The Judge Over Your Shoulder

A Guide to Judicial Review for UK Government Administrators

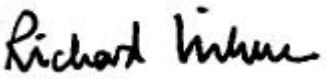
GLS Version

Third Edition (March 2000)
Treasury Solicitor

FOREWORD

by Sir Richard Wilson, KCB

The previous (second) edition of "The Judge Over Your Shoulder" appeared in May 1995. Since that time the scope and volume of administrative law and judicial review have continued to develop at an increasing pace. The Human Rights Act 1998, and the changes in the law already taking place in anticipation of the Act coming into force have made this third edition even more timely. Like the earlier editions, "The Judge Over Your Shoulder" aims to give administrators at all levels an introduction to the present state of the law and to highlight the principles of good administration which the courts will expect us to apply. I am sure that these will prove as useful and popular as the earlier editions of "The Judge Over Your Shoulder".



Contents

Stop Press!

Under the Northern Ireland Act 2000, the Northern Ireland Assembly and Executive were suspended by the Secretary of State for Northern Ireland from midnight on 11 February 2000.

INTRODUCTION
to the Third Edition

"Judicial review" is the name given to the High Court[1] procedure for challenging administrative action. It has an important constitutional role in supervising the executive's exercise of power. It is also a growth industry. In 1974 there were 160 applications for leave to seek judicial review in England and Wales. By 1998 the figure was 4,539.[2] In the same year 137 applications were recorded in Scotland and 150 in Northern Ireland.

As a result of these cases we may have read dramatic headlines like "Minister acted illegally" or "Minister's decision was perverse, says court", but how many of us recognise the impact of judicial review on our own day-to-day work? **The Judge Over Your Shoulder** aims to help you do just that. It sets out to explain what judicial review is and how it can affect decision-making by civil servants.

This edition also covers two further matters of importance for Government administrators. They are the coming into force of the Human Rights Act 1998 ("HRA") and devolution. Both areas are considered in the main text. But a separate guide to the devolution legislation and the HRA is set out in a special section. You can find this at page 42.

A word of warning. **The Judge Over Your Shoulder** is not a legal textbook. It does not set out to be a comprehensive guide to administrative law, devolution or the HRA. Although it aims to help you recognise when one of these areas of law is relevant to your work, it is not a substitute for seeking legal advice.

Further, although this edition has been written before the HRA comes fully into force on 2nd October 2000, the effect of the Act is already being considered by the courts. Some important judgments will be made before October. Devolution is also new. Our constitutional law is undergoing a series of landmark developments. We have therefore given our best assessment of the law as it stands as well as anticipating future change.

---

[1] In Scotland, applications are made to the Court of Session. Although "judicial review" can mean any review by the courts, in this guide our focus is on the procedure under Civil Procedure Rules ("CPR"), Schedule 1, RSC Order 53 ("Order 53").

[2] 2,518 were immigration cases. Only 22.4% of all applications ended in full hearings.

PART ONE
Good administration and administrative law

1.1 The judicial review procedure is a means by which the courts can supervise how Ministers, Government Departments or other public bodies exercise their powers or carry out their duties. It plays an important part in the process of good administration, providing a powerful and effective method of ensuring that the improper exercise of power can be remedied.

What is administrative law?

1.2 "Administrative" or "public" law governs the acts of public bodies and the exercise of public functions. Public bodies include "non-departmental public bodies", such as the Committee on Standards in Public Life, and Next Steps Agencies like HM Prison Service.

1.3 Private sector bodies may also be subject to administrative law when they exercise a public function. Generally, bodies exercise public functions when they act and have authority to act for the collective benefit of the general public. The activities of City institutions with market regulatory functions, like the London Stock Exchange, are a good example.

1.4 Sometimes public bodies mix public law governed and "private" law activities. For example, if a Government Department buys some IT equipment, the contract with the supplier for the purchase of the equipment will be governed by contract law (i.e. "private" law). But the decision of the Department to buy the equipment in the first place, or the selection of the supplier may involve aspects of its public functions. The test the courts have adopted to distinguish the two areas is complex, and involves examining in each case the degree to which public functions are involved in the activity concerned.

1.5 The HRA is part of administrative law in so far as it governs (or will govern) the powers and activities of public authorities or private bodies exercising public functions. For example, because it will affect the way their statutory powers are interpreted. The devolution legislation is part of "administrative law" for the same

reasons. Likewise, European Community ("EC") law or particular rights under the European Convention on Human Rights ("ECHR") may be relevant. In our special section which starts at page 42 we provide additional material on the HRA, the ECHR, devolution and EC law.

1.6 It is a court's decision that an act is sufficiently connected with public functions that makes it susceptible to judicial review and the principles of administrative law.[3] In what follows, we seek to give some guidance on the way in which the courts will expect public functions to be lawfully exercised.

[3] See page 36 for the different position in Scotland.

PART TWO
Making a decision

The context of executive action

2.1 When a Minister or Department decides to act, act in a particular way or not to act, they exercise a discretion. But however unfettered the decision-maker's discretion may seem, there are legal and constitutional limits on the exercise of that power.

2.2 Some limits may be express, because the purposes for which a particular power was given to a decision-maker have been specified in legislation. But many will be implied in the context of the statutory scheme, and others may derive from fundamental constitutional principles. These have developed over time to reflect the evolution of constitutional and democratic government. The advent of the HRA and devolution are the latest changes to this "evolving" context.

2.3 In this guide, the following tests will expose the limits to the lawful use of executive power:

- legality (e.g. acting within the scope of any powers and for a proper purpose);
- procedural fairness;
- unreasonableness;
- compatibility with rights in the HRA and EC law.

2.4 Imagine, therefore, that your Department wants to make a decision and take some action that affects members of the general public. To ensure, as far as is possible, that it will be acting lawfully, ask some questions:[4]

[4] Failure to take action may also be unlawful. See, for example, para 2.23 below and the discussion in *Stovin v Wise* [1996] AC 923, HL(E).

Do we have the power?

2.5 To act lawfully, the Department must have the power to do what it intends. If it does not, its actions will be called *ultra vires.* This phrase describes any action taken by a body which is beyond its lawful powers.

2.6 The power will usually be found in:

- primary legislation (an Act of Parliament in Westminster); or
- subordinate legislation (for example, a statutory instrument).

2.7 Occasionally a contractual or a "prerogative power" will be the legal basis for its action. Prerogative powers are powers of the State exercised by the executive and derived from the residual authority of the Sovereign. Examples are the power to make treaties and issue passports.

2.8 If the power is in legislation, you will need to look at its words to work out what the Department can and cannot do. Usually, words in a statute are given their plain English meaning. Where different interpretations of the words are possible the courts will apply formal "rules of construction" to try to determine what the intention of the legislation was. Either way, you will need to consider the general purpose of the statute. This can sometimes involve looking at Hansard.

2.9 Once the HRA is fully in force, you will be under a statutory duty to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights, so far as that is possible.[5] In this way the Act adds an extra dimension to interpreting legislation.

2.10 Statutory interpretation can be difficult. It is becoming more complex because of the impact of the HRA. Your Department may have procedural guidance to assist you. But you can also seek advice from your Departmental lawyers when you need help in finding out what your statutory or other powers are.

"Constitutional" limits

2.11 The courts have held that Parliament cannot intend to limit "constitutional" rights, unless it does so by an explicit statutory provision in primary legislation.

---

[5] Courts and tribunals will be under the same duty. See s 3(1) of the HRA, and turn to para 5.29 in Part Five to see what the attitude of the courts is likely to be where legislation affects ECHR rights before full commencement of the HRA.

Case Example

The Lord Chancellor had power to set or alter court fees, and a procedure for doing so was laid down. In accordance with that procedure, by the Supreme Court Fees (Amendment) Order 1996 he increased the fees and repealed a pre-existing provision which relieved litigants in person, who were in receipt of income support, of the need to pay court fees. He also repealed the provision which enabled him to waive or reduce fees in cases of undue financial hardship. Mr Witham wished to sue for defamation, for which legal aid was not available, and he was unable to afford the fee. The effect of the Lord Chancellor's Order was to prevent Mr Witham from suing at all, and there were other cases where those on low incomes would be denied access to the court. The Divisional Court held that access to justice (in the sense of being able to take legal action) was a fundamental constitutional right and that, in the absence of an express statutory provision to that effect, Parliament could not have intended the Lord Chancellor to exercise his power in such a way as to abrogate that right. The Order was therefore *ultra vires* and was quashed. (*R v Lord Chancellor, ex parte Witham* [1998] QB 575, DC).[6]

Is the power being exercised for a lawful purpose?

2.12 As well as having the power to act, the Department must use its power for a lawful purpose. Its action will be *ultra vires* and an abuse of the power if:

- it uses the power to achieve a purpose that the power was not created to achieve.[7]

2.13 Legislation may expressly set out the purposes for which a power may be exercised, or they may be implied from its objectives. The courts have accepted that a body can undertake tasks "conducive" to or "reasonably incidental" to a defined purpose.

2.14 Where a contractual power is being used for public purposes, it must be used for ends that are within the scope or "four corners" of the power. Its use must also not be unreasonable, which we discuss later.[8] For example, wrongfully withholding or

---

6 See also *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, HL(E), *per* Lord Steyn, for example, at 587C-D and 591E-F and Lord Browne-Wilkinson at 575C-D, and *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 All E R 400, HL, *per* Lord Steyn at 411h-j.

7 See *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1, HL(E).

8 See the section that starts at para 2.49.

withdrawing the award of a contract[9] or attaching a manifestly unreasonable condition to a planning permission may be unlawful.[10]

Case Example

A city council had a policy of discouraging sporting links with South Africa. It had allowed a rugby club to use a recreation ground under its control for training and matches. Three members of the club were selected for a rebel England team to tour South Africa. The council passed a resolution banning the club from using the ground for 12 months. The council defended its action by reference to the need to promote good race relations, as expressed in section 71 of the Race Relations Act 1976. The House of Lords held that the decision was a misuse of the council's statutory powers concerning the recreation ground; their intention was to punish the club, even though it had done nothing unlawful. (*Wheeler v Leicester City Council* [1985] AC 1054, HL).

2.15 The use of a power may be unlawful if the decision-maker's aims are in contravention of Community law rights or, once the HRA is fully in force, rights in the ECHR. After October 2000 it will be unlawful for you to act in a way that is incompatible with a Convention right, unless your duty under primary legislation means that you cannot do otherwise.[11] It is already a presumption that Parliament in Westminster intends its legislation to comply with Community law and the ECHR. The Scottish Parliament and Executive, the Northern Ireland Assembly and Executive and the National Assembly for Wales have no legislative competence to do anything other than make compatible Acts or measures.

What factors should inform the decision?

2.16 Allied to the need to act for a proper purpose is the requirement that for the decision to be lawful the Department must not have:

- exercised its discretion on the basis of irrelevant factors; or
- failed to take into account factors that it is under a duty to consider.

Doing either will usually lead to a decision being held invalid.

---

9 See *R v Lewisham LBC, ex parte Shell UK Ltd* [1988] 1 All ER 938, QBD.

10 See *Newbury DC v Secretary of State for the Environment* [1981] AC 578, HL(E).

11 See section 6 of the HRA. For example, a Minister or Department will be acting *ultra vires* if they make subordinate legislation that is incompatible with a Convention right, unless primary legislation requires the subordinate legislation to take that form.

