

W201 The Individual and the State

Study notes on illegality in judicial review

What does illegality mean?

The first challenge in this area is understanding the meaning of illegality.

In criminal law for example illegality is a simple concept. It is against the law to contravene a criminal statute or commit a common law crime. The law in this context is represented by rules clearly set out and simply checked.

Illegality in the context of judicial review is an umbrella term describing many different ways in which a public body may act which a court after the event may decide are illegal according to a variety of **principles** not contained in statute not fixed but which are developing all the time in case law.

The study of illegality in public law therefore is the study of cases where courts have had to decide whether public bodies have acted illegally in the past. These cases are grouped by authors under different headings. Authors do not always agree on what those headings should be. For example the headings in Manual 2 and in Allen & Thompson (page 547) are similar but not identical.

Manual

Allen & Thompson

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|----------------------------------------------|-------------------------------------------|
| 1. Misinterpreting legislation | 1. Exceeding jurisdiction |
| 2. Ultra Vires (exceeding statutory powers) | 2. Proper direction on law |
| 3. Illegality in relation to fact | 3. Improper purpose |
| 4. Mistake as to relevance/improper purposes | 4. Relevant and irrelevant considerations |
| 5. Fettering discretion | 5. Unauthorised delegation |
| 6. Unauthorised delegation | 6. Fettering discretion |
| 7. Disregard of quasi legal rules | 7. Failing to fulfil a statutory duty |
| 8. Infringement of convention rights | 8. Mistake of fact |
| | 9. Interference with fundamental rights |

Sometimes individual cases crop up under more than one heading. This reflects the fact that when a case is brought counsel will rely on more than one type of illegality.

Where does the expression 'ultra vires' fit into all this?

In the past when judicial review had not developed to the same extent courts approached the

question of legal challenge by using the test - had a body acted 'ultra vires' ('beyond its powers'). As time went on this single expression was too general to describe all the situations which might arise and so in 1985 in the **GCHQ** case Lord Diplock suggested the three headings illegality irrationality and procedural impropriety.

Lord Diplock went on to define illegality:

“ By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that relates to his decision making power and give effect to it. Whether he had...is...to be decided...by...the judges.”

The original use of the expression ultra vires also reflected a traditional view of the courts which accorded with parliamentary sovereignty and the separation of powers. Where parliament had granted powers to the executive by statute courts only felt able to intervene where public bodies had exceeded their powers and went beyond parliament's intentions in their exercise of them. The role of the courts in the 21st century goes beyond this. Courts have created for themselves a much more interventionist role which parliament in passing the Human Rights Act 1998 has implicitly sanctioned. Courts no longer need rely on the expression ultra vires with its links to a historically more restricted role.

The eight types of illegality set out in Manual 2

1 Misinterpreting legislation

An example of the historical reluctance of courts to interfere with the decisions of public bodies can be found where legislation has been misinterpreted. The traditional view was that this did not take the public body outside its jurisdiction and the decision could not be reviewed. An exception was where the error of law was on the face of the record. In this situation courts would intervene to correct the error of law and set the record straight. This remedy was used up to the mid 19th century to review decisions of lower courts at a time when the system of appeals had not been fully developed.

This jurisdiction was first revived and then expanded in the 20th century.

Lord Denning was responsible for its revival in **R v Northumberland Compensation Appeal Tribunal ex parte Shaw** 1952 (The Tribunal misapplied a regulation when deciding compensation payable to a person made redundant as a result of health service reorganisation. There was no right of appeal. Lord Denning turned to the ancient remedy of correcting errors of law on the face of the record "even though they do not go to jurisdiction". He explained his decision as follows "with the advent of many new tribunals and the plain need for supervision over them recourse must once again be had to this well-tried means of control".)

The expansion of the principle arose in **Anisminic Ltd v Foreign Compensation Commission** 1969 Lords. This case is the leading authority on ouster clauses and is also a crucial early decision on errors of law. The brief facts were that the Commission had ruled that Anisminic were not entitled to compensation arising out of the Suez canal seizure. They misdirected themselves on the relevance of the issue of whether Anisminic's successor in title had British nationality. The House of Lords held that the Commission had misinterpreted the law and therefore because it had asked itself the wrong question it had acted outside its jurisdiction.

The importance of the decision was in its practical application in later decisions which treated it as having abolished the distinction between errors of law that went to jurisdiction (which courts could review) and non-jurisdictional errors (which courts could not). From now on any error of law of whatever nature was treated as jurisdictional and judicial review was allowed. (Unless the review was of a lower court or a university visitor).

2 Ultra Vires: exceeding the powers given by statute

This can arise because the public body either misunderstands the law or misunderstands the facts or decides to exceed its powers deliberately.

Examples are found in the older cases where the terminology ‘ultra vires’ was still used.

