INTRODUCTION TO PUBLIC LAW PRINCIPLES

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1. Public law (also known as "administrative law") allows the Courts to supervise the activities of public bodies. It is unquestionably the part of our law which most directly engages with questions of constitutional importance, and in particular, the relationship between Parliament, the executive, and the judiciary.

2. Although the principles behind public law are not fixed for all time, and tend (as with other parts of the common law) gradually to be developed by the Courts, there are certain basic themes which consistently run through its substance. There are also relatively strict procedural and practical requirements in public law litigation. This paper attempts to provide a very basic introduction to the principles behind both the substance and procedures of public law.

Potential Grounds for Judicial Review

3. "Judicial review" is the name of a procedure by which the High Court, applying public law principles, will examine the actions and decisions of public officials. The Court will view its own role on judicial review as *supervisory* rather than *appellate*. It will want to know from the Claimant exactly what "ground" of judicial review is being relied upon. One cannot go to Court merely complaining that a public official "was wrong" in making a particular decision.

4. The grounds for judicial review fall into somewhat open-ended categories, and those categories often overlap. Here are the main ones.

Illegality

5. Plainly, public bodies are bound by the law. They must comply with many of the laws that bind the rest of us. They must not, for example, defraud people, pervert the course of justice, or commit manslaughter. But they are also, typically, invested with *powers* which the rest of us do not have. They have powers to collect our taxes, or to grant us licences to do things (without which we would

not be allowed to do them), or to deport us or lock us up. Those powers are usually set out in legislation passed by Parliament. The basic purpose of judicial review is to regulate the exercise of these powers and to ensure that they are being used according to the rule of law. When a public body acts in a way which goes beyond the limits of its own powers, it is said to be acting "ultra vires". Many academics and judges believe that the ultra vires principle is at the root of all public law. An ultra vires decision will be quashed by a Court on judicial review.

6. The straightforward and classic theoretical example of a body acting "ultra vires" is where the statute permits a public authority to do *x*, but the public authority has, instead, done *y*. Alternatively, the statute might say that an order to do *y* can be made by a person holding a specific qualification – but the person who makes that order turns out not to hold that qualification. In either case the decision is ultra vires.

7. In practice, however, ultra vires cases in judicial review usually tend to turn on questions of principle, often dressed up as questions of *construction* under a particular statute (i.e. whether the statute "really" does allow *y* or not).

8. Before the enactment of the Human Rights Act 1998, the courts used a combination of the doctrine of ultra vires, combined with a principle of construction known as the "principle of legality", in a number of cases in which, in effect, public authorities were prevented from breaching the human rights of individuals (even though there was at that time no statute expressly forbidding them from doing so).

9. For example, in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, decisions and rules which prevented prisoners from having interviews with journalists were struck down. The House of Lords said that if Parliament really wanted to restrict fundamental rights such as freedom of expression, it needed squarely to confront the political cost of doing so, and needed to be explicit about it. The fact that Parliament had not done so meant that it could not have intended to have prevented prisoners from exercising their rights to free expression.

10. Not only must a public authority's *action* be lawful; so must its *purpose*. A decision made with the improper purpose of, for example, punishment, or of improperly extracting cash, can be judicially reviewed even if the resulting decision is itself formally one that is otherwise within a decision-maker's available powers: see *Padfield v Minister of Agriculture Fisheries and Food* [1986] AC 997. The area of legal debate in such cases usually concerns the issue of what Parliament's intended purpose actually *was*, and how the decision-maker's behaviour relates to it.

Error of law

11. The traditional language of "ultra vires" has tended to be replaced with the language of "illegality". It is now clear that a public body can act illegally, not only if it goes beyond its own powers, but also if it acts contrary to some higher legal authority (such as (i) EC law, or (ii) human rights), or itself makes a material error of law.

12. Judicial review is generally available where a public body reaches a decision which is materially flawed by reason of a misdirection in law. As Lord Diplock said in *CCSU v Minister for Civil Service* [1985] AC 374, 410F: "…the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it."

13. A recent example of a Court granting judicial review for error of law is *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368. The asylum seeker claimed that to remove him to Germany would breach his rights under article 8 of the Convention to a private and family life. The Secretary of State "certified" that claim (which meant that as well as rejecting it, he declared it to be "manifestly unfounded", with the consequence that the asylum seeker had no right to the normal statutory appeal through the immigration system – he had to go to Court by way of judicial review). The Secretary of State's reasoning was, bluntly, that the interests of immigration control always trumped the article 8 rights of individuals. The House of Lords held in effect that this was a misdirection of law. Article 8 *might* be engaged and *might* be violated by deporting a person (even if he was not a refugee and had no formal right to

reside in the UK). It would depend on the facts. It could not be said in this particular case that the claim was "manifestly unfounded".

Unfairness

14. A public body might act "unfairly" in either of two senses:

    a) It has decided to do something which is inherently unfair ("substantive unfairness");

    b) The way it has gone about making the decision has been unfair ("procedural unfairness").

15. For a long time English public law concentrated on procedural rather than on substantive unfairness. (Note that the comparable fairness rights under Strasbourg jurisprudence – contained in article 6 of the ECHR – are almost entirely procedural rather than substantive in nature). It is now clear that the rule of law demands both: see *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539.

