

Public Law & Administration Notes

Introduction

Administrative law = Constitutional law put into practice / Government put into effect; security, immigration, education, prisons, local govt, etc. All public action that is not in the High Courts or Parliament (local authorities, executive, 'inferior courts' ...), although there is increasing outsourcing to private agencies.

There is no 'system' in England, compared to *Droit Administratif* in France.

Prerogative power of kings -> prerogative (= administrative) courts (e.g. Star Chamber) = absolute power ... 1610 royal proclamations unlawful and void, 1641 abolished Star Chamber and High Commission (extra-legal lawmaking and adjudication) and constitutional law began to develop, banning extra-legal, supra-legal or consolidated power. Citizens trusted common law courts after crusade vs prerog and distrust of administrators appropriating judicial functions fed by AV Dicey whose rule of law stipulated they should be subject to same laws and procedures.

Bagg's Case [1615]: removed from office. Court not satisfied with reasons. Coke CJ quoted 'Who ought decrees nor hears, both sides distrust. Does but unjustly, though his Doome be just' (*Medea*, Seneca). Even if decision right, not just if made without decision-maker first hearing from person to be affected by it. "authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of subjects, or to the raising of faction, controversy, debate or any manner of misgovernment" (activist judge) <- English approach being developed (200 years before French) but dropped after the Civil War and Bill of Rights (1649).

Maitland (1888) "half the cases reported in the QBD concern the rules of administrative law", today over half Supreme Court appeals concern public law.

2 legal realms – Legal Proper: matters dealt with by ordinary courts of (common) law, sitting in open court and dispensing justice according to law. Administrative Realm: matters dealt with by tribunals, inquiries and other admin procedures, not court.

Governments always wanted to keep lawyers out (see Anisminic)

R v Secretary of State for the Home Department, ex parte Khawaja [1984]: HL held question whether apps were “illegal immigrants” was a question of fact that had to be positively proved by Home Sec before expulsion. Not *Wednesbury* standard of review (reasonable conclusion) but sufficient evidence to justify belief.

SSHD v Rehman [2002]: Sec of State refused Pakistani national indefinite leave as likely threat to nat security. Appeals Commission did not find that likelihood but CA found they had too narrow of view of what = a threat to nat security. Deportation “conducive to public good” and “in the interests of national security”. Words not = jurisdictional fact court can assess, expertise and info exclusive competence of exec.

R v SSHD ex p Fayed [1997]: Sec can grant certificate of naturalisation “if he thinks fit”, refused and declined to give any reasons, no consultation process or representations. Not required to assign reasons, decision not subject to appeal or review. CA held, particularly as good character is a factor, fairness obliged to notify Mr Fayed of matters causing him concern. Not biased, irrational or disproportionate. Example of preclusive/finality (total ouster clause) in legislation, where not used courts tend to respect expertise of tribunals and avoid reversing decisions.

Time limit clauses are now much more common than complete ouster clauses. Was problem lack of appeal and should decisions stand if rational? Who decides that?

R v MMC ex p South Yorkshire Transport [1993]: investigating merger between 2 companies operating buses where only 3.2% of UK population lived. Review condition = affect “substantial part of the UK”. Not a hard and fast rule, doesn’t depend on geography or arithmetic solely, construed to not limit MMC. Not irrational. MMC acted without jurisd, not used correct comparator. Test “enabling not restrictive”, but conclusions within “permissible field of judgment” so appeal allowed.

Sugar v BBC & Another [2009]: A made Freedom of Information request for a BBC report on Middle East, BBC withheld report for purposes of journalism grounds. Information Commissioner upheld that view and held had he had no juris to issue a decision notice as BBC not a public body. A successfully appealed to Info Tribunal, BBC succ applied for judicial review of IT decision, CA held IT acted without jurisd.

“designate” local authorities that set excessive budgets, starting process to cap their community charges. A number of local authorities sought JR as argued breach of legit expectations for govt, indicated could not be a ground for challenge short of bad faith, improper motive or manifest absurdity as regards abuse of power.

R v Environment Secretary, ex p Nottinghamshire City Council [1986]: Central govt could control local expenditure by reducing support to local authorities, fact that rate-capping decisions could only take effect with House of Commons approval made HL reluctant to interfere. Example of massive deference by the judiciary, *Wednes* not.

