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Overview of Judicial Review

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Overview of Judicial Review

1. A general overview of judicial review can be divided into the following topics, of which the second (Grounds of Review) forms the focus of today's presentation:

(1) Procedural issues.

- (a) Introduction.
- (b) Pre-action conduct.
- (c) Protective Costs Orders.
- (d) Commencing a Claim.
- (e) The Acknowledgment of Service.
- (f) Permission.
- (g) Costs at the Permission stage.
- (h) Standing.
- (i) Alternative Remedies.
- (j) Time Limits.
- (k) Discretion to Refuse a Remedy.

(2) Grounds of Review

- (a) Illegality
  - (i) Doing an act with no legal authority (simple illegality).
  - (ii) Misinterpreting the law governing the decision.
  - (iii) Failure to retain a discretion by:
    - (1) Improper delegation.
    - (2) Fettering of discretion by adoption of over-rigid policy.
  - (iv) Abuse of discretion:
    - (1) Using a power for an improper purpose.

(2) Taking into account irrelevant considerations or failing to take into account relevant considerations.

(b) Irrationality.

(c) Procedural Impropriety.

(3) Remedies

(a) Prerogative Remedies:
  (i) Quashing Order
  (ii) Mandatory Order
  (iii) Prohibiting Order

(b) Common Law Remedies:
  (i) Injunction
  (ii) Declaration

(c) Pecuniary Remedies:
  (i) Damages
  (ii) Restitution.

Procedural Issues

Introduction

2. A claim for judicial review is defined widely by CPR 54.1(2)(a) as

> "a claim to review the lawfulness of –
> (i) an enactment; or
> (ii) a decision, action or failure to act in relation to the exercise of a public function."

3. The judicial review procedure must be used in a claim for judicial review when the Claimant is seeking a prerogative order (mandatory order, prohibiting order, or quashing order) or an injunction under *s30 Supreme Court Act 1981* (restraining a person from acting in any office in which he is not entitled to act): CPR 54.2.

4. The judicial review procedure may be used in a claim for judicial review where the Claimant is seeking a declaration or an injunction: CPR 54.3(1). A claim for judicial review may include a claim for damages, restitution, or the recovery of a sum due, but may not seek such a remedy alone: 54.3(2).

Pre-action conduct

5. The parties must comply with the pre-action protocol: see http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm.

6. Except in urgent cases, before making a claim the Claimant must write a letter before claim to the proposed Defendant in the standard form (see Annex A of the Protocol) identifying the decision which is being challenged, giving a brief summary of the facts, and explaining why it is "contended to be wrong", and what

remedy is sought. The letter should normally identify any interested parties, and copies should be sent to them.

7. Within 14 days the Defendant should send a letter of response in the standard form (see Annex B). This should provide where appropriate a fuller explanation of the decision, and indicate whether the claim is conceded in whole or in part, or will be contested. The letter of response should be sent to the interested parties.

8. Failure to comply with the pre-action protocol may well affect a party's prospects of recovering costs:

(1) In *R (William Kemp) v Denbighshire Local Health Board* [2006] EWHC 181 (Admin) the Claimant had effectively succeeded in obtaining funding of his nursing home costs; but because he had failed to comply with the pre-action protocol, there was no evidence that the Defendant would not have offered a review had a protocol letter been written, so no order for costs was made.

(2) In *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260 Lord Justice Brooke commented (para 54):

> "Needless to say, if the claimant skips the pre-action protocol stage, he must expect to put his opponents to greater expense in preparing the summary of their grounds for contesting the claim, and this may be reflected in the greater order for costs that is made against him if permission is refused."

(3) In *Aegis Group Plc v Inland Revenue Commissioners* [2005] EWHC 1468 (Ch) the Claimant discontinued judicial review proceedings, but because the Defendant took almost two months to reply to the Claimant's initial protocol letter, it was awarded only 85% of its costs.

Protective Costs Orders

9. A Claimant may wish to apply for an order that it pays not costs even if it loses the case. In *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347 Dyson J accepted that he had the power to make such an order – now known as a Protective Costs Order ("PCO"). However Dyson J indicated that only in the most exceptional circumstances would the discretion to make a PCO be exercised in a public law case. The criteria were stated at p358:

(1) The court is satisfied that the issues raised are truly ones of general public importance; and

(2) That it has a sufficient appreciation of the merits of the claim (by short argument) that it can conclude that it is in the public interest to make the order.

(3) The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue.

(4) It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

10. In *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 the Court of Appeal reviewed the jurisdiction and procedure of PCOs. The case involved an application for judicial review of procedures adopted by the Export Credit Guarantee Department of the DTI. Corner House was a non-profitmaking company with a particular interest and expertise in examining bribery and corruption in international trade.

11. The general principles were recast as follows:

> "1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> i) The issues raised are of general public importance;
>
> ii) The public interest requires that those issues should be resolved;
>
> iii) The applicant has no private interest in the outcome of the case;
>
> iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
>
> v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> 2. If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.
>
> 3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above." [74]

12. The second guideline in the CPAG case was modified,

> "no PCO should be granted unless the judge considers that the application for judicial review has **a real prospect of success**…" [73] (emphasis added)

13. The court commented that

> "Dyson J's requirement that the court should have a sufficient appreciation of the merits of the claim after hearing short argument tends to preclude the making of a PCO in a case of any complexity." [71]

14. A PCO which prescribed that there be no order as to costs whatever the outcome would generally only be granted where the Claimant's lawyers were acting pro bono.

15. Where the Claimant is expecting to have its reasonable costs reimbursed in full if it won, a costs capping order was more likely to be required.

16. As to the amount of the cap:

    (1) the court should prescribe by way of a capping order a total amount of the recoverable costs inclusive, so far as a CFA-funded party is concerned, of any additional liability;

    (2) The liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.

    (3) The overriding purpose is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly. [76]

17. As to procedure, a PCO should be sought on the face of the initiating Claim Form, supported by the requisite evidence, which should include a schedule of the Claimant's future costs of and incidental to the full judicial review application.

18. If the Defendant wishes to resist the PCO, it should set out its reasons in the Acknowledgment of Service.

19. The application will then be considered by the judge on the papers. If the judge refuses to grant a PCO and the Claimant requests that the decision is reconsidered at a hearing, the hearing should be limited to one hour.

20. In *R (Compton) v Wiltshire Primary Care Trust* [2008] ECA Civ 749, a challenge to the closure of the minor injuries unit at a hospital, the Court of Appeal held that there was no additional criterion that a case be exceptional. The court also held that issues of general public importance could include issues of public importance affecting only a section of the population – there was no need that the issue be of interest to all of the public nationally.

21. In *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 the Defendant's decision to grant planning permission in respect of a development was challenged. The court held:

    (1) There was no difference in principle to PCOs in environmental and non-environmental cases.
    (2) Where a court was making a PCO in favour of a Claimant, it might also be appropriate to cap the liability of the Defendant should the Claimant win.
    (3) There should be no automatic assumption that the Claimant's and Defendant's costs should be capped at the same amount: the amount of any cap depended on the circumstances.
    (4) A similar procedure to that at first instance should apply in the Court of Appeal. Issues of permission to appeal and PCOs should be considered at the same time, and the success fee (if the Claimant's lawyers are on CFAs) should be disclosed at the same time.

Commencing a Claim

22. The Claimant must use the Part 8 procedure as modified by Part 54. The relevant form is N461.

23. Permission is required (CPR 54.4). The Claim Form must be served on the Defendant and any person the Claimant considers to be an interested party within 7 days after the date of issue (54.7). Urgent relief must be applied for using form N463.

The Acknowledgment of Service

24. Any person so served who wishes to take part in the judicial review must file an acknowledgement of service including “a summary of his grounds” for resisting the claim: 54.8(1).

25. It must be filed not more than 21 days after service of the Claim Form: 54.8(2).

26. A party who fails to file an acknowledgment of service may not take part in any permission hearing, unless the court allows him to (54.9(1)(a)), and the failure may be taken into account in later decisions as to costs (54.9(2)). He is not precluded from taking part in the substantive hearing of the judicial review, subject to complying with the relevant rules for detailed grounds and evidence in 54.9(1)(b).

27. As to the contents of the Acknowledgment of Service:

> “Neither the rules nor the practice direction expand on what is meant by a "summary" of grounds. However, the "summary" required under this rule must be contrasted with the "detailed grounds for contesting the claim" and the supporting "written evidence", which are required following the grant of permission (CPR54.14). In construing the rule, it is necessary also to have regard to its purpose, and place in the procedural scheme. If the

> parties have complied with the Protocol, they should be familiar with the general issues between them. **The purpose of the "summary of grounds" is not to provide the basis for full argument of the substantive merits, but rather** (as explained in para 24 of the Bowman report: see para 15 above) **to assist the judge in deciding whether to grant permission, and if so on what terms.** If a party's position is sufficiently apparent from the Protocol response, **it may be appropriate simply to refer to that letter in the Acknowledgement of Service. In other cases it will be helpful to draw attention to any "knock-out points" or procedural bars, or the practical or financial consequences for other parties** (which may, for example, be relevant to directions for expedition). As the Bowman report advised, it should be possible to do what is required without incurring "substantial expense at this stage".” (emphasis added) (*R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260 at [43])

Permission

28. Unlike in private law, a claim for judicial review cannot be made as of right. A claimant must apply for permission to bring a claim for judicial review.

29. The requirement is designed to filter out claims which are groundless or hopeless at an early stage. The purpose is:

> “…to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error and to remove the uncertainty in which public… authorities might be left…” per Lord Diplock in *R v IRC, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 643

30. The Claimant must demonstrate that there is an arguable case for seeking judicial review. Permission will generally be considered initially without a hearing (Practice Direction para 8.4), and if a hearing is held the other parties need not attend unless the court so directs (PD para 8.5). Where such a party does attend a hearing the court will not generally make an order for costs against the Claimant: para 8.6.

31. If permission is given, the order is served on the Defendant and other parties by the Court|: 54.11. Any Defendant or other person served with the Claim Form who wishes to contest the claim must file and serve “detailed grounds” for doing so, within 35 days after service of the order granting permission: 54.14.

32. If permission is refused the Claimant can apply for an oral hearing for reconsideration of permission (54.12(3)), which must be filed within 7 days after service of the reasons for refusal (54.12(4)).

Costs at the permission stage

33. The jurisdiction is given by *section 51 Supreme Court Act 1980*, which provides that costs are in the discretion of the court.