2.17 If a decision-maker is operating under statutory powers, the statute may set out all the matters they should consider when making a decision. If the statute is silent, what is relevant may be clear from its purpose or objects. But if the decision is challenged, the courts will decide which factors should have been taken into account.

2.18 Generally, anything not identified by the power-giving statute or relevant to the particular circumstances in which a power is exercised will be irrelevant. It will be enough to show that the influence of an irrelevant factor was material for a decision to be held invalid.

2.19 The HRA will introduce new issues of relevance that go beyond the text of primary or secondary legislation. Because the Act has some retrospective effect and incorporated Convention rights impact in Wales, Scotland and Northern Ireland already,[12] these are issues you *may* need to take into account now.[13]

2.20 Once the Act is fully in force, you will be under a statutory duty to read and give effect to legislation in a way that is compatible with Convention rights, as far as it is possible to do so. If you think your action may touch a Convention right, you need to consider whether what you propose may be incompatible with it.[14] If it is, you will be acting unlawfully unless your duty under primary legislation means you cannot act differently. The section that starts at paragraph 2.63 explains how the courts will test whether your decision is incompatible with a right in the ECHR.

2.21 Ministers and civil servants in the Scottish and Northern Irish Executives, as well as the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales themselves, *are now* acting *ultra vires* the devolution legislation if they act in a way that is incompatible with ECHR rights included in the HRA. The same is true of acts incompatible with Community law.

2.22 Whatever factors guide you, you need to be sure that the facts on which you base your decision are accurate.

---

[12] In relation to acts and measures of the Scottish Parliament, Scottish Executive, Northern Ireland Assembly or Executive and the National Assembly for Wales. See further the special section on devolution at page 50.

[13] See page 47 for a guide to the effect of the Act before it comes fully into force on 2nd October 2000.

[14] *Human Rights Comes to Life - The Human Rights Act 1998: Guidance for Departments* contains more detailed guidance on ECHR rights likely to have particular relevance.

Discretion or duty - must we act?

2.23 Although statutory words may indicate a discretion, that the Secretary of State "may" do something, they can be interpreted as imposing a duty to act. For example, a body with the power to approve licences may be obliged to do so where applicants fulfil all the prescribed requirements. The reverse situation is also possible, so that what may seem an absolute duty may allow a decision-maker discretion in the way it is carried out. For example, a duty to enforce the law.

Case Example

The Agricultural Marketing Act 1958 included provisions relating to the milk marketing scheme. Under the scheme, the Milk Marketing Board fixed the prices farmers were paid for their milk. Farmers in the South-East of England complained to the Board that the price they were being paid was too low. Because the Board refused to alter the price, the farmers asked the Minister to exercise his power under section 19(3) of the Act so as to direct that their complaint be considered by a committee of investigation. The Minister refused. The section provided for referral "if the Minister in any case so directs". He thus argued that his only duty was to consider a complaint fairly, and that he had an unfettered discretion whether or not to refer. The House of Lords held that the discretion in section 19 was conferred by Parliament with the intention that it be used to promote the policy and objects of the Act as a whole. One of those was that complaints that the Board was acting contrary to the public interest should be investigated. The farmers had raised just such a complaint. The Act therefore imposed a duty on the Minister to have the complaint investigated. In refusing to refer, the Minister had acted unlawfully by using the section 19 discretion in a way that did not accord with the policy and objects of the Act. (*Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997, HL(E))

Delegation - who can make the decision?

2.24 The general rule of administrative law is that where legislation confers a power on a specified individual or body *it must be exercised by that individual or body* and not "delegated" to another. But the courts accept that Ministers cannot personally make every decision which is made in their name. This is known as the "*Carltona* principle" after the leading case.[15] Its rationale is that, legally and constitutionally, the acts of officials are the acts of their Ministers.

---

15 *Carltona Ltd v Commissioners of Works* [1943] 2 All E R 560, CA.

2.25 A decision may only be delegated to officials of appropriate seniority and experience. There will always be some cases where the special importance of the decision or its consequences mean that the Minister must exercise the power personally. Sometimes specific statutory provisions require that the Minister make the decision personally.[16] If the power can be delegated you need to check if there are limitations on the seniority or function of officials who can exercise it.

Case Example

Deportation under the Immigration Act 1971 was a two-stage process: the giving of a Notice of Intention to Deport (which attracted a right of appeal to an Adjudicator) and the signing of a Deportation Order. Under statute, both functions were conferred on "the Secretary of State". The Secretary of State delegated the first of these powers to Immigration Officers. The delegation was challenged at judicial review, on the grounds that, although it was accepted that the power could be exercised on the Secretary of State's behalf by members of his Department (i.e. the Home Office), Immigration Officers had a function under the Acts separate from those of the Secretary of State or the Home Office. The House of Lords held that despite the distinct functions conferred on Immigration Officers under the Act, they were capable of exercising the power under the authority of the Secretary of State. But it remained his personal responsibility, after reviewing each case, to sign the Deportation Order at the end of the process (*R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254, HL).

2.26 You must be careful to avoid delegating decision-making to an outside body and merely rubber-stamping their decisions. Likewise, do not allow another Department to take a decision for yours unless the relevant legislation expressly permits this.

2.27 Having looked at the test for legality, we now turn to the requirements for the way a decision is made.

Does the power have to be exercised in a particular way?

2.28 Legislation can impose express restrictions or requirements that must be satisfied before a power can be exercised. For example, "The Secretary of State must" or "shall":

[16] Note that there are limited circumstances under which ministerial responsibility for an act can be transferred by way of an Order in Council under the Ministers of the Crown Act 1975.

- consult with Local Authority representatives;
- identify all claimants over 65 years old;
- make due enquiry; or
- consider any objections before making a decision.

2.29 These are called "mandatory" requirements because a failure to carry them out will make a decision invalid. The decision-maker will need to have fulfilled them in spirit as well as literally. A statutory requirement will always be presumed to be mandatory. Occasionally, if the requirement is very trivial or breach of the procedure does not affect the objects and purpose of a statute or damage the public, this presumption is rebutted, and a requirement for the exercise of a statutory power will be described as "directory"; that is to say, a failure to satisfy it will not necessarily invalidate the decision.

Procedural fairness - can other limits be implied?

2.30 As well as acting within the limits of its powers, the Department will also need to come to its decisions in a procedurally "fair" way. Without "fairness", even if the Department is not acting *ultra vires*, its actions may still be unlawful.

2.31 The common law recognises procedural fairness[17] as an important principle of just decision-making. Fairness is a concept drawn from the "*constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public*".[18] The principle is also reflected in rights contained in the ECHR. The HRA will add statutory, implied requirements to those that exist in common law because it incorporates ECHR rights. For example, if you are taking decisions[19] that will determine a person's civil rights and obligations you will need to ensure the procedural requirements of Article 6 of the Convention (the right to a fair trial) are met.

---

17 Sometimes called "procedural due process".

18 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed 1995), para 8-038, p 417.

19 Note that the decision is not always unilaterally that of the decision-maker when, for example, there is public participation in the process.

2.32 A court may therefore find that additional common law or other limitations should be placed on the exercise of statutory[20] or other executive powers. For example, prior to a decision being made, the need for:

- disclosure of the reasons a decision-maker intends to rely on;
- an opportunity for consultation or the submission of written representations.

And post the decision:

- adequate disclosure of material facts or the reasons for a decision;
- an oral hearing where appropriate.

Case Example

Under section 6(2) of the British Nationality Act 1981, the Secretary of State may ("if he thinks fit") grant a certificate of naturalisation. Among the matters of which he has to be satisfied is the good character of the applicant. The Secretary of State refused a certificate to Mr Fayed, and declined to give any reasons for his decision; nor was there any process of consultation or representations. There were no procedural requirements in the Act. Section 44 provided that the Secretary of State was not "required to assign any reason for the grant or refusal of any application" and that decisions "shall not be subject to appeal to, or review in, any court". Nevertheless, the Court of Appeal held that, particularly in view of the requirement of good character, fairness obliged the Secretary of State to notify Mr Fayed of the matters causing him concern. (*R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763, CA).

Consultation - "double fairness"

2.33 Where consultation is required by statute, or by the common law or is undertaken anyway, it has to be conducted properly to satisfy the requirement for procedural fairness. To be proper, four criteria must be satisfied:[21]

- the consultation must be undertaken when proposals for a change of policy, for example, are still at a formative stage;

---

[20] Sometimes a statute will expressly set out a procedure that might be considered "unfair". Where the words of the statute are unambiguous, and Parliament's intention to impose an "unfair" procedure is clear, a court will not override it. After October 2000, a declaration of incompatibility under the HRA may be made in this situation (see further, page 46).

[21] These were referred to by the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan* [1999] Lloyd's Rep. Med. 306, CA, and are drawn from the case of *R v Brent LBC, ex parte Gunning* (1986) 84 LGR 168.

- sufficient explanation for each policy option or proposal must be given, so that those consulted can intelligently consider and respond to them;
- adequate time needs to be given for the consultation process;
- consultees' responses must be conscientiously taken into account when the ultimate decision is taken.

Case Example

The Secretary of State for Social Services was empowered to make regulations setting up a housing benefit scheme. Before doing so the Minister was required to "consult with organisations appearing to him to be representative of the [local] authorities concerned". The Association of Metropolitan Authorities was granted a few days to comment on various proposed amendments, the actual wording of some of which was not sent to them. It was held that the essence of consultation was the communication of a genuine invitation to give advice and a genuine consideration of that advice. To achieve consultation, sufficient information had to be given to the consulted party to enable it to tender helpful advice, and enough time allowed to the consulted party to do that. (*R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*, [1986] 1 WLR 1, QBD)

Fettering discretion

2.34 Procedural fairness demands that decision-makers do not "fetter" their discretion. Their minds must be seen to remain open. A Minister or Department is entitled to have a pre-determined policy on how a discretion will usually be exercised. But if a policy becomes *so rigid* that it prevents a decision-maker from responding to the merits of each case, their discretion will have been "fettered". In effect, the policy has closed the decision-maker's mind to the possibility that a case might prove to be exceptional or that the policy itself should be changed.

2.35 Particular care thus needs to be taken when drafting official press statements or advice to the public, for example, to ensure the impression of a fetter or a closed mind is not mistakenly introduced.

Bias, impartiality and independence

2.36 The rule against bias is concerned to ensure that the decision-making process is not a "sham" because the decision-maker's mind was always closed to the representations of particular parties. It does not just deal with actual bias, but the appearance of bias as well. The phrase, "*justice must not only be done, but ... be seen*

to be done",[22] is often used to encapsulate this idea. The strictness of the rule serves to strengthen public confidence in the legitimacy of the decision-making process.

2.37 Impartiality, the opposite of bias, is a principle of procedural fairness. The quality is reflected in the ECHR. In particular, Article 6 requires that a tribunal be impartial and independent. After the HRA comes fully into force, the quality of "independence" is likely to become more important in UK law.[23] The European Court of Human Rights ("ECtHR") has defined "independence" in Article 6 as a quality different from but closely linked to impartiality. It means the independence of a decision-maker from external pressure or influence; for example, from being bound to follow the view of the executive branch of Government.[24]

2.38 Common law already recognises that decision-makers should not take part in deciding appeals against their own decisions unless that is authorised by statute.

