

**LANDMARK CHAMBERS**

**PUBLIC LAW ROADSHOW - LEEDS**

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**RECENT DEVELOPMENTS IN PUBLIC LAW**

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**Introduction**

1. Recent years have seen exponential growth in the volume of Public Law litigation in the courts. The past year has been no exception. It would be impossible to provide complete coverage of all the developments in the last twelve months or so in the space of one hour. This paper aims to provide a selective overview of some of the most interesting cases in the traditional areas of interest to Public Lawyers since the beginning of 2009. It does not cover, other than incidentally, cases involving human rights issues. Nor does it deal with specific areas of specialist interest within Public Law (such as, for example, immigration or housing). Instead, it concentrates on cases of general interest and application.
  
2. The areas that this paper covers are:
  - (1) Availability of judicial review;
  - (2) Amenability to judicial review;
  - (3) Intensity of review;
  - (4) Presumption of validity / effect of invalidity;
  - (5) Delay and promptness;
  - (6) Alternative remedies;
  - (7) Academic questions;
  - (8) Cross-examination in judicial review, disclosure and fact-finding;
  - (9) Bias;

- (10) Protective costs orders; and
- (11) Abuse.

### **The Availability of Judicial Review**

- 3. Attempts by the Government of the day to remove or limit judicial review of administrative action are nothing new. *Per* Lord Reid in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, at 170D:

“Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history.”

- 4. But the High Court will guard jealously attempts to remove or restrict its traditional common law jurisdiction to regulate the proceedings of inferior courts and tribunals through the process of judicial review. In 2004, the Government proposed not only to remove rights of appeal from immigration decisions but also to oust judicial review in the Asylum and Immigration (Treatment of Claimants etc) Bill. Lawyers and judges were united in opposition to the proposals<sup>1</sup>.
- 5. The matter has recently come to the fore again in *R (on the application of Cart) v. Upper Tribunal* [2009] EWHC 3052 (QB). The principal question that arose in these linked cases was whether the supervisory jurisdiction of the High Court by way of judicial review extended to decisions of the Special Immigration Appeals Commission (“SIAC”) and the Upper Tribunal (“UT”) which were not amenable to any form of appeal. In *Cart*, the decision in question was a refusal by the UT to grant permission to appeal from a decision of the First-tier Tribunal (“FTT”) in a child maintenance case. In the joined cases of *U* and *XC* the decision was a revocation of bail previously granted to *U* and the refusal of bail to *XC*.

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<sup>1</sup> See, for example, Lord Woolf, Squire Centenary Lecture to Cambridge University *The Rule of Law and a Change in the Constitution*, 3 March 2004. Some of the debate on ousting judicial review in general, and in the case of the 2004 Bill in particular, is well summarised in the written brief of the Bar Human Rights Committee to the US Supreme Court in *Hamdan v. Rumsfeld*, a case concerning the availability of *habeas corpus* to challenge detention at Guantanamo Bay, available at <http://commonwealthlawyers.com/Download/BHRC%20CLA%20Amicus%20Brief%20in%20Hamdan1.pdf>.

6. The case is of interest both for its analysis of the role and availability of judicial review as well as for its examination of the meaning of the phrase “superior court of record”. Section 1(3) of the Special Immigration Appeals Commission Act 1997 (“SIACA”) provides that “[SIAC] shall be a superior court of record”. Section 3(5) of the Tribunals, Courts and Enforcement Act 2007 (“TCEA”) provides that “[The UT] is to be a superior court of record”. There was no appeal against the impugned decisions. The claimants sought to challenge them instead by way of judicial review. The defendants argued that the provisions cited meant that the decisions were immune from judicial review; alternatively, that judicial review was available only in rare and exceptional cases. The matter was determined as a preliminary issue. The importance of the issues for the particular tribunals in question was clear. SIAC hears immigration appeals instead of the Asylum and Immigration Tribunal (“AIT”) in cases where the appellant’s removal from the United Kingdom (“UK”) is conducive to the public good. Such appeals routinely raise issues of national security in relation to suspected terrorists. The UT is the upper-tier of the new two-tier tribunal system, which has consolidated and simplified a multiplicity of appeals rights tribunals in a variety of areas of administrative decision-making. Section 15 of TCEA also confers on the UT a judicial review jurisdiction.
7. The defendants’ primary case was that the statutory designation of SIAC and the UT as superior courts of record sufficed to render them immune from judicial review. However, Laws LJ, giving the sole reasoned judgment of the Divisional Court, with which Owen J agreed, identified a prior “and in some ways greater” question at paragraph 28. Assuming that previous cases showed that judicial review was not available against decisions of superior courts of record, did a bare statutory designation of a court as such suffice to render it immune from judicial review? The answer was no.
8. The statutory words used in section 1(3) SIACA and section 3(5) TCEA said nothing about the exclusion of judicial review. Any such exclusion would, therefore, be not only implicit rather than explicit, but also in the nature of a deeming provision: paragraph 29. Laws LJ described an argument that this was not in fact a case of ousting, because the High Court did not have the jurisdiction to exercise judicial review in the first place, as “Jesuitical”: paragraph 30. The proposition that judicial review could be ousted by such

provisions was “a constitutional solecism”: paragraph 31. To the extent that it could be ousted at all, this could be done by only the most clear and explicit words: paragraph 31, relying on *R v. Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, per Denning LJ at 583 and *R (on the application of Sivasubramaniam) v. Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 1 WLR 475, per Lord Phillips MR at paragraph 44. Accordingly, he held that the statutory provisions did not oust judicial review, whatever the historical scope of the expression “superior court of record”: paragraph 33.

9. Laws LJ then proceeded to examine the reasons why judicial review could not be ousted by mere implication. He identified the purpose of judicial review as being to uphold the rule of law: paragraph 34. He then embarked on a rare analysis of the meaning of that phrase at paragraphs 34-42. The following passages are relevant:

“36. What is the meaning to be attributed to the rule of law for the purpose of the present case? The context in which it is to be found is the defendants' reliance on SIACA s.1(3) and TCEA s.3(5) as excluding judicial review. If judicial review were so excluded, SIAC and UT – and any other body which might be immunised against judicial review by a like formula – would (in matters not subject to statutory appeal) be the last judges of the law they have to apply. They would not be required to respect any other interpretation but their own. The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered. There are of course cases where a decision-making body is the last judge of the law it has to apply. But such bodies are always courts. The prime example is the High Court, which is also the paradigm of such an authoritative source of statutory interpretation. We shall have to decide in due course whether SIAC and UT are in the same category.

37. The principle I have suggested has its genesis in the self-evident fact that legislation consists in texts. Often – and in every case of dispute or difficulty – the texts cannot speak for themselves. Unless their meaning is mediated to the public, they are only letters on a page. They have to be interpreted. The interpreter's role cannot be filled by the legislature or the executive: for in that case they or either of them would be judge in their own cause, with the ills of arbitrary government which that would entail. Nor, generally, can the interpreter be constituted by the public body which has to administer the relevant law: for in that case the decision-makers would write their own laws. The interpreter must be impartial, independent both of the legislature and of the persons affected by the texts' application, and authoritative – accepted as the last word, subject only to any appeal. Only a court can fulfil the role.

38. If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers

prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective; that is another.

39. As I have said, the paradigm for such an authoritative source is the High Court, which is independent of the legislature, the executive, and any other decision-makers acting under the law; and is the principal constitutional guardian of the rule of law. In section IV(2)(a) below I discuss the historic primacy of the High Court's predecessor, the Court of King's Bench. To offer the same guarantee of properly mediated law, any alternative source must amount to an *alter ego* of the High Court; and indeed there are instances where the authoritative source is another court, such as the Court-Martial Appeal Court and the Restrictive Practices Court (see the reference at paragraph 71 below to *R v Cripps, ex parte Muldoon* [1984] 1 QB 68). But the general principle is clear. The rule of law requires that statute should be mediated by an authoritative and independent judicial source; and Parliament's sovereignty itself requires that it respect this rule.

40. None of this, of course, is to say that Parliament may not modify, sometimes radically, the procedures by which statute law is mediated. It may impose tight time limits within which proceedings must be brought. It may provide a substitute procedure for judicial review, as it has by a regime of statutory appeals in fields such as town and country planning, highways, and compulsory purchase: where, however, the appeal body remains the High Court. It may create new judicial authorities with extensive powers. It may create rights of appeal from specialist tribunals direct to the Court of Appeal. The breadth of its power is subject only to the principle I have stated."

10. Accordingly, the statutory provisions in question were inapt to exclude judicial review: paragraph 41. However, it was still necessary to examine the historic meaning of a superior court of record, the characteristics to be attributed to such a body and the extent to which SIAC and the UT fulfilled these characteristics. This was necessary in order to determine the degree to which judicial review would still be available of the decisions under challenge.

11. Laws LJ drew a fundamental distinction between the status of a "superior court of record" and the question whether a court's decisions could be subject to review by the High Court. Instead of the view which had prevailed amongst some commentators, and had even received approval by the courts in some cases, that the two could be equated,

the true position was that they were distinct. Immunity from review by the High Court was usually, but not always, a condition for recognition as a superior court of record. At paragraph 63:

“It appears from these materials that in recent times some judges and academic writers have assumed that a court having the status of a superior court of record is thereby immune from judicial review. But in my judgment Miss Rose QC for U was surely right to submit in reply that there is no judicial decision in which it has been concluded, after analysis confronting the issue, that such superior courts are *ipso facto* so immune. No doubt courts which the High Court has accepted are superior courts of record have in fact been generally immune from review. But that is not because the name or status "superior court of record" constitutes a legal condition of such immunity. Rather the immunity has been a condition of the status – at least generally: as *Ex p. White* shows, the prerogative writs have from time to time been issued to courts acknowledged to be superior. What seems to have happened is that in cases where their immunity from review has not itself been in contention, courts have been referred to as superior courts of record as a form of shorthand.”

12. Laws LJ identified the principle lying behind whether a court was an inferior court and therefore subject to the supervisory jurisdiction of the High Court on judicial review as being whether the court in question was of limited or unlimited jurisdiction. So, at paragraph 68:

“The true contrast is between the High Court on the one hand and courts of limited jurisdiction on the other, and it is clear to my mind that the references (of which there are several) to “inferior courts” means, simply, courts of limited jurisdiction. This, then, is the third distinction. The High Court as a court of unlimited jurisdiction cannot be subjected to review. On the other hand courts whose jurisdiction is limited will generally be so subject: they will be amenable to higher judicial authority – the High Court – to fix the limits of their authority.”

