THE JUDGE OVER YOUR SHOULDER

Judicial Review of Administrative Decisions

This pamphlet, which has been prepared by the Treasury Solicitor's Department in conjunction with Cabinet Office (MPO) Training Division, gives administrators at all levels an introduction to the basic principles of administrative law and judicial review. Enquiries about the content should be addressed to the Treasury Solicitor's Department (Telephone 01-210 3140 GTN 210 3140).

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Introduction

1. You are sitting at your desk granting licences on behalf of your Minister. Your enabling statutory powers are in the widest possible terms: 'The Secretary of State may grant licences upon such conditions as he thinks fit'. With power like that you might think that there could be no possible ground for legal challenge in the courts whatever you do. But you would be wrong.

2. Scarcely a day passes without the *Times Law Reports* containing one or more cases where someone is challenging the decisions, or actions, of central or local government or a public body. There has been a considerable rise in the number of such challenges in recent years. The procedure by which such challenges are normally made is known as 'judicial review' and the law which the courts apply in such cases is known as administrative law. In 1974 there were only 160 applications for leave to seek judicial review. By 1985 the figure had grown to more than 1,230 and in the same year a similar procedure was introduced in Scotland. The increase is probably due in the main to the following factors:

- The simplification of the judicial review procedure coupled with a requirement by the courts that this procedure rather than any other court procedure should be used.

- 'Nothing succeeds like success'. A few well publicised cases have alerted individuals and pressure groups to the possibilities of judicial review as a means of achieving their objective.

- An increasing willingness on the part of the judiciary to intervene in the day-to-day business of government, coupled with a move towards an imaginative interpretation of statutes.

3. The purpose of this pamphlet is to give you guidance as to the principles involved and to highlight the danger areas where you are particularly at risk of laying your Minister open to a challenge in the courts. This pamphlet is not, and cannot be, a substitute for seeking legal advice. Nor can it be a comprehensive guide to administrative law. What it can do is to enable warning bells to ring so that you can take legal advice at the right time.

What is administrative law?

4. In very general terms administrative law is the law governing the administration. It governs central and local government and public bodies when exercising statutory or other powers or performing public duties. Administrative law therefore may extend to 'non-departmental public bodies' ('quangos') where they are given special powers even where they act independently of government. The functions described above are called 'public law functions'. It is necessary to distinguish these from 'private law functions' which are functions performed by private individuals as well as public bodies, eg entering into a contract. It will be private law rather than public law which will operate where a person claims damages as a result of being injured by someone else. A claim for damages as a result of a factory accident, for example, will be a matter of private law even if the factory is operated by the Crown.

The basic question in judicial review: What power or discretion has been conferred and has it been exceeded?

5. The starting point in most judicial review cases is the interpretation of the words of the enabling legislation. Few cases will reach court in which there are not competing arguments about the correct meaning of the words in the legislation and, therefore, the correct scope of the power or discretion conferred by them. Sometimes a case can be determined by simple statutory interpretation. A 1921 case illustrates the point:

Example:

> A local authority empowered to provide wash houses where local people could bring their own washing and do it themselves acted outside its statutory powers ('ultra vires') when it proceeded to open a laundry service trading for profit: *Attorney General — v — Fulham Corporation* (1921) 1 CH 440.

6. Not all cases are this simple, however. What makes administrative law difficult is that the courts have developed a means of extended statutory interpretation which goes beyond the wording of the statute or subordinate legislation itself. This means that the decision-maker cannot rely on the words of the legislation alone but will need to know what additional requirements the courts impose. For example we will see below that the courts will, on occasion, read into legislation an obligation to consult before a particular power can be exercised, even where the legislation in question

contains no express requirement to this effect. If a court decides that there has been a failure to consult it may then decide that there was no power to act without first consulting. In such circumstances the authority in question will have exceeded its powers. The grounds of challenge, ie the grounds upon which it may be argued that an authority has exceeded its powers, will now be looked at in greater detail.

The grounds of challenge

7. In the GCHQ case *Council of Civil Service Unions — v — Minister for the Civil Service* (1985) AC 374 Lord Diplock divided the grounds of challenge into illegality, irrationality and procedural impropriety.

Illegality

8. This is another way of saying that the authority got the law wrong. The opportunities for getting the law wrong are potentially very wide indeed. Even where a statute appears to confer the widest possible discretion the courts will consider that the discretion has not been properly exercised if it is outside the purpose or the spirit of the Act. In deciding what that purpose or spirit is the courts will look at the Act as a whole.