2.39 Actual bias is rare. Most cases are concerned with the *appearance* of bias. The test here is whether, in all the circumstances of a case, the court considers that there appeared to be a "real danger of bias."[25] If it does, the decision will be set aside. So as well as being sure that you lack actual bias before making a decision, you need to consider not acting as the decision-maker if there is a real danger that your impartiality might be open to question.

---

22 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, *per* Lord Hewart CJ at 259.

23 Currently, English law recognises "impartiality", which is argued to include independence (see, for example, *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep 45 and s 24(1)(a) of the *Arbitration Act 1996*). But "independence" and "impartiality" have autonomous and differently defined meanings in the ECHR (See footnote 103, page 43) and Article 6 gives the qualities separate and equal prominence. See the opinion of the Appeal Court, High Court of Justiciary in Scotland in *Starrs and Chalmers v Procurator Fiscal, Linlithgow*, The Times, 17th November 1999.

24 See, for example, *Beaumartin v France* (1994) 19 EHRR 485, ECtHR; *Bryan v United Kingdom* (1995) 21 EHRR 432, ECtHR; *Findlay v United Kingdom* (1997) 24 EHRR 221, ECtHR, *McGonnell v United Kingdom* (Application No 28488/95), The Times, 22nd February 2000, ECtHR.

25 See *R v Gough* [1993] AC 646, HL(E).

Case Example

The inquest following the "Marchioness" tragedy was adjourned pending the outcome of criminal proceedings. A bereaved mother, Mrs Lockwood-Croft, was denied sight of her son's body before burial. She became convinced that the body in the grave was not that of her son. She applied unsuccessfully for an exhumation order. The Coroner expressed his belief that her grief had caused her to act irrationally. He described some of the "Marchioness" relatives and survivors as being "mentally unwell". He was alleged to have referred to Mrs Lockwood-Croft as "unhinged" and to have displayed a hostile attitude to her. The Coroner refused either to stand down or to resume the adjourned inquest. Mrs Lockwood-Croft and Mrs Dallaglio, another bereaved mother, applied for judicial review of the Coroner's decisions. The Court of Appeal held that there was a real possibility, judging by the remarks attributed to the Coroner, that he had unconsciously allowed himself to be influenced against the applicants by a feeling of hostility towards them and had therefore undervalued the strength of their case that the inquest should be resumed. The Coroner's decisions were quashed. (*R v Inner West London Coroner, ex parte Dallaglio and Another* [1994] 4 All ER 139, CA).

2.40 A lack of impartiality can also arise from "pecuniary", "proprietary" or other interests of the decision-maker that conflict with their role as fair arbiter of a particular decision. The courts will not inquire into whether the decision-maker was biased. A direct pecuniary or proprietary interest in a decision is enough to disqualify someone from acting, automatically and as a matter of law, because they cannot be a "judge in their own cause".

Case Example

A canal company was in dispute with a landowner across whose land the canal ran, and sought an injunction preventing him interfering with their use of the canal (the landowner had blocked the canal by dumping bricks in it). The Vice-Chancellor granted them the injunction and the Lord Chancellor, on appeal, upheld the order. Unknown to the landowner, the Lord Chancellor was a substantial shareholder in the canal company. The House of Lords set aside the Lord Chancellor's decision. He was automatically disqualified as a matter of law on the grounds of pecuniary interest. (*Dimes v Grand Junction Canal* (1852) 3 HL Cas 759, HL(E).)

2.41 In *Ex parte Pinochet Ugarte (No 2)*[26] the automatic disqualification of a Law Lord was not the result of a pecuniary or proprietary interest, but of his close connection with Amnesty International, which had intervened in the case. The link was sufficient to give the judge an interest in the outcome of the proceedings.

2.42 Other interests in the outcome of a decision, or any personal association with those who might be affected by the decision, may lead to disqualification and the decision being set aside if these factors caused the appearance of "a real danger of bias".

2.43 If parties know of a decision-maker's interest they can agree to waive this objection to them acting. In very rare cases, a decision-maker who might otherwise be disqualified can still act if the decision needs to be made and cannot be made without their participation. You should not decide to act in these circumstances without consulting your legal advisers.

"Legitimate expectation"

2.44 The requirements for procedural "fairness" and adherence to the "rule of law" will normally arise whenever rights, property or interests may be affected by the decisions of a body exercising a public function. But the threatened disappointment of an expectation created by a decision-maker may also give rise to a need to act fairly.

2.45 A "legitimate expectation", giving rise to the need for fairness, will occur where a decision-maker makes an express or implied (e.g. from past practice) promise or representation that a person or class of persons will:

- receive a particular benefit or continue to receive a particular or not substantially varied benefit;[27] or
- be entitled to a hearing before any decision is taken which may affect their rights or interests.[28]

2.46 Where a legitimate expectation has arisen, a public authority can still break its promise if an overriding public interest requires it. In *Ex parte Coughlan,*[29] the Court

---

[26] *R v Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272, HL.

[27] See, for example, *R v North and East Devon Health Authority, ex parte Coughlan* [1999] Lloyd's Rep. Med. 306, CA.

[28] See, for example, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL.

[29] *Ibid*, footnote 27.

of Appeal said that although it was for the decision-maker initially to decide whether an overriding public interest existed, the decision could be examined by the courts if it had been improperly reached. The Court gave guidance on when and how decisions of this kind may be reviewed:

> *"We consider that it is for the court to decide in an arguable case whether such a judgement, albeit properly arrived at, strikes a proper balance between the public and the private interest."*[30]

2.47 It provided this overview of the court's fundamental objective:

> "*The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or extant promise."*[31]

2.48 This is a developing area of law. The importance of procedural fairness and legal certainty as aspects of the "rule of law" may be more apparent after the HRA is fully in force. This is because these ideas are overriding objectives of the ECHR and therefore affect the interpretation of Convention rights. Legitimate expectation is also recognised as a principle of Community law.

Has the decision been made in an "unreasonable" way?

2.49 As well as acting within the limits of statutory, contractual or prerogative authority and using a fair process to come to a decision, decision-makers must not exercise their powers and duties in an "unreasonable" way.

2.50 The level of "unreasonableness" that needs to be shown before the courts will "quash"[32] a decision is often referred to as "*Wednesbury* unreasonableness". The Wednesbury name comes from the case in which this ground for review was formulated.[33] The idea behind it is that the courts will only interfere with a decision that is otherwise lawful or procedurally fair if the decision is so perverse that it can

---

30 *Ibid, per* Sedley LJ at p 320. An echo of the ECtHR's "fair balance" test described at paragraph 2.68.

31 *Ibid,* at p 323.

32 The prerogative order of "certiorari" can quash (i.e. set aside) decisions or subordinate legislation.

33 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, CA.

only have been arrived at by the improper exercise of power. Lord Diplock in the *GCHQ* case said that this ground for review applied:

> *"to a decision which 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."*[34]

2.51 The courts have been careful to point out that review of a decision on the *"Wednesbury"* basis does not involve judges substituting their view of what a reasonable decision would have been for that of the decision-maker. Thus, although the courts have identified a range of foundations for finding decisions to have been "unreasonable", they are all signs of the wrongful use of executive power.

2.52 The threshold for "unreasonableness" is a high one. The courts can only interfere with the exercise of an administrative discretion on substantive grounds when the decision is *"beyond the range of responses open to a reasonable decision-maker"*.[35]

2.53 In "human rights" cases, including those sourced in Community or common law rights, the courts have indicated that they make a more demanding enquiry of how reasonable a decision-maker's response was. This is because:

> *"The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable."*[36]

2.54 A court's review in these cases is sometimes said to be more "intense" because of the importance of the rights involved. This will be the position in relation to cases raising ECHR rights issues as a result of the HRA coming into force.[37]

Intensity of the courts' review of "unreasonable" decisions

2.55 As already noted, the circumstances under which the courts can review the exercise of a decision-makers' discretion on substantive grounds (that is, those not involving just questions of procedure or powers) are limited, and vary as between "human

---

[34] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL(E), *per* Lord Diplock at p 410.

[35] See *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 554.

[36] *Ibid*, at p 554F.

[37] Despite the criticism of the *Wednesbury* threshold by the ECtHR in *Smith and Grady v UK*, The Times, 11th October 1999, under the HRA the UK courts need only take account of its view. The decision does not require them to set aside the established test.

rights" and "ordinary" cases.[38] These limits are said to offer decision-makers a "margin of appreciation" for their decisions. But that phrase can be confusing because it is also used to describe a doctrine adopted by international courts when reviewing national court decisions, for example. We describe in paragraph 5.9 what this latter meaning is in the context of the ECtHR. In this section, we outline what the words mean in the context of the "intensity" with which our domestic courts review administrative action.

2.56 In cases *not* involving human rights issues, the "intensity" of the courts' review is likely to be low if, for example, a decision is concerned with general economic or social policy, particularly if it depends on political judgement. The margin of appreciation or discretion for the decision-maker is therefore correspondingly wide. That means that the courts are likely to be very hesitant to find a decision in such an area is "irrational". But they will look at a range of factors in determining the intensity of their review, including:

- the nature of the executive power;
- the importance of rights or interests affected;
- the decision-maker's level of expertise;
- whether the decision-maker's decision was final, or could be internally reviewed.

2.57 In human rights cases, the intensity of the courts' review is likely to be high. Depending on the importance of the right in question, the decision-maker's margin of appreciation may thus be very narrow or there may be no margin at all.[39] After the HRA is fully in force, the wide application of Convention rights is likely to increase the number of decisions subject to highly intense scrutiny.

"Proportionality"

2.58 Normally, the courts do not measure the weight a decision-maker gives to a relevant consideration. But where an excessive or unreasonable weight has been given to a factor they may intervene. Thus, although "proportionality" is a ground for review under EC law, and a measure for determining permissible restrictions to Convention

---

[38] This distinction may be eroded if socio-economic or environmental "rights", for example, gain more importance.

[39] Where there is an absolute duty on an EU Member State to act in accordance with Community law, there may also be no discretion available. See *Factortame (No. 5)* [1999] 1 WLR 1062, HL(E), *per* Lord Clyde at p1085G-H.

rights in the HRA, it is not certain that it is a separate test yet in English law, for example. But it can be said that the requirement that decisions be "proportionate", and not excessively onerous or harsh when less restrictive measures are available, is part of the general requirement for "reasonableness" in decision-making.[40]

2.59 In Convention rights (from October 2000) and directly effective Community law cases the requirement for "proportionality" applies in order to decide whether a pressing social need justifies a prima facie breach of EC law or ECHR rights.

2.60 The HRA requires that the UK's courts take the "proportionality" requirement "into account" when examining ECHR cases.[41] The test will not be binding under the HRA after October 2000, but it is expected that our courts will use it. Where it has been adopted by the ECJ in cases dealing with ECHR rights, the ECJ's approach will bind our courts in cases concerning Community law issues.

2.61 In ECHR and EC rights cases our courts will therefore ask first:

- were the decision-maker's ends or aims legitimate and sufficiently well defined?