13. In the case of SIAC, it was clear that judicial review was available in principle to challenge its decisions. But the cases in which it would *in practice* be available were limited. *Per* Laws LJ at paragraph 85:

“I think it important to emphasise the limited consequences (if my Lord agrees) of my holding that SIAC is subject to the judicial review jurisdiction. A final determination of an appeal by SIAC is by SIACA s.7 subject to appeal to the Court of Appeal. It is elementary that judicial review is a discretionary remedy of last resort. Accordingly it will not be deployed to assault SIAC's appealable determinations. Not of course for want of jurisdiction: but because the court's discretion should not be so exercised. Nor will it go to interlocutory decisions on the way to such a determination, at least without some gross and florid error. As for bail, the court will not allow judicial review to be used as a surrogate means of appeal where statute has not provided for any appeal at all. In a sensitive area where the tribunal is called on to make fine judgments on issues touching national security, I would anticipate

that attempts to condemn the refusal (or grant) of bail as violating the *Wednesbury* principle will be doomed to failure. A sharp-edged error of law will have to be shown.”

14. The position of the UT was, however, very different. At paragraphs 87-89:

“87. Here I think the position is very different. UT is at the apex of a new and comprehensive judicial structure designed to rationalise and re-organise in a single system the means of adjudication for a multitude of claims previously determined by a variety of disparate tribunals with no common appeal mechanism. Though it is not a court of unlimited jurisdiction, being of course confined to what TCEA gives it, its jurisdiction is very wide. Subject to the fact that some tribunals presently remain outside the fold, it may be said to be an appeal court of general jurisdiction in relation to matters which are consigned to adjudication at first instance by statutory tribunals.

88. In addition, as I have shown (paragraphs 13 – 14 above), UT possesses a jurisdiction itself to grant judicial review, applying the same principles and granting the same relief as the High Court. This, I think, is of some importance in considering "the powers of the tribunal and its relationship with the High Court" (*Muldoon, per Goff LJ*). The intention of TCEA ss.15 – 21 is, I apprehend, to bring about a state of affairs in which the function of judicial review is shared (in England and Wales, and Northern Ireland; ss.20 and 21 deal with Scotland) between UT and the High Court. It is notable that UT's power to grant judicial review is not delineated by a positive list of topics or subjects stated to fall within its scope. It is expressed entirely generally, subject only to certain limitations (TCEA s.15). A striking feature of the balance of judicial review work struck by the statute between UT and the High Court is that by s.31A of the Supreme Court Act 1981 (inserted by TCEA s.19(1)) judicial review applications commenced in the High Court must be transferred to UT if four conditions are met; I give the details at paragraph 14 above. If the third condition (that the application must fall within a class specified for the purposes of s.18(6) in a direction given by the Lord Chief Justice (with agreement of the Lord Chancellor Lord Chancellor) is not met but the other three are, the High Court enjoys a discretion whether to transfer the case (s.31A(3)).

89. I have also described (paragraph 15) the statutory arrangements contained in TCEA Schedule 1 which have been set in place to establish the membership of UT. In England and Wales full-time professional judges of all ranks (save justices of the Supreme Court) are *ex officio* judges both of FTT and UT. However the Senior President is to be a judge of the Court of Appeal here or in Northern Ireland or a judge of the Inner House of the Court of Session, assuming agreement as to the appointee's identity among the statutory consultees (the Lord Chancellor, the Lord Chief Justice both here and in Northern Ireland and the Lord President of the Court of Session); otherwise the JAC will recommend a person who meets eligibility criteria as to his professional standing. The ordinary expectation, as I read the statute, is that the Senior President will be a judge of Court of Appeal rank (as is the present incumbent, Carnwath LJ), and that is of some significance in considering the tribunal's authority. The role of the JAC is in the nature of a longstop in the case of unlooked for disagreement.”

15. Further, the unique position of UT was not changed by earlier cases in which judicial review had been held to be available to challenge decisions of Social Security Commissioners refusing leave to appeal from decisions of Appeal Tribunals. *Per* Laws LJ at 93:

“I do not see these differences of approach as impurities in the law's complexion. They represent the configuration of the judicial review jurisdiction to meet the pragmatic demands of the rule of law. In some instances free rein for judicial review's full panoply will be disproportionate to what is at stake: *Sivasubramaniam* paragraph 54, *Sinclair Investments* paragraph 69. In others, it will not. It is in the nature of the High Court's unlimited, common law powers that it will move its jurisdiction's practical edge to the line where its protection is needed, and will move it no further; and the line itself may shift. In this case we have to set the jurisdiction's practical edge according to the same principle. I acknowledge the clear force of Mr Drabble's submission that the decision sought to be reviewed by Mr Cart was of a type accepted, for good reason, as fit for judicial review when taken by a Commissioner (*Woodling, Connolly*). But I consider that the advent of UT and FTT now commends a different outcome.”

16. Accordingly, the UT was the alter ego of the High Court. *Per* Laws LJ at paragraphs 94 and 95:

“94. In my judgment UT is, for relevant purposes, an *alter ego* of the High Court. It therefore satisfies the material principle of the rule of law: it constitutes an authoritative, impartial and independent judicial source for the interpretation and application of the relevant statutory texts. It is not amenable to judicial review for excess of jurisdiction in the second sense: the case where, albeit acting within the field ascribed to it, the court perpetrates a legal mistake. It is a court possessing the final power to interpret for itself the law it must apply. Mr Drabble's elegant argument has not persuaded me to the contrary. UT's role at the apex of a new and comprehensive judicial structure ought to be respected and given effect. Its judicial review function is highly material to that role's status and authority. And it must, I think, be obvious that judicial review decisions of UT could not themselves be the subject of judicial review by the High Court; but I cannot see that UT might be reviewable when acting under TCEA ss.11 – 12 but not when acting under ss.15 – 21. 95. The need of proportionality also, in my judgment, tells in favour of the defendants. Because of (a) FTT's power to review its own decisions (TCEA s.9), (b) the procedure for applications for permission to appeal to be made first to FTT and if unsuccessful to UT, (c) the procedure for judicial review permission to be sought first on paper and then renewed in court, and (d) the further procedures for permission to appeal to the Court of Appeal, a point first raised in FTT may be liable to something like eight tiers of judicial consideration if judicial review is available as urged on behalf of Mr Cart.”

17. Relying on earlier cases, Laws LJ concluded that judicial review would only be available in cases of an excess of jurisdiction, in the narrow sense of straying outside the four corners of the court's statutory remit, and "a substantial denial of the right to a fair hearing", such as actual bias on the part of the tribunal: paragraph 99.

18. Accordingly, the principles which may be drawn from *Cart* are:

- (1) The statutory designation of SIAC and UT as superior courts of record is inapt to exclude judicial review;
- (2) This is because judicial review is necessary to maintain the rule of law;
- (3) The "rule of law" in this context represents the principle that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered;
- (4) The decisions of SIAC are, in principle, amenable to judicial review although judicial review would fall to be refused where there was a right of appeal to the Court of Appeal; it would only be available against interlocutory decisions vitiated by some "gross and florid" error of law; and it would only be available to challenge an unappealable bail decision where there was a "sharp-edged error of law" with challenges on *Wednesbury* rationality would be "doomed to failure"; and
- (5) UT was in a different position, sitting at the apex of the new tribunal system – judicial review would not be available, save to challenge an excess of jurisdiction in the narrow sense or "a substantial denial of the right to a fair hearing", such as actual bias on the part of the tribunal.

19. The case is of interest to Public lawyers not only because of the specific findings in relation to SIAC and the UT, but also for the more general analysis of the meaning of the rule of law and the circumstances in which Parliament can exclude judicial review. The relevant provisions in SIACA and TCEA were clear attempts through statutory designation to remove rights of judicial review, yet in principle they failed. This was because the mere label "superior court of record" was not sufficient to eliminate review. The more difficult question in constitutional terms is surely what would happen if Parliament, in primary legislation, expressly excluded rights of judicial review without

providing an *alter ego* in the nature of the UT. That would raise a direct conflict with Laws LJ's conception of the rule of law. That was, in essence, the proposal from which the Government backed down in the case of the Asylum and Immigration (Treatment of Claimants etc) Bill.

20. The case rumbles on. Permission to appeal against the decision in relation to *Cart* was granted by the Divisional Court itself. Furthermore, the question of the correct test to apply in cases of refusals by Social Security Commissioners to grant permission to appeal from decisions of Appeal Tribunals has recently been considered by the Court of Appeal in *R (on the application of Wiles) v. Secretary of State for Work and Pensions* [2010] EWCA Civ 258. It had to consider the position which existed before the move to the new two-tier tribunal system that was in issue in *Cart*. It held that judicial review should be available on ordinary principles, but tempered to allow for the specialist nature of the Commissioners, *per Cooke v. Secretary of State for Social Security* [2001] EWCA Civ 734 (see below): paragraph 55. Further discussion and development are to be expected.

### **Amenability to Judicial Review**

21. The case of *Cart* was a rare case where the courts have had to grapple both with attempts to remove decisions of *courts and administrative tribunals* from the scrutiny of the High Court altogether and the measure to which judicial review nonetheless remained available. A question which arises more frequently is whether the decisions of a particular *public body* are amenable to judicial review. In *R (on the application of Boyle) v. Haverhill Pub Watch* [2009] EWHC 2441 (Admin), the claimant challenged by judicial review a decision of the defendant organisation to extend by two years a ban imposed preventing him from entering pubs taking part in the scheme. The cause of the original ban was an altercation in the Black Horse pub in December 2006. The Claimant claimed he was the victim rather than the aggressor in the attack and that the cause of the ban was the police putting forward his name at a meeting of the defendant organisation. In February 2008, the ban was extended because of persistent breaches of the original ban. An appeal against the extension made by his solicitor on 19 February 2008 was rejected without reasons on 13 April 2008.

22. The argument in the case began as one of capacity, with the defendant arguing that it did not have sufficient capacity, because it did not have a sufficiently coherent form, to be sued. Pub Watch schemes are a forum to enable operators of licensed premises in an area to share information and matters of common interest, particularly as regards safety and legal compliance: paragraph 6. The claimant argued that the defendant did have such capacity, either because it was an unincorporated association or because it would be unjust for it to be beyond review where it had exercised a public function. The defendant denied that it was of a sufficiently coherent form to amount to an unincorporated association. In fact, HHJ Mackie QC, sitting as a Deputy Judge of the High Court, considered that this question overlapped considerably with the question of whether Pub Watch was amenable to judicial review, this being the real question in the case. As he stated at paragraph 47:

“The capacity issue seems to me to be something of a distraction because the Courts will almost always find a way of bringing an entity into proceedings if it is just and practicable to do so. [...] The court invariably fashions ways of joining Defendants and other parties where the needs of justice require this. If Mr Boyle’s rights were apparently being infringed by Pub Watch and/or its members then problems of classification of the potential Defendants would not be permitted to stand in his way. But that raises the question of the underlying merits of the claim.”

