has resulted in expanded the scope of Judicial Review providing a mechanism to challenge the validity / interpretation of Acts of Parliament. By virtue of its new criteria for interpreting legislation in line with the requirements of the Act Government action may be judged to be ultra vires. For example, a number of legislative provisions in relation to asylum seekers has been held to be ultra vires.

⁵⁵ **R v Uxbridge Magistrates Court & Anor, ex p Chouki Adimi**; **R v CPS, ex p Dylan Sorani**; **R v Secretary of State for the Home Dept., ex p Dylan Sorani** ; **R v Secretary of State for the Home Dept, ex p Astrit Kaziu** (1999) 29/7/99 : per Simon Brown LJ, Newman J

⁵⁶ **R v Sheffield Magistrates Court, ex p Benson Ojo** (2000) DC 3/7/2000

⁵⁷ **Allingham v Minister of Agriculture** [1948] 1 All.ER 780

⁵⁸ **R v Secretary of State for the Home Dept., ex p Oladeheinde**; **R v same, ex p Alexander** (1990) HL (Lords Keith, Brandon, Templeman, Griffiths and Ackner).

⁵⁹ NLJ July 9 1993 p1005

⁶⁰ **R v Secretary of State for the Home Department ex pt Pegg, Smart & Doody**

Constitutional and Administrative Law

PUBLIC AND PRIVATE REMEDIES COMPARED AND CONTRASTED

- 1). Private Law remedies for breach of private law rights - available via writ following the traditional common law process and now under the CPR 1998 :
Damages (compare only available under EC Law for Public Law matters)
Specific Performance (compare enforcement order under Public Law)
Injunctions : A-G v Guardian Newspapers (NO.2) ⁶¹ The Crown was not entitled to a permanent injunction against certain newspapers as the information they contained was neither damaging to the public interest nor in breach of any duty of confidentiality since the information was already in the public domain.
Declaration : Cannot be used in hypothetical situations. There must be a real problem and a real doubt. The value of the declaration is that such an interpretation would be unlikely to be challenged in the courts. Available as of right.
- 2). **Public Law remedies** These replicate those listed in 1) above - the difference being that they are only available via judicial review where the wrong arises due to the abuse etc of a public law right. Available in public law via Order 53 (CPR 1998 Civil Procedure Rule 54).
- 3). **Remedies peculiar to public Law** (rebranded by CPR 1998)
Prohibition : Quashing Order (Certiorari) ; **Enforcement Order** (Mandamus).
These cannot be use in conjunction with private law remedies : The remedies are discretionary and are subject to the procedures within Order 53 The discretion means that undue delay and unmeritous behaviour can result in a refusal to grant the order. Applications for judicial review are brought ex parte on behalf of the applicant by the crown. The first hearing will normally only involve the applicant - temporary injunctions may be granted - but a full hearing which follows a successful application will usually involve all interested parties.
- 4). **Quashing Order** (Certiorari) : The higher court orders actions of a lower court or body acting in a judicious manner to be undone. The court exercises a supervisory function over bodies exercising judicial or quasi judicial functions. The lower body is ordered to present a record of the proceedings to the high court, which then reviews the proceedings and will quash previous decisions that it finds to be bad. See for example:-
R v L.C.C. ex parte Entertainments Protection Association.⁶² where the L.C.C. exceeded its jurisdiction by granting permission for a cinema to open on Sundays contrary to statute.
R v Hendon R.D.C.⁶³ A councillor sat on a committee which granted planning permission for land owned by the councillor. A rate payer successfully challenged the decision.
R v Northumberland Compensation Tribunal ex parte Shaw.⁶⁴ A miscalculation of the amount of compensation given to the applicant following the loss of his job resulted in a finding of error on the face of the record.
R v Swansea City & County, ex p Jeffrey David John Davies,⁶⁵ the court held that the holder of a hackney carriage vehicle licence could be a person aggrieved by a condition imposed in a private hire vehicle licence for the purposes of s.48 Local Government (Miscellaneous Provisions) Act 1976, and thus had the right to challenge the condition and seek to have it quashed.
- 5). **Prohibition** : This is an order to an inferior court or body acting in a judicial capacity, telling it to stop exceeding its jurisdiction or to stop breaching the rules of natural justice, or to refrain from carrying out a proposed course of action. Once the action has been carried out then prohibition is too late and certiorari is required. The aim of prohibition is prevention.

⁶¹ A-G v Guardian Newspapers (NO.2) [1990] 1 AC 109 : A-G v The Observer Ltd & Ors: A-G v The Times Newspapers Ltd. & Anor (1988): HL (Lords Keith, Brightman, Griffiths, Goff and Jauncey) 13/10/88

⁶² R v L.C.C. ex parte Entertainments Protection Association [1931] 2 KB 215

⁶³ R v Hendon R.D.C. ex parte Chorley [1933] 2KB 696

⁶⁴ R v Northumberland Compensation Tribunal ex parte Shaw [1952] 1 KB 338

⁶⁵ R v Swansea City & County, ex p Jeffrey David John Davies (2000) QBD Crown Office List (Munby J) 16/6/2000

Constitutional and Administrative Law

R v Liverpool Corp ex parte Liverpool Taxi fleet Operators Association.⁶⁶ L.A. proposed to limit the number of licensed taxis without first consulting the taxi operators and hearing their representations.

- 6). **Enforcement Order (Mandamus)** : This is an order to a public body to carry out its public duty. Tribunals can be compelled to hear appeals. A Local Authority. can be compelled to open its accounts for inspection : a returning officer can be compelled to declare a candidate duly elected and to amend the electoral register. **R v Broadcasting Complaints Commission, ex parte David Owen**⁶⁷ concerned a complaint by the party leader as to unfair treatment by the BBC contrary to its statutory duty.