34. In *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 the Court of Appeal stated the following:

> “Accordingly, I would hold the following to be the proper approach to the award of costs against an unsuccessful claimant, and to the relationship of the obligation in CPR 54.8 on a defendant "who wishes to take part in the judicial review" to file an acknowledgment of service with the general rule in paragraph 8.6 of the Practice Direction that a successful defendant at an oral permission hearing should not generally be awarded costs against the claimant:
>
> 1) The effect of *Leach*, certainly in a case to which the Pre-Action Protocol applies and where a defendant or other interested party has complied with it, is **that a successful defendant or other party at the permission stage who has filed an acknowledgment of service pursuant to CPR 54.8 should generally recover the costs of doing so from the claimant, whether or not he attends any permission hearing.**
>
> 2) The effect of paragraph 8.6, when read with paragraph 8.5, of the Practice Direction, in conformity with the long-established practice of the courts in judicial review and the thinking of the Bowman Report giving rise to the CPR 54 procedure, is that **a defendant who attends and successfully resists the grant of permission at a renewal hearing**

should not generally recover from the claimant his costs of and occasioned by doing so.

3) A court, in considering an award against an unsuccessful claimant of the defendant's and/or any other interested party's costs at a permission hearing, should only depart from the general guidance in the Practice Direction if he considers there are **exceptional circumstances** for doing so.

4) A court considering costs at the permission stage should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant;

5) **Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:**

a) the hopelessness of the claim:

b) the persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;

c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends – a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and

d) whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.

6) A relevant factor for a court, when considering the exercise of its discretion on the grounds of exceptional circumstances, may be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.

7) The Court of Appeal should be slow to interfere with the broad discretion of the court below in its identification of factors constituting exceptional circumstances and in the exercise of its discretion whether to award costs against an unsuccessful claimant." (emphasis added)

35. In *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260 the Court of Appeal commented as follows:

> "While I do not of course question the principles established by that decision, they must not be applied in a way which seriously impedes the right of citizens to access to justice, particularly when seeking to protect their environment…. A parallel may also be drawn with *R v Secretary of State for Trade and Industry, on the application of Corner House Research* [2005] EWCA Civ 192; [2005] 1 WLR 2600 (dealing with applications for protective costs orders…
>
> The considerations which may apply in responding to the application for permission will vary enormously from case to case. For example, where the subject-matter is in essence a commercial dispute between rival developers, different considerations may apply. In the ordinary case, however, the court must be particularly careful to ensure that the costs falling on the judicial review claimant are not disproportionately inflated by the involvement of the other parties at the permission stage." [41 – 2]

36. In that case the court also commented on the relevant procedure:

> "In any event, it is important that the procedure should not itself add unnecessarily to the costs. Pending (and without prejudice to) the consideration of the Civil Procedure Rule Committee, I would suggest the following. (i) Where a proposed defendant or interested party wishes to seek costs at the permission stage, **the acknowledgement of service should include an application for costs and should be accompanied by a schedule setting out the amount claimed.** (ii) The judge refusing permission should include in the refusal a decision whether to award costs in principle, and (if so) an indication of the amount which he proposes to assess summarily. (iii) The claimant should be given 14 days to respond in writing and should serve a copy on the defendant. (iv) The defendant will have seven days to reply in writing to any such response, and to the amount proposed by the judge. (v) The judge will then decide and make an award on the papers." [47] (emphasis added)

37. In *R (Roudham and Larling Parish Council) v Breckland Council* [2008] EWCA Civ 714 the Court of Appeal considered the proper approach to the award of costs where the defendant was entitled to its costs of preparing the acknowledgement of service i.e. "acknowledgement costs". At first instance Burton J had encouraged

the preparation of a very detailed acknowledgement of service and awarded an interim payment in respect of these costs of £12,500 (with the rest being the subject of detailed assessment - some £17,000 being claimed in total). Burton J indicated that he found it helpful to have acknowledgements of service which went well beyond summary grounds.

38. However, on appeal, the Court of Appeal held that on the authority of CPR 54.8(a)(i) and of *Ewing v Office of the Deputy Prime Minister*, the acknowledgement should contain only a summary of the grounds on which the claim is resisted and if a party wishes to go further than that at the permission stage, he does so at his own expense. The Court of Appeal held that it would be a matter for the permission judge to decide what need reasonably be said in a response to a claim i.e. the permission judge should apply the *Davey* approach to both "acknowledgement" and "preparation" costs. On the facts of the case the Court of Appeal awarded £5,000 as the appropriate amount for the preparation of the acknowledgement of service.

Standing

39. Section 31(3) Supreme Court Act 1981 requires a Claimant to have sufficient interest in the matter to which the application relates. The House of Lords have held that there is a two-tier test of standing: *R v IRC, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. At the permission stage, standing is regarded as a threshold issue, designed to exclude frivolous or vexatious applications. Only where the applicant is a busybody, or a crank, or a mischief-maker (*R v IRC, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 653), or motivated by ill-will or some other improper purpose (*R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 WLR 1761, para 23) will it be appropriate to refuse permission on the grounds of lack of standing. In one case a priest in the Church of England was held to be a busybody when he sought

judicial review of the decision of the Church of Wales to ordain women priests. He was not a member of that Church and had no connection with it.

40. A full consideration of whether the Claimant does have sufficient interest to claim the particular remedy sought will be undertaken at the substantive hearing of the application. In considering standing in any particular case:

> "it will be necessary to consider the powers or the duties in law of those against whom relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed" (*R v IRC, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, per Lord Wilberforce at 630)

41. A number of other factors can also be identified from the case-law (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd* [1995] 1 WLR 386, 395G – 396; *R v Inspectorate of Pollution, Ex parte Greenpeace (No. 2)* [1994] 4 All ER 329, 349 – 350):

(1) The merits of the challenge.

(2) The importance of vindicating the rule of law.

(3) The importance of the issue raised.

(4) The likely absence of any other responsible challenger.

(5) The nature of the breach.

(6) The role and expertise of any representative body seeking judicial review.

42. Generally the test is not difficult to satisfy, although there have been indications that a stricter approach would apply. In *R v Secretary of State for the Environment, Ex parte Rose Theatre Trust Co.* [1990] 1 QB 504 a company

formed to protect the remains of the Rose Theatre, and representing archeologists, artists, and politicians, applied for judicial review of a decision not to schedule the remains as a national monument. The court found that a pressure group could have no greater interest than its individual members and no individual citizen had standing to seek review of the decision.

43. The courts have not followed this restrictive approach. In *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd* [1995] 1 WLR 386 it was held that a responsible public interest group may have standing to seek an appropriate remedy in relation to measures affecting the activities or the interests that they represent. The World Development Movement Ltd challenged the lawfulness of a decision to grant overseas aid to fund the building of the Pergau Dam. The Claimant was a company limited by guarantee; it was a non-partisan pressure group which had existed for 20 years and received financial support from a wide variety of development charities, churches and other bodies. It had a UK membership of 13,000. It was particularly concerned with issues of development aid.

44. The Divisional Court held that it had standing. Factors which were particularly persuasive in the case itself were the merits of the challenge, the importance of vindicating the rule of law, and the likely absence of any other responsible challenger.

45. The test for standing within the Human Rights Act 1998 is rather more restrictive. It is unlawful for a public authority to act in a way that is incompatible with certain rights derived from the European Convention on Human Rights: s6(1). However s7(7) provides that a person is only to be taken to have sufficient interest for the purposes of seeking judicial review of an unlawful act if he is, or would be, a victim of the unlawful act applying the test set out in the caselaw of the European Court of Human Rights: *R (Hooper) v Secretary of State for Work and Pensions* [2003] 1 WLR 2623, para 29.

46. A victim for Convention purposes will be a natural or legal person directly affected by the act or omission which is said to give rise to a breach of a Convention right: *Corigliano v Italy* (1983) 5 EHRR 334, para 31. Thus public spirited citizens or representative groups cannot challenge the compatibility of actions of public authorities with the rights derived from the European Convention on Human Rights and seek to obtain declarations that legislation is incompatible with the Convention. However public interest groups may support individuals who are victims in making claims.

Alternative Remedies

47. The Claimant must generally prove that he has exhausted all alternative remedies before bringing a claim for judicial review, otherwise permission is likely to be refused. The general principle was stated by Lord Scarman in *R v Inland Revenue Commissioners, Ex parte Preston* [1985] AC 835, 852:

> "… a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

48. In *R v Epping and Harlow General Commissioners, Ex parte Goldstraw* [1983] 3 All ER 257, 262 Sir John Donaldson stated:

> "… save in the most exceptional circumstances, that [judicial review] jurisdiction will not be exercised where other remedies were available and have not been used."

49. However *Wade and Forsyth (Administrative Law, 9th Ed, 2004)* differ:

> "In reality the courts are better than their word. When genuine grounds for judicial review are alleged, it is the refusal rather than the grant of review which is the exceptional course." (at p 708 – 9)

50. They are right to suggest that the reality is not as simple as these general statements of the law; rather than a "rule" it is a general principle governing the exercise of judicial discretion.

51. A common issue is whether the alternative remedy is adequate on the facts of the case. Inadequacy can arise in a number of ways:

(1) The lack of a power to remedy a complaint fully and appropriately. In *R v Deputy Governor of Parkhurst Prison, Ex parte Leech* [1988] AC 533 the Home Secretary had power on appeal to remit a disciplinary punishment but at that time lacked power to quash the decision. As a result, a finding of guilt remained on a prisoner's record and might influence other decisions such as parole decisions. The House of Lords held that such an appeal was inadequate.

(2) The challenge may be to the validity of the regulation rather than against a decision applying that regulation; and the appellate tribunal may not have the power to quash the regulation.

(3) A complaint may include a claim for damage for breach of EU law or of a right derived from the European Convention on Human Rights, and an appeal procedure may not be able to deal with such claims. It such cases it may be appropriate to seek judicial review: see *R (Hoverspeed Ltd) v Commissioners for Customs and Excise* [2003] QB 1041, paras 57 – 8.

(4) Certain remedies are generally considered an inadequate alternative to judicial review, eg the opportunity to complain about a local authority decision to the local ombudsman, whose role is to supplement judicial

review remedies rather than to replace them: *R v Monmouth District Council, Ex parte Jones* (1987) 53 P&CR 108, and similarly for central government decisions and the ombudsman; or the ability to bring private prosecutions against alleged offenders when seeking judicial review of a decision of the police not to enforce certain criminal offences.

(5) Appellate machinery may be inadequate to resolve the dispute eg disputed factual issues. In *Ex parte Leech* appeals against disciplinary awards were conducted by civil servants on the basis of the papers alone. This was considered inadequate where alleged breach of natural justice was in issue, as the appellate authority lacked the power to order discovery and could not resolve disputes of fact. However such machinery would not be inadequate if the issue was of statutory construction rather than disputed fact.

