Principles of Public Law

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JUDICIAL REVIEW PROCEDURES AND REMEDIES

17.1 Access to justice

Each year about 4,000 people in England and Wales are so aggrieved by decisions taken by public authorities that they begin applications for judicial review in the High Court. The previous four chapters have examined the grounds on which such applications may be made, that is to say the legal arguments which may be put forward by applicants to show that a decision is legally flawed. This chapter looks at the procedures litigants must use in order to make an application for judicial review – in other words, the practical steps they, or their lawyers, must take to get a complaint of unlawfulness heard by a High Court judge. It also describes the remedies which successful applicants may obtain, the formal orders which a judge may make.

Court procedures and remedies are not just nitty-gritty considerations for practising lawyers. Questions of when and how litigants are allowed take grievances to court, and what a judge may do to rectify a problem, raise important issues of constitutional principle. If fair, effective and affordable procedures and remedies do not exist, the rule of law cannot be put into action. This is recognised by Art 6 of the European Convention on Human Rights which declares that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in the special circumstances where publicity would prejudice the interests of justice.

(Chapter 21 examines in more detail the rights to fair trials in criminal cases.)

Access to the courts for people to challenge the legal validity of government action is of obvious importance (though they also need the means to settle disputes against their fellow private citizens and business enterprises). An important aspect of the rule of law is that, generally, public authorities, unlike ordinary citizens, only have those powers which have been specifically conferred on them by some positive law. If people are unable to question whether a particular power exists – and, if it does, whether it has been exercised reasonably and fairly – then government institutions and

officials will effectively be able to decide for themselves what powers they have at their disposal. Commentators have often praised English judges for their vigilance in ensuring that government does not hamper the right of people to take their grievances to court. It is certainly possible to find judgments in which the courts emphasise the importance of this principle. In *R v Secretary of State for the Home Department ex p Leech (No 2)* (1994), Steyn LJ asserted that there was a 'constitutional right' of access to the courts and the Court of Appeal quashed a statutory instrument which permitted prison governors to read and stop letters between inmates and their legal advisors. Recently, in *R v Lord Chancellor ex p Witham* (1998), a statutory instrument removing exemptions from court fees previously given to people on very low incomes was held to be unlawful. Only if an Act of Parliament expressly 'permits the executive to turn people away from the court door' (as Laws J put it) will the courts allow this to be done.

In European Community law, too, the importance of 'effective remedies' is recognised (see below, 18.2).

Governments too, both Conservative and Labour, have acknowledged the importance of access to justice. For government, though, facilitating access for aggrieved people to independent courts and tribunals is often balanced against:

(a) the desire to keep the cost of the justice system in check;

(b) the need for legal certainty – public authorities should be able to make speedy and effective administrative decisions unhindered by legal challenge.

For many years, there has been concern that the procedures and remedies in litigation challenging government decisions failed to strike the right balance between the competing goals of access to justice, cost and the need for efficiency in government decision making. The Law Commission of England and Wales has twice investigated the matter. Recommendations in its 1976 Report led to the creation of the modern judicial review procedure set out in RSC Ord 53 (see below, 17.3). Ten years later, an influential pressure group published a scathing report: JUSTICE/All Souls, *Administrative Justice – Some Necessary Reforms* (1988). In 1994, the Law Commission again considered the procedures for making judicial review applications (*Administrative Law: Judicial Review and Statutory Appeals*, Law Com No 226) and made a series of recommendations, but shortly afterwards, Lord Woolf was requested by the then Lord Chancellor (Lord Mackay) to carry out a far-reaching review of the whole civil justice system. Lord Woolf's report, *Access to Justice – Final Report* (1996) urged the need for radical reform. The Civil Procedure Act 1997 (CPA) gives effect to many of his recommendations. It confers powers on a committee to make new rules governing the practice and procedure for civil litigation. The rule making powers of the committee are required to 'be exercised with a view to securing that the civil justice system is accessible, fair

and efficient' (s 1(3) of the CPA). The new Civil Procedure Rules came into force in April 1999. At this date, the rules committee had not completed the task of revising the procedures by which applications for judicial reviews are made. For the time being, the previous rules on judicial review were therefore re-enacted with only minor amendments to terminology (CPR Sched 1, Ord 53).

Against this background of constant reform and importance attached to the constitutional principle of access to justice, this chapter examines the operation of the main procedure for challenging the legal validity of government decisions in court in England and Wales – applications for judicial review. Different litigation procedures apply in Scotland (see Wolffe, WJ, 'The scope of judicial review in Scotland' [1992] PL 625; Mullen, T, Pick, K and Prosser, T, 'Trends in judicial review in Scotland' [1995] PL 52) and in Northern Ireland (see Hadfield, B and Weaver, E, 'Trends in judicial review in Northern Ireland' [1994] PL 12). It should also be remembered that special procedures exist for questioning decisions taken under some Acts of Parliament, especially in the field of town planning (see above, 16.4).