R v Commissioners of Customs & Excise, ex p Kay and Co.⁶⁸ Ultra vires refusal by the Commissioners of Customs and Excise to entertain claims to recover overpaid VAT after three years.

R v Customs & Excise Commissioners, ex p Service Authority for the National Crime Squad.⁶⁹ The Service Authorities for the National Crime Squad and the National Criminal Intelligence Service were not "police authorities", so as to be specified bodies within the meaning of s.33 (3)(f) Value Added Tax Act 1994, and hence did not qualify for refunds of value added tax under that section. The court would not quash the refusal of the Treasury to specify them as such bodies, since the court would not interfere in questions of national financial policy.

R v Criminal Injuries Compensation Authority, ex p B.⁷⁰ Successful application for judicial review of a refusal of the Criminal Injuries Compensation Appeals Panel to allow an appeal against the decision of the Criminal Injuries Compensation Authority ('CICA') not to grant an award for the crime of violence and sexual abuse suffered by the applicant. The CICA had erred in considering whether the applicant had consented during the sexual activity as he had been below the age of consent at the time.

Reform of Judicial Review

Prior to the introduction of the Civil Procedure Rules in 1998 there had been a series of questions raised regarding whether the powers and remedies were sufficient in particular regarding the absence of compensation. The questions have not been addressed effectively by the CPR.

The EC has now developed compensation for Public Law breaches of EC Law and the lack of compensation in the UK is now out of step with the rest of Europe. Clearly, if a legal right is affected compensation can be granted, but not otherwise, hence the potential for large claims for false imprisonment regarding the concurrent sentence I pre-trial detention issue.

Some questions for consideration

- Is the scope of ultra vires wide enough?
- Are the rights to be given reasons adequate?
- Is the public law private law divide clear and is it necessary?
- Should we have a Bill of Rights (not merely the current limited Human Rights Act 1998) and superior law and who should judge such cases ?
- Do we need an elected judiciary or would the apolitical nature of judges be compromised ? If elected who would appoint them ?
- Should the office of Lord Chancellor be abolished as Labour initially proposed in 1997?
- If an electing committee is appointed would it be apolitical and what would the scope of its powers be?

⁶⁶ **R v Liverpool Corp ex parte Liverpool Taxi fleet Operators Association** [1972.]2 QB 299

⁶⁷ **R v Broadcasting Complaints Commission, ex parte David Owen** [1985] QB 1153

⁶⁸ **R v Commissioners of Customs & Excise, ex p Kay and Co. R v Same, ex p Rayner & Keeler: Same, ex p Allied Domecq PLC: Same, ex p The Wardens & Commonality of the Mystery of Mercers of the City of London: Same, ex p Colaingrove Ltd. : Same, ex p Greenlee Group Plc. : Same, ex p Provident Institution: Same, ex p Association of Optometrists** (1996) : QBD (Keene J) 19/11/96

⁶⁹ **R v Customs & Excise Commissioners, ex p Service Authority for the National Crime Squad & Ors** (2000)

⁷⁰ **R v Criminal Injuries Compensation Authority, ex p B** (2000) QBD Crown Office List (Collins J) 30/6/2000 TLR 1/8/2000

Constitutional and Administrative Law

AVAILABILITY OF JUDICIAL REVIEW : PROCEDURAL REQUIREMENTS

Order 53 Supreme Court Rules : CPR 54 1998 : and s31 Supreme Court Act 1981

The effect of the old Order 53 encoded in the SCA 1981, and the current CPR 54, is that all public law remedies must be sought by way of application for judicial review in accordance with the provisions of the Civil Procedure Rules, and in particular rule 54.

This procedure, dealt with in chambers as a paperwork application for a full trial, operates on three main criteria and is something akin to the job of a magistrates court where it asks whether or not there is a case to be answered or not. The court inquires as to whether or not there is a public law issue or not, whether there is an arguable case, whether the applicant has sufficient standing or locus standi and whether the application has been received in time.

Ex Parte

Whilst an application is made ex parte, that is to say by one party alone without the involvement of the other party during the application stage, this does not mean that the hearing cannot be reported. Ex Parte does not therefore mean "in camera" or private. This was demonstrated by **Re D Anonymity**.⁷¹ In considering an application to remain anonymous in an application for judicial review, the key question was whether the evidence, and in particular the medical evidence, showed that there was a real risk that, if his identity was disclosed, the applicant would suffer significant psychological harm.

Public and private law.

What happens if a remedy is sought against a public authority? If the action is for private law rights e.g. contract the traditional writ system for private law rights is still used. Since **R v East Berkshire Health Authority ex parte Walsh**⁷² it has become clear that in such a case public law cannot be used by the individual as a method of appeal and redress for breach of contract by his employers when they sacked him. There was an employment tribunal to deal with such complaints. **R v B.B.C. ex parte Lavelle**⁷³ order 53 could not be used against a private tribunal decision relating to private law.

What then if during a private issue public law issues are raised ? In **Davy v Spelthorne**.⁷⁴ the council claimed that an action for damages involved public law issues regarding whether or not the council had attempted to fetter the exercise of its discretion. This being the case the council claimed that the case should only be heard under order 53. The court disagreed. If the legal issue was basically of a private nature there was no abuse of process and the court could base a private law action subject to its opinion of the public law issue. The action was based on misrepresentation and **Hedley Byrne v Heller** - and either way the council would have lost so there was no reason to involve two separate courts.

O'Reilly v Mackman.⁷⁵ Infringement of a persons public law rights must be pursued via Order 53. Private law remedies and court processes are not available. The availability of Judicial Review under Order 53 is subject to the discretion of the court in order to protect the public interest. An application for private actions does not undergo a judicial filter and so is an abuse of the system. The issues in **O'Reilly v Mackman** were partly historical. Prior to the revamped Order 53 the private law remedies could only be sought by way of a writ. The distinction between public and private law remedies only emerged in 1977 so it was only from that time onwards that the question of abuse of court process arose. Since the benefits of those actions became available under order 53 there was no longer a need to use issue a writ to obtain such remedies in areas dealing with public law.