23. HHJ Mackie QC recalled that the starting point for evaluating whether a decision was amenable to judicial review was the decision of the Court of Appeal in *R (on the application of Beer) v. Hampshire Farmers’ Market Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233. He also referred to *YL v. Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, which examined the extent to which private care homes were public authorities for the purpose of the Human Rights Act 1998. *Per* Dyson LJ in *Beer*, at paragraph 16:

“It seems to me that the law has now been developed to the point where, unless the source of power clearly provides an answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted. There is a growing body of case law in which the question of amenability to judicial review has been considered. From these cases it is possible to identify a number of features which point towards the presence or absence of the requisite public law element.”

24. In *Boyle*, HHJ Mackie QC applied those principles to the facts of the case. Membership of the Pub Watch scheme in question was open to licensed premises in the relevant area. Its meetings were attended by a member of the local police force. The police actively encouraged and marketed the scheme, as well as paying the first year's subscription of members to an electronic information sharing scheme. The local town council was involved by virtue of the fact that its Arts Centre was a member of Pub Watch. The chair was a member of the Town Council.

25. HHJ Mackie QC held that:

“54. Individual licensees have an unrestricted right to exclude anyone, particularly those who they see as troublemakers, from their premises. Similarly individual licensees have the right to exclude those whom others have found to be troublemakers. Furthermore licensees are entitled to form groups or associations to pool information and discuss matters of common interest and to make the exclusion of potential troublemakers more organised and systematic. When Pub Watch decides to ban someone the source of the power is the right of the individual members. The exercise of the power is carried out by individual licensees exercising their right to decide who to let in and who to exclude. The only basis for an argument that these banning decisions are amenable to judicial review lies in the degree of involvement of the public authority and the Police. The role of the town council is limited to that of the licensee of the Arts Centre. [...] The borough council has no role other than as the licensing authority and as encourager. The imposition of a requirement upon some of the member premises to become a member of Pub Watch (albeit only to a proportion of the members of the Pub Watch) does not contribute to the conversion of a private function into a public one. These public bodies rightly encourage and support a scheme which is run by the licensees who alone take the decisions of the kind for which Mr Boyle seeks redress.

55. That leaves the role of the Police. It is well known that the Police do, and are expected to encourage initiatives and involve the community in a variety of ways to discourage and prevent crime. Pub Watch is like Farm Watch and Neighbourhood Watch. The public no longer accept that the involvement of the Police should start only after a crime has been committed. Legitimate schemes run by sections of the public to discourage crime should not have to run the risk of their decisions being subject to the threat of judicial review simply because their work receives assistance and support from the Police or other public agencies. [...] It is entirely understandable that the Police should help and encourage membership and participation in Pub Watch just as they would in Neighbourhood Watch and other schemes. Most law abiding pub customers would think it very odd if the Police did not provide this encouragement and support.”

26. Whilst questions of amenability to judicial review will always, to a large extent, turn on the factual specifics of the organisation being challenged, this case is important for two points:

(1) While applying the now well-established approach, summarised in *Beer* at paragraph 16, the Court examined whether involvement in an associative group by various public elements would be enough to render the source of power public or to impart the required public element onto the exercise of power. Whatever the public benefits of the Pub Watch scheme – and, from HHJ Mackie’s analysis and the evidence of the police in the case, they were not inconsiderable – the source of power to ban individuals was ultimately a private one, stemming from the licensees themselves who were members of the scheme. Although the police attended meetings, promoted the scheme and even funded aspects of its operation, this did not mean that the organisation in some way derived its powers from the police. Nor, perhaps more relevantly, did it impart a sufficiently public flavour to the operation of the scheme. Similarly, the town council’s involvement was essential in the context of a private licensee. Thus, whilst important to the public, the public element of the scheme in administrative law terms was peripheral.

(2) HHJ Mackie QC clearly identified a public interest in not subjecting community organisations such as Pub Watch, and also Farm Watch and Neighbourhood Watch, to the scrutiny of the High Court on a judicial review claim. Whilst not ruling out the possibility of review in a different case, and stressing that much will depend on the particular circumstances of any such organisation, he clearly identified the undesirability in enabling review of organisations which performed a very useful public function for the local community.

### **Intensity of Review**

27. Where judicial review is available, what is the standard to be applied by the court? The three traditional heads of review – irrationality, illegality and procedural impropriety – are well-known. Proportionality is, of course, available in European Community (“EC”) and human rights cases. But is the position different where a specialist tribunal is

exercising the power of review? That is the question that arose in *British Sky Broadcasting Group Plc v. Competition Commission* [2010] EWCA Civ 2. Although the case specifically concerned the application of judicial review principles by the Competition Appeal Tribunal (“CAT”) to a decision of the Competition Commission, the implications for the operation of the judicial review function of the UT under section 15 of TCEA are plain.

28. The case arose from the acquisition of shares in ITV by BSKyB. The matter was referred by the Secretary of State to the Competition Commission as a public interest case under Part 3 of the Enterprise Act 2002 (the “EA 2002”). It was the first such reference under those provisions. The Commission found that the acquisition had created a relevant merger situation (“RMS”) and that this was expected to result in a substantial lessening of competition (“SLC”) which was expected to operate against the public interest. It did not find that the acquisition would have been against the public interest on the point on which the Secretary of State had referred the issue, namely the plurality of the media. In order to remedy the adverse effect, the Commission recommended that Sky be required to divest itself of some of its shares. BSKyB applied to the CAT to review the decision of the Commission and the Secretary of State under section 120 EA 2002. By section 120(4), the CAT was required to apply the same principles on such a review as would a court on a judicial review claim.

29. BSKyB argued that the CAT was required, as a body with specialist experience, to apply a greater intensity of review than would be applied on a normal judicial review application. This submission was firmly rejected both by the CAT and the Court of Appeal. The Court began by noting, at paragraph 29, that this was the only case of which it or counsel was aware, where a tribunal had a duty to apply judicial review principles, leaving aside the position of the UT under TCEA. It accepted, at paragraph 30, that:

“It is well established that courts apply judicial review principles in different ways according to the subject matter under consideration, and that there are some cases in which courts apply a greater intensity of review than in others. The main examples of this approach are cases concerned with fundamental rights under the ECHR.”

30. It cited, at paragraph 34, *Office of Fair Trading v. IBA Health Ltd* [2004] EWCA Civ 142 where:

“Carnwath LJ observed at paragraph 90 that the Tribunal had been “right to observe that its approach should reflect the “specific context” in which it had been created as a specialised tribunal”, but said that the section required the application of the normal principles of review, not of something special and specific to the tribunal.”

31. Finally, it concluded:

“37. It seems to us that these passages are fatal to Mr Beloff’s submissions on this point. They show that the Tribunal is to apply the normal principles of judicial review, in dealing with a question which is not different from that which would face a court dealing with the same subject-matter. It will apply its own specialised knowledge and experience, which enables it to perform its task with a better understanding, and more efficiently. The possession of that knowledge and experience does not in any way alter the nature of the task. [...]

[...]

40. Mr Beloff’s argument that the Tribunal, as a hyper-competent specialised Tribunal, is bound to apply a greater intensity of review than the court itself would apply in a comparable situation seems to us to fly in the face of the words of section 120(4). We cannot accept this proposition.

41. For the reasons given by the Tribunal at its paragraph 63, quoted at paragraph [32] above, we consider that the decision was correct on this point, and this ground of appeal should be rejected.”

32. At paragraph 63 of its determination, relied on by the Court of Appeal, the CAT held:

“If Mr Beloff’s submission amounts to no more than that the Tribunal should use its specialist expertise wherever possible when assessing the validity of findings and the lawfulness of decisions in the context of section 120 reviews, then such submission can hardly be disputed. However this would not in our view be applying the principles of judicial review in a different way from the Administrative Court. If his submission amounts to more than this then it seems to us that it is not supported by the authorities to which he has drawn our attention, and is inconsistent with *IBA* and section 120(4) itself. We consider that the principles we should apply in this application are those which are helpfully set out and discussed in, in particular, *Tameside* and *IBA*, and which were applied in the Tribunal decisions cited to us. As the Commission and the Secretary of State submit, the Tribunal must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits. We shall need to bear this distinction in mind when we come to deal with the specific points raised by Sky in relation to the factual basis upon which the Commission reached the challenged findings. It is one thing to allege irrationality or perversity; it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views from those of the Commission. The latter is not permissible in a review under section 120.”

33. The courts have long accepted that the particular expertise of specialist tribunals should be recognised on appeal when considering whether they are likely to have erred in law in applying the statutory schemes which they are charged with administering: see, for example, the comments of Hale LJ in *Cooke v. Secretary of State for Social Security* [2001] EWCA Civ 734, where she stated, at paragraph 16:

“It is also important that such appeal structures have a link to the ordinary court system, to maintain both their independence of government and the sponsoring department and their fidelity to the relevant general principles of law. But the ordinary courts should approach such cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the Social Security Commissioner will have got it right. The Commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All of this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.”

34. This is uncontroversial. Baroness Hale repeated her view on the approach to expert tribunals in the context of the asylum and immigration system in *AH (Sudan) v. Secretary of State for the Home Department* [2008] 1 AC 678, at paragraph 30. It has recently been applied by the Court of Appeal to calibrate the test for judicial review of decisions of the now defunct Social Security Commissioners, refusing permission to appeal from decisions of Appeal Tribunals, in *R (on the application of Wiles) v. Secretary of State for Work and Pensions* [2010] EWCA Civ 258. This approach simply recognises that particular tribunals have specialist expertise which means that they are well placed to understand the workings of the specialist statutory frameworks they have to apply as well as the realities of tribunal life. Equally, as noted by the Court of Appeal, it is uncontroversial that the standard of review may vary according to the subject matter. Where fundamental rights are at issue, a more intrusive standard of anxious scrutiny is appropriate: *R v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514. However, the flaw in BSKyB’s argument in the present case arose from an attempt to elide the two principles. The specialist knowledge of a tribunal does not mean it is entitled to turn a classic exercise of judicial review, which looks at the legality of the decision-making process, into a more intensive appeal on the merits. As noted by

the Court of Appeal at paragraph 37, it is the subject matter which determines the intensity of review, not the status or identity of the tribunal. The contrary result, as noted by the CAT itself, would blur the line between a merits appeal and a review of legality. Parliament could easily have provided for the former, but did not do so.