(6) The additional speed of judicial review (in particular under the procedure for urgent cases using form N463) is an advantage which, in the case of questions of law, has been said to render judicial review preferable: see Lord Widgery CJ in *R v Hillingdon London Borough Council, Ex parte Royco Homes* [1974] QB 720, 729. However the greater speed of judicial review is unlikely of itself to justify circumventing an appeals procesure: see May LJ in *R v Chief Constable of Merseyside Police, Ex parte Calveley* [1986] QB 424, 436. Such a principle could otherwise be applied to many judicial review cases, resulting in the obliteration of the alternative remedies principle.

(7) The need for an interim remedy, which would not be available under the appeals or complaints system, may allow a claim for judicial review to be made.

(8) The ability of a successful Claimant to claim costs, where costs are not available in the alternative procedure, is unlikely to justify a claim for judicial review. The current approach of the courts is to encourage the use of alternatives to litigation, including alternative remedies in public law cases, precisely to avoid the costs of litigation.

(9) The need for authoritative judicial guidance, is also relevant, where there is an issue of general importance involved. In *R v Huntingdon District Council, Ex parte Cowan* [1984] 1 All ER 58 Glidewell J allowed the applicant to seek judicial review of a licensing decision rather than use the appeal procedure. The case raised for the first time the question of how local authorities were required to exercise their licensing functions under a particular statute. It was in the public interest that the court should give a ruling which would provide authoritative guidance for all local authorities. In another case the Court of Appeal considered that that judicial review was appropriate to determine whether a local authority was under an obligation to consult the residents of a residential home prior to closing the home. The scope of the duty of procedural fairness raised issues of law in a developing field which required authoritative resolution and was so the matter was better suited to judicial review rather than the use of the complaints procedure.

Time Limits

52. There are stricter time limits for bringing a claim in judicial review than in private law: a claim must be brought promptly and in any event within 3 months of the decision being taken (rather than communicated).

53. This is relevant both at the permission stage, being an independent ground for refusal of permission, and also as a reason for refusing relief at the substantive hearing.

54. *Section 31 Supreme Court Act 1981* states as follows:

> "(6) Where the High Court considers that there has been **undue delay** in making an application for judicial review, the court may refuse to grant –
> (a) leave for the making of the application; or
> (b) any relief sought on the application,
> if it considers that the granting of the relief sought would be likely to cause **substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration**.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made." (emphasis added)

55. CPR 54.5 states:

> "(1) The claim form must be filed –
> (a) **promptly**; and
> (b) **in any event not later than 3 months** after the grounds to make the claim first arose.
>
> (2) The time limit in this rule may not be extended by agreement between the parties.
>
> (3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review." (emphasis added)

56. CPR Part 3.1 states:

> "(2) Except where these Rules provide otherwise, the court may –
> (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)…"

57. There are three stages to the test (*R v Dairy Produce Quota Tribunal, Ex parte Caswell* [1990] 2 AC 738, 749 – 50:[1]

(1) Whether the claim was issued promptly and in any event within three months of the grounds arising. The courts have repeated stressed that issue within three months does not necessarily constitute compliance with the promptness requirement. The safest course is for a Claimant to issue well within the three month period, in order to avoid such difficulties.

(2) If the claim was issued late, whether time ought to be extended (now under CPR 3.1(2)(a)).

(3) If the claim was not issued late, or if it was issued late and if time should be extended, whether the grant of relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. This is a ground fore refusing permission, and for refusing relief at the substantive hearing.

58. In *Caswell* the Claimant was refused a quashing order to quash a decision fixing his dairy quota, as he had applied out of time and granting relief would be detrimental to good administration. Lord Goff stated that a precise definition of what constitutes detriment to good administration could not be formulated as the need for finality would differ from one context to another.

59. In *Caswell*, the detriment to good administration resulted from the fact that if Caswell were to succeed in having his quota quashed notwithstanding the delay, a substantial number of Claimants could be encouraged to seek review of their

[1] On similar, but not identical, wording to CPR 54. RSC Ord. 53 r.4 stated: "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

quotas. If a substantial number of those Claimants were successful, it would involve re-opening all allocations over the previous four years, since increased quotas could only be given to successful Claimants if the quotas of other producers were correspondingly reduced.

60. This would undermine the interests of good administration in a regular flow of consistent decisions reached with reasonable speed, which enabled the citizen to order his affairs in the light of those decisions. Relevant factors in assessing the detriment would be the length of the delay, the extent and effect of the decision under challenge, and the impact if it were to be re-opened. The judge had been correct in concluding that the detriment to good administration outweighed the financial hardship suffered by the Claimant as a result of the decision, and in refusing to quash the decision.

61. In *(Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23 [2002] 1 WLR 1593 Lord Steyn described s31 as follows:

> "…It is, however, a useful reserve power in some cases, such as when an application made well within the three month period would cause immense practical difficulties."

62. He then approved the following quotation from David Pannick QC sitting as a deputy:

> "In my judgment, it is absolutely essential that, if parents are to bring judicial review proceedings in relation to the allocation of places at secondary school for their children, the matter is heard and determined by a court, absent very exceptional circumstances, before the school terms starts. This is for obvious reasons relating to the interests of the child concerned, the interests of the school, the interests of the other children at the affected school and, of course, the teachers at that school."

63. To what extent can a claim said to be in breach of the promptness requirement, when it has been issued within the three month long stop?

64. Generally it will be difficult to sustain a claim for lack of promptness if a claim is commenced within 3 months. In *R (A1 Veg Ltd) v Hounslow LBC* [2003] EWHC 3112 (Admin) Silber J stated at [40]:

> "a useful starting point is that when judicial review claims are brought within the prescribed three month period, there is a rebuttable presumption that they have been brought promptly…"

65. However it is possible for a claim to breach the promptness rule even within 3 months. In *R v Independent Television Commission, ex p TV Northern Ireland Limited* [1996] JR 60 [1991] TLR 606, the court stated that it is not correct to proceed on the basis that applicants have three months in which to seek judicial review:

> "In these matters people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged" (per Lord Donaldson MR at p61)

66. In that case the court refused applications for judicial review because of a lack of promptness, even though the applications had been made within three months.

67. In *Hardy v Pembrokeshire County Council* [2006] EWCA Civ 240 the court expressed the reasoning behind such decisions as follows:

> "A public law decision by a public body in almost all cases affects the rights of parties other than the decision-maker and the applicant seeking to challenge such a decision. It is important that these parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly."

68. In *R v Monopolies and Mergers Commission, Ex parte Argyll Group* [1986] 1 WLR 763 Sir John Donaldson MR stated:

> "Good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary" (p774H – 775B)

69. In *R (Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23 [2002] 1 WLR 1593 Lord Steyn described the inference that had sometimes been drawn that the three month time limit had been replaced by a six week rule (para 53). He described this as a misconception.

70. Is the requirement of promptness too vague to satisfy the European Convention and/or EU law?

71. There was a suggestion in *Burkett* by Lord Steyn questioning whether the concept of promptness was sufficiently certain to comply with the European Convention and EU law:

> "…there is at the very least doubt whether the obligation to apply "promptly" is sufficiently certain to comply with European Community Law and the Convention for the Protection of Human Rights and Fundamental Freedoms. It is a matter for consideration whether the requirement of promptitude, read with the three months time limit, is not productive of unnecessary uncertainty and practical difficulty." [53]

72. However this view was rejected by the Court of Appeal in *Hardy v Pembrokeshire County Council* [2006] EWCA Civ 240. Lord Justice Keene stated that the very point had been advanced before the European Court of Human Rights in the case of *Lam v United Kingdom*, application 41671/98, and rejected. The case concerned an application for leave to seek judicial review of a planning decision where leave had been refused on the ground of lack of promptness under RSC Order 53. The Court rejected a claim that the rule was contrary to the principles of legal certainty and/or article 6:

> "In so far as the applicants impugn the strict application of the promptness requirement in that it restricted the right of access to a court, the Court

> observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim. The applicants were not denied access to a court *ab initio*. They failed to **satisfy a strict procedural requirement which served a public interest purpose, namely the need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions**." (emphasis added)

73. However *Lam* had not been cited to the House in *Burkett*. Other reasons given by the court included:

(1) The European Court of Human Rights in *Sunday Times v United Kingdom* [1979 – 80] 2 EHRR 245 had held that, while a citizen should be able to foresee to a reasonable degree the consequences which an action may entail,

> "those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable."

(2) That the notion of promptness was no more uncertain than "undue delay" in s31, which Lord Steyn had specifically endorsed as a "useful reserve power".

(3) The European Convention on Human Rights itself employs the concept of "promptness" in Article 5(3).

74. In that case there were two proposals for the construction of very large Liquefied Natural Gas terminals at Milford Haven, and the challenge was to the grant of planning permission and hazardous substance consents. The Claimant was seeking permission to appeal against the refusal of permission to claim judicial review, which had been refused for (1) lack of promptness, (2) undue delay (s31), and prejudice to third parties. All of the decisions under challenge except one had been made more than three months prior to issue, and that one had been issued on the last day possible within the three month period. The prejudice arose out of works with a combined contract value of £560 million.

75. In *R (Grierson) v OFCOM* [2005] EWHC 1899 (Admin) the Claimant sought to review OFCOM's award of a license of a second commercial radio station for Cornwall to a rival company, Atlantic Broadcasting Ltd. The claim had been issued 2 ½ months after the decision had been made, and Atlantic stood to lose financially were permission to be granted: it had spent £8,500 on its search for property, and was paying £5,000 a month to keep itself ready to act. Stanley Burnton J rejected the assertion that the claim had not been issued promptly, although permission on the merits was ultimately refused:

> "So far as delay is concerned, this is not a case in which the claimant's delay has been so egregious that the court should refuse to countenance the grant of permission regardless of the merits of his claim." [24]

76. He also commented that:

> "The more important an arguable issue, the stronger its apparent merits, the more ready should the court be [to] grant standing and the less strict should it be in its application of the requirement that proceedings be commenced promptly." [23]

77. In *R (Deepdock Limited) v The Welsh Minister for Environment Planning and the Countryside* [2007] EWHC 3347 (Admin) the Claimant sought judicial review of the decision to grant a license to deposit substances in the sea for the construction of a yacht marina pursuant to the Food and Environmental Protection Act 1985. The Claimant companies was engaged in mussel farming whose businesses were allegedly to be affected, and they issued proceedings 2 months 25 days after the grant of the license.

