JUDICIAL REVIEW: RECENT DEVELOPMENTS

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1. INTRODUCTION

In the last 30 years the law and practice relating to judicial review of administrative action has undergone far-reaching changes. Indeed the growth of the principle of accountability at various levels - political, administrative and legal - has been considerable. There have been promulgation of new procedures for control and monitoring, the creation of new offices such as that of the Ombudsman and the enactment of new legislation relating to transparency and accountability in government. Judicial review is supplementary to all these systems since it cannot be expected that every dissatisfaction with administrative action or executive decision will confer a legal remedy. Such a course would transfer the seat of government to the courts. There are therefore still important limitations on the scope of judicial review. In this paper we will examine the extent of the widening of the field and seek to define the new boundaries.

There are three main procedures for initiating legal proceedings to challenge the validity of administrative action:

(i) action begun by writ, in which claims may be made for damages resulting from illegal or ultra vires acts;

(ii) habeas corpus proceedings to challenge the legality of the detention of a person by an executive officer or authority;

(iii) appeal to a higher court where an administrative tribunal or body makes a decision in respect of which a statutory right of appeal has been granted;

(iv) action begun by originating summons for the interpretation of a statutory provision where the citizen's rights or obligations or interest may be affected by the interpretation; and

(v) judicial review proceedings (originating in the ancient writs of certiorari, prohibition and mandamus).

We will be concentrating on this fifth process of judicial review.

2. WIDENING LOCUS STANDI

Under the former Rules introduced in 1960 as Title 44A of the Judicature (Civil Procedure Code) Law there was no provision which defined the persons who could apply for judicial review. Historically, it appears that the approach of the Courts varied depending on the nature of the remedy and clearly there were distinctions between the prerogative remedies and declarations and injunctions which were subject to more stringent rules where the applicant had to prove the infringement of his private right, that he was suffering special damage, and in the case of injunctions, that this was irreparable. *Gouriet v. Union of Post Office Workers [1978] A.C. 435.*

The new Rules, patterned on the modern English Order 53 formulation now, state:

"The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates".

It is clear that under the new rule, as it was under the old principles, a financial or legal interest in the subject-matter will provide a sufficient *locus standi*; but that under the new rule this is not an essential requirement. It is also clear that a mere busy-body interfering in matters with which he has no rational concern will not be recognised as having sufficient interest. It is extremely difficult to define the precise point between these two extremes at which the Court will grant or deny that standing. It is however clear that under the new Rules the approach of the Courts is far more flexible and

liberal. An important aspect of the new development is the increased facility with which civic organisations, pressure groups and representative bodies may gain access to the court. Today a Court properly applying the new rules will not easily deny standing to a responsible body of persons seeking on reasonable grounds to challenge the validity of official action.

3. PRELIMINARY OBJECTIONS

It is now more difficult for preliminary objections on the ground of standing to succeed. Although the Rule speaks of "sufficient interest" in respect of the initial application for leave, the Courts are now inclined to join the preliminary point to the merits. In *Inland Revenue Commrs. v. National Federation of Self-Employed and Small Business Ltd. ("the IRC Case") [1982] A.C. 617,* the House of Lords expressed the view that the Court may be justified in granting leave to apply for judicial review even if it was not convinced that at the later stage the applicant would succeed in showing that he had the requisite *locus standi*.

Lord Diplock stated (at p.642 F-H):

> "So this is a 'threshold' question in the sense that the court must direct its mind to it and form a *prima facie* view about it on the material that is available at the first stage. The *prima facie* view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself".

4. PERSON AGGRIEVED VS PERSON WITH A SUFFICIENT INTEREST

CASE NO. 1 *THE IRC CASE (1982) A.C. 617; [1981] 2 W.L.R. 722; 2 A.E.R. 93.*

The National Federation was incorporated as a limited company representing self-employed persons and small businessmen. The I.R.C. made an arrangement with the employees of 6,000 casual

workers in Fleet Street and their union by which they would cease to evade tax by using false names in return for the Revenue's promise not to investigate evasions of previous years. The Federation's complaint was that the Revenue was treating those casual workers differently from the way in which other guilty taxpayers were treated. It claimed a declaration that such action was unlawful and an order of mandamus directing the Revenue to assess and collect the taxes due. Lord Diplock pointed out that the old formula of "person aggrieved" had been abandoned for the more flexible test of "sufficient interest". The House of Lords held that -

> since tax legislation, far from expressly or impliedly conferring on a taxpayer the right to make proposals about another's tax or to inquire about such tax, in fact indicated the reverse by reason of the total confidentiality of assessments and negotiations between individuals and the Revenue, and since on the evidence the Revenue in making the impugned arrangement were genuinely acting in the care and management of taxes under the powers entrusted to them, the application made by the applicant would be dismissed because the applicant did not have a sufficient interest because it had not been shown that the Revenue had acted *ultra vires* or unlawfully in making the arrangement.