17.2 Exhausting alternative remedies

Before starting an application for judicial review, a would-be applicant is expected to have exhausted other adequate alternative remedies. In a long series of cases, the High Court has said that it will normally exercise its discretion to turn away judicial review applications where the applicant has failed to pursue another remedy. Thus, if a person has available an appeal to a tribunal set up by statute, that should first be used (*R v Secretary of State for the Home Department ex p Swati* (1986), and the discussion of tribunals in Chapter 9). It should be noted that legal aid is not available for tribunal hearings. The possibility of making a complaint of maladministration to an ombudsman may also be viewed as an adequate alternative remedy (*R v Lambeth LBC ex p Crookes* (1997)), even though the jurisdiction of the ombudsmen is to investigate maladministration, not unlawfulness (see below, Chapter 10).

17.3 Using the Ord 53 procedure

To begin an application for judicial review, applicants, or more often their barristers, fill in a form. This needs to set out the facts of the applicant's case and the legal submissions which are being relied upon, supported by the citation of relevant authorities. Written evidence, verifying that the facts are true, must also be submitted to the court.

Order 53 r 4 requires all this to be done 'promptly and in any event within three months' of the date when the grounds of the application for judicial review arise. This is not long, especially if an applicant has to realise that his or

her problem is a legal one, find a solicitor who recognises that judicial review is appropriate, and possibly apply for legal aid to fund the litigation. An application may be refused because the applicant failed to make it promptly, even within the three month period (*R v Swale Borough Council ex p Royal Society for the Protection of Birds* (1990)). The court does, however, have discretion to extend the time limit if there is a good reason to do so (*R v Dairy Produce Quota Tribunal for England and Wales ex p Caswell* (1990). In general civil proceedings – for example, tort and contract claims – limitation periods are three years or more. The rationale for the short time period in judicial review is the need to protect public authorities from the uncertainty which tardy challenges may create.

17.3.1 Obtaining the permission of the court

In general civil proceedings, once a claimant submits pleadings to the court and pays a fee, these can be served on the defendant, and litigation begins. Not so in judicial review. Section 31(3) of the Supreme Court Act 1981 stipulates that every application must first be vetted by a judge before it may be served on the respondent public authority. This used to be known as obtaining 'leave', but the new terminology is obtaining 'permission'. Only if the judge is satisfied that the applicant has a proper case will permission be given for the case to proceed any further. The procedure dates back to the 1930s, and today performs two main functions: it protects public authorities from the time and expense of having to respond to unmeritorious judicial review claims; and it also helps the High Court cope with the ever-growing case load (Le Sueur, AP and Sunkin, M, 'Applications for judicial review: the requirement of leave' [1992] PL 102). Typically, up to 50% of applications for permission are refused each year, which means that many judicial reviews are disposed of without the need for a full hearing.

Order 53 r 3(3) gives the applicant a choice as to how to apply for permission. It can be done entirely 'on paper', when the judge looks only at the applicant's form and written evidence. If permission is refused, a very short statement of reasons – often no more than a sentence or two – is given by the judge and sent on to the applicant's lawyers. Alternatively, an oral application for permission may be made in open court when counsel for the applicant will be allowed up to 20 minutes to address the judge and persuade him to grant permission. Two important characteristics of the permission stage are that the judge normally hears only the applicant's account of events and the law (not the public authority's) and the process is usually very summary, that is, decisions are made on a quick perusal of the documents or after hearing brief submissions from counsel. An applicant who is refused permission by the High Court may renew the application to the Court of Appeal.

There is no comprehensive official statement of the criteria which the judge should apply when considering whether to grant or refuse permission. One common reason given for refusing permission is that the applicant's case is 'unarguable'. Another is that the applicant has failed to seek an alternative remedy (see above, 17.2). Research has demonstrated that there is an astonishingly wide variation in the proportion of cases granted permission by different judges: some judges refuse 75%, whereas others refuse less than 25% (see Bridges, L, Mészáros, G and Sunkin, M, *Judicial Review in Perspective*, 2nd edn, 1995, London: Cavendish Publishing, Chapter 7). Clearly, this a cause for concern.

In the past, there have been calls for the abolition of the permission stage, on the ground that it was an unwarranted obstacle to access to justice. Now, however, the new Civil Procedure Rules encourage judges to take on a role of 'case management' in general civil proceedings. The permission requirement in judicial review therefore seems less anomalous. It also needs to be remembered that many other grievance procedures have mechanisms to 'filter out' some complaints at an early stage – including the ombudsmen (Chapter 10) and the European Court of Human Rights (see below, 18.3.1).

17.3.2 The interlocutory period

Assuming permission is granted, the respondent public authority has 56 days to submit a formal written reply to the applicant's form, disputing any facts and answering the applicant's legal submissions. It currently takes about 10 months from the grant of permission to an application receiving a full hearing in the High Court.

The time between starting litigation and a trial is called the interlocutory period. During this period, an applicant may fear that if the public authority's impugned decision is allowed to stand, then irreparable damage may be suffered. An applicant may, therefore, request that the court make an interim order suspending the operation of the decision which is being challenged – for example, to prevent the publication of an allegedly legally flawed and commercially damaging report (*R v Advertising Standards Authority ex p Direct Line Financial Services Ltd* (1998).