AG v Fulham Corporation 1921 Div Ct (The corporation had a statutory power to provide washhouses for residents to wash their own clothes. Fulham set up a laundry where the Council did the washing for a payment. Held - ultra vires.)

AG v Wilts Utd Dairies 1921 Lords (The Ministry of Food raised a charge on a dairy company in purported exercise of a wartime statutory power to control the production and supply of food. Held - the charge was ultra vires as it offended the rule in the Bill of Rights 1689 that no tax could be levied without the authority of parliament. A power to charge or tax could not arise by implication.)

3 Illegality in relation to questions of fact

Errors of fact are either:

jurisdictional (ie they affect jurisdiction so a court will intervene)

An example is **R v Secretary of State for the Home Department ex parte Khawaja** 1984 Lords (The Home Secretary had statutory power to remove an illegal entrant. Held - he must prove the entrant was illegal not that he had a reasonable belief in illegality. Since he could not prove the entrant was illegal his removal was unlawful. The proof also had to be to a high degree of probability because personal liberty was involved).

The courts describe such facts as ‘jurisdictional facts’ or ‘precedent facts’. They must be established before jurisdiction arises (ie they are a condition precedent).

non jurisdictional (ie the court will not intervene)

A useful explanation appears from a legal article by Ian Yeats in 1994 (quoted in Barnett: Constitutional and Administrative Law) which gives the following example of the range of facts a court may face as preconditions to the exercise of a power:

“dilapidated dwellinghouses in Greater London”

dilapidated	non jurisdictional	(a complicated matter of opinion best left for the local Council)
dwellinghouses	jurisdictional	(this may involve interpreting legislation and deciding the correct legal definition)
Greater London	jurisdictional	(easily resolved by a court)

It is important to understand there are no hard and fast rules here - every case is decided on its merits depending on the different wording and circumstances.

4 Mistakes as to the relevance of factors/improper purposes

R v ILEA ex Westminster City Council 1986 Div Ct (The Council had a statutory power to use monies to provide information about their services. They used it not only to provide information but also to point out their services were adversely affected by the rate capping of central government. Held - the latter was the major purpose and was unauthorised and therefore an irrelevant consideration had been taken into account.)

In this case and that below the judges are drawn into politics. They have to decide what weight to attach to the electoral mandate of the local council.

Secretary of State for Education v Tameside MBC 1977 Lords (The Labour Government ordered a Conservative Council to implement a comprehensive schooling policy. Held - a court could judicially review the Minister’s directive. The Court relied in part on the importance of the Council’s electoral mandate to reach its decision.)

a word about duties and discretions...

Q Why does it matter whether a court is reviewing a ‘duty’ or a ‘discretion’?

A Sometimes it is easier for a court to intervene if a public body has a ‘duty’ - this will be a more clear cut responsibility. If the public body has a ‘discretion’ this is wider and allows a greater range of decisions which may all be within the law.

(A ‘duty’ arises where a statute uses a word like ‘shall’ as opposed to ‘may’ which indicates a ‘discretion’).

Q Why then does government give public bodies discretions when duties are easier for courts to control?

A Courts can’t run or regulate every aspect of government. Sometimes giving administrators discretion is the best or only way to implement a policy flexibly (they may still have rules to help them) eg the social security system.

5 Fettering discretion

No public body can **refuse to listen at all** to an applicant. This however does not prevent a body from having a policy which it will generally follow. **British Oxygen Co v Board of Trade** 1971 Lords (The Board had a general policy but still considered individual cases. Held - this was lawful in the absence of bad faith or a refusal to listen at all.)

If a public body allows its policy to be dictated by another this can amount to fettering its discretion **H Lavender Sons Ltd v Ministry of Housing and Local Government** 1970 Div Ct (Ministry in a planning appeal followed the policy of the Minister of Agriculture who wanted land to be preserved for agricultural purposes).

6 Unauthorised delegation

A public body may delegate a power only if the delegation is authorised by law.

Barnard v National Dock Labour Board 1953 Div Ct (The Board delegated power to suspend workers to a port manager. Held - this was unlawful (being an old case the words ultra vires were used). No power to delegate could be implied here).

Courts have however implied a power to delegate where government officials and ministers have been concerned. **Carltona v Works Commissioners** 1943 Lords (Power to requisition property impliedly delegated to an assistant secretary).

7 Disregard of quasi legal rules/legitimate expectation

Government departments and administrative bodies often have statements of policy (in policy guidelines and circulars). These can create a legitimate expectation. The citizen can argue that legitimate expectation has one of two effects:

The **substantive** effect (part of the law on illegality). An applicant has a legitimate expectation that the informal or quasi legal policy will be followed in the **substance** of the decision to be taken.

The **procedural** effect (part of the law on procedural impropriety). The applicant has a right to make representations if the policy which affects them is to be changed.