CASE NO. 2 *R. V. SECRETARY OF STATE FOR THE ENVIRONMENT, EX P. WARD [1984] 1 W.L.R. 834.*

A London borough council having a statutory duty to provide accommodation for gypsies, leased land from the G.L.C. and spent considerable sums in providing the site. The site proved unsuitable and it decided to discontinue the lease. The applicant asked the Secretary of State to exercise his statutory power to direct the Council to comply with its statutory duty. The Secretary of State decided, as the danger was not imminent, that he would give no such direction. Woolf, J.

held that since the applicant was directly affected by the Council's decision and notwithstanding the alternative remedy of applying to the Secretary of State, he had sufficient interest to make the application for judicial review. Since the Council had failed to appreciate its statutory duty to provide accommodation its decision should be quashed so that the Council could reconsider the matter but the Secretary of State's decision was not invalid since it was not unreasonable for him to decide not to exercise his discretion as there was no immediate danger of the gypsies being evicted.

CASE NO. 3 *R. v. HER MAJESTY'S TREASURY, EX P. SMEDLEY [1985] 1 Q.B. 657; [1985] 2 W.L.R. 576.*

In November 1984 the Treasury laid a draft Order in Council before both Houses of Parliament specifying the Undertaking made by representatives of the member states of the European Community in 1984 to finance a supplementary and amending budget on the basis that the Undertaking was part of the Community Treaty as defined by the European Communities Act. The applicant, a British taxpayer, applied for judicial review claiming that the Undertaking was not such a treaty, that the budget of the Community should be entirely financed from the Communities' own resources and that an Order in Council to declare that such a treaty was to be regarded as Community Treaty was *ultra vires*.

The Court of Appeal held that in the light of the relaxed rules as to *locus standi* there was no doubt that the applicant as a taxpayer had a "sufficient interest" to make the application, and while Parliament was entirely independent of the Court, subordinate legislation such as Orders in Council was subject to a degree of judicial control in that the Court could hold that particular examples were not authorised by law and were therefore null and this could be done although the draft had not yet been made an Order. On the merits the Court held that the Undertaking did amount to a Treaty as

represented and the proposed Order would not be *ultra vires*.

CASE NO. 4 *R. V. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, EX P. THE WORLD DEVELOPMENT MOVEMENT LTD. [1995] 1 W.L.R. 386.*

In 1989 the U.K. Government made an oral offer to the Malaysian Government of aid and trade provision support under section 1(1) of the Overseas Development and Cooperation Act to build an hydro-electric power station in that country. An appraisal mission sent to Malaysia reported that the economic viability of the project was marginal and when the budget for the project was revised upwards the economic appraisal concluded that it was a "very bad buy" and would be a burden on Malaysian consumers. Nevertheless, the Secretary of State took the view that withdrawal would damage the U.K.'s credibility and decided to approve support for the project. The applicants, a company limited by guarantee which acted as a non-partisan pressure group, dedicated to improving the quantity and quality of British aid to other countries, sought an assurance from the Secretary of State that no further funds would be provided for the project but he refused the request. The applicant's sought judicial review of the Secretary of State's decision to refuse to withhold the payments. The Divisional Court held -

(1) that since standing went to jurisdiction it was not to be treated as a preliminary issue but was to be taken in the legal and factual context of the whole case; that the merits of the challenge were an important, if not dominant, factor when considering standing and that significant interest were the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief was sought and the prominent role of the applicants in giving advice, guidance and assistance regarding aid.

(2) that it was for the court to determine on the evidence whether particular conduct was within the purpose of the Act of 1980, but, once it was determined that the conduct was within the statutory purpose, the weight to be given to competing factors was a matter for the Secretary of State; that the power under the Act to furnish assistance related to economically sound development, and where contemplated development was so economically unsound that there was no economic argument in its favour, there was no material distinction between questions of propriety and regularity on the one hand and questions of economy and efficiency of public expenditure on the other; that, although the Secretary of State was fully entitled when making decisions whether to grant assistance under the Act of 1980 to take into account political and economic considerations and to consider the impact of the United Kingdom's credibility of withdrawing an offer already made, on the evidence no developmental promotion purpose within section 1 of the Act of 1980 existed in July 1991, and the Secretary of State's decision was therefore unlawful; and that on the facts delay was no bar to relief and in any event the general importance of the matter was good reason for extending time within R.S.C., Ord. 53, r. 4 and delay provided no basis in itself for refusing relief.

CASE NO.5 *REG. V. INSPECTORATE OF POLLUTION, EX PARTE GREENPEACE LTD. (NO. 2) [1994] 4 ALL E.R. 329.*

The applicant sought leave to apply for an order of certiorari to quash the decision of the Inspectorate of Pollution and the Minister of Agriculture, Fisheries and Food to grant applications by British Nuclear Fuels Plc for variations of existing authorities under the Radioactive Substances

Act 1960 to enable that company to discharge radioactive waste from its thermal oxide reprocessing and a stay on the implementation of the variations. The learned judge granted leave but denied the stay and the applicant appealed against the refusal of the stay. The Court of Appeal held, dismissing the appeal, since the evidence before the judge was that the variation would allow for discharge of radioactive material within authorised limits and the applicant had given no cross-undertaking in damages to compensate the third party for any financial loss it might suffer, the judge applied the correct principles on the balance of convenience to refuse the stay. The Case is interesting from the point of view that the *locus standi* of Greenpeace was taken for granted as well as for the fact that, in respect of the stay, principles similar to those applied with respect to interlocutory injunctions were applied.