16. *Substantive unfairness* has developed in English public law principally through the doctrine of the "legitimate expectation". That might seem somewhat surprising, since one might think that unfairness can arise whether or not a person in fact has an "expectation" of fairness one way or the other.

17. Where a public body has, through a promise or other conduct, engendered in a claimant the legitimate expectation of a particular benefit, it may be unfair and thus unlawful to then deny him that benefit.

18. But there can be difficulties in legitimate expectation cases. What if the public body has promised that it will do something that turns out to be unlawful? Can the Court enforce that? The answer is "no". What if the public body has made two irreconcilable promises, and can no longer keep both? And what about the public policy in allowing public bodies to govern in the public interest (as it calculates that public interest), and not to be shackled by the promises of previous administrations? The Court's response to these tricky questions is to ask whether, in the individual Claimant's case, the frustration of the expectation

would in all the circumstances be "so unfair as to amount to an abuse of power": see *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

19. *Procedural unfairness* is often referred to as the breach of the requirements of natural justice. Those requirements typically include:

    a) A fair opportunity for a person to learn what is alleged against him ("the right to be informed") before any decision is made;

    b) A fair opportunity to present a case to the person making the relevant decision ("the right to be heard"), including having sufficient time to prepare if necessary;

    c) Due process;

    d) Adequate consultation;

    e) A hearing and/or decision within a reasonable time;

    f) Adequate reasoning (at least enough to see whether the decision itself is challengeable).

20. Where a decision is procedurally unfair, but an appeal right is available, the fairness of the appeal procedure may be such as to "cure" the first instance decision of any public law defect. Put another way, the Court will tend to look at the overall decision (including what happened at the appeal stage) in order to determine whether there was any unfairness. The fact that Stage 1 of a decision-making process was unfair might be irrelevant, if Stages 1 and 2 taken together were fair.

21. The specific procedural standards will vary with the context. Not every type of decision, for example, carries with it the right to make oral representations, or to cross-examine one's opponent.

22. A particular result of the above principles is that the executive is under a legal duty to set up fair *systems* in certain important areas of its practice. The asylum process is one such area: see *R (Q) v Secretary of State for the Home Department* [2004] QB 36 at para 69.

Bias

23. A decision which is materially tainted by the bias of the person who makes it is plainly not one which the law should allow to stand. That rule is often seen as an aspect of procedural fairness, but is equally at home appearing as a separate ground of judicial review in its own right.

24. Bias can take a number of forms:

    a) Direct interest (pecuniary or otherwise) in the outcome. This is also known as "being judge in one's own cause". A rather embarrassing saga in domestic public law recently occurred where the House of Lords had to set aside one of its own decisions, having realized that one of the law lords who made it (Lord Hoffmann) had been closely related to a party intervening in the appeal: see *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119;

    b) Actual bias. This is difficult to prove, and consequently rare. It involves a judge *actually* being predisposed to one party's case;

    c) Apparent bias. The question is whether the fair-minded and informed observer would conclude in all the circumstances that there is a real possibility that the decision-maker is in fact biased: see *Porter v Magill (No 2)* [2001] 2 AC 357. Problems can arise, for example, where barristers in independent practice also sit as part-time judges with other judges, and so might end up as advocates in front of their own judicial colleagues: *Lawal v Northern Spirit Ltd* [2003] ICR 856.

25. The reason that apparent bias is a ground of judicial review, as well as actual bias, is that justice must not only be done, but should be seen to be done.

26. A word of warning: the Court of Appeal has expressed the view that a party should not make allegations of bias unless there is satisfactory prima facie material upon which it is proper to do so.

Relevant considerations

27. A material failure to take into account a relevant consideration is a ground for judicial review. Conversely, taking into account something which is legally *irrelevant* may also invalidate the decision.

28. For example, in 1994, the then Home Secretary, in deciding the appropriate minimum jail sentence for the two 11 year olds convicted of murdering Jamie Bulger, openly took into account the fact that his office had been sent (by patrons of the *Sun* newspaper) over 21,000 coupons urging their detention for life (prompted by headlines such as "80,000 call TV to say Bulger killers must rot in jail"). As Lord Steyn in the House of Lords commented (and perhaps, with respect, under-stating the position), this was inappropriate, since the Home Secretary's sentence-setting (and therefore quasi-judicial) role required him to "ignore the high-voltage atmosphere of a newspaper campaign": see *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407. By having thought that the views of those Sun readers who had followed the promptings of its editor were materially relevant, the Secretary of State's resulting decision was flawed, since their views were in fact irrelevant to the question before him.

29. In some difficult cases, the fact that a person has a legitimate expectation will simply be a relevant consideration, and no more: see *R (Bibi) v Newham Borough Council* [2002] 1 WLR 237. So, for example, a person has been promised housing, but that promise can no longer automatically be kept in the light of new priorities, or without giving rise to serious unfairness for others. Nevertheless, the fact that the promise has been made is *itself* something that cannot properly be ignored.