During the interlocutory period, it is quite usual for the applicant and the public authority to attempt to reach an out of court settlement. If an agreement is reached, then the applicant withdraws the case. In general civil proceedings, such settlements are generally regarded as a good thing. It has, however, been argued that, in judicial review cases, out of court settlements may not be so desirable (Sunkin, M, 'Withdrawing: a problem for judicial review?', in Leyland, P and Woods, T (eds), *Administrative Law Facing the Future*, 1997, London: Blackstone). One concern is that applicants may be pressurised to accept unfair settlements by powerful respondent public authorities. Another is that judicial review is an important way of holding government to account

publicly for its actions. Because cases often affect third parties and the wider public interest, decisions to discontinue a legal challenge perhaps ought not be left entirely to the parties to the application.

17.3.3 The full hearing

The full hearing of an application for judicial review is in open court before a single judge, or sometimes a Divisional Court consisting of two or three judges. Counsel for the applicant makes submissions (based on the grounds set out on the application form) and counsel for the respondent public authority then responds. It is highly unusual for any witnesses to be called to give oral evidence or to be cross-examined. Because the outcome of public law litigation can be of concern to people other than just the applicant and the respondent public authority, other interested parties may be allowed to put in evidence and be represented at the hearing. For example, in a judicial review against a hospital's detention of a mentally retarded man, the Secretary of State for Health, the Mental Health Commission and the Registered Nursing Homes Association were granted leave to intervene (*R v Bournewood Community and Mental Health NHS Trust ex p L (Secretary of State for Health intervening)* (1998) and also Schiemann, K (Sir), 'Interventions in public interest cases' [1996] PL 240).

17.4 Remedies

After judgment is given, the court has at its disposal several different types of formal order which may be granted if the applicant is successful:

(a) an order of certiorari, to quash the public authority's decision;

(b) an order of mandamus, or a mandatory injunction, requiring the public authority to carry out its duties;

(c) an order of prohibition, or a prohibitory injunction, restraining the public authority from continuing to act unlawfully;

(d) a declaration, stating what the law is.

Even if the applicant wins all the legal arguments at the hearing, there is no guarantee that the decision will be set aside or the public authority's actions declared unlawful. All remedies on an application for judicial review are discretionary and may be withheld by the court for a number of reasons: for example, the remedy would serve no useful purpose, or the applicant delayed making the application and to grant relief would be detrimental to good administration or would prejudice the rights of third parties (s 31(6) of the Supreme Court Act 1981). Even if a remedy is granted, the applicant's victory may sometimes be a pyrrhic one. If a public authority's decision is set aside on the ground that it was made using improper procedures (see Chapter 13), the

court will remit the matter back to the authority to redetermine and the authority may well reach the same decision, though this time being careful to use the proper procedures.

The fact that a decision is quashed because it was procedurally improper, irrational or illegal of itself gives no basis for claiming damages (see de Smith, SA, Woolf (Lord) and Jowell, J, *Judicial Review of Administrative Action*, 1995, Supplement, London: Sweet & Maxwell, Chapter 19). Order 53 allows an applicant to include a claim for damages on an application for judicial review, but damages will only be awarded if the applicant is able to prove that an actionable tort has been committed by the public authority: for example, negligence, trespass, false imprisonment or misfeasance in public office. Successfully arguing on a judicial review that a government authority has breached one or more of its statutory duties is not sufficient to show that the tort of breach of statutory duty has been committed (*O'Rourke v Camden LBC* (1998)).

An unsuccessful applicant who does not qualify for legal aid will usually be ordered to pay the legal costs of the respondent public authority, which will normally amount to several thousand pounds. Except for rich people and businesses, this risk is a major disincentive to applying for judicial review.

17.5 Who may apply for judicial review?

Over the past 15 years, in a series of important cases, the courts have had to determine whether particular applicants have had the necessary 'standing' to make an application for judicial review (Himsworth, C, 'No standing still on standing', in Leyland, P and Woods, T (eds), *Administrative Law Facing the Future*, 1997, London: Blackstone). This is because s 31(3) of the Supreme Court Act 1981, which creates the judicial review procedure, stipulates that:

> No application for judicial review shall be made unless the leave [now 'permission'] of the High Court has been obtained in accordance with the rules of court; and the court *shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates* [emphasis added].

In fact, since the House of Lords' decision in *R v Inland Revenue Comrs ex p National Federation of Small Businesses and the Self-employed Ltd* (1982), any dispute as to whether or not an applicant has standing is normally not dealt with at the permission stage, but is postponed until the full hearing if the applicant is thought in other respects to have good grounds for obtaining judicial review. This is because it is a mixed question of fact and law, and normally cannot be determined during the permission procedure when the court looks only briefly at the applicant's side of the case.

Judges have been divided over how strictly the 'sufficient interest' requirement should be interpreted. Those who favour a high threshold often

do so because they see the standing requirement as a way of reducing the judicial review case load; but as few applications are refused permission on the basis of lack of standing, it is arguable that a high standing threshold merely increases the work load of the courts, as it creates another issue to be resolved at the full hearing. Another reason for wanting a strict standing rule is to deter the tactical use of judicial review by individuals and pressure groups contesting controversial government policy. Even if an application fails, campaigners may believe that judicial review generates publicity for their cause and is a useful delaying tactic.