And then:

- were the means chosen necessary, or could the ends have been achieved in a less damaging way assuming alternatives to be possible;
- were the means suitable (e.g. not themselves unlawful or unworkable);[42] and
- did the decision-maker properly balance the ends they sought with the means chosen to achieve them?

2.62 In the next section we focus on judicial enquiry into the legitimacy of ends in ECHR cases.

---

[40] See, for example, the approach taken by the House of Lords in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.* [1998] 3 WLR 1260 HL(E).

[41] See section 2 of the HRA

[42] "Suitability" is rarely an issue.

How will the courts determine whether ends are legitimate?

2.63 Assuming that an ECHR right in issue is not absolute,[43] our courts will first look to the text of the Convention to see the extent to which a right can be infringed or restricted.[44] The Convention is an international treaty and its text must be interpreted according to the general principles set out in the Vienna Convention on the Law of Treaties. This means, for example, that courts must take into account the general objects and purposes of the ECHR when looking at its text. Our courts will also take "into account" any relevant decisions of the ECtHR and its predecessor bodies. Because these have shown, in keeping with the purposes of the ECHR, that the balance of interests favours a right over any restriction, rights can be expected to be given a broad interpretation and restrictions a narrow one.

2.64 That a restriction falls within the scope of those allowed by the text of an Article in the ECHR is not enough. The courts will also enquire as to:

- whether a restriction has been adopted to achieve an aim for which it was not intended;
- whether or not the restriction was necessary because it answered a pressing social need. Some Articles (like 8 to 11) require that the restriction also be "necessary in a democratic society". The courts will look at all the facts and circumstances of a case in making this evaluation.[45]

2.65 If a restriction is adopted for an impermissible aim, or if it is not regarded as necessary to meet a pressing social need, your ends will not be "legitimate".

Proportionality after legitimacy

2.66 If a legitimate aim can be established, the restriction must still satisfy the requirement for proportionality.

---

[43] An example of an absolute right is Article 3, the prohibition against torture. Note, in contrast, the potential for limitations to the rights in Article 9.1, the freedom of thought, conscience and religion. These are outlined in Article 9.2. You need to examine the text of each right to see if it is absolute, limited or merely qualified. The broad categories of Convention rights are set out at page 55. The text of the rights that will have direct effect in UK-wide law after 2 October 2000 appear in Schedule 1 of the HRA.

[44] Bear in mind sections 14 to 17 of the HRA, which set out the limited circumstances in which the UK can "derogate" or "designate reservations" from the ECHR.

[45] For example, the more important a right to a democratic society (like freedom of speech in Article 10), the more pressing the problem must be to justify restriction. See *Sunday Times v United Kingdom (No. 2)* (1991) 14 EHRR 229, ECtHR.

2.67 Some "means" are specifically tested. For example, there are Articles, like Article 10 (freedom of expression), that require restrictions to be "prescribed by law". This means more than that the restriction appears in a UK statute. It refers to the quality of the legislation.[46] For example, the provisions should be accessible, clear and not have arbitrary effects. As the promotion of the "rule of law" as a principle is one of the objects of the ECHR, no restriction should be arbitrary, unfair or based on irrational considerations.[47]

2.68 In a limited number of cases the ECtHR has applied a "fair balance" test.[48] This is similar, but not the same as the test of "proportionality". In these cases the Court has expected public authorities to strike a fair balance between the impact of the decision on the protected right in issue against whatever other public interests militate in favour of making that decision.[49]

2.69 The "*Wednesbury* test"and that for "proportionality" in ECJ and ECHR cases are applied with hindsight. So you need to consider how unreasonable or disproportionate your decision may appear to an outsider after the event. The recorded reasons for your decision will be important evidence of whether it was an "unreasonable" or "proportionate" response. It is predicted that the need to have contemporaneous justification for decisions will increase as a result of the HRA. If you give no reasons for your decision, that in itself may be sufficient for a court to infer that it was "irrational", which might provide a foundation for finding that it was "unreasonable". In the next two sections we discuss your duty to give reasons for the decisions you make and the need to record them.

Do we have to give reasons?

2.70 There is no general duty in administrative law for decision-makers' to *give* reasons for their decisions.[50] That means make them available to the public generally or

---

46 See *Hashman and Harrup v United Kingdom* (Application No 25594), The Times, 1st December 1999, ECtHR; an Article 10 case.

47 See *Fayed v United Kingdom* (1994) 18 EHRR 393, ECtHR.

48 Notably, those concerned with Article 1 of Protocol 1 of the ECHR. See *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, ECtHR.

49 An intractable problem for policy makers is that rights of equal weight might be in conflict within a given situation. See Articles 8 and 10, for example. See *Winer v UK* (1986) 48 DR 154, ECommHR.

50 But under the existing Code of Practice on Access to Government Information, unless an exception applies, Departments must "give reasons for administrative decisions to those affected". The Parliamentary Commissioner for Administration ("the Ombudsman") is likely

those directly affected by a decision. But the courts have been finding a duty to give reasons in more cases, and it has been said that only in exceptional circumstances will a duty not be found.[51] Community law already requires national authorities to give reasons for decisions affecting EC law rights. In addition, when the Freedom of Information Bill becomes law, it is expected to impose a general statutory duty of disclosure in relation to recorded information.[52]

2.71 There are already Acts and subordinate legislation that require reasons to be given in particular situations. Equally, other measures prohibit reasons being given.[53] You will need to check through the legislation governing your powers to see what kind of scheme is being applied. Where a statute or regulation is silent as to the giving of reasons, but provides for an appeals process, a requirement for reasons may be implied in order for the process to be effective.

2.72 There may be other situations that will create a "legitimate expectation" that reasons be given, because that is what a Department promised would happen. Still more where the giving of reasons will be a common law requirement of fairness in decision-making.

Case Example

An appeal was made to the Civil Service Appeal Board (CSAB) against a Home Office employee's dismissal. The Home Office declined to accept the CSAB's recommendation of reinstatement. The CSAB thus awarded £6,500 compensation but did not explain how it had reached this figure. The employee sought judicial review. Two questions arose. First, whether there was an obligation on the CSAB to give reasons for its decision. Second, if the CSAB declined to give reasons, should the court infer that there were no good reasons, or that the CSAB had acted perversely or had taken into account immaterial considerations? The Court of Appeal held that there was a duty to give reasons. The CSAB took decisions which determined rights as between the Crown and its employees. It should have given outline reasons sufficient to show to what it was directing its mind, thereby showing not whether its decision was right or wrong, but whether its decision was lawful. The Court also considered that the award of £6,500 was so low that it should be regarded as irrational in the absence of any explanation from the CSAB as to how the figure was arrived at. (*R v Civil Service Appeal Board, ex parte Cunningham* [1992] ICR 816, CA)

to make a finding of maladministration if reasons are not given.

51 See *Stephan v General Medical Council*, The Times, 11th March 1999, PC.

52 The Bill is still being considered by Parliament in Westminster and it is not yet clear what final form this duty will take.

53 See, respectively, section 23(7) of the Transport and Works Act 1992 and Sched. 2, section 4(2) of the Intelligence Services Act 1994.

2.73 You also need to consider whether the failure to give reasons might be incompatible with the ECHR. For example, if you are taking decisions that will determine a person's civil rights and obligations you will need to ensure the procedural requirements of Article 6 of the Convention (the right to a fair trial) are met.[54] These requirements include the provision that a reasoned decision be made publicly available.[55]

2.74 The effect of the more intense scrutiny of the courts where human rights issues are raised is that decision-makers' reasons are examined more closely. The HRA will increase the number of cases in which this will happen. The courts can be expected to take a rigorous approach to fact-finding, evidence and disclosure in judicial review cases dealing with human rights issues. Ministers and officials will therefore be required to produce detailed justification to the courts and litigants for decisions, policy or legislation.

Recording reasons - what needs to be included?

2.75 Recording reasons helps encourage careful decision-making. A record can show that decision-makers addressed their minds to the relevant issues and followed the principles of good administration. Whether there is a legal duty to record reasons will depend on the particular circumstances of a decision. For example, a duty may arise where rights under Article 6 of the ECHR are relevant. Further, the absence of recorded reasons may lead to a presumption that a decision was "irrational". But even where there is no strict duty in law, the need for Departments to give reasons when requested means that, for practical purposes at least, reasons must always be recorded.

2.76 There is no uniform standard for the quality of recorded reasons, but they must be at least intelligible and address the substance of the issues involved.[56] The following factors will be important:

- any reasons given for the decision must be lawful, that is within the scope of the relevant power or duty;

---

[54] Cabinet Office Guidance on Article 6(1) and Article 1 of Protocol 1(the protection of property) was produced in August 1999 (CRP (EC)(O)(99) 12).

[55] See *Szucs v Austria* (1997) 26 EHRR 310 and *Ruiz Torija v Spain* (1994) 19 EHRR 553, ECtHR.

[56] See *In re Poyser and Mill's Arbitration* [1964] 2 QB 467.

- any material findings of fact should be set out;
- it should be clear that all relevant matters have been considered and that no irrelevant ones have been taken into account;
- any representations or consultation responses should be noted as having been properly considered, addressed and taken into account.

2.77 Where ECHR or Community law rights are in issue:

- reasons may need to deal with the merits of the policy decision;
- the public authority will be expected to correctly identify any Convention or EC law issue.;
- it will need to show the detailed reasoning process undertaken in balancing any competing interests, including the weight attached to the various competing factors and reasons for a particular conclusion.

2.78 The absence of such information, a failure to give sufficient reasons or dependence on the wrong facts or information may be considered evidence of a failure to act compatibly with Convention or EC law rights. In relation to all decisions it will be important to show that Convention rights have been given adequate consideration because the HRA makes it generally unlawful for public authorities to act incompatibly with those rights.

PART THREE
A typical judicial review case

3.1 This section sets out to explain what happens in a typical judicial review case in England, Wales[57] and Northern Ireland, and what you might expect as the civil servant involved in a Ministerial or Departmental decision under challenge. The procedure in Scotland is different from other parts of the UK and is dealt with separately. If you are involved in a Scottish case, you should seek prompt advice from your legal advisers. They in turn should contact the Office of the Solicitor to the Advocate General.[58]

Standing - can *anyone* challenge a decision?

3.2 A "person" applying for judicial review must have "sufficient interest" (i.e. "standing"), in the matters they want reviewed. The result of the rule is that an individual cannot challenge a decision with which they disagree, but that does not affect them personally.

3.3 They will have "sufficient interest" if they have:

- a direct, personal interest in the decision or action under challenge (e.g. they are the prisoner whose application for release on parole has been refused).

3.4 Because "person" includes "legal persons", organisations, like trade unions, which represent people who may be affected by a decision or policy may have "standing".[59]

---

57 The judicial review procedure in England and Wales is currently under review. It is anticipated that new draft rules will be set out in a Lord Chancellor's Department consultation paper following publication of the report by Sir Jeffrey Bowman on *Review of the Crown Office List* in early 2000.

58 Scottish Executive officials should consult the Office of the Solicitor to the Scottish Executive.

59 Note that unincorporated associations, because they are not "legal persons", cannot make an application for judicial review. See, for example, *R v Traffic Commissioner for the North Western Traffic Area, ex parte "Brake"* [1996] COD 248.