This however raises the issue as to what exactly is a public law matter and what is a private law matter. In **Law v National Greyhound Racing Club**.⁷⁶ It was held that Order 53 was not available to seek an injunction against a private body. The issue was purely contractual but what if the issue had touched on areas of public policy affecting the public ? The answer to this question is still unclear.

⁷¹ **Re D Anonymity** (1999)

⁷² **R v East Berkshire Health Authority ex parte Walsh** [1985] QB 152

⁷³ **R v B.B.C. ex parte Lavelle** [1983] 1 WLR 23

⁷⁴ **Davy v Spelthorne** [1983] AC 262

⁷⁵ **O'Reilly v Mackman** [1983] 2 AC 237

⁷⁶ **Law v National Greyhound Racing Club** [1983] 1 WLR 1302

Constitutional and Administrative Law

In **Wandsworth L.B.C. v Winder**.⁷⁷ The defendant refused to pay a rent rise, claiming the rise was ultra vires, and raised this as his defence to a private action. The council claimed he could not use a public law defence outside order 53. The court disagreed with the council and held that he could use the defence.

The judicial control of quangos is a very grey area, as is that regarding the disciplinary committees of the legal and medical professions. **R v Civil Service Appeal Board, ex p Bruce**.⁷⁸ Civil servant's dismissal reviewable, but review precluded by unlawful dismissal proceedings to an Employment Tribunal under EPCA. Civil Servants employment actions are by EPCA civil law actions, unless an exempting certificate is issued by the Minister in which case they then become public law matters.

Locus Standii.

An applicant has to have sufficient interest in order to apply for judicial review of the lawfulness of the exercise of power or discretion by a public body. Standing or interest means that the legal interests of the individual must have been affected. This precludes applications by interested busy bodies such as Green Peace. The up shot is that such organisations often buy an interest in land in the proximity of alleged polluters before protesting. A mere curiosity interest or a desire to right wrongs without more is insufficient to justify judicial review. The applicant has to be personally affected by a public decision in order to challenge it. He must have some legal right or direct involvement in the decision.

McInnes v Onslow Fane.⁷⁹ : Purely administrative actions not affecting individual rights are not justiciable. Locus standii is essential.

In **IRC v National Federation of Self Employed**.⁸⁰ wished to challenge an amnesty granted to casual workers buy the Inland Revenue by the Federation. The Federation lost the case but the House of Lords introduced less rigorous requirements in relation to locus standii and split the process into two stages, the application itself and the hearing of the application.

The court said that sufficiency of interest would be looked at twice if necessary. On the first occasion it is merely to exclude cranks and mischief-makers. The issue could arise again and a generous conception of sufficient interest would be used. In the particular case there was not sufficient interest where the Federation wished to challenge an assessment of tax, which followed a compromise, of some newspaper employees who had been involved in tax evasion. Individuals do not have any interest in the tax affairs of other individuals.

It would appear to be the case that because each tax payer's relations with the Inland Revenue are personal others do not have sufficient interest simply as contributors to the national purse. Ratepayers of a local authority however appear to have sufficient standing to challenge the way their money is spent.⁸¹ Uncompetitive advantages contrary to EC law would however be challengeable in relation to anti-competitive state subsidies etc.⁸²

R v Ministry of Agriculture, Fisheries & Food, ex p Wear Valley DC.⁸³ discusses the locus standii needed to require special Parliamentary procedure for salmon netting order

An arguable case.

This is dealt with in the actual hearing of the application for judicial review, not the full trial. The applicant does not have to prove the case, but rather that there is a winnable case to be argued. The procedure weeds out frivolous actions.

Time Limits.

RSC Order 53 rule4(1). Applications must generally be made within 3 months to prevent applicants impugning the actions of the authorities long after the event. The court has a discretion to extend the limit but this is very rare. ⁸⁴

⁷⁷ **Wandsworth L.B.C. v Winder** [1984] AC 461

⁷⁸ **R v Civil Service Appeal Board, ex p Bruce** (1989) 2 AER 907

⁷⁹ **McInnes v Onslow Fane** [1978] 1 WLR 1520

⁸⁰ **IRC v National Federation of Self Employed** [1982] AC 617

⁸¹ See **Prescott v Birmingham Corp** [1954] 3 All ER 698 and **Arsenal Football Club v Enbe** [1979] AC 1.

⁸² see **R v AG ex parte ICI** [1987] 1 CMLR 72 and **R v HM Treasury ex parte Smedley** [1985] 1 Q.B. 657.

⁸³ **R v Ministry of Agriculture, Fisheries & Food, ex p Wear Valley DC** (1988)

⁸⁴ See **R v Dairy Produce Quota Tribunal ex parte Caswell** [1990] 2 All ER 434.

Constitutional and Administrative Law

EXHAUSTING ALL OTHER REMEDIES

The Lord Chancellor's Office has expressed great concern at the rapid growth of Judicial Review over the last half century. Under the Civil Procedure Rules 1998 a concerted effort had been made to limit the amount of recourse that is made to the courts where the parties could and should settle the dispute themselves, with considerable resultant savings in time, energy, stress and state funds and resources. The rise in popularity of ADR and in particular mediation has been acknowledged and supported by the Lord Chancellor's Office and is encouraged. The Lord Chief Justice has lent his support to the process publicly and judicially.