Example:

> Under the Agricultural Marketing Act 1958, the Milk Marketing Scheme included a complaints procedure by which a Committee of Investigation examined any complaint made about the operation of

the Scheme 'if the Minister in any case so directs'. When a particular complaint arose the Minister refused to direct that it should be referred to the Committee of Investigation, and claimed that he had an unfettered discretion in deciding whether or not to refer complaints to the Committee. The House of Lords held that the reasons given by the Minister for his refusal were not good reasons in law and showed that he had not exercised his discretion in a manner which promoted the intention and objectives of the Act of 1958. 'The policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court'. *Padfield — v — Minister of Agriculture* (1968) AC 997.

Example:

The Wireless Telegraphy Act 1949 appeared to give the Home Secretary the widest possible discretion to revoke TV licences. In January the Home Office announced an increase in the licence fee from April. The applicant took out a new licence in March at the then current rate, resulting in a saving in money. The Court of Appeal held that the Secretary of State could not exercise his powers of revocation in order to prevent the applicant from taking out a year's licence at the lower rate. The Court of Appeal held that the use of the power of revocation was for a purpose not authorised by Parliament in the Act. *Congreve — v — Home Office* (1976) QB 629.

9. However wide a discretion appears to be, therefore, the courts will always cut it down to what they consider to be the proper purpose for which the discretion was conferred. Thus, for example, where planning authorities may grant planning permission 'subject to such conditions as they think fit' the courts have severely limited the apparent width of this power. A planning condition must fairly and reasonably relate to the permitted development. The decision-maker must direct his mind to the right questions within the scope of the Act and not take into account irrelevant considerations.

Irrationality (unreasonableness)

10. The courts say that all powers and duties must be exercised reasonably. The courts will not however substitute their own view of what is reasonable for that of the decision-maker. The courts purport only to interfere on this ground where a decision 'is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' — per Lord Diplock in the GCHQ case (*CCSU — v — Minister for the Civil Service*). Lawyers call this 'Wednesbury unreasonableness' after the name of a leading case. In practice the courts very rarely make such an express finding. They are more likely, if there is a decision which they do not wish to allow to stand, to find that the decision-maker has taken into account an irrelevant consideration or failed to take into account a relevant consideration or otherwise has directed his mind to the wrong question. Where it is not clear what questions the decision-maker has addressed his mind to, the courts may say that he must have addressed his mind to the wrong questions

because if he had addressed his mind to the right questions and still reached the same conclusion his decision would have been 'unreasonable'.

Do you have to give reasons?

11. There is no general principle of law that reasons should be given for decisions. However:

- The relevant legislation may provide that reasons should be given for a decision.

- There may be an implied right to be given reasons as part of the general obligation to let a person know the case he has to answer, eg if someone is given a right of appeal against a decision he must know sufficient about the grounds of the decision in order to exercise his right of appeal effectively.

- It may be necessary as part of the decision-making process to acquaint people with the current state of your thinking. If for example you are proposing to proceed upon certain factual assumptions it will be necessary to check those facts with anyone who may be in a position to challenge them. This again is part of the general obligation to let a person know the case he has to answer.

- In some circumstances the courts may infer from the absence of reasons that there are no good reasons for a decision: see the *Padfield* case in paragraph 8. If a challenger is able to mount a plausible challenge, the decision-maker will in practice have to defend himself in court by explaining the reasons for the decision.

- Quite apart from any legal obligation ordinary courtesy may require the giving of reasons.

12. If for any purpose you do give reasons it is important to see that the reasons are good in law, ie that they are within the four corners of the power or discretion conferred upon you. It is necessary to show that you have directed your mind to all the right issues and none of the wrong ones, that you have not 'fettered your discretion' (see paragraph 17 below) and that all reasons given hold up to scrutiny. Do not use 'make weight' reasons if they do not hold up under close examination. It is generally better to give two good reasons than to give three good reasons and one bad. It is also important to make it clear in any written decisions that all representations have been considered and taken into account. An example might be: 'I have considered carefully everything which you say in your letter and your further representations at our subsequent meeting but I see no reason to grant a licence in this case'. The precise formulation will of course depend upon the facts and circumstances of the case.