R v Higher Education Funding Council, ex p Institute of Dental Surgery [1994]: CA refused to evaluate worth of research in dentistry; it could not decide the funding council had or had not made the right decision, so would not interfere, court defer.

R v Cambridge Health Authority, ex p B [1995]: 10 y/o girl with leukaemia given only palliative treatment to enjoy several weeks normal life, no further treatment. 2 experts thought could help, NHS had no beds so had to be done privately (£75,000). Father requested health authority pay, refused. Courts ill-equipped to interfere so not unlawful, “not something a health authority can be fairly criticised for not advancing”.

R (Pfizer Ltd) v Health Secretary [2002]: Drug company unsuccessfully challenged restrictions to the circumstances in which the NHS would supply Viagra. Established “treatment’s affordability in context of competing priorities” is sufficiently objective criterion to decide what should be funded. Reiterated what NHS paid for political rather than technical, although successive govt distancing themselves from this.

Where an **expert body** is given the power to make a decision the courts are not so willing to review on grounds of reasonableness.

R v Independent Television Commission, ex p TSW Broadcasting Ltd [1996]: “Judicial review does not issue merely because a decision maker has made a mistake and it is not permissible to probe the advice received by them”

R v Medicines Control Agency, ex p Pharma Nord (UK) Ltd. [1998]: Once the Agency had decided that is a medicinal product and licensable as such, the courts should not seek to substitute own judgment. Not whether a medicine or not, consider whether the decision has been properly reached.

R v Home Secretary ex p Brind [1991]: Leading case on prop in domestic law.

Directives requiring BBC to refrain from broadcasting interviews with people who represented terrorist organisations, farcical dubbing of IRA voices. Disproportionate response to govt objective argument rejected, not a head of review but not excluded for the future. Courts not able to balance factors in admin decisions, inc workload.

R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd [1999]: Chief permitted to consider resources in deciding how many officers to commit (animal rights protesters, only 2 days a week). Consider prop and test for unreasonableness, stated Eur concept of prop and margin of appreciation produce same result as *Wednesbury* principles. Redefined reasonableness test as whether decision reached was one which a reasonable authority could reach. *Daly*, page above

R (Alconbury) v Environment Secretary [2001]: Slynn "time has come" to recognise prop as a full "part of English admin law, not only... Community acts." Suggested full application of prop test for irrationality, except "policy" = *Wednesbury*. Confused.

R (British Civilian Internees) v Defence Secretary [2003]: (ABCIFER case) Trade unions can have standing. Recognised argument for prop as a general test for all domestic cases strong but stayed with *Brind* = if not Convention or HR, use *Wednesbury*. Formulated definition of *Wednesbury* close to proportionality.

R (MN (Tanzania)) v Home Secretary [2011]: Psychiatrist report that depressed and risk of suicide high not fresh claim against deportation after first application failed (HIV, treatment avail in Tanzania). *Wed* test anxious scrutiny irrationality held correct

Proportionality became developed most expressly in human rights cases, courts took European Convention on Human Rights seriously even prior to HRA 1998. Develop "sub-*Wednesbury* test", inc scrutiny that human rights cases provoke from courts. Courts began to weave the Convention rights into the Common Law...

Attorney General v Guardian Newspapers [1990]: ex-MI5 published book, breach Official Secrets Act, published in Australia and US. Paper article on proceedings in Aus courts by UK govt to stop publish, injunction by AG to stop papers. Had to show disclosure contrary to public interest, no damaging info so no confidentiality breach. ECHR suggest where obv private info disclosed, even by stranger, can bring court action for "misuse of private information".

Most recent major issue for procedural justice is Human Rights Act 1998, particularly involving rights from ECHR, e.g. Art 6 = Right to fair trial, 5 = hearing. What is law on procedural justice aiming to achieve? Public participation in public policy making, or some degree of fairness in decisions in indiv cases. In UK without clear concept of what procedural justice is supposed to achieve it is difficult to see a more principled or coherent approach to development of admin law in the UK being introduced.

Consultation was covered briefly in relation to delegated legislation in constitutional, one method by which English public law attempts to ensure some form of public participation is achieved in the govt process. Note: duty of consultation is not overarching, only be in place if Parl's legisl allows it in a specific instance (no general duty to consult unlike USA Admin Procedure Act). Court may find a common law duty to consult, but relatively rare, and generally linked to legitimate expectation.