78. The judge specifically rejected the submission that, in the context of the grant of a license, that if the application was made within 3 months there had to be special or exceptional circumstances to justify a conclusion that the application had not been made promptly. The judge approved the following passage from *R (Young) v*

Oxford City Council [2002] EWCA Civ 990, in relation to the grant of planning permission:

> "… the obligation to file the claim form promptly remains a feature of English law, in my view, and the presence of the word "promptly" in the rule should not be ignored. Those who seek to challenge the lawfulness of planning permissions should not assume, whether as a delaying tactic or for other reason, that they can defer filing their claim form until near the end of the three month period in the expectation that the word "promptly" in the rule is a dead letter."

79. The judge dismissed the application for permission and held that the claim had not been issued promptly. Although the issue of s31 did not arise, the judge stated:

> "the… [Claimants] knew or certainly ought to have known that delay in bringing such a challenge was potentially prejudicial…I say that since it must be obvious that there are likely to be time constraints and linked financial considerations associated with the construction of a project of the magnitude of a marina. Any delay has the potential for prejudice…" [35]

80. Whether the court extends time under CPR 3.1(2)(a) is a matter of discretion. Factors relevant to the exercise of discretion include the following, where:

(1) The Claimant reasonably did not know of the decision.

(2) The Claimant was pursuing alternative remedies.

(3) Delay in obtaining CLS funding.

(4) Hardship, prejudice and detriment to good administration.

(5) The merits of the claim and the importance of the issues.

Discretion to refuse a remedy

81. It is a characteristic of public law that, even though grounds of review are proved, a remedy may be refused as a matter of discretion. There is no right in principle[2] to a remedy once the grounds have been proved, unlike in private law.

82. For instance, if a Claimant is motivated by some improper purpose or ill-will in bringing the claim, the court might decline to grant a remedy: *R (Mount Cook) v Westminster City Council* at para 45 – 6.

83. A ratepayer was refused a remedy to quash a refusal to make a refund of rates because of his previous deliberate and unjustifiable withholding of rates owed, and because there would be no unjust enrichment as far as the council were concerned, since the money not refunded represented fair compensation for the loss of interest on sums which ought to have been paid previously.

84. Claims may be made unduly early as well as late. A Claimant may seek to review an error in the decision-making process before that process is completed and a final decision reached, or he may seek to review a preliminary decision such as a decision refusing an adjournment or allowing certain evidence to be admitted. Decisions of this nature are subject to judicial review; the issue is whether the court will refuse permission, or relief at a substantive hearing, and insist that the Claimant wait until the final decision has been reached. For instance, normally an individual should await the final outcome of a disciplinary hearing and not seek judicial review of a preliminary decision, such as a finding that notice of the disciplinary charges had been given as soon as possible.

[2] Subject to proof of loss.

85. The courts may refuse a remedy where it is no longer necessary in the circumstances, or where the issues have become academic or of no practical significance. The court refused a declaration that the Inner London Education Authority was in breach of its duty, when the authority was due to be abolished a few weeks later. In *R (Broadbent) v Parole Board* [2005] EWHC 1207 (Admin) The Times 22 June 2005 although the Board's assessment of risk of reoffending in relation to the Claimant had been flawed, since it was to reconsider risk shortly, relief was refused.

86. The fact that the Claimant has suffered no prejudice as a result of the error complained of may be a reason for refusing him a remedy. The courts may refuse relief where there has been a breach of natural justice, but the Claimant has still had a fair hearing. One example is where an investigatory body fails to disclose material, where that material was in fact known to the Claimant and has has had the opportunity to deal with it: *R v Monopolies and Mergers Committee, Ex parte Brown (Matthew)* [1987] 1 WLR 1235.

87. A court may be influenced by the fact that a public body would have exercised its powers in the same way, or reached the same decision, even if it had not fallen into error. This argument is more persuasive in the case of an error of law, or failure to consider a relevancy, than in the case of a breach of natural justice.

88. However this is a potentially dangerous principle, for it apparently excuses unlawful action by public authorities, and tempts courts into substituting their own opinions for those of the decision-maker. Accordingly, the courts should not refuse relief unless the same decision would undoubtedly be reached irrespective of the error, and there is a clear countervailing public interest in not quashing the decision.

89. Decisions of public bodies may affect others in addition to the Claimant, who may have acted in the belief that the decision was valid. The court may have regard to

the interests of such third parties in deciding whether to grant relief. Examples include the financial field: decisions of regulatory bodies such as the Monopolies and Mergers Commission, or the Panel on Take-Overs and Mergers, may be relied upon in good faith by dealers in the market. In the education field, where a local authority challenges a ministerial decision on the status of a school, the interests of that school and of other schools affected by the proposals need to be considered in deciding whether to grant a remedy.

90. The impact on the administration is also relevant to remedial discretion, for court decisions may impose heavy burdens on the administration which divert resources away from the main activity being carried out. In *R v Monopolies and Mergers Commission, Ex parte Argyll Group* [1986] 1 WLR 763 Sir John Donaldson MR emphasized the need to take into consideration the principles of good public administration in deciding whether to grant a remedy. The Chairman of the Commission had made a decision that a take-over bid had been abandoned, leaving the bidder free to make a fresh bid. Under the statute the decision should have been taken by the Commission, and there was no power to delegate the decision to the Chairman. The Court of Appeal refused a remedy, referring to the need for speedy decision-making, finality, and decisiveness once a decision has been reached, particularly in the financial markets. Compelling reasons would be needed to quash a decision in such circumstances. The public interest had been protected as the Secretary of State had approved the decision. The Claimant's interest was merely that of a commercial rival seeking to prevent the bidder from making a fresh bid; that was insufficient to justify granting a quashing order.

91. The nature of the decision may be relevant to whether a remedy is granted. For instance the courts have indicated that they will not normally interfere in decisions involving the allocation of resources, particularly in a field involving difficult expert judgments such as the health service. The House of Lords has emphasized the undesirability of the courts intervening too readily to review decisions

involving the allocation of limited resources: *R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* [1999] 3 WLR 1260.

Grounds of Review

92. These have grown since the tripartite classification of **illegality**, **irrationality**, and **procedural impropriety** in *CCSU v Minister for the Civil Service* [1985] AC 374.. Furthermore, as Lord Roskill in *Wheeler v Leicester City Council* [1985] observed: "Those three heads are not exhaustive, and as Lord Diplock pointed out, further grounds may hereafter require to be added. Nor are they necessarily mutually exclusive." Indeed the coming into force of the *Human Rights Act 1998* has added the further ground of acting incompatibly with a Convention right (s6). It is worth also noting the rather poetic dictum of Lord Donaldson MR in *R v SSHD, ex parte Oladehinde* [1991] 1 AC 254 (CA): "…it would be a mistake to approach the judicial review jurisdiction as if it consisted of a series of entirely separate boxes into which judges dipped as occasion demanded. It is rather a rich tapestry of many strands, which cross, re-cross and blend to produce justice".

Illegality

93. There are 4 types of illegality:

(1) Doing an act with no legal authority (simple illegality).

(2) Misinterpreting the law governing the decision.

(3) Failure to retain a discretion by:
    (a) Improper delegation.
    (b) Fettering of discretion by adoption of over-rigid policy.

(4) Abuse of discretion:
    (a) Using a power for an improper purpose.

(b) Taking into account irrelevant considerations or failing to take into account relevant considerations, or breaching a legitimate expectation.

Doing an act with no legal authority

94. An example of simple illegality was *Laker Airways v Department of Trade* [1977] QB 643 CA in which the Secretary of State's policy guidance was held unlawful as it cut across the statutory objectives which made it clear that the British Airways Board was not to have a monopoly. The Secretary of State should have amended the Act, rather than issuing guidance.

Misinterpreting the law

95. As to errors of law, the argument that there were certain "non-jurisdictional" errors of law which did not render a decision unlawful was put to rest in *R v Lord President of the Privy Council, ex p Page* [1993] AC 682. In that case a lecturer at Hull University was given three months' written notice terminating his employment on the ground of redundancy. His appointment was subject to the terms of his letter of appointment and to the university statutes. Mr. Page petitioned the visitor of the university for a declaration that his purported dismissal was contrary to the statutes of the university and was of no effect. The visitor dismissed the petition, and the Claimant commenced JR proceedings. The House of Lords held that there had been no error in the interpretation of the statues. Lord Browne-Wilkinson stated

> "In my judgment the decision in *Anisminic*… rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of *ultra vires*. Thenceforth it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis".

96. A recent example of an unsuccessful challenge under this head is *(1) Friends of the Earth (2) Help the Aged v (1) Secretary of State for Energy and Climate Change (2) Secretary of State for Environment, Food and Rural Affairs* [2009] EWCA Civ 810.

Failing to retain a discretion

97. In *Barnard v National Dock Labour Board* [1953] 2 QB 18 the local board delegated the power to suspend to the port manager. The Court of Appeal held that while an administrative function can often be delegated, a judicial function rarely can be. This was held to be a judicial function, and there was no express or implied power to delegate, so the delegation was unlawful.

98. Governmental functions can be delegated to civil servants within central government (*Carltona v Commissioners of Works* [1943] 2 All ER 560) but there are limits to that doctrine – provided the delegation does not conflict with or embarrass them in the discharge of their statutory responsibilities and that the decisions are suitable to their grading and experience (in the context of delegation of powers to authorise service of notices of intention to deport person from the UK: *R v SSHD, ex p Oladehinde* [1991] 1 AC 254).

99. The leading case on the question of an over-rigid adherence to a general policy is *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 which concerned the discretion of the Board of Trade to make investment grants for new plant. They had a rule of practice not to approve grants for items which individually cost less then £25. The Claimant spent over £4 million on cylinders which individually costs less then £25. The House of Lords held that the Defendant was entitled to have a general policy:

> "provided the authority is always willing to listen to anyone with something new to say"; "The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application""

Abuse of discretion

100. A further head is abuse of discretion. This includes:
   (1) Improper purposes.
   (2) Taking into account irrelevant considerations/not taking into account relevant considerations.
   (3) Unreasonableness (see above).

101. Discretionary power must be exercised for the purposes for which it has been given. For instance in *Wheeler v Leicester City Council* [1985] AC 1054 the Defendant purported to be acting under the general duty under the *Race Relations Act 1976* to "promote good race relations", and also under its broad powers to manage its own land, the Defendant withdrew the licence of a local rugby club to use the council-owned recreation ground. The council did this as a mark of their disapproval that the club had been unable to persuade some of its members to withdraw from the English rugby tour of South Africa at the time of apartheid. The House of Lords held the Defendant's action unlawful. Lord Templeman considered it to be a "misuse of power… punishing the club when the club had done no wrong".

102. As to relevant and irrelevant considerations, there is a threefold distinction:
   (1) Factors which must be taken into consideration.
   (2) Factors which may be taken into consideration.
   (3) Factors which must not be taken into consideration.