30. Sometimes a power-giving statute will explicitly set out the matters which the decision-maker is obliged to have regard to. In some cases there is room for argument about whether Parliament's intention was to make the list of relevancies comprehensive or not. Sometimes the statute will be silent on the issue – it will then be for the Court to determine what is relevant and what is not.

31. However, there will be cases in which the court will be reluctant to decide for itself what the relevant considerations were. It might be that it is primarily for the decision-making body itself to decide what is and what is not a relevant

consideration. That is particularly the case where it is a decision of a specialist body with specific professional expertise that is being judicially reviewed. Take, for example, the government's discretion to award higher education institutions the title of "university". The decision is based on advice from a specialist quasi-governmental agency, the QAA, which is staffed by experienced higher education experts. The Court is unlikely to be keen to 'second-guess' the experts' assignment of relevance to all the considerations involved in making a decision on university title, except in a very clear case.

Unreasonableness or irrationality

32. A public authority might act in a way which is so unreasonable that its decision cannot lawfully stand.

33. The classic and traditional view in public law was that the Court was likely to be unimpressed with complaints on judicial review about whether the decision-maker was allegedly "wrong", "misguided", or whether he allegedly concentrated too heavily on some matters while paying insufficient regard to others in coming to his decision. The Court would, instead, *only* interfere if the decision was "so unreasonable that no reasonable authority could ever have come to it": see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 WB 223. That clearly set a very high threshold for a Claimant alleging unreasonableness in judicial review. Other descriptions of the threshold for this ground of review included the decision-maker "taking leave of his senses", acting "outrageously", acting "in defiance of logic or morality", or being "perverse". It was also assumed by many that, while the relevance of a particular consideration was plainly a matter for the Court (see above), the *weight* to be assigned to it could not be.

34. The modern approach retains some of the Wednesbury-scepticism – few competent practitioners ever go to court confident of victory on an unreasonableness point alone. But the Courts have certainly retreated from the traditional hands-off approach, and have shown themselves to be more willing than previously to address the "merits" of a decision (including questions of "weight").

35. First, in the human rights field, the Courts recognised that the more substantial the interference with rights, the more the court would require by way of justification before it could be satisfied that the decision was reasonable. That arose most directly in a case about the ban on homosexuals serving in the armed forces: *R v Ministry of Defence, ex p Smith* [1996] QB 517.

36. It has since been recognised that it is not only in cases involving fundamental human rights that the *Wednesbury* test should be replaced with a more flexible approach: see *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391 at para 66.

37. The newer, contextual approach to reasonableness has been welcomed by many – and it is indeed surely better for citizens. It must be said, on the other hand, that the imprecision of the correct legal *test* does make it somewhat difficult in practice for lawyers to advise their clients accurately. For example, in *R (ProLife Alliance) v BBC* [2004] 1 AC 185 the issue was whether the BBC had been reasonable to refuse to broadcast a party election broadcast depicting abortion on the ground that it was "offensive". The Prolife Alliance argued that its right to freedom of expression was being violated by the BBC's refusal, and said that the Court should therefore adopt an interventionist approach to reasonableness since rights had been engaged. The House of Lords refused to strike down the BBC's decision. What was interesting was their Lordships' (perhaps reluctant) acceptance of the fact that a "one size fits all" formulation of the reasonableness test in public law is now impossible to apply. The actual test will *itself* vary from case to case. How to know which test will be applied in which case is far from easy.

38. The Courts have played with the possibility of replacing the "reasonableness" test with one of "proportionality" (i.e. requiring appropriate decisions which are strictly necessary to achieve defined legitimate aims) – but have so far declined to go that far.

Judicial Review – procedural and practical aspects

39. In any potential judicial review, it is likely that potential claimants need to ask themselves many if not all of the following questions:

    a) What is the decision we are proposing to challenge?

    b) What can we get if we win?

    c) Who is the correct defendant?

    d) Is the decision one which is amenable to judicial review?

    e) Do we have the right status to be allowed to bring a judicial review?

    f) What should we do before commencing litigation?

    g) How long have we got for the pre-action stages?

    h) What about costs?

Timing

40. The first unofficial rule of judicial review in practice is probably this: *be proactive*. The reason for this warning is that any decision which is to be challenged must be challenged "promptly, and in any event not later than 3 months after the grounds to make the claim first arose". The rule exists to protect and promote good administration and is usually applied strictly. Any litigant guilty of serious and unexplained delay before issuing a claim for judicial review is likely to encounter serious difficulties in getting his case heard.

41. This rule might not be as easy to comply with as it sounds. Judicial review is often described as the "remedy of last resort". That means that no judicial review will lie where a claimant has an alternative remedy. An alternative remedy might include an appeal; it might also include the exploration of the relevant matters with the proposed Defendant in correspondence. A claimant who launches proceedings before taking these steps will be told by the Court that he is acting prematurely. Only very rarely will a Court hear a judicial review when a Claimant truly does have an alternative remedy.

42. Intending judicial review claimants are now also under a duty to comply with a 'pre-action protocol'. This includes the sending of a letter before claim (in a

standard format containing specified information[1]). Failure to comply with the protocol can have serious consequences.