Procedural impropriety

13. This is an important and developing head of challenge. Broadly speaking it covers all questions relating to the manner in which a decision is reached. Primarily this relates to the question whether a person or body affected by a decision has been given a fair hearing. In order to protect the interests of persons adversely affected it is important that the decision-maker should give a full opportunity for representations to be made in order that he may be fully acquainted with all the relevant considerations before making his decision. In order for a right to a hearing to be effectively exercised it may also be important for those making representations to know the case they have to answer. In recent years the courts have tended to describe the duty to give a fair hearing in more general terms as 'a duty to act fairly'.

14. What the duty to act fairly amounts to is difficult to define in general terms. It will depend upon the facts and circumstances of the case. At one extreme it may involve a duty to allow legal representation and cross-examination of witnesses. At the other extreme it may amount to no more than an obligation to consider any written representations which are made.

15. The circumstances in which the courts will impose a duty to act fairly towards persons likely to be affected by a decision are now almost limitless. They extend not only to decisions affecting private persons but also to those affecting public bodies and authorities.

Example:

> Under sections 48 to 50 of the Local Government Planning and Land Act 1980 the Secretary of State had power to reduce the amount of the rate support grant payable to an authority, but before he could exercise this power he had to lay certain orders before Parliament for approval. Before the orders had been approved and before the Secretary of State exercised his power to reduce the rate support grant, the Local Authorities Association asked for a meeting to discuss the issue. The Secretary of State refused the meeting because he did not think it would have any effect. The Court of Appeal held that fairness demanded that their objections should be heard at some time between the granting of the power and its exercise, and the Minister's decision was therefore set aside. This was despite the fact that his policy had been fully discussed with them and debated in Parliament before the passing of the Act empowering the cuts. *R — v — Secretary of State for the Environment ex parte Brent L.B.C.* (1982) 2 WLR 693, (1983) 3 AER 321.

16. The above case illustrates that it is extremely dangerous to assume that further representations will have no effect and therefore refuse to hear them or consider them. The courts will not normally allow decision-makers to close their minds to what might be material considerations in the exercise of their discretion.

Fettering of discretion

17. The courts' refusal to countenance 'fettering of discretion' can give rise to difficulties where an administrator wishes to exercise a discretion consistently between different applicants according to a predetermined policy. The courts have held that it is legitimate for decision-makers to have a policy as to how like cases are to be treated but that they must not allow the policy to close their minds to the circumstances of a particular case which might lead to the policy not being applied in that case.

Bias

18. Another form of procedural impropriety is bias. Here it is the appearance or suspicion of bias which counts. Examples of bias in this context are potential conflicts of interest caused by having a financial interest in the subject matter of the decision or being a relative of the applicant. More general 'bias' in relation to the subject matter does not come under this particular head although it may form the basis of a challenge on other grounds. If for example the decision-maker is prejudiced against members of a particular political party he may be led into taking into account an irrelevant consideration. Similarly a 'bias' in favour of certain categories of applications over others may be a legitimate exercise of discretion, depending upon the wording of the enabling legislation, provided that the decision-maker has not closed his mind to the circumstances of the particular case (see paragraph 17 above).

Legitimate expectation

19. In recent years the courts have developed a doctrine of 'legitimate expectation' to indicate rights which the courts will give effect to in administrative or public law over and above rights which derive from express statutory provision or from private law rights such as those deriving from contract. The GCHQ case is the best known example of this. The House of Lords was prepared to hold in principle that the Council of Civil Service Unions had a legitimate expectation, arising from the existence of a regular practice of consultation, that they would be consulted in future unless or until they were given reasons for the withdrawal of this right and an opportunity to comment on those reasons and to make representations against the withdrawal. The right to consultation was not one which derived from any statute which was applicable to the case nor did it derive from contract. It was purely a public law right which the courts had built up in case law. In the particular circumstances of that case the interest of national security overrode what would otherwise have been a legitimate expectation. The point of principle, however, remains.

20. When considering the duty to act fairly in any particular case, therefore, it is necessary to look at the conduct of the parties as a whole in order to decide whether the circumstances are such that a person affected by a decision has acquired a legitimate expectation that the decision-maker should act towards him in a particular way.

Abuse of power

21. It seems now that the courts will be prepared in certain cases to look not merely to the *way in which* the decision is reached but to indicate *what* that decision should be.

Example:

> A taxpayer withdrew claims for reliefs on the understanding, he alleged, that the Inland Revenue would not pursue another matter in the light of explanations given. Subsequently when the true nature of the unpursued matter became clear the Revenue sought to exact tax in respect of this. The House of Lords held that the Revenue had never agreed or represented that it would not pursue the tax if the true facts showed tax to be due. If however there had been a proper agreement it would have been an abuse of power for the Revenue to reopen the matter. *Preston — v — IRC* (1985) AC page 835.

