

## **W201 The Individual and the State**

### **Study notes on judicial review**

#### **What is it ?**

It is how the courts control misuse of power by public bodies. They 'review' the decisions of public bodies 'judicially'.

#### **Where does it come from?**

It is based **not** on statute but on common law.

Until the Second World War overmighty government was not seen to be a problem. Courts generally left well alone when the decision of a minister or public authority was challenged. Put simply the courts didn't want to know.

In 1949 Lord Denning warned of change to come. He spoke in a lecture at a time of post war Labour government nationalisation and the welfare state.

“ we have not yet settled the principles upon which to control the new powers of the executive...The Courts must do this...Properly exercised the new powers of the executive lead to the Welfare State: but abused they lead to the totalitarian state.”

In the last fifty years judges have developed rules to enable them to impose legal control over the exercise of government power. Today this has been extended to control any body exercising a public function.

To date parliament has not intervened to stop them and significantly in the Human Rights Act 1998 parliament has extended the scope of judicial review.

To understand judicial review it is best to break it down into three areas - grounds limits and remedies.

#### **What are the grounds of judicial review?**

These have been developed piecemeal. In the beginning there was no clear framework. In the **GCHQ** case in 1985 Lord Diplock set out three grounds for judicial review.

##### **1. Illegality**

This covers the construction of the statute giving the public body its power but is wider than the situation where the body misconstrues legal rules. For example it includes taking into account irrelevant matters or having an improper purpose. This ground tends to succeed most often as local and central government officials and administrators are busy people. They are not lawyers. They can overlook the law or

rules or technicalities which may later assume vast importance in judicial review proceedings.

The significance of the **Anisminic** Case of 1969 was that it was the first time that the House of Lords treated an error of law or misconstruction of legal rules as going to jurisdiction and making the decision ultra vires or illegal. Until then the courts avoided administrative areas and offered no remedy in the situation where a public body made a legal error unless the error took them outside their legal jurisdiction.

## **2. Irrationality**

This is sometimes called Wednesbury unreasonableness.

In the past this has succeeded least often as you have to show the decision maker has gone 'barking mad' or made an irrational or unreasonable decision.

**Wheeler v Leicester City Council** in 1985 is a rare example where the House of Lords found a decision (a rugby club was banned from using its ground for 12 months for not supporting the council's anti-apartheid policy) unreasonable.

There are some recent signs that courts are more ready to use this ground. In 2002 a government decision to exclude Gatwick airport from a survey on airport expansion in the south east was successfully challenged as irrational.

## **3. Procedural Impropriety**

This involves either a breach of procedural rules laid down in a statute or breach of a fairness test for the procedure actually used.

Judges apply the rules of natural justice as a test of procedural fairness. In **Lloyd v McMahon** in 1987 the House of Lords said that the requirements of fairness depended on the decision to be made the character of the decision making body and the statutory framework.

It is difficult for officials to know in advance where judges are going to draw the line. What is a fair procedure in one situation may be ruled unfair in another. It has been a recent growth area as judges determine what fairness means in each new case.

Lord Diplock was simply grouping under three headings a confused mass of cases. His framework is now generally relied on.

### **A new ground?**

The Human Rights Act 1998 makes it unlawful for a public body to breach a convention right. This will be another basis for seeking judicial review for illegality.

## **What are the limits to judicial review?**

### **Public bodies only**

To decide whether a body is public or private it is necessary to apply the test set out in the **Datafin** case. In **R v City Panel on Takeovers and Mergers ex parte Datafin Ltd** 1987 C A the court said that usually the **source** of the power exercised was decisive. If the source was statute or prerogative it was likely to be a public body. However sometimes the court would look beyond the source and examine the **nature** of the power to see if public law functions or functions with public law consequences were being exercised. In this case the Takeover Panel (which had no statutory or prerogative basis) was a public body. The test has become important as more private bodies take over former public functions **R (Beer) v Hampshire Farmers Markets Ltd** 2004 C A (private company took over running of farmers' markets from County Council). Held – after referring to Datafin - there was a sufficient public element.

### **Public law only**

The decision complained of must involve public law and not exclusively private law. An action for breach of contract or for damages in tort is a private law action.