5. THE LOCUS STANDI OF THE RESPONDENT

For a decision to be susceptible to judicial review "the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers"per Lord Diplock in *Council of the Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374 at pp. 408-9.*

The respondent whose action or inaction is the subject of the application must be a public body or officer and must have been acting in a public rather than a private law capacity. Although the respondent's power may be derived from statute it is not essential that the powers or duties in question should have been expressly conferred by statute. In certain cases where a statutory body has a contractual relationship with the applicant a challenge may be sustained if there is a public element involved. Domestic Tribunals and arbitral bodies whose authority derive solely from contract

are therefore not subject to judicial review.

CASE NO.6 *R V. HAMMERSWORK AND FULHAM L.B.C., EX P. BEDDOWES [1987] 2 W.L.R. 263; [1987] Q.B. 1050*

The Council owned an estate consisting of blocks of rented flats built in 1933. The Council adopted a policy supported by the Conservative Government but opposed by the Labour Party members to sell the estate for development for owner-occupation. In accordance with the Housing Act there was consultation with the Housing Policy Committee and the tenants and in 1986 shortly before the local government elections the Committee resolved to carry out the first phase of the policy by agreeing to sell one of the blocks of flats to a private developer on terms including restrictive covenants which would largely prevent the letting of vacant flat on the retained land save by a long lease at a premium. The Court of Appeal treated the Council's decision as amenable to judicial review but held by a majority that -

> since the council's policy, albeit designed to produce owner-occupancy and not rented accommodation, was consistent with the purpose of using the estate for providing housing accommodation in the district, the creation of the restrictive covenants in implementation of the policy would not unlawfully fetter the exercise by the council of its housing powers and refused the application.
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> Kerr, L.J. dissenting said that -
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> "the housing policies of the council and committee for the development of the estate were deliberately underpinned by the scheme of the restrictive covenants with the predominant motive of seeking to ensure the continuation and irrevocable maintenance of the policies in the event of a political change in the administration of

the borough after the elections in 1986. Therefore, the decision to contract for the development of the block subject to the covenants was an unreasonable and impermissible exercise of the powers and functions of a housing authority."

CASE NO. 7 *R. V. DR. A. BINGER & N. VAUGH, EX PARTE*

CHRIS BOBO SQUIRE (1983) 20 J.L.R. 114

The applicant was employed by the Scientific Research Council for a period of three years. The employment contract contained provisions for suspension and dismissal. The applicant was suspended and eventually dismissed on grounds of unauthorised absence from duty and general lack of interest in his work for a prolong period. The Supreme Court upheld a preliminary objection on the ground that the respondent as a statutory authority had been given discretionary powers to appoint its officers on such terms and conditions as it thinks fit and the relationship was purely contractual it being not enough that the applicant's office was a public office it must also be an office in respect of which there are essential requirements to be observed.

CASE NO.8 *REG. V. RENT OFFICER SERVICE, EX PARTE MULDOON*

Two applicants had each sought judicial review of the refusal or failure of the Rent Officer and a local authority to determine their respective claims to housing benefits. The Secretary of State who had an obligation to reimburse up to 95% of local authorities' housing benefit expenditure, applied to be joined as a party. The House of Lords held that on its true construction R.S.C. Order 53, r. 5(3) required notice to be given to persons who would be affected by the judicial review decision without the intervention of any intermediate agency and the Secretary of State's collateral obligation to increase the authority's annual housing benefit subsidiary did not amount o an obligation to pay housing benefit to the applicant either directly or through the agency of the local authority; and

that, accordingly, the Secretary of State would be no more than indirectly affected by the decision in the judicial review proceedings and could not be joined as a party.

6. RESPONSIBLE RESPONDENTS

It was formerly the orthodox view that the rules of natural justice applied to bodies which act in a judicial capacity. In *R. v. Electricity Commissioners [1924] 1 K.B. 171*, in his the much quoted dictum Lord Atkin stated that certiorari could issue to "any body of persons having legal authority to determine questions affecting the rights of subject, and having the duty to act judicially". This begun a shift away from the institutional to the functional characteristics. However, the Courts were reluctant to imply the duty to act judicially. In *Nakkuda Ali v. Jayatne [1951] A.C. 341*, the Controller of Textiles in Ceylon had cancelled a textile dealer's licence in pursuance of a power to revoke a licence when he had "reasonable grounds for" for believing its holder to be unfit to continue as a dealer. The dealer applied for certiorari to quash the order, contending that the Controller had not held an inquiry in conformity with natural justice. The Judicial Committee of the Privy Council dismissed his appeal, holding that the Controller, although obliged to act on reasonable grounds, was under no duty to act judicially, so that certiorari could not issue and compliance with natural justice was unnecessary.