Case Example

The Government introduced a modified scheme of criminal injuries compensation, the effect of which was in many cases to reduce the amount of compensation payable to victims. The decision was challenged by an alliance of trades unions. Their members were likely to become victims of crimes of violence, and so the unions had standing to challenge the new scheme. (*R v Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] 2 AC 513, HL(E))

3.5 Groups with a particular public interest sometimes have "standing" to challenge a decision. These are called "public interest challenges".

Case Example

Amnesty International UK and the Redress Trust (represented by Mr Bull) applied for judicial review of the decision of the DPP not to prosecute two individuals for possession of electric-shock batons, contrary to the Firearms Act 1968. They claimed an interest in ensuring the proper enforcement of laws relating to weapons of torture, including an interest in any particular case in which a decision was taken as to whether or not to prosecute for breach of such laws. The batons were alleged to be used in some countries for repressive purposes including riot control. The Applicants had standing as they represented potential victims of such repression who were unlikely to have the opportunity to challenge the decision personally. (*R v DPP, ex parte Bull and Another* [1998] 2 All ER 755, QBD).

3.6 A judicial review application based on a breach of a Convention right in the HRA must be brought by a "victim". This is the same test used by the ECtHR. It means a natural or legal person,[60] group or other non-governmental body directly affected by the alleged violation. This is a narrower test for standing than that for other judicial review cases. In particular, organisations such as Greenpeace or the Child Poverty Action Group will not be able to bring public interest challenges relying on the HRA, although they may be able to intervene or assist individual applicants

[60] Which would include a company, for example, but not an unincorporated association. In relation to the latter, see *Canea Catholic Church v Greece* (1999) 27 EHRR 521, ECtHR.

where relevant.[61] The same test of standing has been adopted in the devolution legislation for Convention rights challenges.

What constitutes a "decision"?

3.7 The challenge will usually be made to a decision affecting an individual, such as the award of a licence or the refusal of parole. But the courts have been prepared to consider challenges to acts falling short of true "decisions". For example, where a Department issues guidance in which it tries to explain how a statute should be interpreted or a policy operated.

Case Example

When the "Poll Tax" was introduced, the Government issued a leaflet called "The Community Charge: How it will work for you." The decision under challenge was nominally the decision to issue the leaflet, which was said to be misleading. In substance, the challenge was to the allegedly misleading nature of the guidance. The Divisional Court was prepared to consider the application even in the absence of a true "decision". (*R v Secretary of State for the Environment, ex parte Greenwich LBC* [1989] C.O.D. 530).

Are there any decisions which the courts cannot review?

3.8 The proceedings of Parliament in Westminster are not open to judicial review as a matter of "constitutional" law.[62] Decisions involving the use of certain prerogative powers, like the power to make treaties or the grant of honours, are also considered not susceptible to judicial review. This is because the *"nature and subject matter"* of particular prerogative powers are *"not ... amenable to the judicial process."*[63] For example, the Government's decision to sign an international treaty will not be

---

61 A consequence of the "victim" test is that a court examining a public interest challenge, for example, brought by a body which has standing under Order 53 for human rights issues found in common law, but is not a "victim" within the meaning of s 7 of the HRA, will not have jurisdiction to consider whether ECHR rights have also been breached or the power to order any remedies under the Act. See the discussion at para 2.7.3, Lester & Pannick (eds), *Human Rights Law and Practice*, Butterworths, 1999. Note also that section 11(b) of the HRA safeguards the right to bring non-HRA proceedings relying on existing human rights for persons who are not "victims".

62 See Article 9 of the Bill of Rights 1689 and, for example, *Hamilton v Al Fayed* [1999] 1 WLR 1569, CA. But a case may be brought before the ECtHR by a "victim" if the proceedings of a Parliamentary Committee, for example, were to breach ECHR rights.

63 See *The Council of Civil Service Unions v The Minister for the Civil Service* [1985] AC 374, HL(E), *per* Lord Roskill at 418B-C.

reviewable, being a matter of "high" political policy. But a decision that affects an individual's freedom to travel, like denial of a passport, may be.[64]

3.9 In other areas, generally the more political the policy element in a decision the greater the courts' deference has been to the judgement of decision-makers. But the degree of the courts' deference will depend on the "intensity" of judicial scrutiny applied to a decision depending on all its circumstances. As already discussed in the section on "unreasonable" decisions, where human rights are affected by a decision, a high level of scrutiny will be applied.

Before the challenge reaches court

3.10 If an application for judicial review is not urgent, the first warning a Department is likely to have that a decision is being challenged is a "letter before claim". This will set out the complaint, and may suggest how it can be resolved without the need for litigation. It may also ask for detailed reasons for a decision. The letter is an opportunity for the Department to consider whether the complaint can be settled, and take any necessary action to settle it. Following the civil procedure reforms, the courts will expect to see *"the spirit of reasonable pre-action behaviour"* in all cases.[65] The courts will therefore take the letter and the Department's reaction to it into account when deciding what they should order. If you receive a letter like this, pass it to you legal advisers immediately.

3.11 If practicable, the person complaining should have exhausted any other remedies they have (e.g. gone through all the immigration appeals procedures) before making an application for judicial review. A court can refuse to hear a judicial review application if they have not .[66]

The "permission" hurdle

3.12 If settlement cannot be reached (it can be made at any time before final judgment), someone who wishes to challenge a decision by judicial review will need to apply

---

64 See *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811.

65 See CPR Protocol PI, Note 2.4.

66 The effect of section 29(3) of the Supreme Court Act 1981 should also be noted in relation to the judicial review of matters before Crown Courts. A matter is probably excluded from judicial review where the decision sought to be reviewed is one arising between the Crown and the defendant formulated by the indictment. See *R v Manchester Crown Court, ex parte DPP* [1993] 1 WLR 1524, HL(E), *per* Lord Browne-Wilkinson at 1530. Approved in *R v DPP, ex parte Kebilene & Others* [1999] 3 WLR 972, HL.

to the High Court for "permission" (formerly known as "leave") to issue legal proceedings against the Secretary of State, usually as the representative of the Department.

3.13 In court and on the court documents, the person applying for judicial review will be described as the "Applicant", and the Secretary of State will be called the "Respondent". The case is brought in the name of the Queen ("R" for Regina) because the Applicant is asking the Crown to monitor the powers being exercised in its name. So the case will be "cited" as R v (i.e. versus) The Secretary of State, ex parte (i.e. on behalf of) the Applicant.

3.14 Permission will only be granted if the court considers that:

- the Applicant has "standing";[67]
- there is *an arguable case*, and
- that the Applicant has not unduly delayed seeking permission.

3.15 CPR Schedule 1, RSC Order 53[68] requires an application for permission to be made *"promptly and in any event within three months from the date when grounds for the application first arose"*, although the courts have the power to extend that period.[69]

3.16 When very short delay has caused, for example, serious administrative inconvenience or financial loss to third party interests, permission may be denied even when the application has been made within three months of the decision.[70]

---

67 Although the court must address its mind to standing at the permission stage, as the House of Lords made clear in *R v IRC, ex parte Federation of Self-Employed* [1982] AC 617, standing is rarely possible to determine as a preliminary issue, being a mixed question of fact and law to be decided in all the circumstances of a case.

68 The Civil Procedure Rules ("CPR") govern procedure in the civil courts in England and Wales. The rules were introduced on 26th April 1999, replacing the County Court Rules 1981 and the Rules of the Supreme Court 1965. Order 53, which governs judicial review proceedings, did not form part of the first phase of the CPR reforms, but was re-enacted (with minor amendments) in Schedule 1 of the CPR. The CPR generally use the term Claimant rather than "Applicant" for court actions, but as Order 53 refers to "applications" being made, the familiar term Applicant has been used here.

69 Order 53, Rule 4(1). See also section 31(6) of the Supreme Court Act 1981. In Northern Ireland, the Rules of the Supreme Court (Northern Ireland) ("RSC(NI)") apply, not the CPR. Applications are still for "leave" and must be made "promptly", i.e. within 3 months.

70 If the "Respondent" Department wants to raise the question of delay, it must do so at the permission hearing or on an application to set the permission aside.

3.17 Applications for permission are usually considered on paper by a judge, but applicants can ask for an oral hearing.[71] The Secretary of State does not have an automatic right to be represented at the hearing, but the courts will allow representation if they consider that justice requires it. For example, they will normally allow Ministers to "appear" at the permission stage if they have anything to say which would assist a court's determination of the application.

3.18 Applicants who are refused permission on a paper application may renew their application to a single judge (civil cases only) or the Divisional Court (criminal cases).[72] Where a court grants permission at a hearing in which the Respondent is not represented, an application can be made to set the permission aside. Permission will only be set aside in exceptional circumstances, for example, where:

- the application contained no arguable case at all; or
- the Applicant did not give full and frank disclosure of all relevant matters of fact or law.

Evidence

3.19 If permission is granted, the "papers" are "served on" (i.e. delivered to) the particular Department's lawyers designated for service. In most cases this will be the Treasury Solicitor, but MAFF, the Departments of Health and Social Security, the Inland Revenue, and HM Customs and Excise have their own in-house "Solicitor" who is the person served. In matters relevant to the National Assembly for Wales service should be on its Counsel General. In Northern Ireland, papers are served on the Crown Solicitor.

3.20 The "papers" will consist of Forms 86 and 86A (the documents formally setting out the Applicant's case) and a witness statement verifying the facts relied on.[73] The Department's legal advisers will take a view on whether the challenge can be defended. If the legal advice is that the challenge cannot be defended, and the

---

71 "Leave" applications are usually heard orally in Northern Ireland (see Order 53 of the RSC(NI)). The court may direct an applicant to appear before it. It cannot refuse leave without giving an Applicant the opportunity to be heard. Applicants who are refused leave may renew their applications to the Court of Appeal.

72 But not, in "non-criminal" matters, where the permission was determined with a hearing.

73 See CPR Practice Direction - Schedule 1, Order 53. In Northern Ireland, RSC(NI) Order 53 rule 5 requires a "statement" (the equivalent of Forms 86 and 86A) supported by an "affidavit" (a sworn statement of the facts).

Department accepts that advice, the proper course is for the case to be conceded (and the decision quashed by consent). Sometimes the decision can then be considered by the Minister or Department afresh.[74] It would be improper to seek to defend a challenge for purely presentational reasons.

3.21 There is a tight timetable for judicial review cases. The Applicant may have secured a court order that the Department give "disclosure" of relevant documents.[75] The Applicant will have the right to inspect "disclosed" material. You will be expected to promptly assist in the consideration of the case against your Department by directing its lawyers to the relevant papers in your files, explaining any policy considerations that affected your actions, and helping them to understand why and how the decision under challenge was reached. If the case is to be defended, you may be asked to make a witness statement setting out the Department's side of the case and attaching relevant material from your files.

3.22 Where breach of Convention rights is alleged, the court will expect all relevant policy consideration and details of the reasoning process showing the way in which competing interests were balanced to be set out in the witness statement. Relevant supporting documentation will also be needed. The drafting of the witness statement will usually be done by your Department's lawyers after discussions with you. But you must satisfy yourself that it is an accurate, complete and frank account of the action under challenge, and that any relevant documentation is provided.