43. It will be seen from the above that it is possible in judicial review to find oneself on the horns of a dilemma – "do we act immediately , and risk being criticized for prematurity, or do we wait, and risk being criticized for delay?" Knowing when to wait, and knowing the right moment to pounce, requires careful reflection, good judgment and experience.

44. The first stage in launching a judicial review is:

    a) The issue of a claim form for judicial review with Grounds (i.e. why the Claimant says the decision is flawed);

    b) Service of acknowledgment of service by with summary grounds for contesting the claim (i.e. why the Defendant maintains it is not).

Permission

45. All judicial reviews require the permission of the court. This means, in most cases, a two-stage process in the Administrative Court in the RCJ:

    a) The permission stage; and

    b) The substantive stage.

46. At the permission stage, the Judge will look at the papers, and determine whether (a) the claimant has "standing" (see below) and (b) there is an "arguable ground" for judicial review. If so, the case will go forward to a substantive hearing.

47. If the Judge refuses permission on the papers, a Claimant can, within 7 days, ask for oral reconsideration (of the permission issue) at a hearing. The Defendant is not obliged to attend such a hearing, but may do so. He will not usually get his

[1] I.e. (1) name and address of proposed Defendant (2) name and address of proposed claimant (3) reference details (4) clear exposition of the matter being challenged (especially if there has been more than one "decision") (5) the date and details of the decision(s) proposed to be challenged, a summary of the facts and why it is said to be wrong (6) what the proposed Defendant is being asked to do in order to avoid litigation (7) details of the lawyers dealing with the matter (8) details of any interested parties (9) any relevant requests for information (10) any relevant requests for documents (11) address for service (12) deadline for proposed Defendant's response.

costs of attending if permission is refused, but may do so. He will probably get his costs of "acknowledging service".

48. If the Court refuses permission at the oral hearing, a Claimant can appeal that refusal to the Court of Appeal.

49. Permission is supposed to be a procedural filter, allowing arguable cases through and getting rid of the unarguable and vexatious ones. In practice, even permission hearings can be hard-fought, and it is not unheard of for cases in respect of which a Judge refuses permission to succeed ultimately on appeal.

Standing

50. A person must have sufficient interest to bring a judicial review. This rule is intended to prevent busybodies from wasting the time of the court and of the executive. But the Court now employs a relatively generous standing test for judicial reviews: *R v Inland Revenue Commissioners, ex p National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617.

51. A public interest group (such as Greenpeace, or the Equal Opportunities Commission) will not lack standing even though a case might have been brought by an individual member rather than by the organization itself. The Court will tend to ask itself whether the particular group is genuinely able to mount a carefully focused and well-argued challenge on the facts before it.

Costs

52. Judicial review is of course part of civil (adversarial) litigation. There are Claimants and Defendants, protocols and pleadings, and frequently contested interlocutory skirmishes and disputes about evidence. Bringing and defending such claims can be expensive. The general rule applicable in civil litigation is that the loser pays the winner's costs (as well as his own). That rule is usually applied faithfully in judicial review cases.

53. The general rule is subject to some exceptions.

54. First, a party who succeeds on one issue but not on another might not recover all of his costs from the losing party. It is up to the Court, as a matter of discretion, how to apportion the costs bill in that situation.

55. Second, where the losing party is found by the Court to have acted responsibly and appropriately in bringing the public law challenge, on a question involving a clear public interest, the Court might in its discretion, and after the event, decide not to award any costs to the successful party: see e.g. *New Zealand Maori Council v Attorney-General of New Zealand* [1994] 1 AC 466, PC.

56. Of course, because a typical costs decision is retrospective, the claimant will still have taken the *risk* when commencing proceedings, that a very large costs order might very well be made against it should it lose the judicial review. In reality, that, for many public interest groups as well as for individuals, can be a prohibitive risk and one which surely frequently deters people from going to Court. It potentially stifles claims that ought properly to be heard.

57. Third, and specifically in response to the problem of "stifling" referred to above, the Courts have developed the jurisdiction to make a *pre-emptive costs order* (or *protective costs order*), so that the Claimant may be reassured by the Court in advance that, even if it loses the substantive case, it will not have to pay the Defendant's costs at the end of the case. Less dramatically, the Court might order (in advance) that a Claimant will not, in any event, have to pay more than a predefined level of costs, should it lose the case. But these are still difficult and elusive orders to obtain. The Court of Appeal is currently considering what exactly is required to get one (in a case called *Corner House*), and judgment is imminent at the time of writing.

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RECENT DEVELOPMENTS IN PUBLIC LAW

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1 This brief paper has been produced for the *Liberty* training day on *"Introduction to Human Rights and Public Interest Litigation"* (3 March 2005) to be read alongside the paper produced by my colleague David Pievsky on *"Introduction to Public Law Principles"*. In this paper I highlight some recent developments in public law, and recent cases which help illustrate some public law principles.