22. It is not yet clear what precisely the courts mean by 'abuse of power' or how far they will extend its meaning. It does however provide a basis upon which the courts could move towards considering whether the decision itself was right or wrong rather than merely the way in which the decision was reached. In *Preston — v — IRC* referred to above, if the court had found that there had been an agreement it would have been prepared to hold that the Revenue could not pursue a claim for tax notwithstanding its prima facie legal and statutory power to do so.

Who makes the decisions?

23. In this pamphlet we have referred to 'the decision-maker' to cover as appropriate both the Minister or other person formally charged with making the decision and the official who will in fact have the conduct of the matter. The courts accept that Ministers cannot personally make every decision which bears their name. This is known as the *Carltona* principle from the leading case of that name. Thus the courts have held that where the relevant legislation provided that breathalysing apparatus had to be approved by the Secretary of State it was perfectly lawful for an Assistant Secretary in the Home Office to approve the apparatus on behalf of the Secretary of State. Whilst such 'vertical' delegation is perfectly lawful you must be careful to avoid delegating the decision-making to an outside body (and merely rubber-stamping that decision) or delegating the decision-making power to another department if yours is the department which ought to be making the decision.

Example:

> The Secretary of State for Trade exercised his powers under the Import, Export and Customs Powers (Defence) Act 1939 to restrict by licence the importation of bananas. Unfortunately the only people who knew about bananas in Whitehall were in the Tropical Fruit division of the Ministry of Agriculture. Accordingly it was the Minister of Agriculture who actually made the decision as to how the licences in banana import were to be allocated and the Secretary of State for Trade merely endorsed this decision. It was held that the Secretary

of State for Trade who was entrusted with the decision, had actually through his officials properly to consider the matter. He and his officials could of course consult with their colleagues but it was they who had to make the decision, which in this case they had failed to do. The decision was accordingly set aside — *ex parte Chris International* (unreported).

Will the courts substitute their own views for those of the decision-makers?

24. The powers which the judges have built up over the years are not limitless. It is for the person entrusted with the decision-making power to make the decision not the courts. Provided there has been no illegality, procedural impropriety, unreasonableness or abuse of power the courts should not interfere. Further, even if the courts do set aside the decision made, it is usually still for the decision-maker, rather than the courts, to make a fresh decision. It can happen that the same decision is reached second time round without taint of illegality.

25. Nonetheless words like 'fairness', 'reasonableness', 'legitimate expectation', and 'abuse of power' allow the courts a considerable degree of flexibility in deciding how the legal principles are to be applied in particular cases. This makes it difficult to be certain in advance how the court will decide a particular case. There are however a number of questions which you can ask yourself.

Questions to ask yourself

26. • Have you got the powers to do what you want to do? Are you merely adopting a particular statutory interpretation which happens to suit what you want to do? (See paragraph 5.)

- Are you exercising the power for the purpose for which it was given? (See paragraphs 8 and 9.)

- Are you acting for the right reasons? Have you taken into account all relevant information and excluded irrelevant considerations? (See paragraphs 8-12.)

- You may not need to spell out the reasons for your decision but if you do are the reasons which you give the correct ones? (See paragraphs 8-12.)

- Will you hear and consider the point of view of people likely to be affected by the decision? Have they been put in the picture sufficiently so that they have a fair opportunity to make representations? (See paragraphs 13-16.)

- Have you allowed in your timetable sufficient time for consultation and representations?

- Have you made up your mind in advance or given that impression, eg have you merely blindly followed departmental policy without considering the circumstances of the particular case? If you propose to follow a general policy in a particular case should

you make it clear when communicating your decision that you have carefully considered the individual application to see whether it merited an exception being made? (See paragraph 17.)

- Have you or anyone involved in making the decision any conflicting interest which might lead someone to suppose that there is bias? (See paragraph 18.)

- Are there any grounds for thinking you might not be acting fairly? Have you led anyone to suppose that you will be acting differently from what is now intended? (See paragraphs 19 and 20.)

- Has the decision-making been wrongly delegated? (See paragraph 23.)

- Do you propose to act in a way which a court may regard as abusing your power or generally so unreasonable that it is likely to find against you? (See generally paragraphs 10, 21, 22, 24 and 25.)

27. If you have serious doubts on any of these questions you should take legal advice before committing your Minister or your department to a particular decision.

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