### **The Presumption of Validity and Effect of Illegality**

35. A difficult question, which has not infrequently taxed the House of Lords in the past, is the status of allegedly unlawful administrative decisions prior to challenge. *Mossell (Jamaica) Limited (T/A Digicel) v. Office of Utilities Regulation* [2010] UKPC 1 concerned the extent of the powers of the Minister of Industry, Commerce and Technology and the Office of Utilities Regulation (“OUR”) in Jamaica in relation to the regulation of the telecommunications sector. Cable & Wireless Jamaica (“CWJ”) had previously operated a monopoly in this sector, which was in the course of being opened to market competition. The Minister issued a Direction to OUR which purported to restrict OUR’s powers in respect of such regulation. OUR considered that the Direction was, in some respects, *ultra vires*. It subsequently issued a Determination Notice, some aspects of which both OUR and the Minister considered contravened the Direction. The question arose as to the position of the Direction until it was found to be unlawful by a court.

36. The first point that arose was whether the Direction was *ultra vires*. Lord Phillips delivered the speech of the Privy Council. At paragraph 27 he recalled that the section pursuant to which the Direction had been made provided for Directions to be followed by OUR in the performance of its statutory functions, and that functions included duties:

“Thus a Direction must be one that it is possible for the OUR to follow in carrying out its duties under the Act. A Direction that prohibits the OUR from carrying out those duties cannot lawfully be made by the Minister.”

37. The Minister’s actions in promulgating the Direction had “emasculated” OUR’s statutory function. The Direction was *ultra vires*.

38. This gave rise to the second, important question on the appeal: was the OUR obliged to comply with the direction even though it was *ultra vires*? The Privy Council described the question of the effect of executive orders and administrative decisions before a final

judgment is reached on their validity as a “vexed question”. It considered the seminal cases in this field, namely *Smith v. East Elloe Rural District Council* [1956] AC 736, *Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry* [1975] AC 295 and *Boddington v. British Transport Police* [1999] 2 AC 143. *Smith* and *Hoffmann-La Roche* clearly establish the principle of the presumption of validity of administrative acts. Such acts are to be presumed valid unless and until quashed in the right proceedings, by the right person, at the right time. *Boddington* considered these cases and proceeded to consider the effect of the presumption once invalidity had been declared by a court. To recall, Lord Irvine of Lairg LC held, at 155B-C, that “the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all”. The Privy Council in *Mossell*, having considered these passages, held:

“43. [...] The Board would reject entirely Digicel’s submission that the principle established in *Boddington* is relevant only in the context of criminal prosecutions and not, as here, Ministerial Directions. The Board would reject too the suggested analogy between Ministerial Directions and the orders of superior courts which, it is well established (see for example, *Isaacs v. Robertson* [1985] AC 97) must always be obeyed, whatever their defects, until set aside.

44. What it comes to is this. Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found *ultra vires*, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called “third actors”) during the period before their invalidity is recognised by the court – see, for example, *Percy v. Hall* [1997] QB 924. All these issues were left open by the House in *Boddington*. It is, however, no more necessary that they be resolved here than there. It cannot be doubted that the OUR was perfectly entitled to act on the legal advice it received and to disregard the Minister’s Direction. This much too is plain from *Boddington* (see Lord Irvine’s speech at pp. 157H-158D) and, indeed, in the context of ministerial “guidance”, from Lord Denning’s judgment in *Laker Airways*:

“[I]f the Secretary of State goes beyond the bounds of ‘guidance’, he exceeds his powers: and the Authority is under no obligation to obey him.” (p 700A).”

39. The analysis of Lord Phillips is a useful and compendious statement of the law on presumed validity and the effects of invalidity. In *Boddington*, the principle that it was open to an individual to ignore an allegedly unlawful decision prior to it having been

declared unlawful flowed from the right of a defendant in criminal proceedings to be able to raise issues as to the legality of the penalising provision as a defence to the charge. But Lord Irvine stressed that this, of course, carried a risk. If the appellant consciously chose to ignore the provision and it was subsequently declared valid then he would be found guilty. In *Mossell*, Lord Phillips raises the possibility that an order subsequently found invalid, although always invalid and of no effect, might nonetheless have recognisable effects on third parties, which the courts might recognise through prospective declarations of invalidity or for some individuals only. One example from the earlier cases is *Percy v. Hall*. In that case, bylaws, on the basis of which a private individual was arrested for trespass at a military site, were found to be lawful. However, had they been held to be unlawful, the Court of Appeal held nonetheless that this would not have founded an action in damages for false arrest and imprisonment, since the constables who arrested the plaintiff were entitled to rely on the validity of the bylaw, just as the plaintiff was entitled to argue that it was invalid in defence to criminal proceedings. However, the principle has added potency since the recognition of the principle of prospective overruling by the House of Lords in *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, [2005] 2 AC 680. Although it did not arise in *Mossell* the interaction of these principles is surely an area which is likely to see further development in the years to come.

### **Delay and Promptness**

40. The European Court of Justice (“ECJ”) handed down judgment in Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority* on 28 January 2010. The case concerned the implementation in domestic law of Directive 89/665/EEC relating to review procedures for public works and supply contracts. The questions posed by the High Court for determination by the ECJ related to a requirement under the domestic regulations which implemented the Directive, that proceedings challenging the award of a contract “are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought”. The High Court asked whether time should run from the date of breach or the date when the claimant knew or ought to have known of the breach of EC law, how it

should apply the promptness requirement and how it should exercise any discretion to extend time.

41. In answer to the first question, the ECJ held that time should run “from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions”. The logic is understandable and is consistent with the decision of the House of Lords in *R (on the application of Anufrijeva) v. Southwark LBC* [2004] 1 AC 604, in which it was held that administrative decisions should not be considered to have effect until they are communicated to the subject of the decision.

42. However, it is the comments of the ECJ on the issue of promptness which are of real interest to public lawyers. The Court stated as follows:

“41. A national provision [...] under which proceedings must not be brought ‘unless ... those proceedings are brought promptly and in any event within three months’, gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made ‘promptly’ within the terms of that provision.

42. As the Advocate General observed [...] a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.”

43. The implications for the “promptness” requirement under CPR 54.5(1)(a) are clear. Concern had previously been expressed at the highest level that the promptness requirement might not comply with either EC or human rights law: *R (on the application of Burkett) v. Hammersmith & Fulham LBC* [2002] 1 WLR 1593, per Lord Slynn and Lord Hope. However, the Strasbourg Court in *Lam v. United Kingdom* (41671/98) (unreported, 5 July 2001) considered this argument to be manifestly ill-founded<sup>2</sup>. This is surely an area the Civil Procedure Rules Committee will have to revisit. But the solution is unclear. It is possible that a different time limit could be used for EC cases, but such differences of approach are hardly satisfactory. One possible solution would be to have a shorter, fixed period of challenge that was subject to discretion to extend. Another question

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<sup>2</sup> The case was not cited in *Burkett*. See also *Hardy v. Pembrokeshire CC (Permission to Appeal)* [2006] Env LR 28.

concerns the impact on the consideration of “undue delay” in granting relief under section 31(6) of the Senior Courts Act 1981.

### **Alternative Remedies**

44. It is trite law that judicial review is a remedy of last resort. If a suitable alternative remedy exists, permission should ordinarily be refused. Furthermore, the parties are under an obligation to consider whether their dispute can be resolved by alternative dispute resolution. *Per* Lord Woolf CJ in *R (on the application of Cowl) v. Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803:

“14. [...] The parties do not today, under the CPR, have a right to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process. The disadvantages of doing so are limited. If subsequently it becomes apparent that there is a legal issue to be resolved, that can thereafter be examined by the courts which may be considerably assisted by the findings made by the complaints panel.

[...]

27. This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute so far as is practicable without involving litigation. At least in this way some of the expense and delay will be avoided. [...]”

45. The warning was not heeded in *R (on the application of S) v. Hampshire County Council* [2009] EWHC 2537 (Admin). The case concerned alleged failures by the Council in relation to an assessment of S’s needs under the Children Act 1989 and the Framework for the Assessment of Children in Need and their Families. The assessment under challenge was dated 13 May 2009. An earlier assessment from April 2008 had been the subject of a complaint by S. This had led to an independent person examining the complaint under the Children Act 1989 Representations Procedure (England) Regulations 2006 (the “Complaints Regulations”) and finding that parts of the complaint were justified. This led to a process of reassessment by the Council and even a letter of apology to S in relation to part of the complaint that was not upheld. In respect of the 2009 assessment, neither the complaints procedure under the Complaints Regulations

nor the opportunity to respond to the Council offered in the assessment itself, were utilised. Acknowledging *Cowl*, S stated nonetheless that since the 2009 assessment had resulted in the same outcome as the 2008 assessment, the complaints procedure and opportunity for comments would have been pointless. Also, it was said that the Council had ignored correspondence and that one of the issues raised was acknowledged by commentators to be of national importance. Walker J was unimpressed:

“59. These submissions on behalf of S in my view missed the point of the complaints procedure. It is there to provide a speedy, informal and cheap method of resolving disputes. Once L [S’s mother] had had a chance to consider the 2009 Assessment with those advising her, any points which L wished to make should have been set out in the “Parents / Carer’s comments” section of the form or in correspondence. If there was an assumption by those advising L that doing this would serve no useful purpose, or that the complaints procedure was pointless, then in my view that assumption was utterly wrong. As Mr Friel himself acknowledged, there had been major changes in the factual position since the 2008 Assessment. If the Council had failed to appreciate the significance of these changes, and L wished to go straight to a dispute resolution process rather than canvass matters in correspondence, then the complaints procedure was the appropriate route by which to notify the council of points of dispute and to seek to have them resolved. The complaints procedure had the further advantage that it could be expected to result in clarification on the part of the Council of its position in relation to each point of dispute, clarification which might well lead L’s advisers to explain to her that on some or indeed all of the points there was no good ground for challenging the stance of the Council.

60. Nor in my view does it make a difference that the argument under the Disability Discrimination Act was said to be of national significance. First, that argument had never been put to the Council and thus no dispute in relation to it had ever been crystallised. Further, as the extract from *Clements & Thompson* explains, whether or not there is a valid point to be made on what has happened in the individual case, it could not be assumed that the suggested point of national importance would necessarily need to be litigated.