In the early 1960s the balance shifted and in 1963 the House of Lords in the landmark decision of *Ridge v. Baldwin [1964] A.C. 40* restored the law to its developmental course. Their Lordships held, by a majority:-

> that a chief constable, dismissible only for cause prescribed by statute, was impliedly entitled to prior notice of the charge against him and a proper opportunity of meeting it before being removed by the local police authority for misconduct. In an

illuminating review of the authorities, Lord Reid repudiated the notions that the rules of natural justice applied only to the exercise of those functions which were analytically judicial, and that a "superadded" duty to act judicially had to be visible before an obligation to observe natural justice could arise in the exercise of a statutory function affecting the rights of an individual. He emphasised that the duty to act in conformity with natural justice could, in some situations, simply be inferred from a duty to decide what the rights of an individual should be.

Since then the scope of judicial review has expanded to encompass a wide variety of bodies and officials who are adjudged to have a duty to act fairly and the more modern use of the term "fairly" is indicative of the flexibility of the expanding jurisdiction.

CASE NO. 9 *SHARIF V. COMMISSIONER FOR REGISTRATION OF INDIA AND PAKISTANI RESIDENTS [1966] A.C. 47*

The Indian and Pakistani Residents (Citizenship) Act 1949 provided that any Indian or Pakistani resident possessed of certain residential qualifications may apply for registration as a citizen of Ceylon; section 8(1) provides that the Commissioner for Registration of Indian and Pakistani Residents or his deputy shall refer any such application for verification of the particulars and statements therein to the area investigating officer, and section 8(4) that the report of the investigating officer shall be taken into consideration in dealing with the application. The Privy Council held that when conducting the inquiry under the Act of 1949 the commissioner was acting in a semi-judicial capacity in which he was bound to observe the principles of natural justice, which required that a party should b given fair notice of the case made against him and an adequate opportunity at the proper time to meet that case; that although under section 15(4) the commissioner had wide powers

of inquiry and investigation not enjoyed by a judge in a civil or criminal trial and was not bound to conduct the inquiry according to the normal rules of evidence, it would have been in accordance with normal fair conduct of an inquiry to disclose the report of the investigating officer and the report on which the letter from the Director of Education was made, nor was it fair that the school teacher should have been examined by the deputy commissioner on the details of the investigating officer's report without disclosing the report to the appellant's advocate, for it was almost impossible for the appellant's advocate to re-examine the witness and clear up any difficulties raised; that, during the whole conduct of the inquiry the appellant was never told the details of the case against the genuineness of the document and was never given a proper opportunity of answering it, and the failure to disclose the Director of Education's letters at an earlier date may have misled the appellant's advocate into thinking that no further argument or evidence was required as to the genuineness of the certificate; and that, in all the circumstances, the principles of natural justice were not complied with. Accordingly, the orders of the Supreme Court and of the deputy commissioner must be quashed and the case remitted to the Supreme Court for the purpose of placing de novo the appellant's application before the commissioner, preferably for hearing by a different deputy commissioner.

CASE NO. 10 *JEFFS V. NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD [1967] 1 A.C. 551.*

The respondent board was established by the Dairy Production and Marketing Board Act, 1961, and was concerned both with the production and marketing of dairy products. One of its powers was to define areas from which particular factories could get cream and milk. In 1963 a committee set up by the Board held a public inquiry and made a written report recommending certain zonings and the Board accepted its recommendations. The appellant farmers sought a writ of

while the board could regulate its procedure as it thought fit, e.g. by hearing the interested parties orally or by receiving written statements from them, or by appointing a person to hear and receive evidence or submissions from interested parties for its own information, in determining zoning questions affecting the rights of individuals it was under a duty to act judicially and it had failed to discharge that duty in that it had reached its decision without consideration of, and in ignorance of, the evidence, and had thus failed to hear the interested parties.

CASE NO. 11 *MAHON V. AIR NEW ZEALAND ET AL [1984] 3 W.L.R. 884*

There was an airline crash in the Antarctica involving an Air New Zealand DC-10 commercial aircraft. A Royal Commission of Inquiry was appointed to investigate the cause of the accident. The Commissioner found that the dominant cause of the accident was the act of the airline in changing the computer track of the aircraft without telling the aircrew. He exonerated the captain and other members of the crew from blame. He also found that there had been a predetermined plan of deception on the part of officials of the airline with the result that he had had to listen "to an orchestrated litany of lies." He made an order under section 11 of the Commissions of Inquiry Act 1908 that the airline should pay $150,000 towards the cost of the Royal Commission. The airline applied by motion for an order of judicial review of the order that it should pay part of the costs of the commission.

The Privy Council in uphelding the decision of the Court of Appeal of New Zealand held - that the rules of natural justice required the judge as a Royal Commissioner investigating the cause and circumstances of the accident to make findings based upon

material that logically tended to show the existence of facts consistent with those findings and, if he disclosed his reasons to support those findings, to ensure that the reasoning was not self-contradictory; that natural justice also required the judge to ensure that any person represented at the inquiry that might be affected adversely by a finding should know of the risk of such a finding being made and be given an opportunity to adduce additional material that might have deterred the judge from making that finding; and that, since there was no material of probative value that tended by a process of logical reasoning to show that there had been a predetermined plan of deception and since certain witnesses had not been given an opportunity to answer the criticisms made against them, the order that the airline pay part of the costs of the Royal Commission had been properly set aside.

7. FETTERING, UNFETTERED DISCRETIONS RATIONALISATION OF THE BASIS FOR REVIEW

Where a discretion is given by statute to a person or body to make choices which impact on the interests of other persons, the statute may or may not specify limitations or restrictions on the manner of the exercise of the discretion.