A - Statutory Duty to Consult

When the rule making function is a legislative one, there may be a duty to consult built into the enabling legislation, but seems if not then won't find common law duty.

Basic Content of the Duty to Consult

R v Brent LBC ex p Gunning [1983]: Gunning criteria to learn! "The consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third... that adequate time must be given for consideration and response, and finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals." 4 tests before adequate:

1. Time where proposals at formative stage.
2. Consulted must have sufficient information avail to permit an informed response.
3. Consultees given reasonable time to respond
4. Response must be properly considered.

Discretion to Consult

Bradbury v Enfield LBC [1967]: give public notice of proposals for comprehensive reorganisation, 3 months, failure = ultra vires. Change to "significant", Sec decides.

Agricultural Industry Training Board v Aylesbury Mushrooms [1972]: Minister meant to consult "any organisation... appearing to him to be representative of substantial numbers of employers engaging in the activity concerned", 85% of all mushroom

for consultation. Held only required where substantial change to existing may have “significant negative effects on human beings or the environment”

Sufficient Time to Respond

Lee v Education Secretary [1968]: 5 days not sufficient time, extended to 4 weeks.

R v Birmingham CC ex p Dredger [1993]: 2 days insufficient for detailed proposals

R v. Devon County Council, ex parte Baker [1995]: where having home closed, fairness suggests inform in good time and give resident the opportunity to make representation which should be considered by the Secretary of State.

Proper Consideration of the Responses

Rollo v Minister for Town and Country Planning [1948]: Minister could listen to comments, publish the draft order and hold further talks after if needed. *Baker*

B – Common Law Imposition of a Duty to Consult

Where there is no statutory duty to consult, the case *R v Social Services Secretary ex p Association of Metropolitan Authorities* [1986] suggests the common law will generally not be willing to impose such a duty. This presumption can be rebutted if the court finds a legitimate expectation to consultation, which is, in essence, a common law duty to consult. In order for this to arise, the test for legitimate expectation, as discussed with substantive legitimate expectation, must be met.

Attorney-General for Hong Kong v Ng Yuen Shiu [1983]: Express promise made by govt created SLE, from *GCHQ* “either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.” Deported without opportunity for reasons to stay.

R v Home Secretary ex p Asif Mahmood Khan [1984]: Quashed refusal to admit immigrant when contrary to LE created by circular letter SoS published.

R v. Secretary of State for Health, ex parte United States Tobacco International Inc. [1992]: Public interest takes precedence over expectations. Had LE that, provided perform obligation of voluntary agreement and no strong evidence of risk to death, operation permitted to continue, LE substantive as well as procedural. Ban unfair

Cinnamond v British Airports Authority [1980]: Long record of convictions and flouting regs means no LE of being heard before ban imposed. No LE, no hearing.

R v Liverpool Corporation ex p Taxi Fleet [1972]: Explicit representation made and

Fairness dictated need not give reasons, ought to inform app before of any matters weight against the grant of naturalisation so the app could address him on them.

R (Farrakhan) v Home Sec [2002]: Whether SoS provided sufficient reasons to exclude C on public good grounds when otherwise eligible to enter UK and no evidence that would violent UK's race relations or public order laws. Art 10 fine, court interfere where no reasons support decision within "discretionary area of judgment". Didn't dispute and furnished extensive reasoning as interfere with convention rights.

R v. Home Secretary, ex p Anufrijeva [2003]: Need reasons for refusal of leave to remain/asylum and need to be given in an appropriate manner, in reasonable time.

It seems, however, the law is still no nearer to a general duty to give reasons:

Stefan v. General Medical Council [1999]: Judicial character of committee and fact decisions open to appeal and concerned doctor's fitness to work led to common law oblig to provide at least a short statement of reasons. "Dangers and disadvantages to universal requirement for reason... undesirable legalism where high degree of informality is appropriate and adds to delay and expense. Trend of increased recognition of duty proceeding on case by case basis, not as right of established position of the common law that there is no general duty, universally imposed."

Gupta v. General Medical Council [2001]: No general duty to give reasons, particularly where depended on issues pertaining to credibility of witnesses.

R (Asda Foundation) v. Millennium Commission [2003]: Not under duty to expand reasons that preferred other applicants to C in not giving grant to C charity. Not a common standard, depended on circums of indiv cases. Undue burden on M.

Has the Duty Been Adequately Discharged?