61. For these reasons I conclude that the Council is right to say that L had an adequate alternative remedy which she should have followed. For that reason alone I would refuse permission to apply for judicial review in this case. I add that there was a complete failure to comply with the pre-action protocol in relation to the 2009 Assessment, and no attempt whatsoever to avoid litigation. This, in my view, would also warrant peremptory refusal of permission. There was never any adequate opportunity for the Council to consider and respond to points of dispute before these proceedings were launched. Nor did S’s legal team approach the matter in the way mandated by the *Cowl* decision.”

46. There are obviously some areas of Public Law where alternative dispute resolution is inappropriate. Those immigration decisions which do not carry rights of appeal, for example, would rarely be capable of being mediated. Similarly, the presence of a

considerable public interest element to certain types of Public Law disputes means that mediated compromise is very difficult. However, for many areas of decision-making, there is a real part to be played by alternative forms of dispute resolution which do not involve the Administrative Court. Where they exist as in *S*, the Court will want to see that they have been pursued and will seek an explanation for any failure to do so.

### **Academic Questions**

47. The Higher Courts are traditionally reluctant to hear disputes which have become academic. *Per* Lord Hutton in *R (on the application of Rusbridger) v. Attorney General* [2004] 1 AC 357, at 371:

“[...] it is not the function of the courts to decide hypothetical questions which do not impact on the parties before them.”

48. Similarly, in *Smeaton v. Secretary of State for Health* [2002] 2 FLR 146, Munby J emphasised, at 244, that “the court – including the Administrative Court – exist to resolve real problems and not dispute of merely academic significance”. However, Lord Slynn in *R v. Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 did provide some flexibility, when he held, at 457A, that:

“[...] the discretion [of the Judicial Committee of the House of Lords] to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the fact and where large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

49. Silber J has recently confirmed that this guidance applies not only to the House of Lords, but also to the Administrative Court: *R (on the application of Zoolife International Ltd) v. Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin).

50. In *R (on the application of McKenzie) v. Waltham Forest LBC* [2009] EWHC 1097 (Admin), Miss Belinda Bucknall QC, sitting as a Deputy High Court Judge, was faced with a homelessness dispute concerning a woman with a young child, who had been pregnant

at the time of the defendant's impugned decision. The case concerned when the council's duty to house the claimant would arise. Three days after the claim had been commenced and shortly before Christmas, the council informed the claimant's representatives that, in view of the imminence of the birth of her child and the pending Christmas period, it would provide her with accommodation before her due date. By the time of the hearing, there was no longer any live dispute between the parties. However:

"19. The Claimant nevertheless wishes to pursue her claim. She does so on the ground that it is in the public interest to obtain the court's guidance as to how local authorities should approach homeless applications by pregnant women by inviting the court to answer seven questions and to make nine declarations."

51. Perhaps unsurprisingly the invitation was declined. The Judge provided a useful summary of the applicable authorities and distillation of the relevant principles at paragraph 24. She applied, at paragraph 25, the approach of Silber J in *Zoolife*:

"Accordingly the Claimant must establish that two conditions are satisfied, the first being that a large number of similar cases exist or are anticipated and the second that her claim involves the resolution of a discrete issue which does not require detailed consideration of the facts."

52. Neither of those two conditions were satisfied in this case. The problem for the claimant was that she had not presented any evidence as to the extent of the problem she claimed existed generally. It was merely asserted on her behalf that the council's approach was unlawful and was a common one. The Judge refused to accept this assertion as she had no means of determining whether they were correct or not: paragraph 26. The case serves as a useful reminder of the limits of litigation in the Administrative Court. Whilst High Court Judges frequently provide useful analyses of the law and its practical application, their role is ultimately to determine real disputes between parties before them. It is not the role of the Court to give advisory opinions. The case also emphasises the importance of being able to present evidence to justify the alleged "national importance" of what would otherwise be an academic point.

### **Cross-Examination, Disclosure and Fact Finding in Judicial Review**

53. The traditional understanding of the position of the Administrative Court in judicial review claims is that it is not well-placed to resolve disputed issues of fact. The usual procedure in judicial review proceedings is first, that there is no oral evidence, and

secondly, that insofar as there are factual disputes between the parties the court is ordinarily obliged to resolve them in favour of the defendant: *R v. Board of Visitors of Hull Prison, ex parte St Germain (No 2)* [1979] 1 WLR 1401, per Geoffrey Lane LJ, at 1410H.

54. However, that position has been tested in recent times in a number of cases. *R (on the application of Al-Sweady) v. Secretary of State for Defence* [2009] EWHC 2387 (Admin), although only decided on 2 October 2009, has already become famous as the case in which both the Treasury Solicitor and the Provost Marshal were summoned to court “to assist in ensuring that proper disclosure would take place”: paragraph 8<sup>3</sup>. Although primarily of interest in terms of the approach to disclosure by public authorities, the case is also of considerable interest in terms of the approach to cross-examination in the Administrative Court.

55. The case concerned allegations of torture and unlawful killing of Iraqi civilians by British soldiers in Iraq. The claimants sought orders requiring adequate and independent investigations into alleged violations under Article 2 and 3 of the European Convention on Human Rights (the “Convention”). During the course of proceedings, both prior to and during the hearing, it became clear that the Secretary of State had failed to comply with his obligations in terms of disclosure. The case was effectively conceded on the eve of an adjourned hearing, and the matter was stayed by the court, pending the inquiries.

56. The court observed that if the usual procedure indicated by *ex parte St Germain (No 2)* had been followed in this case, “the Secretary of State would have succeeded and it would have had the more far-reaching consequence that a defendant would always succeed if sued for an infringement of human rights which was disputed”: paragraph 18. Accordingly:

“[...] a different approach was needed because these “*hard-edged*” questions of fact represented an important exception to the rule precluding the court substituting its own view in judicial review cases. It is noteworthy that Lord Mustill has distinguished between “*a broad judgment whose outcome could be overruled only on grounds of irrationality*” and “*a hard-edged question [where t]here is no room for legitimate*

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<sup>3</sup> The Secretary of State’s approach to disclosure in *Al-Sweady* was described as “lamentable” and led to an interim costs award: paragraph 13.

*disagreement*” (*R v Monopolies & Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32D-F).

19. In our view, it was necessary to allow cross-examination of makers of witness statements on those “*hard-edged*” questions of fact. We envisage that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the ECHR and the engagement of its Articles.”

57. The court considered that this approach was consistent with that adopted by Dyson LJ in *R (on the application of N) v. M* [2003] 1 WLR 562 at 574, when he explained that cross-examination in judicial review cases should be ordered only if it is necessary to enable the court to determine factual disputes for itself. It was the requirement for a fact-finding exercise which in turn led to the dispute over disclosure. The Court continued:

“27. For there to have been effective cross-examination, it was vital for full disclosure to occur as otherwise the evidence of those witnesses could not be effectively challenged and appraised with the consequences that the truth would not have been discovered. Put in another way, where the court is involved in fact-finding on issues as crucial to the outcome of this case as they were in the present case, the approach to disclosure should be similar to that in an ordinary Queen’s Bench action.

28. We concluded that it is vital that when it becomes clear that the outcome of a judicial review application might depend on the determination of a factual dispute, urgent consideration should be given to ordering disclosure and cross-examination. Rule 12.1 of the Practice Direction to CPR Part 54 provides that “*Disclosure is not required unless the court orders otherwise*”.

29. In our view, the parties and the Court should always scrutinise with care the stance of parties to judicial review applications (and in particular those concerning human rights claims) to ascertain if there is any critical factual issue which requires orders for cross-examination of the makers of witness statements or disclosure as being (in the words of Lord Bingham in the *Tweed* case [...]) “*necessary in order to resolve the matter fairly and accurately*”. Courts should not be reluctant to make such orders in suitable cases, which are especially likely to arise in claims based on the ECHR. [...]

58. The court distilled its findings into general case management guidance at paragraph 64:

“As to the case management issues, we consider that the parties have a clear obligation in any judicial review case to consider at all times whether there is a crucial issue in the case in the form of a hard-edged issue, of the kind described Lord Mustill [in *ex parte South Yorkshire Transport*] because this will be relevant in determining whether the court should make orders for cross-examination and disclosure. If the parties cannot reach agreement, an application should be made for the appropriate orders for disclosure and cross-examination in accordance with the principles, which we have set out above.”

59. Accordingly, there appear to be two limbs to the test for determining whether cross-examination is required:

- (1) There is a hard-edged question of fact; and
- (2) Cross-examination is necessary in order to resolve the matter fairly and accurately.

60. The court will no doubt be astute to limit such cross-examination to genuine disputes of fact, rather than disputes as to the exercise of judgment, in reliance on *ex parte South Yorkshire Transport*. However, it is notable that the court predicted an increase in such fact-finding exercises in human rights cases. That is entirely in keeping both with the duty of anxious scrutiny in human rights cases (see *ex parte Bugdaycay*) and also the position which is now clearly established in human rights cases that the task for the court is to decide whether the claimant's human rights have actually been violated, rather than to conduct a mere review of the decision-making process: *R (on the application of Begum) v. Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100; *R (on the application of Nasser) v. Secretary of State for the Home Department* [2009] UKHL 23, [2009] 2 WLR 1190. These two principles demand a more intrusive approach to disputes of fact.

61. Another issue which arises as a result of the judgment in *Al-Sweady* is the extent to which the presumption of regularity, the essence of the maxim *omnia praesumuntur rite esse acta*, will still be available in such cases. In *R v. Inland Revenue Commissioners, ex parte TC Coombs & Co* [1991] 2 AC 283, Lord Lowry commented on the operation of the presumption. He cited with approval the following passage from *Earl of Derby v. Bury Improvement Commissioners* (1869) L.R. 4 Exch. 222 at 226:

“[...] in the absence of any proof to the contrary, credit ought to be given to public officers, who have acted prima facie within the limits of their authority, for having done so with honesty and discretion”

62. The presumption can be displaced; the burden of doing so is, however, a weighty one.

*Per* Lord Lowry at 300, the presumption can only be displaced:

“[...] by evidence showing that at the [relevant] time [...] the [decision maker] could not reasonably have held that opinion. In order to decide whether the applicants succeed in this task, the court must consider all the evidence on both sides and all the available facts [...]”