Public Statement by Lord Irvine, March 2001. The government plans to significantly increase its use of alternative dispute resolution in contracts and only pursue litigation as a last resort to settle legal disputes involving government entities. Lord Irvine said the government's disputes would be "*settled by mediation or arbitration whenever possible.*" He added that "*[a]rbitration, mediation and independent assessments will bring simpler, cheaper, quicker ways of resolving Government legal cases.*"

According to Lord Irvine, "*[s]tandard Government procurement contracts will in the future include clauses on using ADR to resolve disputes instead of litigation and whenever possible claims for financial compensation will be settled by independent assessment instead of going to court.*" Given that the Lord Chancellor is responsible for management of the courts, the appointment of judges, magistrate and other judicial officers, the oversight of civil litigation, and reforms in family and property law who can doubt his ability to implement such measures. As Karol K. Denniston, an attorney with Paul Hastings Janofsky & Walker in London, said the announcement is "*an indication of the development*" of ADR in England and shows that "*the whole litigation environment has changed in tone since the Woolf reforms*" were put into place. According to Denniston, the announcement also "*shows the government is coming in line with the courts*" greater reliance on ADR to resolve disputes. The only problem that may arise from the government's new commitment to using ADR is the lack of experienced mediators in the commercial sector to handle the expected increase in mediation. Dan Wood, communications director for the Centre for Dispute Resolution in London, said CEDR was "*delighted to hear the announcement*" but warned that whilst the announcement is "*great at the symbolic level [the government] must practice what they preach beyond just encouraging ADR use.*" According to Wood, the government's commitment to use ADR is "*good for UK taxpayers because of the cost savings to the government,*" and "*good for business because they know that disputes with the government will first be directed into ADR*" rather than litigation and that the "*impact on the field is enormous because of the size of the government's purchasing power.*"

Lord Irvine said the government is dedicated to leading the way in the use of ADR by showing that disputes do not need to end up in court, and that "*[v]ery often, there will be alternative ways of settling the issues at stake which are simpler, cheaper, quicker and less stressful to all concerned than an adversarial court case.*" Provided the other party to the dispute agrees, "*the Government is now formally pledged to resolve legal disputes by ADR whenever possible*" and the government will monitor the effectiveness of ADR in resolving disputes. Areas where ADR will not be used by the government include intentional wrongdoing, abuse of power, public law and where there is a need for legal precedent, he added.

The statement said government departments will "improve flexibility in reaching agreement on financial compensation, including using an independent assessment of a possible settlement figure," and the central government will "produce procurement guidance on the different options available for ADR in Government disputes and how they might be best deployed in different circumstances." These undertakings will "spread best practice and ensure consistency across Government," according to the statement. No clearer evidence of the commitment of both the Lord Chancellor and the Lord Chief Justice of the intention to shift the focus from the courts to ADR for the settlement of public law disputes could be asked for, than the decision of the Court of Appeal in **Cowl v Plymouth City Council**.⁸⁵ <http://www.bailii.org/ew/cases/EWHC/Admin/2001/734.html>

It is clear from **Cowl v Plymouth City Council** that the courts, when considering applications for Judicial Review under Order 53 and Rule 35 are likely in future to take a robust view of the inapplicability of Judicial Review hearings where alternative methods of settling the dispute, without the assistance of the courts, have not yet been fully explored.

⁸⁵ **Cowl v Plymouth City Council** 2001/2067 [2001] EWCA Civ 1935, 14th December 2002.

Constitutional and Administrative Law

The constitutional issue of the power of authorities to reach settlements which may be questioned by Public Auditors is less clear, but if the Government is committed to such settlements it may not be a major barrier to negotiated settlement. One potential problem is that officials may be unwilling to make payments out of public funds without being ordered to do so by the courts, particularly where they firmly believe they are not required to do so, or where a judicial decision is needed to clarify what is or is not ultra vires their powers and duties.

Another unanswered question is what happens to the three month time limit from decision of an authority for applications for judicial review in situations where the parties voluntarily enter into ADR processes. Possibly, it is wiser to apply for Judicial Review and then submit to a court recommended ADR process, since the application will have been made on time, but will merely have been temporarily suspended pending the outcome of the ADR process. If the Lord Chancellor's Office could set up a filing process for submissions to Judicial Review, which resulted in the time limit being suspended this could resolve the problem. Applicants for Judicial Review may be well advised to have considered appropriate ADR bodies before applying, so that if a judge advises ADR, the parties will be able to choose the organisation rather than be pressured to adopt a particular organisation by the court, which might not be appropriate to their needs.

Finally, what amounts to exhaustion of the ADR process poses problems. One party may seek further outside assistance and guidance, simply to buy time, or perhaps in order to get a favourable outside opinion. Particularly if the other party has an urgent need to settle the dispute or needs an interlocutory order / injunction to stop something occurring further ADR participation may be seen as disadvantageous and against that party's interests.

The Woolf Reforms and the Civil Procedure Rules 1998. The duty of the parties to embrace ADR and the duty of courts to encourage parties to use ADR is set out in the overriding objective of **Part 1 of the Rules**, under **s1 CPR 1998**. Whilst the sections in bold below are directly concerned with ADR, it is clear that ADR has much to offer in respect of many of the other issues covered by the section, in particular in respect of speed and expenditure, especially where the sums of money at stake are relatively low. Where the financial resources of one party far exceed those of the other ADR has much to commend it in terms of fairness by providing an affordable mechanism for dispute resolution for the financially disadvantaged party. Furthermore, co-operation between the parties lies at the heart of ADR and mediation in particular. Even where the provisions do not lead directly to the use of ADR one should note that once the courts have taken the directions contained within the overriding objective on board and put them into practice, many of the pre-existing financial benefits to lawyers of litigation will disappear. In future litigation will be "*leaner and meaner*". The lawyer who can maximise the benefits of the new system by providing ADR services to clients will further enhance his or her reputation as a provider of legal services which lead to the efficient, fair and cost effective resolution of clients' disputes.

