

# Review of Administrative Law: challenges on scope and exercise of powers



**David Lock QC**

## What does the review say?

“Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise of a power within the permitted scope. Traditionally, the first was subject to control (by JR) by the Court, but the second was not. Over the course of the last forty years (at least), the distinction between “scope” and “exercise” has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end (“scope”) to all of the conventional [JR] grounds and proportionality at the other (“exercise”). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach”

## Established No Go areas for the Courts

- Article 14 of the Bill of Rights

*"That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."*

- But:
  - The decision as to what constitutes a 'proceeding in Parliament', and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House: *R v Chaytor & Ors (Rev 2)* [2010] UKSC 52
  - Prorogation of the house is not a "proceeding in parliament: *R (Miller) v The Prime Minister* [2019] UKSC 41.

## But have the Courts added to powers in last 40 years?

- Terms of reference set up dichotomy between “scope and “exercise” of powers
- If a public body acts outside the scope, it acts unlawfully because it does not have the power to do what it does
- But does that mean that, until the last 40 years, any exercise of a power cannot be challenged in the court if the public body had the power
  - Bad faith
  - Dishonesty
  - Improper Purpose
  - Unreasonableness

# Is “no review of exercise of a power” premises correct?

## **Associated Provincial Picture Houses, Limited v Wednesbury Corporation**

[1948] 1 KB 223 per Lord Greene

“When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. The exercise of such a discretion must be a real exercise of the discretion .... the authority must disregard those irrelevant collateral matters”

## The exercise of a discretion - 1948

“Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent”

“Warrington L.J. in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another”

## *Short v Poole Corporation* [1921]

“Thus no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative.

It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would be held ultra vires under this head, though performed bona fide. To look for one example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void”

## Challenge to the exercise of a power

Contrary to the case advanced in the Terms of Reference, control by the Courts over the exercise of the powers is not a recent development

*e.g. Kruse v Johnson* [1898] looked at test by which the question as to whether certain by-laws were unreasonable or not was to be decided.

Improper purpose doctrine may have been expanded by *Padfield* doctrine

- But that builds on C19th foundations
- If power is given to public authority for purpose A, should courts refuse to act if it is used for purpose B?



## What is this part of the review really about?

- Appears to be an attempt to prevent the inner workings of government decision making being exposed to judicial scrutiny:
- To avoid asking:
  - What decision was made
  - By whom
  - For what purpose
  - For what reasons
- It is a political question whether that scrutiny should be curtailed.

# Thank you for listening

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