

Challenging the balance of power (Pt 2)

In his second update, **Simon Parsons** examines the possible grounds to challenge the public law decisions taken by public bodies



IN BRIEF

► Grounds of judicial review: illegality, irrationality, procedural impropriety.

Decisions of public bodies are liable to challenge by way of judicial review and may be quashed as *ultra vires* (beyond the powers) by reference to the ordinary principles of English public law. The jurisdiction of the court is supervisory and not appellate thus judicial review looks at legality, not merits (the quality of the decision) it cannot (supposedly) provide the applicant with a substitute decision as the decision is for government.

Substantive hearing stage

In *Council of Civil Service Unions v Minister for the Civil Service* [1985] A C 374 HL (the GCHQ case) Lord Diplock identified (at 410-411) three grounds of judicial review as:

- Illegality -where a public body abuses its power. (Substantive *ultra vires*).
- Irrationality -unreasonableness- a decision that defies logic- a decision that no sensible person who had applied his mind to the subject matter could have arrived at. It requires something overwhelming. The standard has to be this high to avoid the danger of the court deciding on the merits of the decision.

- (Substantive *ultra vires*).
- Procedural impropriety-this encompasses failure to observe procedural rules set down in an Act of Parliament (procedural *ultra vires*) or failure to observe the rules of natural justice.

The first two grounds are known as the substantive grounds for judicial review because they relate to the substance or legality of the disputed decision. Procedural impropriety is aimed at the decision making process rather than the substance or legality of the decision itself. To these must be added proportionality which is the appropriate standard of review for human rights and EU law. There is also the doctrine of legitimate expectation. Note that the grounds overlap. In each case where a ground (or grounds) is made out, the public body's decision will be void from the beginning i.e. as if the decision had never been taken (void *ab initio*).

Illegality

This was the most used and the most important ground until the development of proportionality. It is aimed at abuses of power by public bodies and includes the following. First, irrelevant and relevant considerations. A decision maker when given a discretionary power by Parliament

must take into account relevant matters and ignore irrelevant matters. So, in *Roberts v Hopwood* [1925] AC 578 a local council was given statutory power to pay its employees' wages. The council made the decision to pay its both its men and women employees a wage of £4 per week which was much higher than wages in the private sector. The cost of living fell but the council did not reduce the wages, even though the wages in the private sector were falling. The legality of the council's decision was considered by the House of Lords and the House quashed the decision as *ultra vires* and illegal because the council had been influenced by irrelevant considerations namely social philanthropy and feminist ambition. The council had failed to take account of relevant considerations namely the wages level in the private sector and the cost to ratepayers.

Second, fettering a discretion by the adoption of a policy. This principle was considered in *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 where the Minister was given a statutory power to give companies grants to buy new plant and machinery. The Minister adopted a policy not to award grants for items costing less than £25. British Oxygen made an application for a grant for gas cylinders each one of which cost £20. The application was turned down. British Oxygen then made a challenge to the Minister's decision arguing that the policy prevented the proper consideration of the application.

Judicial review of governmental power: a brief history

In the second half of the last century judicial deference to the government reduced and there was a great increase of judicial review of governmental power. This involved the development of the common law doctrine of *ultra vires* (beyond the powers) which supported the fundamental principles of the British Constitution namely the legislative sovereignty of Parliament and the rule of law. The executive should not exceed or abuse the governmental power given to it by the Parliament.

This was a response to judicial concerns that political parties who had large majorities in the House of Commons were able to give ever greater powers of government to the executive, ie the government.

Note the concern today in Parliament of proposals to give ministers 'Henry VIII' powers in respect of Brexit, ie the power to issue secondary legislation and the power to amend primary legislation with limited Parliamentary scrutiny.

The House of Lords held that the policy was legal provided the Minister, through his officials, was ready to make to exceptions it. The officials had 'listened to all that the applicant had to say' with an open mind thus there had been a valid exercise of the discretionary power. Thus, the refusal to make a grant was *intra vires* and legal.

Third, statutory powers must not be used for an improper purpose but rather for the express or implied purposes for which they were granted. If the power is used in a way that is inconsistent with enabling Act's objectives then it will have been used illegally. For example, in *Laker Airways v Department of Trade* [1977] QB 643 the Minister of Trade was held to have acted illegally when he used his statutory power to promote competition in long haul flights to protect British Airways dominant position on the transatlantic flight route. The power may be used for another purpose but the authorised purpose must be dominant. For example, in *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 the Minister was given a statutory power to compulsorily acquire land for redevelopment. Land was acquired but his power was also used to alter the route of roads in the land acquired. This was held to be essential to achieve the redevelopment and therefore *intra vires* and legal.

Fourth, fettering discretion by wrongful delegation. When an Act of Parliament gives a public body a discretionary power the general rule is that it is illegal for that public body to delegate that power to another body or person. This does not mean that civil servants or local government officials cannot take decisions on behalf of ministers or local authorities as the act of the official is considered to be that of the minister: *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560.