63. The answer is probably that there is very little room left for the operation of the presumption in cases of hard-edged factual disputes, particularly in the context of human rights. The presumption was in any event rebuttable. It is likely that Judges will now be more inclined to displace it and engage with the facts than before.
64. Difficult issues over the resolution of problematic disputes of fact are not limited to the situation where public authorities have failed to comply with their duty of candour. In *R (on the application of A) v. London Borough of Croydon* [2009] UKSC 8, [2009] 1 WLR 2557, the Supreme Court was concerned with the correct approach to determining whether an individual was a “child” under section 20(1) of the Children Act 1989. Where the age of the person concerned was in dispute, who should decide whether he is a child: the local authority or the court? It was a central plank of the argument for the authorities, supported by the Secretary of State for the Home Department, that in determining whether the conditions exist for the exercise of statutory power, it is for the courts to decide what the words mean, but for the public authorities in question to decide whether the facts fit those words. Reliance was placed on formidable authorities: *R v. Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309, *R v. Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484 and *R (on the application of Wahid) v. Tower Hamlets London Borough Council* [2002] LGR 545.
65. However, the question was always what Parliament intended under the particular statutory scheme: *per* Lady Hale at paragraph 24. She continued:
- “26. [...] where the issue is [...] what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and “Wednesbury reasonableness” there are no clear cut right or wrong answers.
27. But the question whether a person is a “child” is a different kind of question. There is a right or wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers.

28. The arguments advanced by Mr Béar might have to provide an answer where Parliament has not made its intentions plain. But in this case it appears to me that Parliament has done just that. [...]"

66. In relation to an argument that this was a question of jurisdictional fact for the court to determine, Lady Hale continued as follows:

"29. I reach those conclusions on the wording of the 1989 Act and without recourse to the additional argument [...] that "child" is a question of jurisdictional or precedent fact of which the ultimate arbiters are the courts rather than the public authorities involved. [...]"

32. However, as already explained, the Act does draw a distinction between a "child" and a "child in need" and even does so in terms which suggest that they are two different kinds of question. The word "child" is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case). With a few limited exceptions, it defines the outer boundaries of the jurisdiction of both courts and local authorities under the 1989 Act. This is an Act for and about children. If ever there were a jurisdictional fact, it might be thought, this is it."

67. She specifically dealt with practical arguments based on the inappropriateness of the judicial review procedure for dealing with such disputes, similarly to those considered by the Divisional Court in *Al-Sweady*. She held at paragraph 33:

"The final arguments raised against such a conclusion are of a practical kind. The only remedy available is judicial review and this is not well suited to the determination of disputed questions of fact. This is true but it can be so adapted if the need arises: see *R (Wilkinson) v. Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 WLR 419. That the remedy is judicial review does not dictate the issue for the court to decide or the way in which it should do so, as the cases on jurisdictional fact illustrate. Clearly, as those cases also illustrate, the public authority, whether the children's services authority or the UK Border Agency, has to make its own determination in the first instance and it is only if this remains disputed that the court may have to intervene. But the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence. If the other members of the Court agree with my approach to the determination of age, it does not mean that all the other judgments involved in the decision whether or not to provide services to children or to other client groups must be subject to determination by courts. They remain governed by conventional principles."

68. Lady Hale's reference to *Wilkinson* is a reference to the possibility of cross-examination in appropriate judicial review cases. Disputes over whether asylum-seekers are or are not children are frequent. The implications of such disputes are serious. The Secretary of

State's policy on child asylum-seekers, the leave they are entitled to and the treatment of their claims is very different to that of adult asylum-seekers. Also, the implications for local authority expenditure are enormous: a child asylum-seeker will be accommodated by the relevant local authority, whilst the Secretary of State has responsibility for adults. Accordingly, there are a great many vested interests in the process. The fact that the issue may now be determined by a Judge of the Administrative Court means that there is yet more potential for cross-examination in judicial review proceedings. This process frequently involves expert evidence from paediatricians specialising in age assessment of asylum-seekers. *A v. Croydon* and *Al-Sweady*, although in very different contexts, both show that practice and procedure in the Administrative Court in this field is in the process of far-reaching development.

### **Bias**

69. The test for apparent bias is now well-established. *Per* Lord Hope in *Porter v. Magill* [2002] 2 AC 357, at 494H:

“[...] the question is whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased.”

70. In *Helow v. Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416, Lord Hope expanded upon the test:

“3. Then there is the attribute that the observer is ‘informed’. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

71. Lord Mance continued:

39. [...] The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para 19 *per* Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-

C. The fair-minded and informed observer is “neither complacent nor unduly sensitive or suspicious”, to adopt Kirby J’s neat phrase in *Johnson v. Johnson* (2000) 201 CLR 488, para 53 [...]”

72. Despite such clear statements of principle, this area of Public Law continues to produce cases of interest. Two recent Court of Appeal cases deal with allegations of apparent bias in varied and unusual circumstances.

73. In *Apostolides v. Orams* [2010] EWCA Civ 9, it was argued that a second reference to the European Court of Justice (the “ECJ”) should be made on the grounds that the decision of the ECJ on the first reference was marred by apparent bias. The case concerned a property dispute in Cyprus. The land in question was located in the Turkish-controlled area, but a Court in the Cypriot Government-controlled area made a determination in relation to it. The judgment was sought to be registered in the UK. The first reference from the Court of Appeal raised questions as to the approach of Member State courts to the registration of judgments of Cypriot courts in relation to land on territory outside the Cypriot Government’s control. The ECJ essentially responded by saying that Member State courts did have to give effect to such judgments.

74. When the matter came back to the Court of Appeal the respondents argued that the President, Judge Skouris, who presided over the chamber which heard the first reference and who is Greek, should have recused himself because of his links to the Cypriot Government. It was said that the failure to do so amounted to apparent bias. In support, the respondents relied on five occasions where Judge Skouris had had contact with the Cypriot authorities. Three of these occasions involved visits by Judge Skouris to Cyprus, on two occasions as part of a delegation from the ECJ and/or Court of First Instance. On the other occasion, he was awarded a state honour by the President of Cyprus, the Makarios III Grand Cross, which was awarded, according to a news agency, “due to his strong and sincere feelings towards Cyprus and its people”. He was apparently praised by the Cypriot President specifically for his support of the people of Cyprus. The other two occasions involved Judge Skouris receiving Cypriot political and legal delegations at the ECJ.

75. Pill LJ, with whom Lloyd LJ and Sir Paul Kennedy agreed, dismissed the allegations of apparent bias. He stated that:

“88. I stress that no suggestion is made of actual bias. I accept that members of a court need also to avoid an appearance of bias. In my judgment, there is no appearance of bias in this case. The context is a court created by Member States of the European Union to which their courts can refer questions for elucidation of Union law. Judges are appointed by Member States on the basis of nationality. Mutual trust exists in the administration of justice in the community (recital 16 of the Regulation) and, even when Member States are in dispute, no objection to the presence of a judge can be taken on the ground of nationality (article 18 of the statute).

89. Judges, and the states from which they come, will inevitably have closer links with some Member States than with others. No appearance of bias is created by the presence in the court hearing the case, even as President, of a judge from a state known to have close relations with the state the decisions of whose courts are the subject of debate.

90. As President of the court, the President can be expected to wish to promote knowledge of the court and its workings in Member States, and in particular new Member States. Making official visits and receiving visiting delegations is a valuable and appropriate part of the office of President. That approach is likely to be reciprocated by Member States, including new Member States. Further, any commendation of the Republic of Cyprus in the presence of the President must be seen in the context of numerous international instruments calling for respect for its territorial integrity and independence. In that context, commendation is of the sovereign entity as a whole.

91. In my judgment, no appearance of bias arises from the visit of the President, together with other judges, to Cyprus in May 2005. It was aptly stated in the ECJ press release that “The Court of Justice maintains continuous relations with the supreme institutions of the Member States and this visit is taking place within that context”. No appearance of bias arises from the political nature of a speech said to have been made by the President of Cyprus during the visit. There is no suggestion that the President adopted or approved the sentiments expressed. The same applies to the President of Cyprus's speech when the honour was conferred on the President in November 2006. The reasonable informed observer would have no fears that the remarks might influence the President or other judges in their judicial capacity. Nor does the fact that the honour was conferred by a Head of State, rather than by a head of the judiciary, create a fear that the President might be influenced in his judicial capacity. Such honours will normally be conferred by the Head of State and concern based on a distinction between executive and judicial honours (Bangalore 38(d)) has little relevance.

92. The purpose of the President's visit to Cyprus in February 2009 was to attend a conference organised by the University of Cyprus. Neither his presence, nor the company he kept, creates an appearance of bias in the President of the judicial organ of the Union which is concerned to promote in Member States of the Union understanding of its role. His meeting, in March 2009, with a delegation of Cypriot MPs to discuss the role of the court does not demonstrate an attempt by the

delegation to influence the President, still less does it create an appearance that he may be influenced by the delegation. It was the role of the court that was under discussion and not political issues or particular cases.”

76. The case represents an interesting and unusual application – and development – of the principles discussed in *Helow*. Just as there, the Court considered that the fair-minded and informed observer would not simply equate the political views of persons with whom Judge Skouris had been in contact with his own position on the issues. As elsewhere in Public Law, context is everything. The fair-minded and informed observer is taken to understand the realities of co-operation and communication between the ECJ and the Member States. The Court referred to the Statute of the ECJ, the ECJ’s own code of conduct, the Bangalore Principles of Judicial Conduct and Cases C-341/06P and C-342/06P *Chronopost* [2008] ECR I-4777 on the approach in cases of alleged impartiality. In the *Chronopost* case, the ECJ had examined an allegation of “lack of impartiality” in a judgment of the Court of First Instance (“CFI”). It was alleged that the hearing before the CFI had not been fair because the Judge-Rapporteur had been the same as in an earlier determination on the same point between the parties. The ECJ applied the jurisprudence of the European Court of Human Rights on independence and impartiality under Article 6 of the Convention and found that there was no unlawfulness. Significantly, however, the domestic *Helow* test was still applied by the Court of Appeal in *Apostolides* even though the case concerned alleged apparent bias on the part of a judge of an international court. Although it is possible to understand how, applying the *Helow* approach, the mere fact of contact between Judge Skouris and the Cypriot authorities was not sufficient to amount to apparent bias, the position with regard to the award of a state honour is surely very close to the line.