Chief Constable, Lothian and Borders Police v. Lothian and Borders Police Board [2005]: Not made valid decision as stat requirement for reasons, so quashed and app reheard by new tribunal. Board wanted no quash, state reasons and reconsider.

R (Tofik) v. Immigration Appeal Tribunal [2003]: Required to give reasons for refusal to extend time for applying to appeal. Stat and common law essential right to appeal.

The Role of National Security

On occasions the duty to give reasons which might ordinarily arise will be overridden by national security concerns, most famously SoS relieved of duty to give reasons in *R v Home Secretary ex p Adams* [1995]: Gerry Adams, Sinn Fein president, JR of 3 year exclusion order under domestic and EC law. Domestic dismissed as not usual subject to JR as not duty to give reasons or disclose material, and as such court was not able to judge whether improper purpose or unreasonable. ECJ case referred.

What Type of Hearing is Required?

The key distinction here is between the need for an oral or a written hearing.

Lloyd v McMahon [1987]: Auditor's failure to offer oral hearing when not requested and had made full written determinations not open to challenge at law as not supplemented in any material way by an oral hearing. Fairness depended on body. *R (Smith) v Parole Board* [2005]: HL delivers clarity on when oral hearing required, but no hard and fast rules. Common law duty of procedural justice didn't require hold an oral hearing in every case where resisted recall to prison, should be predisposed. *Osborn v Parole Board* [2013]: Further guidance, no clear on standards?

General rule that any accusations/evidence should be made available to defendant.

R v Gaming Board of Great Britain ex Benaim and Khaida [1970]: Not obliged to disclose sources or details of its information to app, confidential info not disclosed

Bank Mellat v HM Treasury [2013]: Closed material procedure allowed if justice required. Must be greater evidence than avail before single entities targeted.

Note the challenge of "closed procedures":

Home Sec v AF [2009]: Must be given sufficient info about allegs against to enable to give effective instructions. Open material purely general assertions and case based solely or decisive on closed materials requirements of fair trial not satisfied.

Al-Rawi v Security Service [2011]: Court had no common law power to adopt closed material procedure in ordinary civil claim for damages. Departure from principles of open natural justice, unlike public interest immunity, and change for Parl to make.

Tariq v Home Office [2011]: No absolute requirement that C provided with sufficient detail of allegs against him to enable him to give instructions to his legal rep as

respondent and amount likely to be involved, and if Order not made app will probably discontinue the proceedings and be acting reasonably in doing so. Easier if pro bono *Weaver v London & Quadrant Housing Trust* [2009]: PCO allowed in circumstances of public importance although couldn't apply *Corner House* principles precisely as app could not reasonably discontinue proceedings as L in control of appeal and would pursue regardless. Public law protection as assured tenant, private interest as *Corner House* consid. No doubt reasonable to refuse, no interest beyond all tenants. *Eweida v British Airways Plc* [2009]: No PCO as not public but private claim by single employee against employer, private interest too significant to use *Corner House* principles. No Cost Capping Order as risk of disproportionate costs could be adequately controlled. Lost for cross necklace ban not religious discrim, now ok. The reality here is that it is relatively difficult to obtain a PCO and the costs of obtaining one could, in itself, be significant! The govt's recent consultation paper on JR reform suggests PCOs are too readily available, yet very few have been granted in JR cases, seems unfair as reducing legal aid and nowhere near other cost reforms

Future Options

After the Jackson review a number of arguments were made in favour of one-way cost shifting. In this model, the costs of both parties would be borne by the govt in the vast majority of JR cases. However, this approach has not been adopted and appears unlikely given attitude of govt's most recent Discussion paper on JR reform. The recent consultation document and approach to legal aid suggests there will be an effort to restrict the avail of JR in a number of ways. This will be done partially through the use of cost-based incentives and disincentives, but also perhaps by limiting the avail of remedies and modification of standing to reduce no of JR claims. It is clear access to the courts is crucial to all JR claims and the primary objective of most claimants is to obtain a remedy from the courts. If the ability to seek such remedies is significantly curtailed then clearly the rule of law may be diminished. Issues of costs are extremely challenging in the sphere of judicial review. Many claimants are not wealthy and the present approach to costs and legal aid, particularly if accompanied by endeavours to restrict the standing of interest groups and charities, could have a detrimental effect on poorest to pursue JR where govt action or inaction has very severe consequences for them.