103. An example is *R v SSHD, ex p Venables and Thompson* [1998] AC 407 in which the House of Lords held that the Secretary of State, who had fixed a tariff of 15 years, had acted unlawfully in taking account of the legally irrelevant factor of

public clamour that a particular offender whose case is under consideration should be singled out for severe punishment.

104. In *R (Corner House Research) v Serious Fraud Office* [2008] UKHL 60 the House of Lords overturned the perhaps bold decision of the Divisional Court that the Director of the Serious Fraud Office had acted unlawfully in halting a criminal investigation into bribery allegations concerning a contract for military aircraft between the UK government and Saudi Arabia, having been informed by Saudi Arabia that if the investigation continued, it would withdraw its support for counter-terrorism arrangements. The Divisional Court had 'identified' a principle that 'submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker'. The House of Lords reiterated that the question to be decided was whether the decision was lawful, not whether it was wrong, and concluded that the decision was one which was reasonably open to the Director.

105. A further, and more recent example is the challenge to the (previous) Government's support to a third runway at Heathrow, in the case of *R(oao Hillingdon & Others) v Secretary of State for Transport (Defendant) & Transport for London (Interested Party)* [2010} EWHC 626 (Admin).

106. Legitimate expectation is an interesting new ground of review. It can be either procedural or substantive. The latter is more controversial, and is more apt to merge into appeal rather than review. The seminal case is *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 in which a promise by a health authority that a particular nursing home would be the Claimant's "home for life" was upheld as an application of the following principles:

> "There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to

> reviewing the decision on *Wednesbury* grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see *In re Findlay* [1985] AC 318; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it (see *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.
>
> … most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract."

107. In *R (Bhatt Murphy) v Independent Assessor, R (Niazi) v Secretary of State* [2008] EWCA Civ 755 two decisions of the Secretary of State were challenged: to end a discretionary scheme for the compensation of victims of miscarriages of justice, and to take a less generous approach to the payment of legal costs arising from applications for compensation for victims of miscarriages of justice (whether under the statutory scheme or the discretionary scheme). Both challenges relied on claims of legitimate expectation, and the court took the opportunity to review the principles in this area of judicial review.

108. With respect to procedural legitimate expectation, Laws LJ repeated his view that detrimental reliance is not a necessary ingredient of a successful claim:

> "30. […] My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how

> harshly the decision bears upon any individual. It arises because good administration ("by which public bodies ought to deal straightforwardly and consistently with the public": paragraph 68 of my judgment in *Ex p Nadarajah* [2005] EWCA Civ 1363) generally requires that where a public authority has given a plain assurance, it should be held to it. This is an objective standard of public decision making on which the courts insist."

109. Aside from the *'paradigm case'* of procedural legitimate expectation, in which *'a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy'*, Laws LJ identified another type of case, the *'secondary case of procedural legitimate expectation'*.

110. This type of case arises where a decision-maker seeks to deprive an individual of some benefit or advantage which he has in the past been permitted to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment. This category of claim raises a question:

> "40. […] What are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it where there has been no previous promise or practice of notice or consultation?"

111. Laws LJ noted that a similar question arises in relation to substantive legitimate expectation:

> "32. […] A substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it.
>
> 33. […] In the procedural case we find a promise or practice of notice or consultation in the event of a contemplated change. In the substantive case we have a promise or practice of present and future substantive policy.

This difference is at the core of the distinction between procedural and substantive legitimate expectation.

36. The concept of substantive legitimate expectation therefore poses a question: what are the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit?"

112. He gave the following guidance in relation to both questions:

(1) Both types of legitimate expectation are concerned with exceptional situations: governments are entitled to formulate and re-formulate policies without having to *'bow to another's will'* (para.41).

(2) But, the court will interfere where not to do so would be '*so unfair as to amount to an abuse of power, by reason of the way in which [the decision-maker] has earlier conducted itself*' (para.42).

(3) In relation to substantive legitimate expectation, there must be '*a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured*' (para.43). Further, '*though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good'* (para.46).

(4) In relation to the second class of procedural legitimate expectation, this will *'not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. […] The impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult.'* (para.49)

(5) In general, '*the idea that the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public, and by that token commends the doctrine of legitimate expectation, should be treated as a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. Any departure from it must therefore be justified by reference among other things to the requirement of proportionality*' (para.51).

113. Laws LJ went on to hold that neither of the challenges before the court met these various requirements and the appeals against refusal of permission for judicial review were dismissed.

114. The doctrine of legitimate expectation was also considered by the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61. However, their Lordships did not engage in substantive analysis of the doctrine. Lord Hoffman said that the relevant principles were not in dispute and he did not think this was the occasion to examine the jurisprudence concerning substantive expectations (para 60); Lord Carswell stated he did not wish to express a concluded view about the scope of the doctrine (para 133); and Lord Mance embarked on more extended discussion on the footing that the relevant principles were not in dispute (para 177).

115. Lord Mance considered the approach adopted by Laws LJ in *Nadarajah* (reiterated in *Niazi*) and stated that he had *"no difficulty in accepting as the underlying principle a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public"*. However, he preferred to reserve for another case his opinion as to whether it is helpful or appropriate to rationalise the situations in which a departure from a prior decision is justified in terms of proportionality.

116. In *R (British Medical Association) v General Medical Council* [2008] EWHC 2602 (Admin), there was an unsuccessful challenge to the GMC's decision to abolish a concession for doctors aged over 65 in relation to the payment of annual

retention fees. The GMC had obtained advice from a QC to the effect that the concession contravened the *Employment Equality (Age) Regulations 2006, SI 2006/1031*, for there was no conceivable justification (ie a proportionate means of meeting a legitimate aim) for the less favourable treatment of those aged under 65.

117. Accordingly the GMC resolved to abolish the concession, as soon as possible.

118. The Claimant submitted that the failure to consult doctors paying the annual retention fee amounted to an abuse of power and was an example of conspicuous unfairness. Strangely, the Claimant did not dispute that the concession was an example of age discrimination, but suggested that if the GMC was unable to identify a legitimate aim achieved proportionately by the exemption, others may have been able to do so.

119. The judge rejected the claim:

(1) There was no evidence that the GMC had previously consulted when changing fee exemptions or raising the fees, and neither had the GDC done so when it abolished its age exemption.
(2) Nor had the GMC done anything to encourage the belief that all registered medical practitioners would be consulted before the age exemption was abolished.
(3) The proposed consultation of 231,000 registered medical practitioners would have been cumbersome and time-consuming in the face of a firm conclusion that the current practice was illegal.

Irrationality

120. Irrationality has developed its meaning since first being referred to in the retrospectively seminal case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, a case about whether a condition

imposed on a licence to permit Sunday cinema performances as long as no children under 15 were admitted was unlawful. Lord Greene MR described the test as follows:

> "…there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority… [for example] the red-haired teacher, dismissed because she had red hair…
>
> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere…"

121. A dismissal of a red-haired teacher could also be challenged on the basis that it took into account an irrelevant consideration. The weight to be attached to a relevant consideration is, absent irrationality, for the decision maker: *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759. Provided relevant matters have been taken into account and the law correctly understood, there are few situations where a particular outcome is irrational when looked at in general terms. Irrationality does depend on the Court's view of the facts of the case.

122. It is also sensitive to the nature of the decision, as Sullivan J observed in the Airports White Paper challenge (*R (London Borough of Wandsworth) and others v Secretary of State for Transport* [2005] EWHC 20 (Admin)):

> "58. In his Summary Grounds of Defence it was submitted on behalf of the Defendant that the White Paper was not amenable to judicial review: the Defendant was answerable to Parliament for the policies in the White Paper, but not to the Court. This position was not maintained in the Defendant's Detailed Grounds. It was no longer contended that the White Paper was not in principle amenable to judicial review, rather it was submitted that there was a spectrum of decisions, ranging from answers to questions of primary fact, where the Court would be as well equipped to answer the question as the decision-taker, to questions of political and economic judgement, where the Court's approach to judicial review would acknowledge that it was singularly ill-equipped to answer such questions: see *R (on the application of Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129, [2001] 3 WLR 323, paras 47 – 50. Where a decision is based upon the evaluation of political or

economic considerations there will be a heavy evidential onus upon a claimant for judicial review to establish that such a decision is irrational, absent bad faith or "manifest absurdity". It was submitted on behalf of the Defendant that the policy decisions in the White Paper were very much at the latter end of the spectrum.

[59] Subject to their submissions as to the fairness of the process, the Claimants did not dissent from the generality of this proposition and accepted that certain policy decisions in the White Paper, for example the decision that the first priority was to make the best possible use of existing runways, fell at the latter end of the spectrum. However, they submitted that within the White Paper itself there was a spectrum of decisions ranging from the broad proposition in para 2.18 that "A balanced and measured approach to the future of air transport is needed", which could not sensibly be challenged, to the particular, that the new runway at Stansted "would be the wide-spaced runway option presented in the consultation document", which was challenged as being unduly prescriptive ..."

123. Irrationality challenges therefore tend to be successful in two circumstances:

(i) The decision maker could not rationally have reached the conclusion it did in the light of its earlier conclusion;

(ii) The decision maker could not rationally proceed to reach a conclusion in the absence of particular information.

124. A recent example in the first category is the Herceptin case: *R (Rogers) v Swindon NHS Primary Care Trust* [2006] 1 WLR 2649, in which the Court of Appeal held the Defendant's policy adopted with respect to Herceptin was irrational. Having stated that financial considerations were irrelevant, it was irrational for the PCT not to fund all requests for Herceptin within the group defined as able to benefit. There was no rational method of differentiating between different patients on the basis of personal characteristics:

> "All the clinical evidence is to the same effect. The PCT has not put any clinical or medical evidence before the court to suggest any such clinical distinction could be made. In these circumstances there is no rational basis for distinguishing between patients within the eligible group on the basis of exceptional clinical circumstances any more than on the basis of personal, let alone social, circumstances. In short, we accept Mr Pannick's submission that once the PCT decided (as it did) that it would fund Herceptin for some patients and that cost was irrelevant, the only

> reasonable approach was to focus on the patient's clinical needs and fund patients within the eligible group who were properly prescribed Herceptin by their physician. This would not open the floodgates to those suffering from breast cancer because only comparatively few satisfy the criteria so as to qualify for the eligible group."

125. Yet the court had approved a dictum of Sir Thomas Bingham as follows:

> "the courts are not, contrary to what is sometimes believed, arbiters as to the merits of cases of this kind. Were we to express opinions as to the likelihood of the effectiveness of medical treatment, or as to the merits of medical judgment, then we should be straying far from the sphere which under our constitution is accorded to us. We have one function only, which is to rule upon the lawfulness of decisions. That is a function to which we should strictly confine ourselves."