Nature of judicial review

2 One recent case re-emphasises the general supervisory purpose of judicial review: to review the decision-making process rather than the merits of the decisions itself. In R (P) v. Essex County Council & Basildon District Council and joined cases,[2] the Court was considering an area where the relevant decision making had been conferred by Parliament on County Councils and not the courts. Munby J. set out the relevant applicable principles in such a case:[3]

> *"… the primary decision maker is the County Council and not the court. The court's function in this type of dispute is essentially one of review – review of the County Council's decision, whatever it may be – rather than of primary decision making. It is not the function of the court itself to come to a decision on the merit. The court is not concerned to come to its own assessment of what is in these children's best interests. The court is concerned only to review the County Council's decisions, and that is not a review of the merits of the County Council's decision but a review by reference to public law criteria."*

[2] Unreported; QBD (Admin) (Munby J); 19 August 2004.

[3] At para 32 of the judgment.

3 This can be regarded as a classic, traditional statement of the role of judicial review. But the role of the court, and in particular the extent it is prepared to scrutinise the decision challenged, will vary depending on the type of case.

4 Human rights litigation is the best example of where the court, whilst still shying away from a full fledged merits review, will often be prepared to scrutinise the decision making process to a much greater extent than otherwise. The most celebrated recent illustration of this occurred in *A (FC) and ors v. Secretary of State for the Home Department*,[4] the highly significant decision of the judicial committee of the House of Lords finding the detention without trial of "suspected international terrorists" to be unlawful. An important argument in that case was the extent to which the court should scrutinise decision made by the executive.

5 Deference to the executive is an important feature of judicial review, just like the concept of the courts' role being restricted to review of the decision maker's decision making process rather than the merits of the decision itself. In cases involving national security, and particularly since 11 September 2001 suspected international terrorism, deference to the executive has played an even more important role. But when fundamental human rights are at stake, as in *A (FC),* the courts are faced with a dilemma. In many recent cases involving terrorism before *A (FC)* the courts continued to defer to the executive despite the fact that fundamental rights and liberties were being infringed. *A (FC)* is an important turning point. For the purposes of this paper, however, it is Lord Bingham's examination of the role of the courts in judicially

[4] [2004] UKHL 56; [2005] 2 WLR 87; *The Times*, 17 December 2004; *Independent*, 21 December 2004.

reviewing a decision when fundamental human rights issues, and the concept of proportionality in particular, arise:[5]

> *" … In Smith and Grady v United Kingdom (1999) 29 EHRR 493 the traditional Wednesbury approach to judicial review was held to afford inadequate protection. It is now recognised that 'domestic courts must themselves form a judgment whether a Convention right has been breached' and that 'the intensity of review is somewhat greater under the proportionality approach': R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532, paras 23, 27.*
>
> *… the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true … that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it 'The courts are charged by Parliament with delineating the boundaries of a rights-based democracy' (Judicial Deference: servility, civility or institutional capacity? [2003] PL 592, 597)."*

[5] Paras 40 and 42 of the judgment.

6 Deference to the decision maker (which itself is a shifting standard depending on the circumstances) and judicial review as review of a decision making process and nor merits review remain important standards of judicial review. However, there are particular constitutional reasons why human rights based judicial review is likely to involve a greater scrutiny than otherwise.

Unfairness

7 There have been a number of recent decisions concerning the public law principle of fairness.

8 It is a basic principle of fairness that a person ought to be able to make representations before being subject to some disciplinary sanction – the **right to be heard**.[6] In *Secretary of State for the Home Department v SP*,[7] the Minister appealed against a decision in a judicial review claim that a prison governor's decision to segregate SP had been unfair because she had not been given the opportunity to make representations before the segregation order was made. The reason for the segregation, given in writing to SP at the time of her removal to the segregation unit, was because it was necessary for the safety of others following her admission that she had felt like putting razor blades in a piece of soap to harm someone. She was not asked to comment about the reason for her removal. The Minister submitted that the post-decision safeguards in relation to segregation were such that fairness did not require SP be given an opportunity to comment prior to the decision. SP submitted that if she had been given the opportunity to comment she would have

[6] This right is also protected by Article 6 of the European Convention on Human Rights.

[7] [2004] EWCA Civ 1750; *The Times*, 21 January 2005.

explained that what she had said was in response to having been bullied by another inmate and was said in anger only.

9 The Court of Appeal upheld the decision below: given the importance of the governor's initial decision, fairness in this context required that SP should have been given the opportunity to make representations before a segregation order was made. The contemporary standards of fairness required the Secretary of State to give SP an opportunity to make representations before the order was made. Although not a formal punishment, in reality removal to the segregation unit was the most severe punishment that could be awarded following disciplinary charges for an inmate of a young offender institution. If SP had been given the opportunity to respond this might have influenced the initial decision and steps taken to prevent further bullying, thus fulfilling prison service order requirements to deal with inmates "fairly and openly". Fairness also played a part in helping to prevent unnecessary grievances within the closed prison service.

10 A recent decision of the Administrative Court, *R (Q suing by his father and litigation friend) v Independent Appeal Panel of Wolverhampton City*,[8] emphasises that where a claimant alleges **procedural unfairness**, including the provision of insufficient reasons for a decision, procedural errors have to be examined within their context. The mere fact that there has been an error of procedure is not necessarily enough. Q, a pupil, claimed judicial review of the decision of the appeal panel to allow his appeal against the decision to permanently exclude him from school, but to refuse to order his reinstatement. The appeal panel did not seek representations on behalf of Q in relation to comments made by the head teacher in his closing submissions about the breakdown in relationships between the pupil and the school making it impractical to reinstate Q. It

[8] Unreported. Administrative Court, 31 January 2005; Case no. CO/6259/2004.

was also argued that there had been a failure by the panel to give sufficient reasons for its decision not to order reinstatement.