s1.1(1) *These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*

s1.1(2) *Dealing with a case justly includes, so far as practicable*

- (a) *ensuring that the parties are on an equal footing*
- (b) *saving expense*
- (c) *dealing with the case in ways which are proportionate*
 - (i) *to the amount of money involved*
 - (ii) *to the importance of the case*
 - (iii) *to the complexities of the issues and*
 - (iv) *to the financial position of each party*
- (d) *ensuring that it is dealt with expeditiously and fairly and*
- (e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

s1.2 *the court must seek to give effect to the overriding objective when it*

- (a) *exercises any power given to it by the Rules or*
- (b) *interprets any rule.*

s1.3 *The parties are required to help the court to further the overriding objectives.*

s1.4(1) *The court must further the overriding objective by actively managing cases.*

Constitutional and Administrative Law

s1.4(2) *Active case management includes*

- (a) *encouraging the parties to co-operate with each other in the conduct of the proceedings.*
- (b) *identifying the issues at an early stage.*
- (c) *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others.*
- (d) *deciding the order in which issues are to be resolved.*
- (e) ***encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.***
- (f) *Helping the parties to settle the whole or part of the case.*
- (g) *Fixing timetables or otherwise controlling the progress of the case.*
- (h) *Considering whether the likely benefits of taking a particular step justify the cost of taking it.*
- (i) *Dealing with as many aspect of the case as it can on the same occasion.*
- (j) *Dealing with the case without the parties needing to attend at court.*
- (k) *Making use of technology; and*
- (l) *Giving directions to ensure that the trial of a case proceeds quickly and efficiently.*

Under s26(4) CPR the court has the power to direct that a case be stayed for 1 month with a power to extend, in order for the parties to reach a settlement. The power is pursuant to the response given by the parties to the Allocation Questionnaire (s26(3)), Question A of which asks the parties "Do you wish there to be a one month stay to attempt to settle the case?"

Even if the parties do not agree to a stay, the court of its own initiative can order a stay if the claimant / defendant who wishes the court to deal with the matter, provides no good explanation to the court as to why a stay, in order to try and settle the issue, should not be made. At the end of the period, if the parties return to court, the court will give further directions on the management of the case as appropriate.

What will be appropriate will depend on the responses of the parties to questions posed by the court such as "**Was there a mediation agreement?**", if the response is "**No**" the court might inquire "**Why not ?**". If the response is "**Yes**" the court will wish to inquire whether or not the party attended and since the mediation failed will want to know whether or not someone with the power to settle the dispute took part in the mediation. The court may even wish to inquire of the mediator whether or not the process was abused by a party who obdurately failed to co-operate.

s26.4(1) *A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.*

s26.4(2) *Where*

- (a) *All parties request a stay under paragraph (1) or*
- (b) *the court, of its own initiative, considers that such a stay would be appropriate, the court will direct that the proceedings be stayed for one month.*

s26.4(3) *The court may extend the stay until such a date or for such a specified period as it considers appropriate.*

s26.4(4) *Where the court stays the proceedings under this rule, the claimant must tell the court if a settlement is reached.*

s26.4(5) *If the claimant does not tell the court by the end of the period of stay that a settlement has been reached, the court will give such directions as to the management of the case as it considers appropriate.*

District Judge Monty Trent, a member of the Civil Justice Committee, suggests⁸⁶ that whilst the courts cannot compel the parties to participate in ADR processes the court may none the less take any failure to engage in the process into account when awarding costs under s44.3. C.P.R. 1998.

s44.3(1) *The court has discretion as to*

- (a) *whether costs are payable by one party to another;*
- (b) *the amount of those costs; and*
- (c) *when they are to be paid.*

s44.3(2) *If the court decides to make an order about costs*

- (a) *the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but;*
- (b) *the court may make a different order.*

s44.3(4) *In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including*

- (a) *the conduct of all the parties;*
- (b) *whether a party has succeeded on part of his case, even if he has not been wholly successful; and*

⁸⁶ at NLJ 149 No6880 page 411

Constitutional and Administrative Law

- (c) *any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)*

s44.3(5) *The conduct of the parties includes*

- (a) *conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;*
(b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
(c) *the manner in which a party has pursued or defended his case or a particular allegation or issue; and*
(d) *whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.*

s44.3(6) *The orders which the court may make under this rule include an order that a party must pay*

- (a) *a proportion of another party's costs;*
(b) *a stated amount in respect of another party's costs;*
(c) *costs from or until a certain date only;*
(d) *costs incurred before proceedings have begun;*
(e) *costs relating only to a distinct part of the proceedings; and*
(f) *interest on costs from or until a certain date, including a date before judgement.*

The private nature of mediation is such that the parties to a mediation will not in the general course of things be penalised by a subsequent order as to costs simply because the parties failed to reach an agreement through mediation. As will be seen later, a common standard clause in mediation agreements states that information revealed during a mediation and any offers or counter offers may not be relied on by either party subsequently in court in respect of the matter at hand. The mediator is committed to maintaining confidentiality in all matters arising out of the mediation. Without such protection parties could not afford to engage in the mediation process.

Nonetheless, the court can now take note of the fact that a party has unreasonably failed to participate in the mediation process. The fact that costs will not in future invariably follow the event provides a powerful incentive for parties to reach a mediated settlement and to "water down" or compromise exaggerated claims at the mediation stage.

We now have the benefit of three significant cases on the role of ADR in Public Law matters in the UK., namely **Cowl v Plymouth City Council**, **Royal Bank of Canada v S.S. for Defence**⁸⁷ and **Anufrijeva v London Borough of Southwark**.⁸⁸ Public Law litigation is big business and a significant aspect of legal practice. The advent first of the European Union and secondly of human rights legislation has introduced for the first time the concept of damages for breach of public law duties, though it remains the case that no damages are available outside these limited areas. It is now possible to draw some tentative conclusions about this area of ADR practice, firstly as to what amounts to ADR for the purposes of Public Law and secondly, when damages are permitted, as to how they will be assessed by the court.