The main counterargument is that a legal system is discredited and the rule of law weakened if an allegedly unlawful decision is immune from challenge in the courts just because there is no one with a 'sufficient interest' in the matter (as in the *Rose Theatre* case, considered below, 17.5.2). Situations may also arise where an individual does have standing, because his interests are directly affected, but he is reluctant to risk the cost and stress of pursuing legal proceedings. Surely, it may be argued, pressure groups (such as Age Concern and the Child Poverty Action Group) should be allowed to bring an application for judicial review on behalf of people whose interests they represent (for a general discussion, see Cane, P, 'Standing up for the public' [1995] PL 276).

17.5.1 Strict approaches

Clearly, the 'sufficient interest' formula used in s 31(3) of the Supreme Court Act gives a considerable degree of discretion to the judges. In *National Federation*, a well respected and influential group lobbying for the interests of small businesses sought judicial review to challenge the Inland Revenue's 'amnesty' to casual print workers in the newspaper industry who, for many years, had used false names (such as Mickey Mouse) to avoid paying income tax. As a quid pro quo for the newspaper owners and workers regularising the position, the Inland Revenue agreed not to demand back taxes from the employees. The National Federation thought that this was unfair (as their members were always being hounded by the tax authorities) and unlawful. The majority of the House of Lords held that the National Federation did not have sufficient interest to seek judicial review of the tax affairs of other citizens. Lord Diplock dissented on the point, stating:

> It would in my view be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

In the years which followed *National Federation*, some judges in the High Court used the majority's approach to justify a high threshold. In *R v Secretary of State for the Environment ex p Rose Theatre Trust Company Ltd* (1990), a

company formed to act as a pressure group campaigning to have the archaeological site 'listed' and protected by the government as an ancient monument was held not to have standing to challenge the minister's refusal. Applying *dicta* from the majority speeches in the *National Federation* case, Schiemann J said that a group of people, none of whom had standing individually, could not confer standing on themselves by forming a company. He believed that there were good reasons for having standing rules: they reduced uncertainty and chaos and discouraged overcautious decision making by public authorities. He conceded that his decision meant that nobody had sufficient interest to challenge decisions under the Ancient Monuments Act 1979, but this was an inevitable consequence of the statutory requirement that applicants have sufficient interest. The decision was much criticised, and Schiemann J took the unusual step of defending his decision by writing an academic article ('*Locus standi*' [1990] PL 342).

17.5.2 Whittling away the threshold

The stance taken in *Rose Theatre* turned out to be a high water mark and, in later cases, High Court judges have approached the 'sufficient interest' test far more generously – so much so, in fact, that Lord Diplock's dissenting speech in National Federation now reflects the current position. In *R v Secretary of State for the Environment ex p Greenpeace Ltd (No 2)* (1994), the environmental pressure group was held to have standing to challenge a licence allowing the testing of a new nuclear reprocessing plant. Several factors were regarded as justifying this result. Greenpeace had over 400,000 supporters in the UK and, of these, 2,500 were in the region where the plant was situated. Also, if standing were denied to Greenpeace, there might be an application by an individual employee at the nuclear plant or a local resident. If that happened, such an applicant would not be able to command the scientific expertise which was at the general disposal of Greenpeace. Consequently, a less well informed challenge might be mounted which would stretch unnecessarily the resources of the court and which would not afford the court the assistance it required in order to do justice between the parties. The decision of Schiemann J in *Rose Theatre* was distinguished on the basis that the pressure group in that case had been formed for the exclusive purpose of saving the archaeological remains and no individual member of the group could show any personal interest in the outcome.

The next step in the liberalisation of the standing requirement was *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* (1995), in which a pressure group sought judicial review of a decision by the Foreign Secretary to make a substantial grant to the government of Malaysia towards the construction of a hydro-electric project on the Pergau Dam under the Overseas Development and Co-operation Act 1980. In deciding whether the WDM had a sufficient interest in the Foreign

Secretary's decision, the Divisional Court could not simply apply *Greenpeace (No 2)*: whereas a number of Greenpeace members would themselves have had standing to challenge the licence granted to the nuclear plant because they lived near the plant, no supporter of WDM was any more affected by the Foreign Secretary's grant to the government of Malaysia than any other taxpayer or citizen living in Britain. This fact did not, however, prevent the court from holding that WDM had the standing necessary to bring a judicial review challenge. Among the factors to which the court attached importance were: the strength of the applicant's legal arguments (here, WDM went on to win the case); the importance of vindicating the rule of law (a phrase used by Lord Diplock in his dissenting speech in National Federation); the importance of the issue raised (here, the legal question had far-reaching implications for government overseas aid policy); the likely absence of any other challengers; the nature of the breach of duty against which relief was sought (here, the argument was that the minister had misunderstood the constraints on his statutory powers); and the prominent role of WDM in giving advice, guidance and assistance in the field of overseas aid policy (in other words, the applicants were well established and well respected, not least because it had consultative status with several United Nations organisations).