11 In relation to the panel's failure to invite Q's representative to comment on the head teacher's closing submissions, the Court held that the issue was whether an error in procedure had given rise to unfairness. The opportunity for redress was available to Q at the material time, even if his representative was not invited to comment. There had been no loss of opportunity to cross-examine the head teacher or apply to cross-examine or to address the panel on the substance of the evidence given. There was also ample evidence before the panel to justify a decision that reinstatement was not practical. With respect to the argument that **insufficient reasons** were provided by the panel for its decision that there had been an irretrievable breakdown between all the parties concerned in the case, the Court held that whilst the decision letter had been inadequate in that it failed to give reasons why the decision was reached apart from the gravity of the incident, there was sufficient evidence and material contained in the short summary provided by the panel to support its decision. It was also obvious from the proceedings what the basis for its decision had been.

12 In *R (Richards) v Pembrokeshire County Council*,[9] the Court of Appeal explained that the primary source for **identifying the reasons** for a decision was the contemporaneous documented reasoning; that where there is any ambiguity in the reasons, that ambiguity can be resolved by reference to fresh evidence, provided that that evidence is credible and authoritative; but it would require exceptional circumstances before the court was prepared to entertain evidence of any other nature to enable reasons to be given for a decision.[10]

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[9] [2004] EWCA Civ 1000; 29 July 2004.

[10] See para 58 of the judgment.

13 The courts have considered the doctrine of **legitimate expectation**[11] in a number of important recent cases. Of most significance is *R (Rashid) v Secretary of State for the Home Department*.[12] The claimant (an Iraqi Kurd) had claimed asylum in the UK in 2001. His application (and appeal) was refused. Unbeknown to him and his advisers the Secretary of State had developed a policy which, should it have been applied to him at the time he applied, would have resulted in him being granted refugee status and entitled to indefinite leave to remain in the UK. The claimant only found out about the policy when it was revealed in the context of cases pending in the Court of Appeal. The claimant's case was then referred for reconsideration, but in the intervening period the war against Iraq had caused the policy to be changed and the claimant's application for asylum status and leave to remain was refused. The claimant argued that had the policy properly been applied to him he would have been granted refugee status, the failure to apply it was an abuse of power and/or breach of a legitimate expectation, the subsequent change in circumstances in Iraq cannot be relied upon by the Secretary of State as this would mean he was relying on events that occurred as a result of the delay arising because he failed to apply his own policy, and it was important that a policy applied fairly, consistently and equally. The Secretary of State argued, amongst other things, that it is a general public law principle that a decision-maker may make his decision in the light of the facts and law pertaining at the date of the decision, even where such a decision is made after an earlier decision has been quashed.

14 The court reviewed the authorities and legal principles underpinning the public law doctrine of legitimate expectation, and at para 44, Davis J held that:

[11] Discussed in paras 16-18 of David's paper.

[12] [2004] EWHC 2465 (Admin); *The Times*, 17 November 2004.

> *"In my view, these authorities show that detrimental reliance is not necessary, or a legal precondition, to be established in this context. There may be cases where an unwarranted departure from an established policy will be quashed without more. That is just because in such a case considerations of fairness and consistency and good administration may require the even-handed application of a stated policy and no further justification for the court's intervention is called for. Otherwise there would be an inducement to arbitrariness. But detrimental reliance is not irrelevant. On the contrary, it is ordinarily likely to be of great relevance: just because such a factor will feed into the consideration of the issue of whether a breach of legitimate expectation or departure from policy is of sufficient unfairness to require the intervention of the court by the grant of an appropriate judicial remedy."*

15 The public law doctrine of legitimate expectation thus differs from the private law doctrine of estoppel.[13] The Court found that there had been unfairness by abuse of process/breach of legitimate expectation for the following reasons:

15.1 The only reason the claimant found himself in the position he was in was because of the wrongful failure of those acting on the Secretary of State's behalf to apply the policy to him. To allow this would be to allow the Secretary of State to profit from his own wrong.[14]

15.2 The public interest in the practice that refugee status should only be accorded on the basis of the relevant evidence at the time of the decision was outweighed by a greater public interest: that an unwarranted failure to apply a policy at the relevant time should not be allowed to be utilised in the light of a subsequent change of circumstances to deprive an individual of the asylum benefit that he should have been entitled to had the policy been properly applied at the relevant time.[15]

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[13] See also, Hobhouse LJ in <u>*R v Secretary of State for the Home Department, ex parte Patel*</u> [1998] INLR 570 at 591.

[14] See para 47 of the judgment.

[15] Para 50.