Witnesses

3.23 A judicial review challenge examines the legality, in administrative law, of a decision. The facts are usually not in dispute, and it is exceptional for evidence to be given orally by witnesses. Occasionally where material factual disputes arise, the people who gave the witness statements can be required to attend the hearing in order to be cross-examined. In HRA challenges, this may become more common.

At the main hearing

3.24 It is possible for the "substantive" application (ie the actual challenge which follows the permission stage) to be scheduled for hearing very quickly, possibly within 24 hours if the issues are sufficiently urgent.[76] But non-urgent cases may have to wait

---

74 For example, where procedural unfairness made the decision irrational, but not *ultra vires.*

75 Orders for disclosure are currently very rare in judicial review cases (because facts are not usually in dispute), but are expected to be less so after the HRA is fully in force.

76 The time period is generally shorter in Northern Ireland.

for over a year. You will usually be expected to attend the hearing to offer guidance (eg on factual issues) to your legal advisers. The hearing will be before a single High Court judge or the "Divisional Court", which is a court of the Queen's Bench Division of the High Court. The Divisional Court sits with two to three judges.

3.25 The procedure is straightforward; it may take from an hour or two to several days, depending on how complex the case is:

- The lawyer appearing for the Applicant[77] introduces the case, refers to the witness statements and addresses the court about the law. Reference will often be made to cases previously decided by the courts which concern similar points of law (called "precedents" or "authorities").
- The Department's lawyer will then present the case in answer to the Applicant.
- Finally, the Applicant's lawyer may address the court again on any points arising from the Department's case.
- The court then considers the rival arguments and delivers a decision, either immediately or after taking time for consideration (a judgment delivered later is called a "reserved judgment").

The powers of the court

Interim relief

3.26 The difficulties caused by delay in obtaining a hearing date often lead applicants for judicial review to seek "interim relief". For example, an injunction to preserve the status quo until a full hearing is possible. An injunction can now be made and enforced against Ministers and Government Departments, not only in Community law cases but also public law cases generally.[78]

3.27 Injunctions against Ministers and Departments remain rare because they have usually been prepared to give undertakings not to proceed with action pending the substantive hearing. Whether or not to give an undertaking is something that you may be required to consider as a matter of urgency at the outset of a case. It is a decision you should make with the assistance of your legal advisers.

---

[77] Applicants can represent themselves rather than using a lawyer. They are "litigants in person" when they do this.

[78] See *In re M* [1994] 1 AC 377, HL(E). But the position is different in Scotland. See para 3.44.

3.28 Since 26th April 1999 the CPR have conferred a new power on the courts to grant interim declarations as to the law.[79] This may be exercised by a court in the expectation that a public body will act in accordance with the declaration pending a final hearing. If the public body fails to do so, an application might then be made for an injunction.

Remedies following a successful challenge

3.29 All the remedies available to the court are discretionary. That means that a successful Applicant has no right to a remedy, but in practice the court will usually at least grant a declaration. Issues it will take into account when deciding whether to grant a remedy include:[80]

- any delay in bringing the case;
- whether the applicant has suffered substantial hardship;
- any impact the remedy may have on third parties;[81]
- the merits of the case; or
- whether it would promote good administration.

3.30 The remedies available are:

- "certiorari", which is a court order which "quashes" (ie sets aside) a decision or subordinate legislation found unlawful;
- "prohibition", which is a court order telling a body not to perform a particular act held unlawful;
- "mandamus", which is a court order telling a body to perform a public duty;
- "a declaration", where the court declares what the law is, for example that a decision is unlawful;
- an injunction, usually an order not to do something, but it can be positive;
- damages, in a limited number of circumstances.

3.31 If the court quashes a decision, it may send it back to the Secretary of State with a direction that it be reconsidered and a decision reached in accordance with the court's findings.[82]

---

79 Again, not available in Northern Ireland where the RSC(NI) and not the CPR apply.

80 See s 6(b), Supreme Court Act 1981.

81 Note the effect of section 12 of the HRA, where the relief granted may affect the exercise of the ECHR right to freedom of expression (Article 10). Also section 13, where the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion (Article 9) may be affected.

82 See s 31(5), Supreme Court Act 1981.

3.32 Once the HRA is in force, the higher courts will also be able to make a "declaration of incompatibility" in relation to legislation found to be incompatible with incorporated Convention rights.[83] We set out in paragraphs 5.19 and 5.20 what the effect of a declaration will be.

3.33 Any courts dealing with the competence of devolved bodies in Scotland, Wales and Northern Ireland already have new statutory remedies in relation to Acts or measures found incompatible with the ECHR or Community law. You will find these described at pages 51 and 52.

When can the court award damages?

3.34 The circumstances in which damages can be awarded are at present limited to those where:

- damages would have been available in a private law action, such as false imprisonment or misfeasance in public office;
- in some cases involving a breach of EC law.[84]

3.35 After the HRA is fully in force damages may be awarded where breach of a Convention right is established. Section 8(4) of the HRA lays down that in determining any damages award the courts must "take into account" the principles applied by the ECtHR when it determines an award of "compensation". It is likely that our courts will follow the ECtHR's practice that damages should "afford just satisfaction" to a victim. This is a less generous measure than that given by private law in the UK, although our courts are not bound by ECtHR practice.

3.36 We discuss in more detail two important areas that may give rise to a private law measure of damages in judicial review in Part Four.

Appeals

3.37 A party who objects to a court's decision can appeal it to the Court of Appeal only with "permission". An application for permission to appeal must be made to a court immediately following its judgment. If the court decides not to grant permission, an application for permission may then be made to the Court of Appeal itself.[85] In

---

83 See section 4 of the HRA.

84 See para 5.50 for more detail.

85 See CPR Court of Appeal PD, 2.2. The rules are slightly different for criminal cases.

exceptional cases of importance there may be a further stage of appeal to the House of Lords.

3.38 In Northern Ireland there is an automatic right of appeal to the Court of Appeal from the decision of a judge. An appeal from a decision of the Divisional Court can be made to the House of Lords with the leave of the Divisional Court or the Judicial Committee of the House of Lords.

Judicial review in Scotland

3.39 The grounds on which judicial review may be sought in Scotland are substantially the same as those described for the rest of the UK. Relevant case law from the courts of England, Wales and Northern Ireland will be considered by the Scottish courts.

3.40 The distinction drawn between public and private law in England, Wales and Northern Ireland is not applicable in Scotland. The test to be applied to discover if the Scottish courts can judicially review an action is to ask whether there is what has been described as a "tripartite relationship". This means a relationship between the decision-maker, the legislature and the applicant for whose benefit a jurisdiction, power or authority is to be exercised.

3.41 The mechanics of judicial review in Scotland are different from elsewhere in the UK. In addition, the devolution legislation has given the courts additional remedies to deal with acts that are *ultra vires* the Scottish Executive or Parliament. *Ultra vires* acts include acts incompatible with EC law or with ECHR rights in the HRA.

3.42 All applications for judicial review must be made to the Court of Session. There is no application for permission and in most cases there will be only one hearing which will normally be at least 7 days after the application (or petition) has been made. In an urgent case, the hearing will generally be no longer than a week or two after the application. There are no fixed time limits within which proceedings must be raised, although it is open for the Court to rule that the raising of proceedings has been left for too long.

3.43 The petition will describe the facts and circumstances of the decision complained of and the Minister will have an opportunity to submit written answers to the claims made by the petitioner. As in England and Wales, there will generally not be oral evidence. The procedure at the hearing is much as described for the rest of the UK.

3.44 The section above on the powers of the court is equally applicable to Scotland, although the Inner House of the Court of Session in *McDonald v Secretary of State for Scotland*[86] declined to follow *In re M.*[87] It held that interim interdict (the Scots equivalent of an interim injunction) is not available against the Crown.

[86] 1994 SLT 692

[87] [1994] 1 AC 377, HL.

PART FOUR
Private law damages in judicial review

4.1 Except in cases involving breaches of EC law and, in future, HRA actions, awards of damages are not available against public bodies unless a recognised cause of action in tort (civil wrong) can be pleaded and proved. There is no restriction on the kinds of tort that can be used. But here we deal with two important and developing areas, negligence and misfeasance in public office.

Negligence

4.2 Public authorities have no general immunity in tort. But public policy problems arise when negligent conduct is found in the exercise of public obligations or statutory powers. There is a strong public policy interest in ensuring public authorities can carry out obligations necessary for general social wellbeing. The courts have thus held the police to be immune from liability in negligence when investigating crime.[88]

4.3 The courts also recognise that the public purse is finite and financed by taxpayers. They are therefore unwilling to impose the financial burden of paying compensation for private financial loss resulting from the necessary exercise of public duties, unless Parliament intended to create that right in tandem with the statutory duty. There is thus reluctance to find a duty of care, giving rise to a private law damages remedy, if a claim is founded on the negligent breach of a statutory duty.[89]

---

[88] Although the immunity of the police has been gradually eroded in case law.

[89] See *Stovin v Wise* [1996] AC 923, HL(E). But distinguish the situation where abuse of a discretionary power can give rise to a common law duty of care. Here, because the act complained of is beyond statutory authority, public policy protection against a private law damages claim is lost; see *Barrett v Enfield LBC* [1999] 3 All E R 193, HL, *per* Lord Slynn at p 208-9, for example.

Case Example

Five children from one family (represented by the Official Solicitor) sued the local authority responsible for social services in their area. For a prolonged period the local authority had been receiving reports from the children's relatives, GP, teachers and the NSPCC, amongst others, that the children were severely neglected and at risk of sexual abuse. Several years after the authority first received reports of abuse, it called a case conference. It decided at this time to take no action. At their parents request, the children were placed in foster care. The children were placed on the child protection register in 1992 and final care orders were made in 1993. They argued that the authority had breached its statutory duty of care to them under the Child Care Act 1980 and the Children Act 1989 by not acting more quickly and effectively to protect them from abuse. As a result they had suffered physical ill-treatment, neglect and illness. Both Acts placed duties on and gave powers to local authorities to take children into care if necessary for their interests and welfare. On the defendant's summons, the children's claims were struck out for disclosing no reasonable cause of action. The Court of Appeal and House of Lords upheld this decision. The House of Lords held that the statutes were designed to promote the social welfare of the community, but that Parliament had not intended them to create more than public law duties. The children therefore had no private law cause of action for damages for breach of statutory duty.(*X (Minors) v Bedfordshire C C* [1995] 2 AC 633, HL).[90]

4.4 Ultimately, each case in this area has to be looked at on its own merits. Extensions to actionable negligence will not be acknowledged unless that is fair, just and reasonable in all the circumstances.[91] However, the duty of care held by public authorities may undergo judicial development after the HRA applies in full.[92] This is partly as a consequence of the effect of the ECtHR's decision in *Osman v UK*,[93] which the courts will in future be required to take into account when looking at duties of care arising from statutory duties.

---

90 Note that the claimants are raising ECHR rights issues arising from this case before the EctHR, see *Z and Others v United Kingdom*, (Application No 29392/95). Compare the effect of the US constitution on the Supreme Court's approach to similar facts in *DeShaney v Winnebago County Department of Social Services, 489 US 189 (1989).*

91 The test laid down in *Caparo Industries plc v Dickman* [1990] 2 AC 605, HL. In *Barrett v Enfield LBC, ibid*, it was said that the decision as to whether extension was "*fair, just and reasonable*" depended on "*weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered*", *per* Lord Browne-Wilkinson at p 198.