CASE NO. 12 *PADFIELD V. MINISTER OF AGRICULTURE, FISHERIES AND FOOD [1968] 2 W.L.R. 924.*

Under a statute the Minister had the duty, after considering a Committee's report and any complaint made to him on the operation of a milk marketing scheme, if he thinks fit, to amend or revoke the scheme and direct the Board to take such steps to rectify the matter as he may specify. Under the scheme producers had to sell their milk at different prices and the South East Region producers contended that circumstances had changed and the Minister had unlawfully failed to

appoint a committee of investigation as requested by them. The House of Lords held that -

> Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to be determined by the construction of the Act and this was a mater of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere.

The Courts do not abstain from reviewing the exercise of discretionary power on the grounds that it is administrative or managerial and will examine the quality and attributes of the decision to determine its justiciability. Thus the managerial decisions of a prison governor, the use of government contract powers to exert pressure and the exercise of prerogative powers have been held to be subject to review.

CASE NO. 13 *THE COUNCIL OF CIVIL SERVICE UNIONS V. THE MINSTER FOR THE CIVIL SERVICE [1985] A.C. 374; [1984] 3 W.L.R. 1174.*

The main functions of Government Communications Headquarters ("GCHQ") were to ensure the security of military and official communications and to provide the Government with signals intelligence; they involved the handling of secret information vital to national security. Since 1947, staff employed at GCHQ had been permitted to belong to national trade unions, and most had done so. There was a well-established practice of consultation between the officials and trade union sides about important alterations in the terms and conditions of service of the staff. On December 22, 1983, the Minister for the Civil Service gave an instruction, purportedly under article 4 of the Civil Service Order in Council 1982, for the immediate variation of the terms and conditions of service of

the staff with the effect that they would no longer be permitted to belong to national trade unions. There had been no consultation with the trade unions or with the staff at GCHQ prior to the issuing of that instruction. The applicants, a trade union and six individuals, sought judicial review of the minister's instruction on the ground that she had been under a duty to act fairly by consulting those concerned before issuing it.

The House of Lords held that executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from a common law, or prerogative, rather than a statutory source, and a minister acting under a prerogative power might, depending on its subject matter, be under the same duty to act fairly as in the case of action under a statutory power; that the applicants would, apart from considerations of national security, have had a legitimate expectation that unions and employees would be consulted before the minister issued her instruction of December 22, 1983, and, accordingly, but for the decision-making process would have been unfair by reason of her failure to consult them and would have been amenable to judicial review.

CASE NO. 14 *LEECH V. PARKHURST PRISON DEPUTY GOVERNOR [1988] A.C. 533.*

L., a prison inmate, succeeded in a petition to the Secretary of State to quash the disciplinary finding of guilty made by the deputy prison governor but his prison records were not altered to reflect the result. He was subsequently told that the Secretary of State had no power to quash the finding. The House of Lords held allowing his appeal, -

> that the court had jurisdiction to entertain an application for judicial review of a prison governor's disciplinary award for an essential characteristic of the rights of the subject, whatever his status and however attenuated his rights and liabilities might be in consequence of some punitive or other process, was a right of recourse to the

courts unless some statute provided otherwise, and that there was no provision in the Prison Act 1952, in particular section 4(2), which derogated from that principle in relation to the exercise of the disciplinary powers conferred upon a prison governor; that accordingly, in the circumstances for adjudication made upon L. would be quashed and the matter relating to P. would be remitted to the Queen's Bench Division for determination on the merits; and added that in a matter of jurisdiction it is not right to draw lines on a purely defensive basis and determine that the court has no jurisdiction over one matter which it ought properly to entertain for fear that acceptance of jurisdiction may set a precedent which will make it difficult to decline jurisdiction over other matters which it ought not to entertain.

CASE NO. 15 *R. V. SECRETARY OF STATE FOR THE HOME DEPT., EX P. BENTLEY [1994] 2 W.L.R. 101.*

The Secretary of State refused a free pardon where the death sentence had already been carried out on the ground that he could not simply substitute his judgment for that of the then Home Secretary and that it had been the long established policy of successive Home Secretaries that a free pardon in relation to a conviction for an indictable offence should be granted only if the moral as well as technical innocence of the convicted person could be established, which was not possible in this case. The Divisional Court held that -

(i) decisions taken under the Royal Prerogative were susceptible to judicial review if their nature and subject matter were amenable to the judicial process and in so far as the challenge did not require the court to review questions of policy; and that, although the formulation of criteria for the exercise of the Royal Prerogative of mercy by the grant of a free pardon was probably not justiciable, a failure by the Home Secretary

to recognise that the prerogative of mercy could be exercised otherwise than by way of a free pardon was subject to judicial review; and

(ii) that the Royal Prerogative of mercy was a broad and flexible constitutional safeguard against mistakes encompassing conditional as well as free pardons; that where it was wished to recognise that a death sentence, which had been carried out should have been commuted to life imprisonment there was no objection in principle to the grant of a posthumous conditional pardon; that the Home Secretary had not given sufficient consideration to the possibility of granting a form of pardon suitable to the circumstances of the case; and that, accordingly, the Home Secretary should consider afresh whether it would be just to exercise the prerogative of mercy in such a way as to acknowledge the generally accepted view that the applicant's brother should have been reprieved.