77. In *Baker v. Quantum Clothing Group* [2009] EWCA Civ 566, the Court of Appeal was faced with what it described as “a novel type of application”: paragraph 16. The underlying cases were test-cases about noise-induced deafness in the textile industry. The Court was composed of Sedley, Smith and Jacob LJ. At the outset of the main hearing, Sedley LJ disclosed that he was the Honorary President of the British Tinnitus Association (“BTA”). He described it as “a voluntary self-help organisation that brings clinicians and patients together. It has no axe to grind at all in liability or litigation

terms”: paragraph 6. None of the three respondents objected. Following the lack of objection, Sedley LJ specifically told them “If you do think of something, make sure I know fairly soon”. Seven weeks later, the Court received a letter from the first respondent’s solicitors alleging “a web of links between the professionals involved in the case – solicitors and experts – on the appellant’s side, with the BTA – and hence, albeit indirectly, with Lord Justice Sedley”: paragraph 8. It argued that:

“[...] we and our clients [...] would suggest that there is a real possibility of bias when:

- a. a Judge suffers from the same condition as is in issue – in terms of responsibility (or not) for it – in the appeal;
- b. the Judge does not himself disclose this – while disclosing other facts perceived by him to be relevant to his ability to sit;
- c. this occurs in the context of the web of links to which we have already referred.”

78. The first respondent’s position was supported by the other two respondents. Following a response from the appellants’ solicitors, Sedley LJ made a written statement refusing to recuse himself. The respondents nonetheless persisted in their applications.

79. The application for recusal was refused in robust terms. The Court gave useful guidance on the approach to applications alleging such indirect connections between judges and firms of solicitors, as well as on the procedure for such applications generally:

“Novelty of the application

16. Before considering the substance of the applications in detail, we draw attention to the fact that the complaint here is not that there is a connection between Lord Justice Sedley and Mrs Baker but an indirect link between the Lord Justice and Mrs Baker's solicitor. This is a novel type of application in our experience. We do not think that a tenuous connection between a judge and a firm of solicitors in the case could ever be regarded by the well informed observer as a giving rise to a possibility of bias. In *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, in paragraph 25, the Court of Appeal sought to give practical guidance about the kind of situations in which the judge ought to or need not recuse himself. One of the factors, which would not normally give rise to the need for recusal was the ‘previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him’. We observe that the connection alleged in this application, which relies on an indirect link between Lord Justice Sedley and Wake Smith (via the BTA) is far more tenuous than the link between a judge and a firm of solicitors by whom he has previously been instructed.

Conclusions on the “web of links”

17. Sedley LJ made it plain that he had no knowledge of any of the matters on the BTA Website constituting the so-called “web of links”. In those circumstances, we do not think that any fair-minded reasonable observer would consider that there was any real possibility that he might be biased arising from the so-called “web of links”. We are surprised that the applications have been pursued thereafter as they have been.

18. But even if the facts giving rise to the “web of links” relied upon had been known to Sedley LJ it would not have moved that observer to conclude that there was any real possibility of bias. [...]

[...]

32. The upshot of all this is that the “web of links” is quite without substance. The objection on this basis should never have been made, and once made should have been dropped as soon as Sedley LJ had made his statement.

The tinnitus objection

33. We turn to the objection based on the fact that Sedley LJ himself suffers from mild tinnitus and we are accepting for present purposes that this was not disclosed. It too is a point of no substance. It amounts to a contention that no judge with any particular disability should hear a case involving that disability. A judge with poor eyesight or only one eye could not hear a case about an eye injury, a judge in a wheelchair could not hear a case about an injury which made the victim wheelchair bound and so on. And, taken to its logical conclusion, the argument would mean that a disabled judge could not hear a case about disability living allowance, or a woman judge hear a case about sexual discrimination against a woman. The examples multiply.

34. This objection, like that of the “web” has no substance. Coupling the one objection with the other makes no difference: zero plus zero is zero. The objections here are well on the far side of being “unduly sensitive or suspicious.”

The Delay

35. Sedley LJ said outset that “if you think of something make sure I know fairly soon.” In those circumstances it is particularly surprising that Weightmans say they only discovered certain of the matters relied upon two weeks after the hearing. We have unchallenged evidence from Mr Fry of Wake Smith leading to the clear inference that Mr Byard of Weightmans had visited the BTA website during the hearing. Even accepting that the matters concerned were only found two weeks later, there is no explanation of why they were not found earlier. Further, it is astonishing that, having found the material, the applicants took no action for a further five weeks. We draw the inference from this delay that the matters now relied on were not, at the time of discovery, seen as serious.

36. Finally, we think that this objection simply comes too late. It is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable.

37. For all these reasons, we refused recusal. The applications were without merit.”

80. There are three useful points of principle that can be derived from this decision:

- (1) A “tenuous” alleged connection between a firm of solicitors and a judge, of the indirect sort that was in issue in this case, could not realistically give rise to a possibility of bias in the eyes of a fair-minded and informed observer;
- (2) A personal characteristic, such as disability, which was in issue in a case and which a judge shared, could not give rise to a possibility of bias in the eyes of a fair-minded and informed observer; and
- (3) It is imperative for those alleging apparent bias on the part of a judge hearing a case to act with all due speed to bring the matter to the attention of the court.

### **Protective Costs Orders**

81. The principles to be applied by the Courts in deciding whether to make a Protective Costs Order (“PCO”) have now been considered by the Court of Appeal on a number of occasions. The basic principles are well-known and set out in *R (on the application of Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600, at paragraph 74:

“(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) Where those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”

82. Waller LJ stressed in *R (on the application of Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749 that the *Corner House* criteria should not be read in an overly restrictive fashion. At paragraph 24 in *Compton*, Waller LJ held that there is no principle of exceptionality to be imposed as an additional criterion to those set out in *Corner House*. Further, the issue whether cases raise questions of general public importance is one of degree and one that judges should be able to resolve. The *Corner House* principles were applied in the environmental case of *R (on the application of Buglife) v.*

*Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209; [2009] Env LR 18. The Court of Appeal applied the *Corner House* principles as interpreted by Waller and Smith LJ. It added that there should be no assumption that where the claimant's costs were capped there should be a cap at the same level on the defendant's costs. All would depend on the circumstances. The procedure should be similar between the High Court and Court of Appeal.

83. The matter came before the Court of Appeal again in *Morgan v. Hinton Organics* [2009] EWCA Civ 107, [2009] Env LR 30. The case was unusual in that it did not involve a public law claim, but rather a claim in private nuisance by local residents against the operators of a composting facility. Two of the issues that arose were the application of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention") in private law proceedings, and PCOs. It was the first private law claim raising the Aarhus Convention to reach the Court of Appeal. By the time the case reached the Court of Appeal, the PCO point was irrelevant. It did not, therefore, deal with the difficulties of PCOs in private nuisance actions. Also, the Court's comments on PCOs were, therefore, *obiter*. However:

"36. [...] the authorities to which we have been referred reveal considerable uncertainty in relation to what we have already identified as a controversial element in the *Corner House* guidelines, that is the requirement (1)(iii), that "the applicant should have no private interest in the case". Although the court must be cautious in offering guidance on matters not directly in issue, we think that, pending further clarification by the Rules Committee, it would be helpful for us to give our view as to where the law now stands."

84. As well as the *Corner House* judgment itself, the Court considered the judgments of the Court of Appeal in *Goodson v. HM Coroner for Bedfordshire and Luton* [2005] EWCA Civ 1172, *R (on the application of England) v. Tower Hamlets LBC* [2006] EWCA Civ 1742, and of the High Court in *Wilkinson v. Kitzinger* [2006] EWHC 835 (Fam) and *R (on the application of Bullmore) v. West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin). It noted that a strict approach to the private interest test was taken by the Court in *Goodson*, but that a more flexible approach was evident from the other cases. Carnwath LJ, giving the judgment of the Court, held:

“39. On a strict view, it could be said, *Goodson* remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court in the last two cases. Although they were directly concerned with other aspects of the *Corner House* guidelines, the “flexible” approach which they approved seems to us intended to be of general application. Their specific adoption of Lloyd Jones J’s treatment of the private interest element makes it impossible in our view to regard that element of the guidelines as an exception to their general approach.

40. The hope that the Rules Committee might be able to address these issues in the near future has not been realised. In the meantime, in our view, the “flexible” basis proposed by Waller LJ, and approved in *Buglife* should be applied to all aspects of the *Corner House* guidelines.”

85. The private interest test has long proved controversial in the realm of PCOs. The strict approach in *Goodson* was out of kilter with subsequent judicial commentary on the approach generally to the *Corner House* tests and the need for flexibility. That such flexibility should be encouraged generally by the Courts in this field is unsurprising. The *Corner House* principles are not statutory rules set in stone. They are guiding principles used to direct the exercise of the Court’s discretion on costs. As such, they should be approached and applied with the necessary degree of flexibility rather than rigidity. Notwithstanding that the point was *obiter* in *Hinton Organics*, it is to be expected that this will now represent the accepted approach in PCO litigation, at least until the Rules Committee addresses the issue<sup>4</sup>.

### **Abuse**

86. Finally, the unusual case of *Land Securities Plc v. Fladgate Fielder (A Firm)* [2009] EWCA Civ 1402 provides an interesting example of the approach of the Court to allegations of abuse of process in the context of judicial review. It concerned a claim for damages of £17 million on the grounds that the Defendant had committed against the Claimant the tort of abuse of process. The Defendant applied to strike out the claim, alternatively for summary judgment. The background to the case was that the Claimant had applied for planning permission to develop land next to the Defendant’s offices. The Defendant objected and, when planning permission was ultimately granted by Westminster City

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<sup>4</sup> PCOs were also the subject of discussion in the unusual cases of *Weaver v. London Quadrant Housing Trust* [2009] EWCA Civ 235 and *R (on the application of E) v. Governing Body of JFS School* [2009] UKSC 1, [2009] 1 WLR 2353. However, there was no development of the *Corner House* principles in these cases.

Council, launched judicial review proceedings. A further grant of planning permission also led to a legal challenge by the Defendant. Fladgate's position was that they were attempting to dispose of the residue of their lease on the premises in order to move to new premises. They considered that the three years required to build out the proposals would make the premises unmarketable and would be "three years of hell". It was this sentiment, rather than any concern for the public interest, which was behind their legal challenges. Negotiations took place between the parties. Fladgate suggested that Land Securities could take an assignment of their lease. Land Securities considered that Fladgate was really seeking a financial payment.