Normally a public body making a decision will involve public law but if a council dustcart knocks over a pedestrian or a council fails to pay an employee his wages these will be private law matters.

### **Non-Justiciable Cases**

The **GCHQ** case decided that there are limits where courts will not tread. While the House of Lords was willing to review a prerogative power (withdrawing Union recognition at GCHQ) they would not interfere as the particular decision involved national security.

### **Standing**

Not everyone can apply for judicial review. You must have sufficient interest but courts interpret this widely if they think a genuine point of public law is involved which needs clarifying. This means that not only individual citizens affected can apply but also interest groups such as Greenpeace and the World Development Movement.

### **Delay**

You must commence proceedings for judicial review promptly and within three months at the outside. The Court can give leave after three months in special circumstances.

### **Ouster clauses**

Parliament sometimes gives a body a power and says in the statute its exercise can not be reviewed by the courts ( ie it ousts the court's jurisdiction). Courts have interpreted these clauses restrictively and sidestepped them whenever possible.

In the **Anisminic** case 1969 the relevant Act said decisions of the Foreign Compensation Commission 'shall not be called in question in any court of law'. The court held that as the decision was a nullity the ouster clause was of no effect! In contrast 'time limit clauses' where review is excluded only after the expiry of a time limit have been upheld **R v Secretary of State for the Environment ex parte Ostler** 1977 Div Ct.

### **Review not Appeal**

Although the courts will quash a decision or declare it unlawful they will not retake the decision themselves and substitute their judgment for that of the body involved.

This self limitation is important. If courts retook the disputed decision they would be crossing the divide between **reviewing** how the decision was arrived at and entering the area of **appeal**.

If courts took this extra step it might tempt parliament to step in and limit the courts' powers.

### **Alternative remedies**

If statute provides for an alternative remedy the court has a discretion whether to allow an application for judicial review or to insist the alternative remedy is exhausted first. The court will also look at the needs of good administration.

### **What are the remedies for judicial review?**

The history

Prerogative writs were used by the king to compel his officers to carry out their duties properly or not to exceed their powers. The archaic Latin names you will read about are evidence of their antiquity. Today they are public law remedies available to private citizens who may apply to the court for:

1. A quashing order (formerly Certiorari)

to overturn or quash a decision of an inferior court or body which has **already** been made

2. A prohibiting order (formerly Prohibition)

to prohibit an inferior court or tribunal from exceeding its jurisdiction or doing something it is **about** to do

3. A mandatory order (formerly Mandamus)

to order an inferior court or body to do something

These are **public law** remedies ie you would never get them in private law cases such as contract or tort where you normally sue for damages and /or apply for an injunction.

A declaration was a remedy available in public and private law. It states what the law is or what a person's rights are.

Today

If you bring a judicial review case this must involve public law (but may involve private law as well).

The following remedies are available:

A quashing order (Certiorari)	Traditional public law remedies
A prohibiting order (Prohibition)	
A mandatory order (Mandamus)	

Declaration	Available in public or private law
Injunction	

Damages	Generally a private law remedy
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When you bring a case for judicial review in the document starting the proceedings you ask for all the remedies you think may be appropriate (better safe than sorry).

If your case involves breach of private law rights as well as public law rights then a lawyer would ask for all the remedies he thought might apply (all six if necessary). This gives the court a free hand and maximum choice if the applicant wins.

Discretionary remedies

In judicial review proceedings all these remedies are discretionary. This means that you may win your case but the court may then decide not to grant the remedy sought. This may be because the applicant has behaved badly has been guilty of delay or the remedy would damage the public interest. Sometimes a remedy may simply be inappropriate because things have moved on.

## **Conclusion**

Judicial Review involves masses of cases. No one can learn them all. Some cases - such as GCHQ or Anisminic you can't escape. Try and learn a limited number of cases so that you can illustrate basic points.

A grasp of the main principles is more important than the detail.

## **Overmighty Judges?**

As a result of judicial activity in the 'political' area of judicial review (which has now extended into human rights) judges have come increasingly under the harsh spotlight of political and popular attention. They may not welcome this. Judges are openly criticised for being secretive self appointing white male dominated and accountable to no one. Pressure to widen judicial appointments to reflect broader race gender and class patterns looks set to continue.