The emerging broad and flexible approach was reinforced by Sedley J in *R v Somerset CC ex p Dixon* (1997), where he held that the applicant – who was a local resident, a parish councillor and a member of several environmental campaigning groups – had sufficient interest to seek judicial review of a council's decision to grant planning permission for the extension of a limestone quarry. Sedley J held that there was no authority for the proposition that a court was compelled to refuse leave where the 'interest' of the applicant was shared with the generality of the public (and, if *dicta* in *Rose Theatre* suggested otherwise, they should not be followed). While he accepted that, in the majority of cases, such a greater interest might be necessary to establish that an applicant was more than just a busybody, Sedley J said that 'there will be, in public life, a certain number of cases of abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court'.

The process of liberalising standing ends (for the time being) with a twist in the tail – in another judicial review challenge made by Greenpeace. In *R v Secretary of State for Trade and Industry ex p Greenpeace* (1998), the pressure group sought to argue that the minister had acted unlawfully in granting licences for offshore petroleum drilling because this would harm a special type of coral, protected under an EC directive. It was accepted by all parties that Greenpeace did, indeed, have a sufficient interest to make the application. Laws J commented that litigation of this kind, in which applicants bring challenges in the public interest and have no rights of their own, 'is an accepted and greatly valued dimension of the judicial review jurisdiction'. In such public interest litigation, however, applicants have to act 'as a friend to

the court'. This means, for example, that the rules about delay in making judicial review applications (see above, 17.3) would be applied with particular strictness against such applicants – and, in the circumstances of the present case, Greenpeace could and should have applied for leave much earlier. Laws J also made it clear that an applicant's motives for bringing a case (here, Greenpeace's opposition to drilling for oil) formed no part of the public interest equation. The only public interest asserted by Greenpeace was the upholding of the rule of law.

As we shall see in Chapter 19, the problem of defining an appropriate standing test is not confined to s 31(3) of the Supreme Court Act 1981. Standing requirements are also contained in the Human Rights Act 1998 (see below, 19.10.5) and in Art 230 of the EC Treaty, under which legal proceedings may be taken before the European Court of Justice to annul legislation and actions by Community institutions (see below, 18.2.5).

17.6 Which decisions may be challenged by judicial review?

Judicial review developed as a constitutional mechanism for controlling the misuse of statutory powers by magistrates and local government and, later, by ministers (see de Smith, SA, Woolf (Lord) and Jowell, J, *Judicial Review of Administrative Action*, 1995, London: Sweet & Maxwell, Chapter 14). The body of case law which now exists setting out the grounds upon which judicial review may be sought – illegality, procedural impropriety and irrationality – regulates the powers of a much broader range of institutions and office holders. In everyday language, these decision making authorities are often referred to collectively as public authorities. As the High Court has extended its supervisory jurisdiction to cover new types of public authority, it has become important to provide a principled justification to explain against whom applicants may bring judicial review challenges. Why, for instance, have to courts held that the Jockey Club (the non-statutory authority regulating the multimillion pound British racing industry) is not subject to judicial review, whereas the Press Complaints Commission (the non-statutory self-regulatory authority for newspaper publishers) is amenable to challenge in this way? Compare *R v Jockey Club ex p Aga Khan* (1993) and *R v Press Complaints Commission ex p Stewart-Brady* (1997).

17.6.1 Source of power test

Until the 1980s, the courts applied a rather mechanistic test and asked, in effect, only if the particular decision challenged was made under statutory powers. After the House of Lords' decision in *Council of Civil Service Unions v Minister for the Civil Service* (1985) (the *GCHQ* case), decisions which based their legal authority on prerogative powers (see above, 2.4.3) ceased, for that

reason alone, to be immune from judicial review. Thus, the Home Secretary's refusal to recommend the exercise of the prerogative of mercy was held to be reviewable (*R v Secretary of State for the Home Department ex p Bentley* (1994)). The issue, in other words, was: what was the source of the decision maker's power? If it was conferred by statute or the prerogative, then, in principle, the decision was amenable to judicial review challenge. If the power was contractual (for example, the relationship between a member and a private club), then judicial review was not available.

17.6.2 Functions test

The courts then abandoned the test based solely on the source of power and devised a more sophisticated approach which rested on the nature of the 'function' being performed by the decision maker, or the nature of the decision's consequences. The leading case is *R v Panel on Take-overs and Mergers ex p Datafin plc* (1987). The panel is a non-statutory authority staffed by people on secondment from merchant banks, law firms and accountants. Its operations are financed by a levy on equity deals in the City and its role is to ensure 'fair play' during takeovers and mergers of companies in accordance with a code. The panel was not set up by, and receives no funds from, government – though its functions complement those of statutory authorities, such as the Monopolies and Mergers Commission and the Securities and Investment Board. Datafin plc was involved in a takeover bid. The panel made certain decisions which the company believed to be unlawful; in particular, it refused to investigate a complaint that the code had been breached by a rival. How could Datafin challenge this decision? It applied for permission to apply for judicial review; the judge applied the 'source test' (see above, 17.6.1) and held that the panel was not amenable to judicial review because it was not exercising statutory powers. The leave application was renewed to the Court of Appeal, which held that the panel was subject to judicial review because the source of a decision maker's power was not always conclusive of the issue. What powers did the panel have? This question caused the Court of Appeal to scratch its collective judicial head. The panel clearly had no statutory or prerogative powers. Nor was it in a contractual relationship with those it sought to regulate. Its power derived merely from their consent. Lloyd LJ devised a test:

> The source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation, then clearly the body will be subject to judicial review. If, on the other end of the scale, the source of power is contractual ... then clearly [the body] is not subject to judicial review ... But between these two extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body

> within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think that it does.