126. In *R (Ross) v West Sussex PCT* [2008] EWHC 2252 the Claimant challenged the decision of the PCT not to fund a cancer drug without which his life expectancy would be very limited. The Court reminded itself of the cautious approach identified in *R v Cambridgeshire Health Authority ex p B* [1995] 1 WLR 898 and that the court was concerned not with the merits but only with the legality of the decision. The Court, in concluding that the PCT's policy was unlawful, subjected the policy to a detailed scrutiny, ruling at para 79 that:

> ".. the PCT's policy is unlawful because it is a contradiction as defined by its own terms because:
>
> i) it is not a policy for exceptional cases because a person is automatically disqualified if he can be likened to another: in order to qualify, a person must show in effect that he is unique, rather than merely exceptional…
>
> ii) in practical terms, in a case such as this Claimant's it is impossible to show uniqueness, so the policy is incapable of fulfilment because (i) it will always be possible for another patient to emerge who is appropriately comparable; and (ii) the comparison depends on how widely a label is drawn by the PCT eg whether the Claimant should be compared to any cancer patient who suffers unpleasant side effects or to something more specific;
>
> iii) in my view, it is impossible to envisage circumstances other than those where the applicant shows that his or her circumstances are

> unique, whereas in a simple policy of exceptionality … a reviewing panel would have no difficulty in applying the ordinary meaning of exceptional." [3]

Applying this policy, the PCT panels were led into error because they clearly thought that, because other patients could find themselves in the Claimant's position, he could not come within the concept of exceptionality.

127. In a challenge to a planning permission for a windfarm, Sullivan LJ held (*R(Friends of Hethel Limited) v South Norfolk Council* [2010] EWCA Civ 894 at paragraph 32:

> "... while the question whether a proposed development affects, or would affect the setting of a listed building is very much a matter of planning judgment for the local planning authority ("in the opinion of the local planning authority", "and the authority think"), in view of the conclusions in the [Environmental Statement ("ES")] the First Respondent had to consider whether this proposed development affected, or would affect the setting of the listed buildings referred to in the ES. Unless the First Respondent disagreed with the conclusions in the ES it is difficult to see how it could rationally have come to the conclusion that there would be no such effect. Paragraph 5.1 of the Report suggests endorsement of, rather than disagreement with, the description in the ES of the potential impacts of the development."

128. In human rights cases the test is now proportionality: *R (Daly) v SSHD* [2001] 2 AC 532. In that case Lord Steyn stated:

> "The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test.

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[3] In another drugs rationing challenge, *R (Murphy) v Salford PCT* [2008] EWHC 1908 (Admin), the court set aside a decision on the basis that, although the PCT panel had looked at all the individual factors that could point to an exceptional case, it had failed to look at them in the round.

> Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."”

129. He also suggested some differences with the previous intensity of review:

> **27**... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138:
>
> "the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention."

> In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> **28** The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review.

130. Lord Cooke went even further:

> "Lord Steyn illuminates the distinctions between "traditional" (that is to say in terms of English case law, *Wednesbury*) standards of judicial review and higher standards under the European Convention or the common law of human rights. As he indicates, often the results are the same. But the view that the standards are substantially the same appears to have received its quietus in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (1999) 29 EHRR 548. And I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

131. In *R (Northern Cyprus Tourism Centre Ltd) v Transport for London* [2005] EWHC 1698 (Admin) [2005] UKHRR 1231 Newman J held that the refusal to accept Northern Cyprus tourism adverts on London buses violated article 10 because it was (1) insufficiently foreseeable to be "in accordance with law", (2) lacking a legitimate aim, and (3) with no pressing social need.

132. In *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893 the Court of Appeal held that the interference with the Claimant's right to manifest his religion

inherent in the slaughter of Shambo the temple bull was proportionate and objectively justified, notwithstanding the Defendant's failure to attempt to assess the risks involved in isolating Shambo from other animals. The Court therefore held that a decision to eliminate risk was justified.

133. In non-human rights cases, the test remains *Wednesbury* reasonableness: *R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] QB 1397:

> **"34** Support for the recognition of proportionality as part of English domestic law in cases which do not involve Community law or the Convention is to be found in para 51 of the speech of Lord Slynn of Hadley in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 320-321; and in the speech of Lord Cooke of Thorndon in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548-549, para 32. See also *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed (1995), p 606. It seems to us that the case for this is indeed a strong one. As Lord Slynn points out, trying to keep the *Wednesbury* principle and proportionality in separate compartments is unnecessary and confusing. The criteria of proportionality are more precise and sophisticated: see Lord Steyn in the *Daly* case, at pp 547-548, para 27. It is true that sometimes proportionality may require the reviewing court to assess for itself the balance that has been struck by the decision-maker, and that may produce a different result from one that would be arrived at on an application of the *Wednesbury* test. But the strictness of the *Wednesbury* test has been relaxed in recent years even in areas which have nothing to do with fundamental rights: see the discussion in *Craig, Administrative Law*, 4th ed (1999), pp 582-584. The *Wednesbury* test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests: see Lord Hoffmann's Third John Maurice Kelly Memorial Lecture 1996 "A Sense of Proportionality", at p 13. Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the *Wednesbury* test.
>
> **35** But we consider that it is not for this court to perform its burial rites. The continuing existence of the *Wednesbury* test has been acknowledged by the House of Lords on more than one occasion. The obvious starting point is *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696. The Home Secretary had issued directives to the British Broadcasting Corporation and the Independent Broadcasting Authority prohibiting the broadcasting of speech by representatives of proscribed

terrorist organisations. The applicant journalists challenged the legality of the directives on the ground that they were incompatible with the Convention, and also on the ground that they were disproportionate in a sense going beyond the established doctrine of reasonableness. Mr Pannick submits that the ***Brind*** case [1991] 1 AC 696 does not stand in the way of this court holding that proportionality has supplanted the ***Wednesbury*** test in English domestic law, even where no human right or European Community law issues are raised. We do not agree. It is true, as Mr Pannick points out, that Lord Bridge of Harwich and Lord Roskill left the door open for the possible future introduction and development of the doctrine of proportionality into English domestic law. But all of their Lordships rejected the proportionality test in that case and applied the traditional ***Wednesbury*** test. In other words, they closed the door to proportionality in domestic law for the time being…

37 ...the passages in the speeches of Lord Slynn in ***R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*** [2003] 2 AC 295, 320-321 and Lord Cooke in the ***Daly*** case [2001] 2 AC 532, 548-549 to which we have referred, themselves imply a recognition that the ***Wednesbury*** test survives, although their Lordships' clearly expressed view is that it should be laid to rest. It seems to us that this is a step which can only be taken by the House of Lords. We therefore approach the issues in the present appeal on the footing that the ***Wednesbury*** test does survive, and that this is the correct test to apply in a case such as the present which does not involve Community law and does not engage any question of rights under the Convention."

Procedural Impropriety

134. Thirdly, procedural impropriety concerning how the decision was made. There are five basic concepts:

(1) The need to comply with the adopted (and usually statutory) rules for the decision making process;

(2) The common law requirement of fair hearing;

(4) (3) The common law requirement that the decision is made without an appearance of bias;The requirement to comply with any procedural legitimate expectations created by the decision maker;

(5) The giving of a fair hearing under Article 6(1) of the European Convention on Human Rights..

135. There may be an overlap between these various grounds. Something may be both unfair and a breach of the procedural rules which have been adopted.

Procedural rules

136. Procedural requirements laid down in statute or other binding provisions should be adhered to. These will often be construed in the context of giving a fair hearing, but will often go beyond the requirements of common law.

Fair hearing

137. The specific content of the right to a fair hearing varies with the circumstances of the case. Possible rights in an individual case include:
    (1) Notice.
    (2) An oral hearing.
    (3) Representation.
    (4) Reasons. There is no general duty to give reasons in public law, but the courts are increasingly willing to imply a duty to give reasons in particular cases.

138. Procedural impropriety can also cover alleged lack of consultation. In *R (Elphinstone) v Westminster CC* [2009] ELR 24 the Court of Appeal held that a local authority did not lack the necessary details and information on the basis of which it could resolve to discontinue a community school with a view to reopening it as an academy. Furthermore, a modification to the academy's future admissions policy made after the statutory period of consultation did not vitiate the consultation exercise or the decision.

139. In *R (Chandler) v Camden LBC and the Secretary of State for Children, Schools and Families* [2009] EWHC 219 (Admin) the Claimant sought to challenge (1) the local authority's decision to promote an Academy school to be sponsored by UCL, and not to hold an open competition to decide what secondary school should be built, and (2) the Secretary of State's decision to approve the formal

Expression of Interest submitted by UCL without complying with the EU/domestic procurement regime.

140. Forbes J concluded that there were two entirely separate and different statutory routes by which an academy could be established: via a funding agreement between a sponsor and the Secretary of State for Children, Schools and Families under section 482 of the Education Act 1996 or via a successful proposal following a competition held in accordance with the local authority's discretion in the Education and Inspections Act 2006 s.7. It was for the local authority to decide which route to follow.

141. As to the second point the judge held that the case was not about the process of choosing someone to build the school or to maintain or clean it. The case concerned the setting up of the entity which would govern the school, as part of the state education system. It was artificial to seek to "shoehorn" the process of creating a state school into a legal regime concerned with markets and the regulation of competition in such markets. The sponsorship of an academy did not constitute a market, but was better seen as a form of philanthropy.

Bias

142. Bias can be divided into the following subcategories:

(1) Actual bias. In practice this is not a common allegation and is strictly the exercise of discretion for an improper purpose.

(2) The appearance of bias. –.

143. The appearance of bias arises in this situation.

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

144. The appearance of bias may arise from two circumstances:

(i) The decision maker having an interest in the matter;

(ii) The decision-maker giving rise to a real possibility of having pre-determined the matter ('closed minds').

145. An interest may be a private interest or it may be an interest arising out of public roles performed by the decision-maker. So deciding a planning application on the neighbour's land would be a private interest. An individual's other public responsibilities may lead to a risk of bias. In *Bovis Homes v New Forest District Council* [2002] EWHC 483 (Admin) *(para 32, 41, 45, 84-106)* bias was found when a councillor was on the planning committee and had been a member of and present when another body agreed on written representations to that committee). However simply because a decision maker had several roles within the same authority will usually not give rise to a risk of bias from an interest.