15.3 There was a legitimate expectation even though the claimant did not know of the policy (let alone rely on it to his detriment). He was entitled to assume (i.e. he had a legitimate expectation), that whatever applicable policy was in existence at the time would be applied to him.[16]

15.4 In any event there was some detriment - a "moral detriment".[17]

16 *Rashid* represents an important development and clarification of the legitimate expectation principle in public law. The Court's approach could be said to reflect an underlying principle of public law: the rule of law – and in particular a central aspect of that principle, that like cases should be treated alike and there should be no arbitrariness in decision making. Rather than adopt an overly technical approach, the Court found a way to develop public law principles of fairness in order to give effect to this underlying principle. However, it will be interesting to see if the decision in *Rashid* survives. Acknowledging the general importance of the case on public law principles, the Court allowed the Secretary of State permission to appeal to the Court of Appeal – the appeal has yet to be heard.

17 In *R (Montpeliers & Trevors Association) v City of Westminster*,[18] the Administrative Court considered the extent of the **duty to consult**, one of the usual requirements of procedural fairness. According to Munby J., where a consultation process takes place, fairness requires there is a process of consultation in which those consulted could express their views on **all** the various options – not just on some of them.[19]

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[16] Para 51.

[17] Para 52.

[18] [2005] EWHC 16 (Admin); (2005) EG 117 (CS); 13 January 2005

[19] See para 29 of the decision.

18 What constitutes fair consultation was also considered in R (Jennifer Capenhurst) v Leicester City Council.[20] Silber J. set out the leading authorities:[21]

18.1 Consultation must be undertaken 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.[22]

18.2 Fairness will very often require that the person consulted is informed of the gist of the case which he has to answer.[23]

19 Therefore, according to the Court, the person consulted is entitled to be informed or made aware of what criterion would be adopted by the decision-maker and what factors would be considered decisive or of substantial importance by the decision-maker in making his decision at the end of the consultation process.[24]

Procedural issues

20 A number of important recent cases have been concerned with the procedural and practical aspects of judicial review.[25]

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[20] [2004] EWHC 2124 (Admin); [2004] ACD 93.

[21] At paras 41 and 42.

[22] *R v. North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, 258 [108]

[23] *R v. Secretary of State ex parte Doody* [1994] 1 AC 531, 550.

[24] Para 46.

[25] Discussed in para 39-57 of David's paper.

Alternative remedies

21 Judicial review will normally be refused as an exercise of judicial discretion where an alternative remedy is available to the Claimant. In *Cookson & Clegg Ltd v Ministry of Defence & Anor*,[26] C had applied for permission to judicially review a commercial decision of the defendant and instituted separate Part 7 proceedings in the High Court. The remedies claimed and arguments advanced in both proceedings were materially identical. The Court held that in commercial disputes it was wrong to have two sets of proceedings running in parallel seeking the same relief, with potentially two sets of costs and duplication of time, effort and resources not only of the parties, but also of the court. Judicial review was customarily refused as an exercise of judicial discretion where an alternative remedy was available.

22 In another situation, where a claimant could pursue an investigation of a decision by a local government ombudsman, this should be pursued first before judicial review proceedings are brought - *R (Scholarstica Umo) v Commissioner for Local Administration in England*.[27]

23 The same principle was recently applied in a decision of particular interest to judicial review practitioners as well as immigration specialists as it concerned the question of whether a statute "ousts" the supervisory power of the court to judicially review a decision: *R (on the application of M) v (1) Immigration Appeal Tribunal (2) Secretary of State for the Home Department; R (on the application of G) v (1) Immigration Appeal Tribunal (2) Secretary Of State For The Home Department.*[28] Section 101(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")

[26] [2005] EWHC 38 (Admin); 21 January 2005.

[27] [2003] EWHC 3202 (Admin); [2004] ELR 265; 24 November 2003.

[28] [2004] EWCA Civ 1731; [2004] ACD 85 (P.339); *The Times*, 23 December 2004: *Independent*, 11 January 2005

provided that a party to an appeal to an immigration adjudicator may appeal on a point of law to the Immigration Appeal Tribunal ("IAT"), s. 101(2) provided a further right to appeal, on the basis the IAT had made an error of law, to the High Court, and s.101(3) provided that that appeal would be heard by a single judge on the papers (without an oral hearing). The claimants sought to judicially review decisions of the IAT, and the Home Secretary argued that judicial review was not available in light of the new statutory procedure. The Court held that the 2002 Act did not expressly oust judicial review, and it could not be ousted by implication only. But Parliament had intended statutory review to take the place of judicial review. Judicial review is a remedy of last resort and any alternative remedies must be considered first.

24 However, the mere existence of a **private** cause of action does not necessarily make judicial review inappropriate. Where the claimant owner of rival markets claimed judicial review of the Minister's decision to grant leases for the purpose of selling meat or fish to another market authority, the other market authority (and second respondent) argued judicial review was inappropriate because the claimant had an alternative private law remedy in the tort of disturbance. The Court of Appeal held that the existence of the private cause of action did not make judicial review inappropriate. The question of whether the Minister had exceeded his powers in granting the consent was a public law issue.[29]

Standing

25 A recent case to have considered the issue of standing (whether the claimant has a sufficient interest to bring a claim) is of particular interest to those involved in public interest litigation. *In R (David Edwards) v (1)*

[29] *City of London Corporation v (1) Secretary of State for Environment, Food and Rural Affairs (2) Covent Garden Market Authority* [2004] EWCA Civ 1765; *The Times*, 27 December 2004; *Independent*, 18 January 2004.