8. THE NATURALNESS OF NATURAL JUSTICE

The concept of natural justice which is inherent in the principles of natural law has, as we have seen, regained its natural features exemplified by the use of the non-technical term "fairness". The law has moved towards the "position where the common law requirements of procedural fairness will, in the absence of clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making" *Annetts v. McCann (1991) 65 A.L.J. 167 (168).* The duty to afford procedural fairness has been extended in recent years to a wide variety of circumstances.

CASE NO. 16 *REES V. CRANE [1994] 2 A.C. 173; [1994] 2 W.L.R. 476.*

It was alleged that a superior court judge was unable or willing to perform his judicial

functions. The Chief Justice decided that the judge should not preside in court and the Judicial and Legal Services Commission confirmed this decision. Without notifying the judge the Commission met to consider whether it should make representations to the President that the question of his removal from office ought to be investigated. The judge sought judicial review and redress for infringement of his constitutional rights. The Privy Council held -

(i) that although the Chief Justice of Trinidad and Tobago as head of the judicial administration there had power to organise the procedures and sittings of the courts, including arranging that for a temporary period a particular judge did not sit in court, a judge could only be suspended or removed from office in accordance with the procedure prescribed by the Constitution; that the decision of the Chief Justice to exclude the respondent from the roster, with no indication when he would be permitted to sit in court again, was not merely an administrative arrangement within the Chief Justice's competence but constituted an indefinite suspension which he had no power to impose and which could not be corrected retrospectively by the order of suspension made by the President under the Constitution; that in purporting to confirm the Chief Justice's decision or to suspend the respondent themselves the commission had also acted *ultra vires,* and those decisions of the Chief Justice and the commission were unlawfully and had properly been quashed; and

(ii) that although in preliminary or initiating proceedings the person concerned generally had no right to be heard, particularly if he was entitled to be heard at a later stage, that was not a rigid rule; that, notwithstanding that the

procedure for removing a judge from office under section 137 had three stages only the first of which was before the commission and at the two later stages the judge had a right to know of and to answer the complaints made against him, the commission had a duty to act fairly in deciding whether a complaint had prima facie sufficient basis in fact and was serious enough to warrant making a representation to the President; that, in view of the seriousness of the allegations and the suspicions both for the present and the future raised by a decision to suspend a judge which a subsequent revocation of the suspension would not necessarily dissipate and in all the circumstances, the commission had not treated the respondent fairly in failing to inform him at that stage of the allegations made against him or to give him a chance to reply to them in such a way as was appropriate, albeit not necessarily by an oral hearing; and that, accordingly, the commission had acted in breach of the principles of natural justice and had contravened the respondent's removal from office ought to be investigated, and the consequential appointment of the tribunal, and he was entitled to damages the assessment of which would be remitted to the High Court in accordance with the order of the Court of Appeal.

CASE NO. 17 *R. V. SECRETARY OF STATE FOR THE HOME DEPT., EX P. DOODY [1994] 1 A.C. 531; [1993] 3 W.L.R.*

The applicants had received mandatory life sentences for murder. The Secretary of State considered the date on which each applicant under the Criminal Justice Act might be released on

licence after consultation with the Chief Justice and trial judge before determining when their cases would qualify for review. The House of Lords held that the Secretary of State was required to afford to a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the period that a prisoner should serve for the purposes of retribution and deterrence before the Secretary of State set the date of the first review of the prisoner's sentence; that, before giving the prisoner the opportunity to make representations, the Secretary of State was required to inform him of the period recommended by the judiciary as the period he should serve for the purposes of retribution and deterrence, and of any other opinion expressed by the judiciary which would be relevant to the Secretary of State's decision as to the appropriate period to be served for those purposes; but that the Secretary of State was not obliged to adopt that judicial review although, if he departed from it, he was required to give reasons for doing so, and that he was entitled to delegate his powers for that purpose to a junior minister within the Home Department; and that, accordingly, the decisions made by the Secretary of State as to the length of the period each of the applicants should serve before the date of the first review of their sentences should be quashed and that each applicant should be given the opportunity to make written representations after he had been informed of the judicial opinion regarding the period he should serve before review.

9. THE IMPACT OF LEGITIMATE EXPECTATION

The notion of legitimate expectation has further expanded the scope of procedural fairness. The concept was first formulated by Lord Denning, M.R. in *Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149 (170)* where he stated:

> "The speeches in Ridge v. Baldwin [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an

opportunity of making representations. It all depends on whether he has some right or interest or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say".

It was used in *O'Reilly v. Mackman [1983] 2 A.C. 237* and *Re Findlay [1985] A.C. 318* to establish the applicant's standing. The principle was given full expression by Lord Diplock in the *G.C.H.Q. Case*. He stated:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such person either:

(i) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(ii) by depriving him of some benefit or advantage which either

(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

(I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation', in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an

expectation or hope that some benefit or advantage would continue to be enjoyed, although it might be entertained by a 'reasonable man', would not necessarily have such consequences.)"