Cowl makes it clear that there is scope in certain situations for the representatives of public bodies to lawfully enter into settlement negotiations without compromising their statutory duties. **Cowl** however throws little light on the extent to which that is the case. Consequently, it can be anticipated that district auditors may again in the future seek to hold representatives of public bodies personally to account for funds thrown away by a compromise agreement in breach of statutory duty to manage public funds in the public interest. Alternatively, it may be anticipated that a compromise agreement may in some situations be unenforceable due to a lack of authority, which might correspondingly give rise to arguments as to the scope estoppel in public law.

Royal Bank of Canada touches on a question common to ADR in respect of civil litigation, namely when is it appropriate to reject ADR overtures? and implications on costs of so doing. It would appear that a mere confidence in the strength of one's claim in law is insufficient reason to refuse to mediate. Whilst the MOD were penalised in costs for failing to mediate, the question is still unanswered however, as to what would have happened if they had engaged in mediation and forfeited the right to repossession or paid compensation for early repossession when, as became clear from the judgement, they had a legal right to

⁸⁷ **Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence** [2003] EWHC 1479

⁸⁸ **Anufrijeva v London Borough of Southwark; R v S of S for Home Department ex parte N & ; R v S of S for Home Department ex parte N M** [2003] EWCA Civ 1406

Constitutional and Administrative Law

repossess and no legal liability for terminating the lease and an auditor had subsequently investigated the circumstances of that compromise settlement. Are public bodies caught in a Catch 22 situation whereby officers may be made to account for bad deals, but the public body will suffer cost penalties for failing to enter into negotiations? What point is there in engaging in negotiations knowing there is nothing you can lawfully put on the table for consideration? Further clarification is needed here.

Anufrijeva reveals the scope of ADR in Public Law matters, the hurdles to be surmounted in applying for Judicial Review and touches on matters of quantum in damages. In **Cowl**, the CA had already intimated that all forms of negotiation satisfy the overriding requirements of s1 CPR 1998, not simply mediation and further stated that the courts should be satisfied that an applicant had discharged his duties in this respect by pursuing all other practicable methods of resolution before acceding to an application for J.R. In **Anufrijeva** the court made it clear that the good offices of the Parliamentary Commissioner for England and Wales and other ombudsmen are included within the umbrella of ADR for the purposes of Public Law, and that whilst it is not necessary to have "*exhausted*" all other avenues of settlement, the applicant must at least explain why the ombudsman option was not appropriate in the circumstances. A short answer, whilst not canvassed by the court, must surely be that since the application sought to recover damages, these would not have been available from the Ombudsman in this series of applications. Traditionally, the remit of the Ombudsman was to provide a form of redress in respect of mal-administration, where the aggrieved citizen lacked the locus standi, in the absence of breach of a legal interest, to sue either at law, or to apply for judicial review. In normal circumstances therefore it is difficult to see what contribution the ombudsman can make to a public law application which involves a recovery of damages, since all that the ombudsman can do is advise or recommend, with a view to improving administrative services. However, if the Ombudsman is prepared to recommend compensation in deserving situations and local authorities are prepared to follow that advice or recommendation, the ombudsman could perform a useful ADR role. An intriguing question is what the response to the courts would be where mal-administration is established and the advice of the Ombudsman has been disregarded. Would this impact on costs alone or also on the level of damages?

The next question that arises is "How does the court assess damages at public law?" The answer provided by the court, I regret to say is, like the inscrutable sphinx, not too revealing or helpful. The court stated "*The awarding of compensation under the HRA is not to be compared with the approach adopted under a claim for breach of civil law. However, rough guidance as to the level of damages to be awarded may be obtained from the guidelines issued by the Judicial Studies Board, the Criminal Injuries Compensation Board, the Parliamentary Ombudsman and the Local Government Ombudsman. The difficulty, however, is in finding a suitable comparator within these guidelines. In cases of maladministration, where damages are appropriate, awards should be moderate, but not minimal, as this would undermine the respect for Convention rights.*" What exactly amounts to "*moderate but not minimal*" is anyone's guess. Any award however small may however be sufficient to ensure that a case cannot proceed to Strasbourg, and thus enables the UK to remain in control and safeguard the public interest free from outside interference.

The European Union Law element also has an impact upon the assessment of damages, which is not canvassed by these cases, since the matter did not arise. The assessment of damages for breach of European Union law is un-problematical where civil action is involved. However, where a public law breach of European Union law occurs, Factortame and related cases have made it clear that a real and substantial remedy must be available and that no rule of English Law that bars damages can override this requirement. Hence the Spanish fishermen were entitled to and indeed received compensation. The level of compensation reflected their commercial losses and was neither "*moderate nor minimal.*"

Anufrijeva throws some light on the availability of damages at Public Law. The court stated in respect of Human Rights issues that "*There are a number of features that distinguish damages under the HRA from damages in contract or tort law. Damages under the HRA are not recoverable as of right. When choosing whether or not to award damages, the court must have due regard to ECtHR principles and must balance the need of the individual against that of the State. The approach adopted to awarding damages should be no less liberal than that applied by the ECtHR. The critical message is that damages should only be awarded when it is 'just and appropriate'*"

Constitutional and Administrative Law

and 'necessary' to achieve 'just satisfaction'" (paragraph 63). They should be awarded on an equitable basis having due regard to the seriousness of the violation, the conduct of the parties and the "degree of loss" suffered."

The only problem with this dicta is that if a claimant can demonstrate a likelihood that if the case were to go to Strasbourg, the court there would award damages, presumably this would give rise to a "*right*" to recover damages from a UK court.