An early case to highlight both effects was **R v Secretary of State for the Home Department ex parte Khan** 1984 C A (A Home Office circular set out criteria for the entry of children into the UK. An application from Khan was refused on different criteria. Held - 1) legitimate expectation had been created - certiorari was granted 2) The policy could be changed but only (in this case) after allowing Khan full opportunity to make representations and then only if the overriding public interest demanded it.)

The Khan case however was very much a high water mark. Subsequent cases showed a greater reluctance to find a legitimate expectation resulting in a substantive effect.

In re Findlay 1985 Lords and also **R v Secretary of State for the Home Department ex parte Hargreaves** 1997 are examples where prisoners seeking early release failed in challenges to policy changes.

In general judges were reluctant to declare policy decisions illegal by relying on substantive legitimate expectation. In the prisoner release cases they accepted that for the system to work the executive must have the right to make policy and change it even though the effect can be harsh on individuals.

The important case **R v North and East Devon Health Authority ex parte Coughlan** 2000 C A has revived substantive legitimate expectation. (C was a severely disabled NHS patient who was moved from a hospital to Mardon House. C was told by letter this would be a permanent home for her. Later the NHS decided to close Mardon House. C challenged the decision by judicial review. Held - the decision was unfair and frustrated C's legitimate expectation. The unfairness amounted to an abuse of power. There was no overriding public interest justifying the decision.)

Perhaps significantly C also relied successfully on Article 8 of the ECHR namely her right to respect for her home. The case certainly shows a new confidence on the part of the court which in practical terms was substituting its own judgment for that of the authority on the merits.

In summary Lord Woolf in Coughlan suggested three possible outcomes for a claim based on legitimate expectation:

- 1) The claim **fails** on the basis that the body/ authority simply has to bear in mind the previous representation when deciding the new policy. (This will be where the court decides the executive should retain a free hand in decision making ie the prisoner early release cases Findlay and Hargeaves).
- 2) There is a **procedural** effect such as a requirement for consultation before a decision is taken.
- 3) There is a **substantive** effect - would frustrating the expectation be so unfair as to be an abuse of power and is there an overriding public interest in the change of policy?

8 Infringement of Convention rights

Section 6 of the Human Rights Act 1998 provides:

“It is unlawful for a public authority to act in a way which is incompatible with a convention right”

This will apply unless primary legislation means that the authority could not have acted differently.

Under Section 8 damages can be awarded if the court is satisfied that the award is necessary “to afford just satisfaction “. This power is in addition to any other relief or remedy the court has within its jurisdiction.

There is a difference between the way this ground operates and traditional cases on illegality. To avoid falling foul of the traditional law on illegality a public authority must normally address its mind to the power under which it is acting. In contrast where a breach of the Convention is alleged the court will consider only whether the decision constitutes a breach. Whether the public authority is aware of Convention law is immaterial. Lord Hoffman in **Belfast City Council v Miss Behavin' Ltd** 2007 Lords stated: “Either the refusal infringed the respondent's Convention rights or it did not? If it did, no display of human rights learning by the Belfast City Council would have made the

decision lawful”. (Decision to refuse a licence for a sex shop not contrary to Article 10, freedom of expression or Article 1 of Protocol 1, peaceful enjoyment of possessions as refusal not disproportionate and there was a wide margin of appreciation).

Where breach of a Convention right is alleged can the public authority rely on a democratic mandate as justification?

In **R (Countryside Alliance) v Attorney-General** 2007 Lords there was a challenge on human rights grounds to the ban on hunting with dogs imposed by the Hunting Act 2004. A majority took the view that the only Convention right of the applicants relevant was Article 1 of Protocol 1 (right to peaceful enjoyment of possessions). The court agreed that infringement of this right was justified, having regard (in the words of Lord Bingham) to the “respect due to a recent and closely-considered decision of a democratic assembly.”

Importantly Lord Brown, supported by Lord Rodger, suggested that the standards required for justification might vary from one Convention right to another. Lord Brown in particular thought that if Article 8 had been engaged, the will of a democratic majority would not have provided sufficient justification in itself for the ban on hunting.

Challenges based on Convention rights so far include:

An unsuccessful challenge based on Article 6.1 (right to a fair trial) was made in **R v Secretary of State ex parte Alconbury Developments Ltd** 2001 Lords when it was held that ministerial planning decisions were subject to Article 6 but it was not necessary for decisions to be taken by a planning inspector (as opposed to a Minister) in order to be ‘fair’. A Minister’s decision could qualify as ‘independent’ as it was subject to judicial review.

A successful challenge was made based on Article 6.1 in **R (Anderson) v Secretary of State for the Home Department** 2002 Lords. A decision of the Home Secretary (in accordance with UK legislation) setting a tariff for an adult life sentence murderer did not comply with Article 6 as the Home Secretary was not ‘independent’ nor was he a ‘tribunal’. A declaration of incompatibility was made.

And finally...

remember that these headings are not exhaustive and do overlap each other. Use the headings as a learning tool to help remember the principles which the courts draw on.