CASE NO. 18 *R. V. SECRETARY OF STATE FOR THE HOME DEPT. EXP. RUDDOCK [1987] 1 W.L.R. 1482.*

C., an active and prominent member of the Campaign for Nuclear Disarmament, was also a member of the Communist Party. In March 1985, in a television broadcast it was asserted that his telephone had been tapped in 1983. One of the participants in the programme was a former intelligence officer, M. Before the programme was broadcast C. had had no suspicion that his telephone might have been tapped. In July 1985 M. swore an affidavit that she had applied for a warrant to monitor C.'s telephone calls and that a warrant had been issued by the Secretary of State in August 1983. The Secretary of State neither denied nor confirmed the allegation. C. and two other members of the C.N.D. whose telephone calls to C. would have been intercepted instituted proceedings for a declaration that C.'s had been improperly tapped. Taylor J. held -

(i) that since the only allegation of tapping that had been made related to C.'s telephone only C. could apply to the court for a declaration that his telephone calls had improperly been subjected to interception and that the other applicants lacked sufficient interest to apply for relief; that although the delay in instituting proceedings was well over the three-month period prescribed by R.S.C. Ord. 53, r. 4(1), and had not been satisfactorily explained, in view of the general importance of the issues, the court would not reject the application on the ground of that delay; and that the court would not abdicate its judicial function merely because the Secretary of State maintained a policy of silence on the issue of interceptions in the interests of national

security; but that cogent evidence of potential damage to national security flowing from the trial of the issue would have to be adduced to justify any modification to the court's normal procedure; and that in the absence of any such cogent evidence and in the absence of any danger that the Secretary of State would be compelled to abandon his policy of silence there was no ground on which the court could, in its discretion, refuse to consider the application; and

(ii) that, as a result of the publication of the criteria for the interception of communications between 1952 and 1982 and their regular application when authorisations for interceptions were considered, C. had a legitimate expectation that the criteria would be faithfully applied in his case; and that the doctrine of legitimate expectation could not be restricted to cases concerning the right to be heard; that, although evidence had been adduced to show that an authorisation to intercept C.'s telephone calls had been issued in August 1983 and renewed in September that year, there was no evidence that the authorisation was thereafter renewed, nor that the resultant information had been used for party political purposes contrary to the published criteria, nor that the decision of the Secretary of State to authorise the interceptions was so irrational as to be insupportable; and that, accordingly, C.'s application for a declaration must fail.

The expectation may result not only from express representation but be implied or arise from past conduct. The expectation may be reversed if the authority indicates that it has altered its position and does not intend to pursue the course previously indicated. While it is clear that its legitimate to expect legitimacy in procedure it is not clear whether legitimate expectation can give substantial

rights. It is however tolerably clear that in some situations where the applicant is already in receipt of a benefit, it will have to be continued unless the legitimate expectation of fairness is satisfied before it is taken away or discontinued.

CASE NO. 19 *IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO; APPLICATIONS OF GUYAN, JURSINGH ET AL*

The 3 applicants had all been convicted of murder and sentenced to death by hanging on May 25, 1995. Motions were filed by each applicant on November 9, 1992 for declarations that the execution of each would be unconstitutional as in contravention of their rights to life, to equality before the law, the protection of the law and not to be subject to cruel and unusual treatment or punishment. They also complained that they should not be executed while the report of a commission of inquiry into the death penalty was yet to be debated by Parliament and that there was an unofficial *de facto* moratorium against the use of the death penalty. Their motions were consolidated and taken together by consent as they raised similar issues and claimed similar reliefs. (T & T November 3, 1992). Jones, J. held, *inter alia*, -

> the recommendations of the commission of inquiry that persons convicted and sentenced to death "ten years or more ago" should have their sentences commuted did not give rise to a legitimate expectation by two of the applicants as at the date of the report they had been convicted less than 10 years previously and the other could not rely on it to obtain a post-conviction pardon without the decision of Cabinet or a Minister.

10. PROPORTIONALITY AND RATIONALITY

In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. [1948] 1 K.B. 223* Lord Green formulated the famous Wednesbury doctrine as follows: "If a decision is so unreasonable that no reasonable authority could ever come to it", then it is bad. Although seen as a landmark decision it in fact expressed the limitations on judicial intervention in the administrative decision-making process. In the *G.C.H.Q.* Case, Lord Diplock preferred the use of the term "irrationality", which he described as involving a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

These formulations appears to place the bar rather high for the applicant and implies that some mental perversity has to be shown. The recent recognition of proportionality as a general principle of law has been encouraged by the developing human rights jurisprudence. Proportionality has been applied where excessively onerous penalties or burdens have been imposed or there have been infringements of rights and duties as well as where there has been manifest imbalance of relevant considerations.