92 For an indication of the courts' anticipating this change, see *Barrett v Enfield LBC* [1999] 3 All E R 193, HL and *Gibson v Chief Constable of Strathclyde Police*, The Times, 11th May 1999.

93 [1999] 5 BHRC 293, ECtHR

Case Example

Mrs Osman (and her son) sued the police for damages, alleging they had been negligent for failing to prevent her husband from being killed by an insane man. Her case was struck out in the Court of Appeal on the grounds that the police had no general liability in negligence in relation to the conduct of the investigation[94]. She petitioned the ECtHR on the grounds that her right to have her claim determined by a tribunal (Article 6.1 of the ECHR) was denied in the UK. The Court agreed, holding that the immunity of the police from the negligence claim was not proportionate to the public policy grounds put forward to justify its existence. (*Osman v United Kingdom* (Case No. 87/1997) [1999] 5 BHRC 293, ECtHR)

Misfeasance in public office

4.5 Where it can be shown that the decision-maker was not merely negligent, but acted with "malice", a private law action is possible for the tort of "misfeasance in public office". An example might be where a prison officer unjustifiably punished a prisoner out of spite, or an official rejected an income support application because they disliked the applicant.

4.6 While proof of spite or ill-will may make a decision-maker's act unlawful and give rise to the tort of misfeasance in public office, actual malice is not necessary to prove the tort. It is enough that the decision-maker knew he or she was acting unlawfully and with the *known consequence* that this was in a way that *would injure* the claimant, or was recklessly indifferent to that result.

Case Example

BCCI had been licensed as deposit-takers by the Bank of England under statutory powers. Three Rivers District Council was a depositor with BCCI, and lost the whole of its deposit when BCCI went into liquidation. The Council sued the Bank of England for misfeasance in public office. The Commercial Court held that in every case there had to be a deliberate and dishonest abuse of power by an official who knew that the Plaintiff would suffer loss as a result, or who was recklessly indifferent to that result. It was not reasonably arguable that, in failing to regulate BCCI, the Bank of England had made an unlawful and dishonest decision knowing at the time that it would cause loss to the Council. (*Three Rivers District Council v Governors and Company of the Bank of England (No 3)*, upheld by the Court of Appeal (1999) 11 Admin LR 281, CA).

[94] See *Osman and Another v Ferguson* [1993] 4 All ER 344, CA

The Ombudsman

4.7 In some circumstances the Parliamentary Commissioner for Administration (the Ombudsman) may require a Department to pay compensation (notwithstanding there is no strict legal liability) if maladministration is found.[95] The Government of Wales Act 1998 makes provision for a Welsh Administration Ombudsman

[95] See the companion guide to this one, called "The Ombudsman in Your Files."

PART FIVE
What else should I know about?

5.1 In this section, we set out some general information on the current legal effect of the Human Rights Act 1998, the European Convention on Human Rights and devolution. There is also a brief summary of relevant EC law. Other Government publications look at these topics in more depth.

5.2 The UK is in the process of landmark constitutional change. What follows is our best assessment of the law as it stood in December 1999.

Human Rights Act 1998

5.3 The HRA gives *further effect* to rights and freedoms guaranteed under the ECHR.

European Convention on Human Rights

5.4 The Convention for the Protection of Human Rights and Fundamental Freedoms,[96] better known as the European Convention on Human Rights, is a treaty of the Council of Europe. The Council is an international organisation in its own right and not part of the EU. It includes in its membership many non-EU States.

5.5 The ECHR is one of a number of international treaties created by the Council since its foundation in 1949, but is probably its best known. It was inspired by the adoption of the Universal Declaration of Human Rights by the UN General Assembly in December 1948. The United Kingdom was the first State to ratify the ECHR, which became binding in international law on those States which had ratified it in September 1953.

5.6 In 1966 the UK accepted that an individual, and not just another state, could bring a case against it before the bodies established by the Convention to supervise and enforce Contracting States' compliance.[97] Today, the European Court of Human

[96] Rome, 4th November 1950; TS 71 (1953); Cmd. 8969.

[97] This is referred to as the right to individual petition.

Rights in Strasbourg ("ECtHR") is the international tribunal which decides cases brought by individuals,[98] for example, to enforce their Convention rights. [99] But to exercise the "right to individual petition" they must show that the remedies available to them in national courts have been exhausted. ECtHR decisions are binding, in international law, on the UK.

5.7 The Convention has been described as *"a living instrument which ... must be interpreted in the light of present-day conditions"*.[100] It can therefore be interpreted flexibly, to account for changing social values.[101] Its rights are practical and should not have their effectiveness impaired, but they must be fairly balanced as between the individual and the wider community. The ECHR must also be interpreted in accordance with the general principles of the Vienna Convention on the Law of Treaties.[102] This requires interpretation:

- to be in "good faith";
- to look at both the wording[103] and the general objects and purposes of the Convention;
- to have regard to subsequent practice; and
- to have regard to the common approach of Contracting States in applying the Convention.[104]

5.8 The Convention rights are often said to exist in a "hierarchy", but this gives the misleading impression that some rights can trump others. More accurately they fall into broad categories. Some, like Article 3 (the prohibition of torture), are called "absolute" because the rights they protect are regarded as so important that no

---

98 The Convention rights can be relied on by any natural or legal person, or group of persons, and sometimes NGOs as well, but not governmental bodies or organisations. Contracting States can bring claims against each other.

99 The Court is the successor body to the European Commission of Human Rights and the Committee of Ministers of the Council of Europe in this role, although the decisions of both and advisory opinions of the Commission are still referred to as precedents.

100 See *Tyrer v United Kingdom* (1978) 2 EHRR 1 at 10, ECtHR, para 31.

101 But see *Johnston v Ireland* (1986) 9 EHRR 203, ECtHR, p 219, para 53, for an indication of the limits to this process.

102 See Articles 31-33 and *Golder v United Kingdom* (1975) 1 EHRR 524, ECtHR.

103 Its words are said to have an "autonomous meaning". That is, individual words are defined within the context of the ECHR, not by the rules of national legal systems. Words in the Convention therefore have the same meaning and effect in each Contracting State.

104 But this doesn't require adherence to a uniform view (even if one exists), in particular the ECtHR has indicated that Contracting States will have a wide "margin of appreciation" in relation to concepts of morality closely tied to national cultural and historical traditions. See, for example, *F v Switzerland* (1987) 10 EHRR 411, ECtHR.

derogation from them is permitted. Others, like those in Articles 8 to 11, are described as "qualified" because they require a balance to be struck between individual liberty and the competing interests of society at large. A third category falls between these two others. These are the rights that can be "limited" (e.g. Article 5, the right to liberty and security), but only in the strictly defined circumstances indicated in the Convention.

5.9 In relation to rights that are not *absolute*, the ECtHR allows a "margin of appreciation" to a member State. This is a pragmatic and flexible doctrine commonly adopted by international courts. As the ECtHR explained, this is because *"national authorities are in principle better placed than an international court to evaluate local needs and conditions"*.[105] But this does not mean that the Court will abdicate its supervisory function simply because national authorities impose a limitation according to local conditions. The ECtHR has made clear that its attitude will vary according to the particular circumstances of the case.[106]

Why will the HRA give Convention rights further effect?

5.10 The words "further effect"come from the "long title" of the HRA. They acknowledge that rights in the ECHR have effect in our domestic law even before the full commencement of the Act on 2nd October 2000. But they also indicate that the effect of ECHR rights is limited in our law prior to that date.[107] You can read our assessment of the effect of ECHR rights in domestic law before October 2000 in paragraph 5.29.

5.11 The words also reflect the view that the rights and freedoms explicitly protected by the Convention are not uniquely found in it. It has always been open to our judges to "find" these rights already present in domestic law.[108]

---

105 See *Buckley v United Kingdom* (1996) 23 EHRR 101 at 129, ECtHR, para 75.

106 See *Buckley v United Kingdom, ibid.*

107 The scope of the limitation is a matter for debate. For example, although the ECHR will not be fully incorporated into UK-wide law before October 2000, certain rights, as principles of customary international law, have probably become part of our domestic law without the need for formal incorporation through a statute. Further, EC law, because it recognises the Convention rights as a source of general principles of law, has given them some direct effect through European Court of Justice ("ECJ") decisions. See *Nold v Commission*, Case 4/73 [1974] ECR 491.

108 See, for example, *R v Lord Chancellor, ex parte Witham* [1998] QB 575, DC

5.12 Lastly, the HRA makes ECHR rights *more effective* in domestic law. The Act "incorporates" the Convention rights which it identifies into the United Kingdom's laws. This gives our national courts the necessary "jurisdiction" to decide disputes over the incorporated ECHR rights. It also means that, unlike ECtHR decisions, their judgments in Convention rights cases will be binding in domestic law.

How will the HRA work in practice?

5.13 UK litigants will no longer need to go to the ECtHR to enforce those Convention rights which have been incorporated.[109] However, a right to petition the Court will continue even after the Act is fully in force. This is because the Act cannot diminish the UK's obligations under the ECHR as an international treaty. So unincorporated ECHR rights will still be dealt with by the ECtHR. The Court is also likely to be used as a final resort by those dissatisfied with decisions concerning incorporated Convention rights made by UK courts. In both types of case, a person will have to show they have exhausted all remedies available to them in national courts before they can make an application to the ECtHR.[110]

5.14 Courts and tribunals will be required to *take account* of the decisions and advisory opinions of the ECtHR and its predecessor bodies in cases involving Convention rights.[111] However, they are not bound by that jurisprudence outside Community law cases, and are free to develop new ways of looking at Convention issues.

5.15 Courts, tribunals and public authorities will be bound by the general statutory duty to read and give effect to primary and subordinate legislation in a way that is compatible with Convention rights, so far as it is possible to do so.[112] We describe below what may happen if a higher court finds legislation to be incompatible.

---

109 A "free standing" case under the HRA must generally be brought within 1 year of the act or omission complained of (see s7(5), HRA).

110 To be admissible, the application must be brought within 6 months from the date on which the final decision in the process of exhaustion is taken. See Article 35(1) of the ECHR and *Walker v United Kingdom* (Application No 34979/97) 25 January 2000, ECtHR.

111 See section 2 of the HRA. The ECtHR has recently held that ECHR rights take precedence over EC law. See *Matthews v United Kingdom* [1999] 5 BHRC 686, ECtHR.

112 See section 3 of the HRA.

5.16 It will be unlawful for any public authority, including a court or tribunal, to act in a way which is incompatible with Convention rights, unless their duty under primary legislation means they cannot act otherwise.[113]

5.17 The expression "public authority" is very wide (but excludes Parliament in Westminster).[114] It extends to obvious public authorities, like Government Departments, Next Steps Agencies, utility regulators, local authorities and police authorities. It also includes organisations with a mix of public and private functions in relation to the public functions they exercise. This would include Group 4, for example, when it transports prisoners, but not when it provides supermarket security guards.