In other words, to work out whether a decision can be challenged in Ord 53 proceedings, it may be necessary to ask three questions:

(a) What was the source of the decision maker's power (the old test which, in most cases, will still provide the conclusive answer)?

(b) What functions was the decision maker carrying out?

(c) What were the consequences of the decision?

When *Datafin* was decided, some commentators predicted that there would be virtually no limit to the reach of judicial review, but this has not been the case. *Datafin* has, however, spawned a morass of case law. There have been several judicial attempts to refine the rather fluid language used by Lloyd LJ (see de Smith, SA, Woolf (Lord) and Jowell, J, *Judicial Review of Administrative Action*, 1995, Supplement, London: Sweet & Maxwell, para 3-027). A number of criteria have emerged; the following two are the most important ones:

(a) the 'but for' test – whether, but for the existence of the non-statutory body, the government itself would almost inevitably have intervened to regulate the activity in question? In *R v Football Association Ltd ex p Football League Ltd* (1993), one of the reasons why the FA was not reviewable was because, had it not existed, a television company, rather than the government, would most likely have stepped in to run professional soccer;

(b) whether the government had 'underpinned' the activities of the body with legislation or had in some other way woven into a statutory framework. On this basis, most of the self-regulatory organisations in the financial services industry (such as IMRO and the PIA) have been held to be amenable to judicial review because the voluntary regulatory regime is tied into statutory regulation under the Financial Services Act 1987.

Applications for judicial review by people who are members of, or have contracts with, non-statutory regulatory authorities have been refused because (among other reasons) such applicants have an alternative remedy, namely, to sue in contract: *R v Jockey Club ex p Aga Khan* (1993) and see, also, *Andreou v Institute of Chartered Accountants in England and Wales* (1998).

The attempt to distinguish between public powers (which are challengeable by judicial review) and private powers (which are not) has introduced slippery concepts into English law. Whether this dichotomy between public and private is plausible or helpful in this context is open to doubt (Oliver, D, 'Common values in public and private law and the public/private divide' [1997] PL 630). The policy justifications for confining the court's power of judicial review are rarely spelt out by the courts. As with the standing requirement (see above, 17.5), one factor is that this is seen as a way of rationing judicial review to prevent the High Court becoming

overburdened. Another is that it would be unfair to expect small organisations (such as amateur sports clubs) to have to comply with the decision making standards established by the grounds of judicial review – principles developed over the years to control abuse of power by government institutions.

As we shall see in Chapters 18 and 19, the problem of demarcating public from private persons is not confined to applications for judicial review. First, in European Community law, such a distinction has been made for the purpose of deciding against which authorities directives may have vertical direct effect. The test formulated is based on the notion of 'emanation of the State'(Case C-188/89 *Foster v British Gas plc* (1991) (see above, 7.9.2); and *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* (1997)). Secondly, the Human Rights Act 1998 defines 'public authority' to determine whether a body may be subject to claims in UK courts that it has acted unlawfully by violating one or more of the rights protected by of the European Convention on Human Rights (see below, 19.10.4).

17.7 Do litigants have to use Ord 53?

The previous section examined the proposition that an applicant may only use judicial review to challenge the legality of a public law decision. But what if a person wants to argue that a public authority's decision is unlawful in some other sort of legal proceedings? You might, for instance, be prosecuted for breaching a bylaw – can you, as a defence in a criminal court, seek to argue that the bylaw is invalid? Or, you may want to claim that a local authority has failed to pay a grant to which you are entitled under a statute – can you, in these circumstances, bring proceedings in the county court? Issues such as these are sometimes referred to as questions of 'procedural exclusivity'. Generally, the courts prefer public law issues to be dealt with by way of judicial review in the High Court, rather than by other courts using other procedures. Arguably, the pursuit aim has sometimes led to the principle of access to justice being harmed; certainly, it has led to a great deal of wasteful litigation over which court and procedure is the most appropriate for the resolution of a particular grievance.

The problem of procedural exclusivity began in 1982, when the House of Lords held that it was 'an abuse of the process of the court' for a person to seek a declaration using the general civil procedure rather than the application for judicial review procedure in Ord 53 (*O'Reilly v Mackman* (1983)). Following a riot at Hull prison, a number of prisoners were subjected to punishment ordered by a disciplinary tribunal; some of them argued they had not been given proper opportunity to present their side of the events. The claimant's lawyers commenced litigation in the High Court by writ (one of the methods of starting general civil proceedings before the Civil Procedure Rules 1999),

claiming a declaration. The reason given by the House of Lords for striking out the claimant's case before it got to trial was that the Ord 53 application for judicial review procedure provided public authorities with certain procedural protections: the requirement that permission be obtained; the fact that the application form requires all legal and factual submissions to be revealed from the very outset; the absence of oral evidence, so keeping hearings shorter; and the requirement that applications be made promptly and, in any event, within three months. Lord Diplock said that the whole purpose of these protections would be defeated if a person could use general civil procedures to obtain a declaration to challenge public law decisions. Professor HWR Wade criticised *O'Reilly* as a serious setback for administrative law:

> It has caused many cases, which on their merits might have succeeded, to fail merely because of the choice of the wrong form of action. It is a step back towards the time of the old forms of action which were so deservedly buried in 1852. It has produced great uncertainty, which seems likely to continue, as to the boundary between public and private law since these terms have no clear and settled meaning ... the House of Lords has expounded the new law as designed for the protection of public authorities rather than of the citizen [Wade, HWR and Forsyth, CF, *Administrative Law*, 7th edn, 1994, Oxford: Clarendon, p 682].

In the years following *O'Reilly v Mackman*, a number of exceptions have emerged.

First, public law issues may be raised as a *defence* in general civil proceedings. In *Wandsworth LBC v Winder* (1985), the council passed a resolution raising the rents of council houses. Mr Winder, a tenant, refused to pay the new sum, and possession proceedings were commenced against him in the county court. He argued that the council's resolution was unlawful. The council tried to strike out his defence on the basis that he could not raise such a public law issue other than by Ord 53. The House of Lords disagreed, holding that public law issues could be raised by way of a defence in general civil proceedings. It was not an abuse of process, because the tenant was merely trying to defend himself.

Where a defendant in a criminal prosecution attempts to defend himself on the basis of the invalidity of a public law measure (for instance, where he is prosecuted for breaching rules set down in a statutory instrument), the House of Lords has held that there is a strong presumption that he should be allowed to do so: *Boddington v British Transport Police* (1998) (a defendant charged with unlawfully smoking on a train could defend himself in the magistrates' court by arguing that the bylaw creating the offence was invalid). It has also held, however, that the statute under which the prosecution is bought may, by implication, bar such a defence – and so require the defendant to bring a separate application for judicial review to challenge to validity of the statutory instrument: *R v Wicks* (1998) (a defendant charged in the Crown Court with failing to comply with an enforcement notice issued under the Town and

Country Planning Act 1990 could not argue that, in deciding to serve the enforcement notice, the local authority took into account irrelevant considerations and acted in bad faith).

The second main exception to the principle of procedural exclusivity is that, if a person has some sort of private law claim against a public authority, as well as public law rights, then the court may permit a private law claim to be pursued. This new degree of flexibility emerged from *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* (1992). The plaintiff, a general practitioner, claimed he was entitled to a full basic practice allowance in accordance with a statutory instrument, but the family practitioner committee refused to pay, alleging that he had been out of the country for periods of time and had been employing a locum. The doctor's lawyers began general civil proceedings (rather than an application for judicial review), seeking a declaration and payment of the sums he claimed due to him. Lawyers for the committee, relying on *O'Reilly*, sought to strike out parts of his claim, arguing that he should first challenge the committee's decision by judicial review and only if he won could he commence an action for payment of the sums due. The House of Lords held that there was no abuse of process. Lord Lowry said that there were two ways of looking at *O'Reilly*:

(a) the 'narrow approach': the exclusivity rule applies to all proceedings in which public law decisions are challenged, subject to some exceptions when private law rights are involved;

(b) the 'broad approach': *O'Reilly* applies only when private law proceedings are not at stake. (The prisoners in *O'Reilly* had no private rights.)

His Lordship preferred the broad approach, but said that he did not need to choose. There were many indications in favour of a liberal approach. One was that the Law Commission's 1976 report (see above, 17.1) on which the Ord 53 procedure was based had not recommended a strict rule of procedural exclusivity – in fact, quite the opposite. Another was that the litigation in *Wandsworth v Winder* had included private law rights. Lord Lowry's conclusion was that 'unless the procedure adopted by the moving party is ill suited to dispose of the question at issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings'.

The pragmatic approach advocated in *Roy* has been followed in several later cases. In *Mercury Communications Ltd v Director General of Telecommunications* (1996), the House of Lords allowed a dispute about licensing of telecommunications operators to be dealt with in the Commercial Court because the procedures in that court were equally, if not more appropriate, for resolving the challenge. In *British Steel plc v Customs and Excise Comrs* (1997), the Court of Appeal held (overturning Laws J) that it was permissible for the claimant to bring private law proceedings for restitution of duty on oil demanded by Customs if they could show that the demand was

unlawful. In *Trustees of the Dennis Rye Pension Fund v Sheffield CC* (1998), the Court of Appeal held that the claim for payment of an improvement grant under the Housing Act 1989, which the claimants said the council owed them, could proceed by general civil proceedings which was a suitable procedure for dealing with disputed facts and collecting debts. See, also, *Andreou v Institute of Chartered Accountants in England and Wales* (1998).