The Environment Agency (2) First Secretary of State & Rugby Ltd,[30] the claimant ("DE") brought a claim for judicial review of the grant of a permit to a cement company allowing it to continue to operate a cement plant near Rugby town centre. The judge at first instance refused DE's permission to proceed because he did not have standing. DE had lived in Rugby all his life but at the time of the hearing appeared to be homeless. He had attended meetings of an organisation that opposed the cement plant operations. The Environment Agency argued that DE did not have sufficient interest to bring the claim as he had not taken part in the consultation process and he had been chosen to bring the claim only because he was more likely to obtain public funding, this that was an abuse of process.

26 The Court held that DE did not have to be active in a campaign himself to have an interest in its outcome. He had a sufficient interest in the decision to issue the permit even if he was temporarily homeless, because as an inhabitant of Rubgy he would be affected by any adverse impact on the environment which the trials on the use of tyre chips by the plant might have. Whilst it appeared that DE had been put up as claimant in order to secure public funding of the claim by the Legal Services Commission ("LSC"), it was not an abuse of the court's process for the claim to be brought in DE's name if it was thought by those behind the claim that funding would not otherwise have been available. In any event, the LSC was aware of the relevant facts when issuing the funding certificate and they must have been taken to have addressed the question of whether granting the funding certificate would be an abuse of the system under which cases were selected for public finding.

[30] [2004] EWHC 736 (Admin); [2004] 3 All ER 21; [2004] Env LR 43; [2004] ACD 82.

Costs

27 A couple of particularly important cases for those involved in public interest litigation concerning costs in judicial review have recently been heard. A difficulty that charitable organisations or pressure groups have had in the past when deciding whether or not to bring judicial review proceedings is the danger that they will end up having to pay the other party's costs. This was a major problem where the group has little or no money, where the potential challenge is of particular public importance, and where lawyers are prepared to act pro bono for the group. The effect of the threat of costs in such circumstances could frequently put pressure groups off mounting a challenge and allow an otherwise controversial decision which adversely affects the rights or lives of the vulnerable to go unchallenged.

28 Fortunately, the courts have now gone a long way to remedy this injustice and allow such parties to get a **protective cost order** ("PCO") in the appropriate circumstances. Such an order protects the losing party from bearing the other party's costs. In the first case, *R (Refugee Legal Council) v Secretary of State for the Home Department*,[31] the Court of Appeal granted the Refugee Legal Council ("RLC"), a non-profit making organisation interested in protecting the rights of refugees and asylum-seekers, a preliminary PCO in relation to its appeal challenging the detention of asylum seekers in Harmondsworth. The RLC were due to have a substantial hearing before the Court on their application for a PCO so they could pursue their appeal in relation to Harmondsworth detention centre. However, it was necessary to apply for a preliminary PCO so that the RLC would not be vulnerable to pay the Secretary of State's costs for the application for a PCO (such Kafkaesque circumstances being caused by the Secretary of State's refusal not to

[31] [2004] EWCA Civ 1230; 16 August 2004.

agree that he would not pursue the RLC for costs if it lost its application for a PCO).

29 Brooke LJ decided that the question of whether PCOs should be granted in these circumstances was itself an important one that the Court of Appeal should consider. The approach of the Secretary of State was to "kill the process at birth". On the basis that the RLC was a serious and responsible organisation pursuing important public interest litigation, that it would be represented pro bono, and that it would not apply for its costs if it was successful, Brooke LJ granted the preliminary PCO so that the full Court could properly consider the application for the substantial PCO. When the full Court convened to hear that application, in a hearing that could have led to authoritative and important guidelines being made, the Secretary of State suddenly conceded at the very last moment and consented to the PCO. This meant there was no judgment by the Court on the issue, although there was the first ever PCO, even if made with consent.[32]

30 However, it was not at all long before the question came back before the Court. In *R (Corner House Research) v Secretary of State for Trade and Industry*,[33] the Court of Appeal overturned the decision of the judge below and granted a PCO. At the time of writing this paper the eagerly awaited judgment of the Court of Appeal has yet to be written, but the Court has decided to make the PCO. It is expected the judgment will include various guidelines about PCOs, such as that they should only be available where the claimant cannot otherwise afford to fund the litigation, the claim is in the public interest and might not otherwise be

[32] *R (Refugee Legal Council) v Secretary of State for the Home Department (Costs)* [2004] EWCA Civ 1296; 22 September 2004. In his brief judgment, Brooke LJ stated that he was satisfied it was appropriate to make a consent order to the effect that there will no be order for costs at the hearing of the substantive appeal.

[33] Unreported and judgment not yet handed down by the Court of Appeal; appealing decision in [2004] EWHC 3011 (Admin),

brought, the lawyers act pro bono, the claimant agrees not to pursue the respondent for its costs if it is successful, and a cost-capping order is made. This will mark an important step forward for public interest litigation.

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14 February 2005