CASE NO. 20 *R. V. LEWISHAM LONDON B.C., EX PARTE SHELL UK LTD. [1988] 1 ALL E.R. 938*

The applicant was a company registered in and trading in the United Kingdom; it did not itself trade in South Africa but was part of a multinational group of companies which had subsidiaries operating there. The council of an inner London Borough some 18% of the population of which were black decided, as part of its duty under s. 71a of the Race Relations Act 1976 to promote good race relations within the borough, to adopt a policy of boycotting the applicant's products subject to alternative products being available on reasonable terms. The Divisional Court held that -

(1) Given the multiracial character of the borough and the duty imposed on the council by s. 71 of the 1976 Act, the council was entitled to decide on the basis of its own experience and perception that trade with a particular company should cease because of that company's links with South Africa. Accordingly, the council's decision was not *ultra vires* on the ground that it was unreasonable; and

(2) However, the purpose of the council's decision was not simply to satisfy public opinion or promote good race relations in the borough but to exert pressure on the company and the group to which it belonged to sever all trading links with South Africa. Since that purpose had exerted a very substantial influence on the council's decision and was inextricably mixed up with any wish to improve race relations in the borough and since the group's policy towards South Africa was not unlawful, it followed that the council's decision had been influenced by an extraneous and impermissible purpose, which vitiated the decision as a whole.

CASE NO. 21 *R. V. SECRETARY OF STATE FOR HEALTH, EXP. US TOBACCO INTERNATIONAL INC. [1992] Q.B. 353; [1991] 3 W.L.R. 529.*

In 1984 the applicants, a company incorporated in the United States which had for a number of years imported into the United Kingdom portion-packaged oral snuff, had discussions with various Government departments about the possibility of building a factory in Scotland for the manufacture of their product. Following the receipt of advice from the Committee on Carcinogenicity of Chemicals in Foods, Consumer Products and the Environment, set up in 1977 to provide the

(3) having regard to the history of the Government's dealing with the applicants and the very serious effect the Regulations had on the applicants' commercial undertaking, fairness required that the applicants be informed of the matters which had caused the committee to re-evaluate the risk to health in the use of oral snuff; that the advice of independent experts was not to be treated as if it were confidential advice given to the minister by civil servants; and that, since the Secretary of State had neither disclosed nor given the applicants an opportunity to make representations on the expert advice he had received before the enactment of the Regulations, the Regulations would be quashed.

11. ALTERNATIVE AND AUXILIARY RELIEFS

Under the new Rules not only can interlocutory orders be sought on an application for judicial review but declaratory orders, injunctions and damages may be claimed. These alternative reliefs are not tied to the prerogative orders although the Court may have regard to the nature of the matters in respect of which such relief may be granted as well as the nature of the circumstances of the case. Further, in Jamaica this procedure can be adopted in constitutional cases, inclusive of cases in which the constitutionality of Acts of Parliament is in question. It is still too early to say what impact the flexibility of the new Rules will have on the requirement that applications for redress under section 25 of the Constitution should not be resorted to where adequate alternative means of redress exist.

It may now be possible to obtain declaratory relief although there is no actual conflict or right or liability to be determined provided the applicant has a "real or true interest" in seeking a declaration and some person has a similar interest in opposing it.

CASE NO. 22 *O'REILLY V. MACKMAN [1982] 3 W.L.R. 1096*

Four prisoners brought actions by writ claiming a declaration and injunction on the basis of allegations that disciplinary penalties had been imposed on them in breach of the Prison Rules and rules of natural justice. The House of Lords held that since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals.

CASE NO. 23 *GILLICK V. WEST NORFOLK AND WISBEEH AREA HEALTH AUTHORITY [1986] A.C. 112; [1985] 3 W.L.R. 831.*

In this case a mother filed a write seeking a declaration that the giving of contraceptive guidance advice to her daughters who were under the age of 16 without her consent was unlawful and adversely affected her parental rights and duties. The House of Lords held, *inter alia*,

(1) that the parental right to control a minor child deriving from parental duty was a dwindling right which existed only in so far as it was required for the child's benefit and protection; that the extent and duration of that right could not be ascertained by reference to a fixed age, but depended on the degree of intelligence and understanding of that particular child and a judgment of what was best for the welfare of the child; that the parents' right to determine

whether a child under 16 should have medical treatment terminated when the child achieved sufficient intelligence and understanding to make that decision itself;

(2) Although the plaintiff is proceeding against two public authorities and invoking the criminal law and public policy in support of her case, her claim is based upon the allegation of a threat of infringement to her private rights as a parent. The private law content of her claim is so great that she is fully entitled to proceed by ordinary action, even though she could also have proceeded by way of judicial review.

CASE NO. 24 *SEAGA V. THE ATTORNEY-GENERAL C.L. 1997-S170 (NOVEMBER 7, 1997)*

The Leader of the Opposition requested the Governor-General to appoint a Commission of Inquiry to inquire into the circumstances in which during a joint police and military operation in Western Kingston, four citizens were killed and five injured by gunshots and damage done to homes and property. The Governor-General's response was that he had no authority to appoint the Commission without advice to do so from the Prime Minister or the Cabinet. The Leader of the Opposition applied by originating summons for the construction of the Commission of Inquiry Act and the relevant constitutional provisions so that the question could be authoritatively determined. The Chief Justice held that the Leader of the Opposition had no locus standi as he had not shown that he had a cause of action in the traditional sense. Happily the new Judicial Review Rules have now rendered this decision of little importance as it would otherwise make an undesirable halt in the modern development of this area of the law.

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