But the delegation of a judicial power by a statutory body will be considered illegal, for example, in *Vine v National Dock Labour Board* [1957] AC 488 a dock worker had been sacked by a committee set up by the Board. This was held to be illegal because it was a judicial power and was too significant to be delegated. In contrast administrative powers may be legally delegated for example, in *R v Race Relations Board, ex parte Selvarajan* [1975] 1 WLR 1686 the Board was able to delegate its statutory power to investigate race relations to a committee, that carried some preliminary investigations and reported back, as that was an administrative function and it was not possible for the Board alone to carry out these investigations.

Lastly, a mistake of law, this happens when a court or tribunal misinterprets a law which it has to apply to a case with the

result there is an illegal purported decision which is a nullity see *Anisminic v Foreign Compensation Commission (No 2)* [1969] 2 AC 47 HL.

Irrationality

Before the GCHQ case and after it this ground of judicial review is also called 'Wednesbury unreasonableness' after *Associated Provincial House v Wednesbury Corporation* [1948] 1 KB 223. It is taken to have two meanings. First, abuse of discretion- this is where a public body is held to have acted unreasonably when it incorrectly interprets the law or it fails to consider matters that should be considered. A recent example of this ground is *R (DSD and NBV) v The Parole Board* [2018] EWHC 694 (Admin) which concerned the controversial decision of the Parole Board to release from prison the black cab rapist John Worboys. The Administrative Court quashed the decision as *ultra vires* and ordered the Parole Board to reconsider its decision because the Board in reaching its decision had acted irrationally as it only considered the offences committed between 2006 and 2008 for which Worboys had been convicted but there was no consideration of the issue of wider offending which had started in 2003. Worboys maintained that his offending was caused by a relationship breakdown in 2005 or 2006 but DSD was attacked in 2003.

Second, other abuses of discretion i.e. decisions that appear to be 'so unreasonable that no reasonable authority could ever come to it, then the court can interfere...but to prove a case of that kind would require something overwhelming' per Lord Green MR in *Wednesday* at 230. In the GCHQ case Lord Diplock said 'By irrationality I mean what can now be succinctly referred to as "Wednesbury unreasonableness". It applies to a decision that is so outrageous...that no sensible person who applied his mind to the question to be decided could have arrived at it'. It is clear that this refers to the second meaning of irrationality and it requires something so irregular or exceptional that the courts have to intervene. For an example see *Backhouse v Lambeth LBC* (1972) 116 Sol Jo 802. It has to be set at such a high level to avoid the claim that the court does not like the merits of the decision so decides to change it. That would be unconstitutional because Parliament has decided the decision is for the public body not the court. Thus, this ground of review is rarely used and tends to be a last resort and when it is pleaded it is with other grounds.

Procedural impropriety

The third ground of challenge recognised by Lord Diplock in the GCHQ case is procedural impropriety which is where a public body

commits a serious procedural error. It covers two things. First, decisions that have been taken in violation of a procedure laid down in an Act of Parliament either because the procedure has been overlooked or has been improperly observed (procedural *ultra vires*). There is a distinction between a 'mandatory' requirement and 'directory' requirement. The failure to observe a mandatory requirement will make a decision *ultra vires*. In contrast the failure to observe a directory requirement may not cause the resulting decision to be invalid. The courts may decide that a statutory procedure has both mandatory and directory requirements. See for examples *Bradbury v Enfield Borough Council* [1967] 1 WLR and *Coney v Choyce* [1975] 1 ALL ER 979. Whether a requirement is mandatory or directory all depends on context sometimes the mistake will prejudice individual rights and sometimes the mistake will be trivial, the court must use its common sense to decide which.

Second, decisions that are taken in breach of the common law rules of natural justice. These consist of the right to a fair hearing and the rule against bias. They apply in both public law (especially in criminal cases) and in private law (eg in a negligence claim). The right to a fair hearing has three central requirements:

- (i) both sides to a case must receive reasonable notice of a hearing and be informed of the case to be answered;
- (ii) the right to have a reasonable time to prepare a response; and
- (iii) the right to be heard whether in person or in writing.

There is no right to legal representation unless an oral hearing cannot be conducted in a fair way without it. There is no duty to give a reason for a decision in English law although such a duty may be imposed by statute. The rule against bias means that a person given power by law to take decisions which can have detrimental results for others should not act if they have any actual, financial or apparent interest in the issue to be decided. It should be noted that since the Human Rights Act 1998 came into force in 2000 the Convention rights of the right to liberty (Article 5) and the right to a fair trial (Article 6) exist in domestic law and are in addition to the common law rules.

The third article in this series will consider the development of proportionality as a ground for judicial review and whether it has overtaken irrationality. Judicial review remedies will also be considered.

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