87. The legal challenges were ultimately dismissed by Collins J: [2009] EWHC 991 (Admin). Against this background, Land Securities commenced a claim for damages for the tort of abuse of process against Fladgate Fielder. Fladgate obtained summary judgment in that claim. Land Securities' appeal to the Court of Appeal was unanimously dismissed. All three members of the Court, whilst acknowledging the continued existence of the tort, made detailed observations about why it should not be extended to judicial review proceedings generally. Their judgments involve detailed examinations of the character and nature of judicial review challenges. *Per* Etherton LJ:

"67. The authorities provide no basis for extending a tort of abuse of process to the Defendants' proceedings for Judicial Review. The following points appear clearly from the authorities. First, there is no general tort of malicious prosecution of civil cases. On policy grounds, the tort of malicious prosecution in relation to civil cases is confined to the three well established heads of damage recognised in *Quartz Hill* and *Gregory*. Second, essential ingredients of a claim for malicious prosecution are the absence of reasonable and probable cause and that the proceedings have ended in favour of the person maliciously prosecuted. Third, *Grainger* has never been overruled. It is authority for a tort of abuse of process. The only other case within this jurisdiction, in which the tort has arguably been successfully invoked, is *Gilding*, over 140 years ago. Both cases concerned a blatant misuse of a particular process, namely arrest and execution, within existing proceedings. In both cases the abuse of that process involved compulsion by arrest and imprisonment to achieve a collateral advantage. Fourth, in cases of abuse of process, it is irrelevant whether or not there was reasonable or probable cause for the proceedings, or in whose favour they ended, or whether they have ended at all. Fifth, statements in the English authorities describing a broader application of the test of abuse of process than the critical factual elements of *Grainger* and *Gilding* were all *obiter*. In particular, *Majory*, which has been cited in support of a wider formulation, was not a claim in tort, but of opposition to a receiving order; it was in any event one of the *Quartz Hill* special

circumstances; and the opposition to the receiving order failed on the facts. There was no reference to Grainger, and Evershed MR referred only to the sanction of prohibiting the abuser from invoking the power of the court by the proceedings he had abused. Sixth, as to the broader statements of principle, there is no clearly accepted approach for identifying what is sufficiently collateral to establish the tort of abuse of process. The analysis which appears to receive most support is that of Bridge LJ in Goldsmith.

68. It is not necessary on this appeal, as it was not necessary for the Deputy Judge, to define the precise limits of the tort of abuse of process. I consider, however, that, even if the tort can be committed outside circumstances of compulsion by arrest, imprisonment or other forms of duress, there is no reasonably arguable basis for extending the tort beyond the other particular heads of damage which must exist for invocation of the tort of malicious prosecution. [...]

69. [...]

70. Those points apply with particular force to proceedings for Judicial Review. We were not referred to any case in any jurisdiction in which it has been held or suggested that the tort of abuse of process can apply to Judicial Review proceedings, for which the court has given permission, let alone when the damage relied upon is general economic loss outside the limited categories of damage for which the tort of malicious prosecution may be invoked. There is a public interest in bringing judicial scrutiny and remedies to bear on improper acts and decisions of public bodies. The permission stage of Judicial Review is intended to weed out claims without sufficient prospects of success. [...]

71. The effect of LS's submissions in the present case is that, even though an allegation of abuse is expressly raised as an objection to permission for Judicial Review and the Judge nevertheless grants unconditional permission, as did Newman J in the Judicial Review proceedings concerning the Wilton Plaza Development, it would nevertheless be possible for someone in the position of LS to institute immediately proceedings for abuse of process. They could do so since the tort does not depend upon the absence of reasonable and probable cause in bringing the "abusive" proceedings or their failure or indeed their termination. Further, the logic of LS's submissions is that, even if the Defendants had succeeded in the Judicial Review proceedings for which Newman J had given permission, the economic loss caused to LS from their successful outcome would be recoverable from the Defendants in tort for abuse of process. There is nothing whatever in the authorities to justify such a remarkable conclusion.

72. [...]

73. Furthermore, even if a wider formulation of the tort of abuse of process was adopted than I consider to be justified on the authorities, whether the wider formulation be that of Bridge LJ in Goldsmith or otherwise, the Deputy Judge was fully entitled to conclude that the interest of the Defendants in relation to their property relocation was insufficiently collateral to the Judicial Review proceedings as to render those proceedings abusive. What, in my judgment, emerges clearly from the authorities is that the tort is not committed by a person who institutes proceedings with a genuine interest in, and an intention to secure, their successful outcome, even if the claimant's motives are mixed and they hope that they may also achieve an objective not itself within the scope of the proceedings. That is often the

situation in Judicial Review proceedings concerning planning matters, as was recognised by the Court of Appeal in *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2004] 2 P&CR 22. [...]"

88. *Per Moore-Bick LJ:*

"93. If abuse of process consists in making use of proceedings in order to achieve some object other than one of the remedies which it lies in the court's power to grant, it might seem obvious that proceedings for judicial review could be abused as much as proceedings of any other kind. In principle that may be so, but it is much less likely to be the case in practice. There are at least two reasons for that. The first is that it is necessary to obtain permission to proceed with a claim for judicial review and that requires the court to consider whether the claim has a real prospect of success and, more generally, whether the applicant should be allowed to pursue the claim. If the defendant or an interested party considers that the proceedings constitute an abuse, that can be drawn to the attention of the court which will consider the position before permission is given. The remarks of Dyson L.J. in *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 W.L.R. 1761, to which Etherton L.J. has referred, make that clear.

94. The second reason lies in the public law nature of the proceedings themselves, the essential nature of which is to ensure that a public body complies with the law. That does not mean that the claimant will not be seeking to serve a private interest of his own; in very many cases he will and will be expecting to further that interest as a direct or indirect result of obtaining the relief that he seeks. Whatever may be the claimant's private purpose in commencing and continuing the proceedings, however, the public has an interest in ensuring that breaches of the law by public bodies are identified and, where appropriate, corrected. It is difficult, therefore, to contemplate a case in which the Crown, in whose name the proceedings are brought, does not have a proper interest in obtaining whatever remedy the court may see fit to grant."

89. Finally, *per Mummery LJ:*

"111. Sixthly, the special character of judicial review proceedings. I doubt whether it is sensible to lump together and make broad generalisations about all kinds of legal process treating their abuse as giving rise to the same policy or practical considerations. In this case the process was judicial review challenging the lawfulness of an exercise of planning powers by a public authority. Access to a court for that purpose is an important right of every citizen affected by the decision or act under challenge. It would be unfortunate if a person could be pressured into desisting from such action by the threat of third party civil liability for substantial damages, even if the judicial review application succeeded.

112. The special judicial review procedure under CPR Part 54 governing claims of abuse of power has robust in-built protections from abuse of process for those directly affected by the claim. Unlike the case of an ordinary action, the prior permission of the court is required to proceed with a claim for judicial review. There is a short limitation period. There is no automatic right to disclosure of documents or to test evidence by cross examination. Interested parties can be joined or can apply

to be joined in the application at any stage. As in this case the interested parties in judicial review proceedings are usually beneficiaries of the exercise of power the lawfulness of which is challenged. A person receives the benefit of a planning decision. The lawfulness of the permission is liable to be judicially reviewed. The recipient of the planning permission naturally wishes to support the validity of the decision under challenge. It is essential that such a person has the right to participate and be heard in the protection of his interests. It is also desirable that the applicant for judicial review should not be deterred from pursuing an application, once permission has been obtained for an arguable case that is considered fit for further consideration, for fear that, win or lose, there may be exposure to a liability to compensate the interested party for pure economic loss suffered in consequence of the claim.”

90. Accordingly, the appeal was dismissed. The Court’s findings were clear and powerful. Yet the position of the Courts in terms of the abuse of judicial review proceedings has, to some extent, varied over recent years. The Court in *Land Securities* relied on the judgment of the Court of Appeal in *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2004] 2 P&CR 22, where it was held, at paragraph 46, that:

“The essential question for a decision-maker in planning matters is whether representations one way or the other, whatever the motives of those advancing them, are valid in planning terms. A collateral motive may have relevance to the reasonableness of a landlord's refusal to consent to alterations [...]. But judicial review applications by would-be developers or objectors to development in planning cases are by their very nature driven primarily by commercial or private motive rather than a high-minded concern for the public weal. I do not say that considerations of a claimant's motive in claiming judicial review could never be relevant to a court's decision whether to refuse relief in its discretion, for example, where the pursuance of the motive in question goes so far beyond the advancement of a collateral purpose as to amount to an abuse of process. The court should, at the very least, be slow to have recourse to that species of conduct as a basis for discretionary refusal of relief. In any event, it would, as Mr. Steel pointed out, be exceptional for a court to exercise discretion not to quash a decision which it found to be ultra vires [...].”

91. However, in *R (on the application of the Noble Organisation Ltd) v. Thanet District Council* [2005] EWCA Civ 782, [2006] Env LR 8, the Court of Appeal expressed rather more concern about the potential effect of such naked commercial considerations. Auld LJ held, at paragraph 68, that:

“[...] I would dismiss the appeal. In doing so I add a note of dissatisfaction at the way the availability of the remedy of judicial review can be exploited—some might say abused—as a commercial weapon by rival potential developers to frustrate and delay their competitors' approved developments, rather than for any demonstrated

concern about potential environmental or other planning harm. By the time of the hearing of this appeal, as is often the case, the approved scheme in issue is clearly of a piece with surrounding and much larger approved proposals already taking shape around it. It could not conceivably be regarded as a significant addition to the overall environmental impact of such development. This may be the cause of great economic harm to individual developers and, more importantly, it is likely to frustrate the public interest in much needed regeneration in areas such as the Isle of Thanet. However seemingly complicated the issues are, or how sophisticated and technical the statement of facts and grounds supporting the initial claim for judicial review, they should be subject to rigorous examination by the single judge at the permission stage of a claim for judicial review.”

92. Whatever the different views of the Court of Appeal over time as to the use and abuse of the judicial review jurisdiction, it was clear in *Land Securities* that such action should not be the foundation for a claim in damages for abuse of process. Indeed, the different characterisations of such action by the Court illustrate the difficulty of distinguishing between mixed motives in what is an inescapably commercial situation. The core influences on the Court’s decision were:

- (1) The public interest in holding public bodies to account and subjecting them to judicial scrutiny;
- (2) The existence of the permission stage and other procedural protections from abuse;
- (3) The undesirability of having a situation where a judicial review claim could succeed yet be followed by a successful claim for damages against the Claimant from a third party;
- (4) The fact that the motives of claimants may often mix matters of private interest with matters of public interest; and
- (5) The importance of the principle of access to justice.

93. Defining abuse in such circumstances is extremely difficult. Against that background, it was both undesirable and unrealistic to render parties liable to concurrent claims in damages for the tort of abuse of process. It is a mark of the maturity of the judicial review process that it contains the remedy for its own abuse.

## **Conclusion**

94. Whilst a significant proportion of contemporary judicial review cases involve human rights arguments, it is clear that traditional “domestic” Public Law continues to develop apace. The selection of cases above shows that common law development of the underlying principles has not slowed over the past year. Next year is unlikely to differ.

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28 June 2010**