146. In *R (Michael Brooke) v Parole Board* [2007] EWHC 2036 (Admin) it was held that the arrangements for the Parole Board and the way in which its relationship with the Home Office (now Ministry of Justice) operated gave rise to a breach of the apparent bias principle at common law, and of article 5(4) impartiality within the Convention. The particular features found to be objectionable were as follows:

(1) The sponsoring Department sometimes treated the Parole Board as part of its establishment.
(2) Inadequate protection for security of tenure of its members.
(3) The use of powers of the Department which have not been consistent with the need to maintain the Parole Board's objective independence eg powers of funding, appointment, and to give directions.
(4) The continuing practice of regular confidential meetings between the Board and the Department.

147. The Court of Appeal dismissed the appeal, holding that since the statutory function of the Parole Board had changed from that of a body advising the Secretary of State in relation to an executive discretion to release prisoners whose penal sentences were part served to that of a judicial body assessing whether continued deprivation of a prisoner's liberty was justified because of the risk that

he would re-offend if released, the Divisional Court's findings as to the board's lack of actual and apparent independence, which were fully supported by the evidence, were justified.

148. The Court of Appeal went on to find that:

(1) neither the Secretary of State nor his department had adequately addressed the need for the board to be and to be seen to be free of influence in relation to the performance of its judicial functions; and that

(2) both by directions and by the use of his control over the appointment of members of the board, the Secretary of State had sought to influence the manner in which the board carried out its risk assessment, and the department's use of its funding powers, aimed at ensuring that the board refrained from or reduced an aspect of its procedure which the department did not consider warranted the expense involved, was interference which exceeded what could properly be justified by the role of sponsor; and that

(3) the Secretary of State's general power to terminate a member's appointment if satisfied that he had failed satisfactorily to perform his duties was not compatible with the independence of members of the board; and that,

(4) accordingly, the declaration granted by the Divisional Court was appropriate.

149. A decision-maker will have failed to exercise a discretion lawfully if it makes up its mind before having all the relevant facts and hearing all the representations. This will be having a closed mind. Bias will arise if in all the circumstances there is a real possibility of there having been a closed mind: *R(Lewis) v Redcar and Cleveland Borough Council* [2009] 1 W.L.R. 83 particularly paragraphs 63, 66-69, 89, 95-99, 105-108.

150. The standard expected will vary from, at one extreme, judges, and at the other politicians who can be expected to bring their political views to the decision. In *Lewis* the Court of Appeal said that politicians were not required to be impartial (unlike, for example, auditors), see Rix LJ:

> "**[95]** The requirement made of such decision-makers is not, it seems to me, to be impartial, but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case, no complaint is raised by reference to the merits of the planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse allegations of political controversy.
>
> **[96]** So the test would be whether there is an appearance of predetermination, in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination, or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself. I think that Collins J put it well in *R (on the application of Island Farm Development Ltd) v Bridgend County BC* [2006] EWHC 2189 (Admin), [2007] LGR 19 when he said:
>
> > '[31] The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should … [U]nless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision …
> >
> > [32] It may be that, assuming the *Porter v Magill* test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations.'

(1) Procedural legitimate expectations

151. The division between substantive legitimate expectations, which affect the outcome of a decision, and procedural legitimate expectations, which govern the decision making process has been discussed above. Procedural legitimate expectations are more common.

152. In *R(Majed) v London Borough of Camden* [2009] EWCA Civ 1029 the Court of Appeal held that a Council's Statement of Community Involvement, detailing how the public would be consulted on planning matters, gave rise to a procedural legitimate expectation. Sullivan LJ held at paragraph 14:

> "Legitimate expectation comes into play when there is no statutory requirement. If there is a breach of the statutory requirement then that breach can be the subject of proceedings. Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by statute. It seems to me the Statement is a paradigm example of such a promise and a practice. ... It was submitted by the respondent and the interested party that, even though there was a clear statement that a person in the position of the appellant would be sent a letter, there was nevertheless no unequivocal assurance that they would be notified. I am quite unable to accept that submission given the clear terms of paragraph 1.3 of the Statement which tells the public that when the Statement is adopted by the Council it is "required to follow what it says". It would be difficult to imagine a more unequivocal statement as to who would, and would not, be notified."

(2) Article 6(1) of the European Convention on Human Rights.

153. Article 6(1) provides a right to a fair trial and begins:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

154. The UK courts have not seen the 'fair ... hearing' part of the Article as adding materially to the common law concept of a fair hearing, although the ECHR caselaw may have influenced views as to what the common law is.

155. There are some cases where a decision making process has not been seen as sufficiently independent and impartial, but that has tended to be in a judicial context. An administrative decision making process will be subject to judicial review by the Court which will be an independent and impartial tribunal.

Consultation

156. A duty to consult may arise from a statutory requirement, a legitimate expectation or (more occasionally) the requirement for a fair hearing. In any event, if a public body decides to consult it will have to do so properly.

157. A decision to consult, whether or not required by law, imposes clear duties. These were distilled in the judgment of the Court of Appeal delivered by Lord Woolf MR in the case of *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, which set out the Sedley requirements from *R v Brent LBC ex p Gunning* [1985] 84 LGR 168 as follows:

> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

158. The requirement to undertake consultation at a formative stage means that if consultation takes place it covers the principle of the proposal rather than merely the manner of its implementation. For example, in *Sadar v Watford BC* [2006] EWHC 1590 a local authority had decided to delimit hackney car licences and then conducted a consultation which was inconsistent as to whether the principle had been settled. Quashing the decision, Wilkie J commented (para 29, 33):

> "The fact that a Council may have come to a provisional view or have a preferred option does not prevent a consultation exercise being conducted in good faith at a stage when the policy is still formative in the sense that no final decision has yet been made. In my judgment, however, it is a difference in kind for it to have made a decision in principle to adopt a policy and, thereafter, to be concerned only with the timing of its implementation and other matters of detail. Whilst a consultation on the timing and manner of implementation may be a proper one on these issues it cannot, in my judgment, be said that such a consultation, insofar as it touches upon the question of principle, is conducted at a point at which policy on that issue is at a formative stage.
>
> … On the crucial issue of principle the sequence has been - decision first, consultation later. It is a different matter to decide to reverse a previous decision rather than to take one in the first place and, in my judgment, the consultation exercise and its fruits went, on the issue of principle, to inform a decision of the first type rather than one of the second."

159. In *R(Parents for Legal Action Limited) v Northumberland CC* [2006] EWHC 1081 there was a multi-stage consultation on schools reorganisation from 3-tier to 2-tier schooling where 'The defendant acknowledges that at the conclusion of each stage a decision is made which "focuses the future consultation, which has become progressively more detailed and localised"' (para 8 per Munby J)` There was a statutory duty to consult on the future of individual schools, however proposals for particular schools were only consulted upon after the decision had been made to adopt a 2 tier system. It therefore excluded consideration whether individual schools should become part of a 2 tier system or remain 3 tier.

160. Sullivan J in *R (on the application of Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] Env LR 29; [2007] EWHC 311 ("*Greenpeace Energy Challenge")*. The case concerned a change of government policy in favour of nuclear power following a 2006 consultation document 'Our Energy Challenge'. There had been an express promise some years earlier that any change

of policy would be the subject of "the fullest public consultation". At paragraph 44 Sullivan J summarised the relevant complaints:

> "Two broad criticisms are made of the 2006 Consultation Document:
>
> (i) it either was or appeared to be in the nature of an issues paper, seeking consultees' views as to which issues should be examined by Government (and the manner in which they should be examined) when deciding whether or not the new nuclear build option, which had been left open, should now be taken up; rather than the consultation paper on the substantive issue itself: should the new nuclear build option be taken up? The decision in July 2006 "leapfrogged the stage of carrying out proper consultation on the substantive issue".
>
> (ii) if it was not simply an issues paper, but was intended to be a consultation paper on the substantive issue, it was inadequate, and the overall consultation process was unfair because:
>
> (a) consultees were not told in clear terms what the proposal was to which they were being invited to respond;
>
> (b) consultees were not provided with enough information to enable them to make an intelligent response; and
>
> (c) on many issues, including in particular the critical issues of the economics of new nuclear power and waste disposal, consultees were deprived of the opportunity to make any meaningful response because the relevant information on which the government relied in making the decision that "nuclear has a role" was published after the consultation period had concluded."

161. At paragraph 61 Sullivan J emphasised the need for the consultation to be fair. Turning to the first criticism, at paragraph 81 onwards he identified the test as being whether those consultees who took the document at face value could reasonably foresee that following consideration of their responses the issue of principle would be decided. He found that the consultation paper was simply an issues paper without an indication that the issue of principle would be decided. The fact that many consultees had responded on the issue of principle rather than just the questions asked did not salvage the process.

162. On the second criticism, at paragraph 90 onwards Sullivan J found that there had been insufficient information for consultees to respond, and that it had been unfair to take account of new information. He observed that the less information that was available at an early stage the likelier it would be that consideration of further new information at a later stage would be unfair.

163. An illustration of the difficulties in identifying the appropriate point of challenge in a multi-stage consultation process was the judicial review of the Eco-towns proposals: *R(Bard Campaign) v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin). Proceedings were brought against a consultation paper *Eco-towns: Living a Greener Future* but the High Court in effect held that the principle of eco-towns had been consulted upon in the earlier *Housing Green Paper* and the locations of possible eco-towns would be decided following a further round of consultation.

Reasons

164. A duty to give reasons for a decision will often arise as a matter of statutory duty, legitimate expectation or policy. In addition there may be circumstances where fairness requires the giving of reasons (*R v Secretary of State for the Home Department* [1994] 3 All E.R. 277) or where the decision maker is departing from policy or a legitimate expectation. Alternatively it may be inferred that the decision would be unsound in the absence of reasons (e.g., *R v Secretary of State for Trade and Industry ex p Lonrho plc* [1989] 1 W.L.R. 525). Additionally the Court may require the decision maker to give reasons.

165. European Union law will often contain an express duty to give reasons. Where European legislation does not refer to the giving of reasons in particular circumstances, there may be a duty to give reasons on request following the decision – *R(Mellor) v Secretary of State for Communities and Local Government* C-75/08 ECJ:

> "59 In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).
>
> 60 That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made."

166. The decision-maker must give adequate and intelligible reasons. The law on that point was authoritatively stated by Lord Brown in the case of *South Bucks DC v Porter (No 2)* [2004] 1 WLR, 1953. Lord Brown reviewed the cases, quoting (paragraph 33) Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) P&CR 263, where he "felicitously observed":

> "I hope I am not oversimplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved … on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

167. Lord Brown then proceeded to a broad summary of the authorities that has become something of a touchstone:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for the decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such an adverse inference will not readily be drawn. The reasons indeed refer only to the main issues in the dispute not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Remedies

168. The remedies available in a claim for judicial review are of three different types.

Prerogative Remedies

169. There are the prerogative remedies:

(1) Quashing order (formerly certiorari). This deprives a decision of effect either retrospectively (where the decision is a nullity, eg ultra vires) or prospectively (where the decision is not a nullity, eg. intra vires error of law).