The Law Commission noted three fundamental criticisms of the procedural exclusivity rule (Consultation Paper No 126, July 1993). First, it automatically gives protection to public authorities without taking account of the real administrative inconvenience that might, or *might not*, be caused if a litigant could sidestep the Ord 53 procedure. Secondly, no sharp distinction can be drawn between public and private rights. Thirdly, public authorities are not given similar procedural protections when they are sued in contract or tort – so why do they need them in respect of judicial review? In its 1994 Report (Law Com No 226), the Law Commission concluded that:

> ... the present position whereby a litigant is required to proceed by way of Order 53 only when (a) the challenge is on public law and no other grounds, that is, where the challenge is solely to the validity or legality of a public authority's acts or omissions and (b) the litigant does not seek either to enforce or defend a completely constituted private law right is satisfactory.

In other words, the report supported the broad approach outlined by Lord Lowry in *Roy*. In *R v Secretary of State for Employment ex p Equal Opportunities Commission* (1995), where the House of Lords declared that statutory provisions treating part time workers less favourably than full timers were contrary to European Community law, Lord Lowry added this as a footnote to his speech:

> I feel bound, however, to add (as can perhaps be inferred from my speech in *Roy*) that I have never been entirely happy with the wide procedural restriction for which *O'Reilly v Mackman* is an authority, and I hope that the case will one day be the subject of your Lordships' further consideration.

Clearly, the principle of procedural exclusivity requires rationalisation (see Emery, C, 'Public law or private law? – The limits of procedural reform' [1995] PL 450). Although *Roy* introduced a welcome element of flexibility into the courts' approach to procedural exclusivity, it has not stemmed the flow of wasteful litigation about which court and which procedure should be used to determine issues. As we have noted, one of the main reasons for its existence is the desire to channel public law disputes through the Ord 53 procedure because this offers respondent public authorities greater protections than do general civil proceedings. Another reason for the procedural exclusivity rule has been to ensure that important issues of public law are determined by High Court judges, rather than in the county court, in the Crown Court or by magistrates. Two other features of modern public law litigation are, however,

undermining the goal. First, European Community law requires every court and tribunal in the UK to set aside national laws which are inconsistent with the EC Treaty, directive, regulations or the case law of the European Court of Justice (see above, 7.9). Even a bench of lay magistrates hearing a criminal prosecution may refer questions about the validity of an Act of Parliament to the Luxembourg Court for a preliminary ruling and, having received guidance, disapply that legislative provision if needs be (see below, 18.2.1). Secondly, the Human Rights Act 1998 now requires every court and tribunal to consider the ECHR and the case law of the European Court of Human Rights in Strasbourg when interpreting and applying national legislation (see below, Chapter 19).

JUDICIAL REVIEW PROCEDURES AND REMEDIES

Access to justice is a constitutional right recognised by the common law, in statute, in Art 6 of the ECHR and in the European Community law principle of effective remedies. Access to justice is of constitutional importance to enable people to challenge the legal validity of actions by public authorities.

Different procedures exist for judicial review in the three legal systems of the UK. In England and Wales, the steps which must be taken in judicial review litigation are now contained in Sched 1, Ord 53 of the Civil Procedure Rules 1999. All judicial review cases are dealt with in the Queen's Bench Division of the High Court in London. For many years there have been demands for reform to the procedure – including calls by the Law Commission.

In outline, the following steps must be complied with:

(a) applicants should exhaust any alternative remedies before commencing a judicial review challenge;

(b) an application must be commenced 'promptly and in any event within three months' from the date when then the applicant first had grounds to seek judicial review;

(c) unlike general civil proceedings, the decision to commence litigation is not that of the applicant alone. Only if a judge is satisfied that there is an arguable case and grants 'permission' may the applicant serve proceedings on the respondent public authority;

(d) the full hearing of the application for judicial review is either before a single High Court judge or a Divisional Court of two or three;

(e) the court has several remedies which it may grant to a successful applicant, including: certiorari (an order quashing a public authority's decision); prohibition, or an injunction preventing unlawful action being continued; mandamus, or a mandatory injunction. The grant of these remedies is discretionary. Damages may also be awarded, but only if the applicant has a cause of action in tort arising from the same facts as the application for judicial review.

Three aspects of the judicial review procedure have been problematic:

(a) who has standing to apply for judicial review? Applicants are required by s 31 of the Supreme Court Act 1981 to have 'a sufficient interest in the matter to which the application relates'. In some cases, the courts have interpreted this strictly and turned people away who were not directly affected by the decision they sought to challenge. Today, however, the

courts take a far more liberal approach; it is unlikely that a person with an otherwise good case will be refused permission to apply for judicial review because they lack standing;

(b) which public authorities are amenable to judicial review? In the past, the courts applied a 'source based' test, asking whether the public authority's powers emanated from an Act of Parliament or the prerogative. Now, the courts may also apply a 'function' test, asking whether the public authority is performing a public function. This has resulted in self-regulatory organisations (such as the Panel on Take-overs and Mergers) being subject to review;

(c) is it necessary to use the judicial review procedure? In *O'Reilly v Mackman*, the House of Lords established the rule of procedural exclusivity. If an applicant has grounds to apply for judicial review, the procedural rules contained in RSC Ord 53 must be followed, and it is not permissible for an applicant to use general civil proceedings. This is because Ord 53 contains a number of procedural safeguards for public authorities. In subsequent cases, procedural exclusivity has been applied less stringently.