A difficult area of Public Law practice also not touched upon in this series of cases, where there may be a role to play for ADR, relates to the inter-relationships between Public Bodies. Where one public body receives public funding from another and an allegation that the money has been used for ultra-vires purposes or has not been used at all, a dispute is likely to arise where the funding body may seek to recover funds. Clearly, where a high level of wrong-doing is involved, individuals may be surcharged by the district auditor. However, where public funds are simply used for the wrong public purpose, so that something the funding body did not wish to fund has reaped a benefit, is restitution available, or alternatively set-off against future funding? Traditionally, these are civil law remedies, though the latter involves a degree of self help. Now that Public Law has embraced the concept of damages, could an award of damages be made? It may be that in order to protect itself from liability, in respect of set off from subsequent funding, taking into account the previous over-payment, a public body might seek a declaration from the High Court that there has been an over-payment or ultra vires use of funds. Whichever course of action is followed, it is submitted that recourse to ADR would be a useful way of ensuring that public funds are not dissipated on unnecessary litigation. The one problem that might arise is, that until a court has made a declaration there may be a lack of incentive to settle.

It is clear that the explosion in Judicial Review cases in the public sector is a cause of concern for the Lord Chancellor, the Department of Constitutional Affairs and the Lord Chief Justice. The Government has made concerted efforts to introduce and encourage the use of alternative dispute settlement processes such as central and local ombudsmen. In addition, it would now appear that there is a concerted effort to encourage the use of ADR. The guiding principles however are not yet finalised, so watch this space.

The Privy Council as a Court of Law.

The judicial function of the Privy Council is as a final court of appeal for commonwealth countries that have retained the court as their final court of appeal. This role is gradually diminishing. The Judicial Committee of the Privy Council can also hear appeals from the disciplinary board of the General Medical Council, deliver advisory opinions on points of law referred it by the Crown, and applications for the disqualification of members of the House of Commons. Post devolution, the Privy Council can also hear Scottish criminal appeals on retained powers, a major constitutional change since Scottish criminal law was originally intended, after the Act of Union, to be preserved.

Whilst the appellate role is not the same as judicial review, in many ways the role of the Privy Council has a largely supervisory element to it.

Recent Privy Council Cases

Darmalingum v The State⁸⁹ Appeal against convictions for aggravated embezzlement and forgery allowed because inordinate delay both before trial and appeal flagrantly breached the appellant's constitutional rights.

Baptiste v The State,⁹⁰ Held : In a capital trial it is particularly important that a defendant's rights were fully observed and the significance of any infringement of such right be considered by the judge.

Pratt v A.G.⁹¹ Long delay between sentence and execution rendered punishment inhuman and degrading.

Higgs & Mitchell v Minister of National Security.⁹² The prolonged periods and conditions during which the appellants had been held in prison, both before and after conviction, did not amount to "*inhuman or*

⁸⁹ **Sooriamurthy Darmalingum v The State** (2000) Appeal from Mauritius Before Lords Steyn and Hope, Sir Patrick Russell, Sir Andrew Leggatt, Blanchard J. 10/7/2000

⁹⁰ **Baptiste v The State** (2000) before Lords Nicholls, Steyn, Hoffmann, Hobhouse and Millet 8/6/2000

⁹¹ **Pratt & Anor. v A-G for Jamaica & Anor** (1994) Appeal from CA Jamaica. 2/11/93

⁹² **(1)-John Junior Higgs (2) David Mitchell v Minister of National Security & Ors** (2000)

Constitutional and Administrative Law

degrading treatment or punishment” contrary to Art. 17(1) of the Constitution of The Bahamas. Further, their execution would not violate their constitutional rights

Briggs v A.G of Trinidad & Tobago.⁹³ The consideration of a reprieve was not a legal process. It was not subject to the due processes of law. The Advisory Committee on the Power of Pardon was not bound to consider, let alone adopt, the recommendations of the Inter-American Commission on Human Rights.

Boodram v Commissioner of Prisons.⁹⁴ Condemned prisoners alleged hanging constituted cruel and unusual punishment. Held : It was the only lawful method of execution of a sentence of death in Trinidad.

Thomas & Hilaire v A.G of Trinidad & Tobago.⁹⁵ A condemned man had the right to complete any appellate process capable of commuting his sentence before executive action could be taken. The general right to the outcome of a pending appeal was not created by any Convention. It was a right accorded by the common law and confirmed in Trinidad and Tobago's Constitution.

AG of Antigua & Barbuda v Cuthwin Lennard Lake.⁹⁶ Whether a Prime Minister was entitled to terminate a Medical Superintendent's appointment and appoint another for political reasons was lawful.

Fisher v Minister of Public Safety & Immigration (NO.2).⁹⁷ Could a death warrant be issued where a prisoner was still awaiting the outcome of his petition to the Inter-American Commission on Human Rights.

De Freitas v Permanent Secretary of Ministry of Agriculture.⁹⁸ Civil servant of Antigua & Barbuda successfully appealed against an interdict for peacefully protesting against a government minister's actions.

Farrington v The Queen.⁹⁹ The right of a poor person to petition the Privy Council for special leave to appeal from a decision on the Bahamian Constitution.

Nankisoon Boodram Als v AG of Trinidad & Tobago.¹⁰⁰ Courses of action available under the Constitution of Trinidad and Tobago to ensure a fair trial when trial by media is threatened or imposed.

Norris Taylor v The Queen.¹⁰¹ Murder conviction quashed on grounds of delay in trial and appeal process.

Rees v Crane.¹⁰² Suspension of judge from Judicial office and appointment of tribunal to investigate the question of his removal from the bench *ultra vires* and contrary to the rules of natural justice Court.

New Zealand Maori Council v H.M. A.G.¹⁰³ Claim to prevent restructuring of New Zealand broadcasting as constituting a threat to the preservation of the Maori language Court.