(2) Mandatory order (formerly mandamus). This compels the performance of a public duty. Most commonly it is used to compel a public body to exercise a jurisdiction to hear and determine a case, or to consider exercising a discretionary power. Occasionally the court has been prepared to order the performance of a specific act eg *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997, where the court indicated that a power to refer a complaint to a committee of investigation should be exercised; although the court will often prefer the non-coercive declaration in such circumstances.

(3) Prohibiting order (formerly prohibition). This is used to restrain a public authority from acting unlawfully. It operates at an earlier stage than a quashing order. In one case the courts prohibited a local authority from licensing additional taxi-cabs unless they first granted a hearing to existing taxi-drivers or their representatives: *R v Liverpool Corp., Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

Common Law Remedies

170. There are also common law remedies, including:

(1) Injunction. This is used to stop a public body from acting unlawfully by exceeding or abusing its statutory, prerogative, or other powers.

(2) Declaration. This remedy merely declares the legal position, and has no coercive effect.

Pecuniary Remedies

171. Then there are pecuniary remedies, specifically damages under the Human Rights Act 1998, and Restitution.

Damages under the Human Rights Act 1998

172. Public law has traditionally not had the remedy of damages available for unlawful administrative action. A damages claim has needed to have a private law basis. The justification for such a gap in the remedial options available to the court is that it would otherwise stultify the proper administrative freedom of public authorities were the public purse to be affected by their actions.

173. Thus, other where there has been misfeasance in public office, and where Community law permits a remedy, there has not been the remedy of damages for unlawful administrative action.

174. The Human Rights Act 1998 changed the position by creating a statutory cause of action in damages:

> "*Judicial Remedies*
> 8(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including – (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
> (4) In determining – (a) whether to award damages, or (b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention.
> …
> (6) In this section – 'court' includes a tribunal; 'damages' means damages for the unlawful act of a public authority; and 'unlawful' means unlawful under section 6(1)."

175. Thus there are four preconditions to an award of damages under the HRA:

(1) That a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right.

(2) That the court should have power to award damages, or order the payment of compensation, in civil proceedings.

(3) That the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made.

(4) That the court should consider an award of damages to be just and appropriate.

176. If satisfied that it is necessary to award damages, it is hard to see how the court could consider it other than just and appropriate to do so: per Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, at para 6.

177. Upon what principles should awards be made? Some of the early cases, as well as the Law Commission in its interesting paper in 2000[4] that in the majority of claims under the HRA, the courts would find it possible, and appropriate, to apply the rules by which damages in tort were usually assessed.

178. However this suggestion has been rejected. The most important cases are as follows.

179. In *Anufrijeva v Southwark LBC* [1003] EWCA Civ 1406; [2004] QB 1124 the Court of Appeal (consisting of Lord Woolf CJ, Lord Phillips MR, and Auld LJ) were faced with the question of the correct approach to damages for breach of article 8 of the HRA. Three cases were joined:

(1) *Anufrijeva*: the Claimants were members of a family who claimed that the local authority failed to discharge their duty under s21 National Assistance Act 1948 to provide them with accommodation that met the special needs of one member of the family, with the result that the quality of family life was drastically impaired.

(2) *N*: the Claimant, an asylum seeker, arrived in the UK from Libya in February 2002 and was granted refugee status in May 2002. He complained of maladministration in the handling of his asylum application which cased much of the delay, of receiving inadequate financial support during that period, and of psychiatric injury caused by the stress of the experience.

[4] Law Commission No. 266, Cmnd 4853 (2000).

(3) *M*: the Claimant was an asylum seeker from Angola. His right to remain a a refugee was recognized in January 2001. he then applied for permission for his family, whom he had left behind, to be admitted to the country so that he could be reunited with them. The family was not given permission to enter until November 2002. The Claimant contended that much of the delay was due to maladministration.

180. Having held that article 8 was capable of imposing on a state the positive duty to provide an individual with support in order to ensure respect for his private and family life, the Court of Appeal place the bar for qualification extremely high. The Court went on to make some general comments about damages under the HRA.

181. First, they were keen to distinguish such claims from claims in tort:

> "We have made it plain that the discretionary exercise of deciding whether to award compensation under the HRA is not to be compared to the approach adopted where damages are claimed for breach of an obligation under civil law." (para 74)

182. Having noted that the primary concern in human rights cases was to bring the infringement to an end, the court inferred that any question of compensation will be of secondary, if any importance (para 53).

183. The court then stated:

> "In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole." (para 56)

184. The court also rejected the contention (which had been approved by numerous commentators including the Law Commission), that the Strasbourg caselaw embodied no clear principles as to when damages should be awarded, and how they should be measured.

185. However the court did identify what it called some "basic principles":

(1) The fundamental principle underlying the award of compensation is that the court should achieve *restitution in integrum*: the Claimant should be placed in the same position as if his Convention rights had not been infringed.

(2) Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded: eg the awards of compensation awarded to homosexuals discharged from the armed forces in breach of article 8.

(3) In determining whether damages should be awarded, in the absence of any clear guidance from Strasbourg, the approach is an equitable one. The critical message is that the remedy has to be "just and appropriate" and "necessary" to afford "just satisfaction". The scale and manner of violation can therefore be taken into account.

186. Where the court decides to award damages in its discretion, rough guidance may be provided by the following:
(1) JSB guidelines.
(2) CICB awards.
(3) Awards by the Parliamentary Ombudsman and the Local Government Ombudsman.

187. Awards for breach of article 8 will be rare, and damages will be modest (para 75). On the facts, none of the Claimants recovered any damages.

188. The court also expressed its concern about the real risk of proceedings for damages under the HRA being very costly in relation to the likely damages

awardable, and laid down a particular procedure at para 81. In particular the court stressed that before giving permission for judicial review the Administrative court judge should require the Claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the Ombudsman in the first instance. Permission for the damages aspect should be deferred until use of ADR, and claims can be determined by judges reading the relevant evidence, with the citing of more than three authorities needing justification, and a normal time estimate of ½ day.

189. In the leading case, *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, the House of Lords has taken this approach further.

190. The case involved a prisoner who had been charged with a prison drug offence after failing a mandatory drugs test. He pleaded not guilty, and the hearing was conducted before the deputy controller who refused the prisoner's request for legal representation. The charge was found to be proved and the prisoner was ordered to serve 21 additional days of imprisonment.

191. The decision was reviewed by an area prison manager, who confirmed that the adjudication had been fairly and properly conducted.

192. Judicial review proceedings were commenced alleging that the offence with which he was charged involved the determination of a criminal charge, and that the deputy controller was not an independent tribunal and the prisoner had wrongly been denied legal representation.

193. After the decision of the European Court of Human Rights in *Ezeh v Connors* (2003) 39 EHRR 1, the Secretary of State conceded that there had been a breach of article 6. In the light of that decision the Secretary of State accepted that the proceedings did involve the determination of a criminal charge, that the deputy

controller was not an independent tribunal, and that the appellant was wrongly denied legal representation of his own choosing.

194. Thus the sole issue before the House of Lords was the claim for damages under the HRA for breach of article 6.

195. The House held as follows:

(1) In the great majority of cases in which the European Court has found a violation of article 6 it has treated the finding of the violation as, in itself, just satisfaction under article 41. This reflected the focus of the Convention on the protection of human rights and not the award of compensation.

(2) The court will only depart from its ordinary practice of finding a violation of article 6 being of itself just satisfaction under article 41 where the court finds a causal connection between the violation found and the loss for which an applicant claims to be compensated.

(3) The court has been slow to award such compensation.

(4) The courts should not use domestic scales of damages such as tortious awards, and discrimination cases. Courts should look to Strasbourg and not to domestic precedents.

(5) To say that Strasbourg awards are not "principles" is a legalistic distinction which is contradicted by the White Paper and the language of section 8 and has no place in a decision on the quantum of an award, to which principle has little application.

(6) The court describes its approach as equitable, which means not precisely calculated but are judged by the court to be fair in the individual case.

(7) Judges are not inflexibly bound by Strasbourg awards but they should not aim to be significantly more or less generous than the European court might be expected to be.

(8) The pursuit of damages should rarely, if ever, be and end in itself in an article 6 case, and the procedure in *Anufrijeva* was approved.

196. In the case itself the court held that the Claimant had been adequately vindicated by the concession itself.

197. A public body may be liable in private law, for instance in tort. In *Jain v Trent Strategic Health Authority* [2009] 2 WLR 248 the House of Lords was asked to consider the case of the owners of a nursing home whose business was destroyed after the local authority made a successful emergency application without notice to remove residents from the home, which was subsequently decided to have been wrongly made. By the time the appeal was heard and the owners vindicated, it was too late. The business had been ruined and the owners had suffered serious economic harm. Did the local authority owe them a duty of care, such that they could seek damages for economic loss?

198. The House of Lords, though sympathetic to the plight of the owners, found that there was no duty of care owed. It was held that the purpose of the power to cancel registration was to "protect the interests of the residents in nursing homes" and that the imposition of a duty of care for the benefit of others whose interests might be adversely affected by an exercise of that power could potentially inhibit the exercise of the power to the detriment of those whom it was designed to benefit.

199. Further, parties involved in judicial or quasi-judicial proceedings were not protected from potential damage caused by the actions of the opposing party by the imposition of a common law duty of care on that party. Such protection depended upon the control of the litigation by the court or tribunal in charge of it, and the rules and procedures under which the litigation was conducted.

200. The House of Lords commented that the statutory procedures disclosed a "lamentable" lack of reasonable safeguards for the absent Respondents, there being a minimum wait of 6 weeks for the appeal to be heard; unlike with such an

application in the High Court, who could apply for the order to be stayed, and for the return date to be expedited.

201. Unusually, the House of Lords were so exercised by the injustice of the case that they took it upon themselves to suggest a further remedy which had not been raised by either party. According to Lords Scott, Hale, Carswell and Neuberger, had the events occurred after the coming into force of the Human Rights Act in October 2000, the situation may have been different. There would probably have been a breach of Article 6 ECHR and Article 1 of Protocol 1 (as a disproportionate interference with the limitation to the public rights to the enjoyment of possessions), and the owners would thus have been entitled to compensation in domestic courts[5] as a result of the failure to give notice of the application.

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[5] They will now have to obtain this remedy in Strasbourg, should they wish to pursue it.

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