Commissioner of Police v Davis & Franklin.¹⁰⁴ Conflict between a statute and the Bahamian Constitution.

Mohammed Mukhtar Ali & Shaik Murtuza Ali.¹⁰⁵ Death sentence set aside because the death sentence was the only penalty available to the court. Executive order to direct case to such a court contrary to the doctrine of the separation of powers and *ultra vires* the Constitution. Sentence set aside.

⁹³ **Briggs v Baptiste (Commr of Prisons), Petersen (Registrar of C.A) & AG of Trinidad & Tobago** (2000)

⁹⁴ **Boodram (AKA Dole Chadee) & Ors v Cipriani Baptiste (Commissioner of Prisons)** (1999) Before Lords Slynn, Nicholls, Hope, Clyde and Millett. 26/5/99

⁹⁵ **Thomas & Hilaire v Baptiste (Commissioner of Prisons), Petersen (Registrar of Supreme Court) & A.G of Trinidad & Tobago** (1999) Before Lords Browne-Wilkinson, Goff, Steyn, Hobhouse and Millett. 17/3/99

⁹⁶ **(1) AG of Antigua and Barbuda (2) Public Service Commission for Antigua and Barbuda (3) Honourable Lester Bryant Bird (4) Chief Establishment Officer v Cuthwin Lennard Lake** (1998) Before Lords Lloyd, Nicholls, Hope, Clyde and Hutton. 8/10/98

⁹⁷ **Trevor Nathaniel Penner-Man Fisher v Minister of Public Safety & Immigration (NO.2)** (1999) Bahamas.

⁹⁸ **Elloy De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land & Housing, Public Service Commission & H.M A.G** (1998) Before Browne-Wilkinson, Lloyd, Hoffmann and Clyde. 30/6/98

⁹⁹ **Ricardo Farrington v The Queen** (1996) Before Lords Keith, Jauncey and Steyn. 17/6/96

¹⁰⁰ **Nankisoon Boodram Als called Dole Chadee v (1) The A-G of Trinidad & Tobago (2) The DPP** (1996) Before Lords Goff, Jauncey, Mustill, Steyn and Hoffmann. 19/2/96.

¹⁰¹ **Norris Taylor v The Queen** (1995) Appeal from Jamaica.

¹⁰² **Evan Rees & Ors v Richard Alfred Crane** (1994) Appeal from the CA Trinidad & Tobago. 14.2.94

¹⁰³ **New Zealand Maori Council & Ors v H-M A-G & Ors** (1994) 13.12.93. On appeal from CA New Zealand.

¹⁰⁴ **Commissioner of Police v Skip Patrick Davis and Barry Franklin** (1993) 04/10/93

¹⁰⁵ **Mohammed Mukhtar Ali & Shaik Murtuza Ali Haji Gulam Rasool** (1992) Appeal from SC Mauritius.18.2.92

Constitutional and Administrative Law

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See The Law Commission Consultation Paper No126, Administrative Law : *Judicial Review and Statutory Appeals and The Public Law Project, Judicial Review in perspective* by Maurice Sunkin, Lee Bridges and George Meszaros, June 1993.

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Constitutional and Administrative Law

ANATOMY OF A CHALLENGE BY WAY OF JUDICIAL REVIEW

* START : APPLICATION PROCESS *

Ex Parte Application : Under Civil Procedure Rule 54 + Practice Direction 54

3 month time bar/limit (Discretion of court to extend)

3 Compulsory Tests to be passed – fail any one and you are out

- **Public Law Issue** (O'Reilly v Mackman)
- **Standing**; and (Gouriet v Union of Post Office Workers) : McInnes v Onslow Fane
- **Arguable case** that justice requires an answer to

No effective **ouster clause**. (Anisminic v Foreign Compensation Board)

Potential stay under CPR for **mediation** under Cowl v Plymouth

GROUNDS FOR ESTABLISHING ULTRA VIRES

Council for Civil Service Unions v Minister of State for Civil Service (GCHQ) Diplock

Illegality Contrary to Public Policy	Irrationality S.S. Education v Thameside	Procedural Impropriety
ABSENCE / ABUSE OF POWER	UNREASONABLENESS WEDNESBURY	NATURAL JUSTICE
<ul style="list-style-type: none"> ▪ No Jurisdiction or Power ▪ Beyond power A.G. v Fulham : Congrieve ▪ Unlawful Delegation Allingham v Min of Ag ▪ Surrender of discretion Policy overriding discretion ▪ Failure to carry out duty Padfield v Min of Ag ▪ Abuse of discretion ▪ Bad faith ▪ Breach of Human Rights ▪ Wrong Purpose 	Taking into account irrelevant factors or a failure to take into account relevant factors : to reach a decision no reasonable decision maker could have reached. Lord Greene	Natural Justice includes <ul style="list-style-type: none"> ▪ Bias : <i>Nemo Iudex in causa sua</i> Dimes v GJC : Pinochet ▪ Hearing : <i>Audi alterem partem</i> Liverpool Taxi : Cooper Ridge v Baldwin ▪ Pre-requisites not fulfilled Aylesbury Mushroom Farm ▪ Error of Law on face of record R v NCT ex p Shaw
	PROPORTIONALITY A ground under E.C. Law. Abuse of Power by going further than needed to solve the harm. R v HS ex p Brind Established international law concept.	

REMEDIES

(difficult to establish any breach if no reasons given)

QUASHING ORDER <i>Certiorari</i>	ENFORCEMENT ORDER <i>Mandamus</i>	PROHIBITION	HABEAS CORPUS R v Louise Collins	DECLARATION	DAMAGES EC Law Only ECJ+ ECHR
Undoes a decision as if it never happened	Makes an authority fulfil its statutory duty Padfield v Min Ag	Stops an authority acting unlawfully	Let us have the body	Explains / declares what the law is.	Free - Movement Discrimination Etc.