5.18 Including courts within the "public authority" definition means that the Act will also have an indirect impact on private litigants, as courts will need to comply with Convention rights during any proceedings.[115] Further, the doctrine of precedent in all cases will need to give way where Convention rights are in issue. This will be the case whenever a statutory provision comes to be interpreted. These collateral consequences for private litigants are sometimes described as the "indirect horizontal effect" of the Convention, because its rights are not *directly* justiciable in actions between private individuals.

What happens when courts find legislation incompatible with ECHR rights?

5.19 If a higher court[116] determines that a provision is incompatible with an incorporated Convention right, it may make a "declaration of incompatibility".[117] The Crown has a right to be put on notice where a court is considering a declaration, and can intervene.[118]

---

113 See section 6 of the HRA.

114 See section 6(3) of the HRA.

115 See the effect of section 9 of the HRA in relation to challenges in respect of "judicial" acts.

116 Only the higher courts have the power to declare legislation incompatible with Convention rights or quash subordinate legislation. The higher courts are the House of Lords, Judicial Committee of the Privy Council, Courts-Martial Appeal Court; in England, Wales and Northern Ireland, the High Court and Court of Appeal; in Scotland, the High Court of Justiciary (not sitting as a trial court) or the Court of Session.

117 See section 4 of the HRA.

118 See section 5 of the HRA.

5.20 A declaration does not have the effect of making *primary* legislation invalid. Parliament remains sovereign in the HRA, but the Government may take remedial action to amend the legislation.[119] Subordinate legislation declared incompatible can be quashed by a higher court.[120] It is worth remembering that for the purposes of the HRA:

- Acts of the Scottish Parliament and the Northern Ireland Assembly;
- all measures of the National Assembly for Wales; and
- any Act or measures of the Scottish or Northern Irish Executives are subordinate legislation.

5.21 In addition, the devolution legislation now in force contains different (after 2 October 2000, additional) remedies when acts of any of these bodies are *ultra vires* because they are incompatible with Convention rights.

The effect of the HRA before 2nd October 2000

5.22 Described above is what will happen once the HRA is fully in force. We say "fully in force" because although the Act received Royal Assent on 9th November 1998, only a limited number of its provisions were brought into effect then. They were sections 18, 20, 21(5) and 22. Section 19 came into force on 24th November 1998. The Government has announced that the remaining provisions of the Act will come into force on 2nd October 2000.

5.23 In relation to sections of the Act not yet in force, the House of Lords has made clear that they have no *direct* effect until 2nd October 2000 and that no legitimate expectation can therefore be raised in relation to any rights in those sections before that date.[121] Of those sections that are in force, the most significant are sections 19 and 22(4).

5.24 The coming into force of section 19 has important consequences for statutory interpretation. The section requires that a Minister in charge of a Parliamentary Bill must publish a written statement declaring whether its provisions are compatible with Convention rights in the HRA. If a "statement of compatibility" is not possible,

---

119 See section 10 of the HRA.

120 Note that a Minister or Department will be acting *ultra vires* (because of the duty in s 6(1) of the HRA) if either makes subordinate legislation that is incompatible with a Convention right, unless primary legislation requires the subordinate legislation to take that form.

121 See *R v DPP, ex parte Kebilene and Others* [1999] 3 WLR 972, HL.

the Minister must note that and declare that the Government wishes Parliament to proceed with the Bill nonetheless. The latter might be an unusual option, as the Minister may in effect be declaring his view that the UK would be in breach of its treaty obligations under the ECHR were the Bill to become law. Ministers will therefore require considered advice from officials before making such a statement.[122]

5.25 Section 22(4) states that section 7(1)(b) of the HRA:

> *"applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section."*

5.26 Section 7(1)(b) reads:

> *7.—(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1)may—*
> *...*
> *(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.*

5.27 Section 6(1) contains the provision that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. The provisions of sections 22(4) and 7(1)(b) were interpreted by the House of Lords in *Ex parte Kebilene* to mean that a trial and any appeal would be treated as parts of one process. Therefore although the provisions of section 7(1)(b) are not yet in force, through section 22(4) they will have some retrospective effect.

5.28 For example, a criminal trial that raises Convention rights issues may begin in December 1999, at which time section 6 of the HRA cannot be relied on. But an appeal may be heard in December 2000 that can consider acts of the prosecuting authority not unlawful at the time the decision to prosecute was taken. The Government's Notes on this Clause of the Bill and published Home Office advice give some further indications of the meaning of section 22(4).[123] Bear in mind that the section is *not* confined to criminal proceedings.

---

[122] Some guidance on section 19 obligations can be found on pages 12 to 14 and in Annex A of *Human Rights Comes to Life - The Human Rights Act 1998: Guidance for Departments.*

[123] Both appear in an article by Francis Bennion, *A Human Rights Provision Now in Force*, Justice of the Peace, p 164, Vol 163, 27th February 1999.

5.29 Recent case law indicates that the courts' view on the applicability of Convention rights in domestic law before October 2000 will be as follows:

- The courts will presume Parliament's intention was to legislate in keeping with the UK's obligations in international law to act in conformity with the Convention, unless it makes express, in clear statutory words, that this was not its intention.[124]
- Where legislation was enacted specifically to fulfil an ECHR obligation or right, it will be presumed that Parliament's intention was that the statute should meet the obligation.
- On questions of common law the courts will not rule inconsistently with Convention rights.
- If the courts are required to exercise a discretion, they will not do so in such a way as to violate any Convention rights
- Where the ECJ has drawn on the ECHR or ECtHR jurisprudence, its approach will bind UK courts as Community law courts.
- In cases which raise Convention rights also recognised in common law, the courts are likely to draw on the ECHR and ECtHR jurisprudence.[125]
- Any acts or measures of the Scottish Parliament, Scottish Executive, Northern Ireland Executive or Assembly or the National Assembly for Wales that are inconsistent with Convention rights will be held *ultra vires.*[126]

5.30 It is thus not safe to assume that because full implementation of the HRA is some months away you can push Convention rights to one side. The devolution legislation has already introduced remedies for acts of the devolved authorities considered incompatible with ECHR rights. We discuss these in the devolution section that follows. In other parts of the UK, Convention rights have some effect and case law is developing quickly in this area. In particular, judges are increasingly familiar with the text of the HRA and ECHR, and may have a strong incentive to "find" "Convention rights" in existing common law before October 2000.

---

124 See *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539,HL, *per* Lord Steyn, for example, at 587C-D and 591E-F and Lord Browne-Wilkinson at 575D; and *R v Secretary of State for the Home Department, ex parte Simms and another* [1999] 3 All ER 400, HL.

125 See, for example, *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198, CA.

126 See the opinion of the Appeal Court, High Court of Justiciary in Scotland in *Starrs and Chalmers v Procurator Fiscal, Linlithgow*, The Times, 17th November 1999.

5.31 So if you think you may have an ECHR or HRA issue on your desk, play the safe option and promptly contact your legal advisers. If the problem may be long-running, get regular updates from them.

Devolution

5.32 The United Kingdom now has four "legislatures":

- Parliament in Westminster;
- the Scottish Parliament;
- the Northern Ireland Assembly; and
- the National Assembly for Wales.[127]

5.33 Devolution transfers some areas of legislative competence to the new legislatures, but key areas (like defence and foreign policy) remain with the UK Government. The exact boundaries for competence differ within the 3 devolution settlements. The one common theme is that Ministers and civil servants, whether they work in Whitehall or one of the devolved administrations, will need to be sure that their acts do not stray into areas that remain with or are devolved to other executive or legislative bodies.[128] Any act that does so will be *ultra vires*, and both referable to the Privy Council as a "devolution issue" as well as being susceptible to judicial review. EC law will bind all the executive and legislative bodies.

5.34 The Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 all contain provisions to ensure that the new devolved bodies do not act incompatibly with ECHR rights in the HRA. These provisions are effective from the date the relevant legislature or devolved administration is established, and not the date for HRA commencement.[129]

5.35 As a consequence, it is now unlawful, being *ultra vires*, for the Scottish Parliament, the Scottish Executive, the Northern Ireland Assembly or Executive or the National Assembly for Wales to act in a way which is incompatible with Convention rights. The same is true of any act incompatible with Community law.

---

127 The National Assembly for Wales is the only devolved legislature that has its competence restricted to secondary legislation.

128 A system of dispute resolution has been established, culminating in references to the Judicial Committee of the Privy Council, to decide issues of legislative competence.

129 In Scotland, for example, where the "duty" has been effective since 20th May 1999, between 5 and 10 criminal cases each week were initially reported to be raising Convention rights issues.

5.36 The Northern Ireland Act contains an important additional provision, making it *ultra vires* for devolved bodies in the province to act in a way that discriminates against anyone on the grounds of religious belief or political opinion.[130]

5.37 However, the National Assembly for Wales can only make *subordinate* legislation. When it makes legislation which is incompatible with a Convention right because:

- UK primary legislation requires it to act in this way, or
- only offers options for subordinate legislators[131] that are incompatible with the ECHR,[132]

the Assembly will *not* have acted *ultra vires.*[133]

5.38 The Scotland, Government of Wales and Northern Ireland Acts all contain the same scheme for dealing with *ultra vires* actions. A court or tribunal may:

- make an order removing or limiting any retrospective effect the *ultra vires* decision may have, or
- suspend the effect of the decision to allow any defect it has to be corrected.

5.39 Under the three Acts, challenges to acts of the devolved bodies on the grounds of incompatibility with Convention rights can only be brought by "victims". This is the same test of *standing* used in the HRA. An exception to the rule is that the Law Officers can bring a challenge even if they are not "victims". Any damages awarded will also be on the basis set out in the HRA.

5.40 The devolution legislation does not alter the susceptibility of devolved bodies' decisions to judicial review as normal. It merely provides additional remedies.[134] For example, cases that allege acts are unlawful because they are incompatible with

---

130 Section 24(1)(c) of the Act. By section 68 it also establishes a Northern Ireland Human Rights Commission to *"keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights"* (section 69(1)).

131 Ministers in the Scottish and Northern Irish Executives have no power to make incompatible subordinate legislation.

132 The subordinate legislation in this situation is sometimes called "inevitably inconsistent" because it is incompatible with a Convention right, but primary legislation prevents the removal of the incompatibility.

133 See section 107(4)(a) of the Government of Wales Act 1998.

134 A further, non-judicial, remedy is the power of any Secretary of State to order proposed action not to be taken or revoke subordinate legislation incompatible with the UK's international obligations (e.g. see s58 of the Scotland Act). Intervention prior to Royal Assent on a Bill is also possible in the Scotland Act (s35).

Community law can be brought in the courts of Scotland, Wales or Northern Ireland as Community law courts just as they could be before devolution.

5.41 Once the HRA is fully in force, the legislation of the devolved bodies could also be quashed by a higher court if declared incompatible with Convention rights. This is because *for the purposes of the HRA* all their legislative acts are treated as subordinate legislation. However, be aware that the relationship between the HRA and the devolution legislation is complicated, particularly before full commencement of the Act.

5.42 Acting incompatibly with EC law or Convention rights may raise a "devolution issue" under the devolution Acts. This position will not alter after 2nd October 2000. Devolution issues are questions that can be put to the Judicial Committee of the Privy Council for a ruling. Cases may reach the Judicial Committee:

- on appeal, or
- by referral from a lower court or tribunal or the House of Lords.

5.43 Cases may also be brought directly in the Judicial Committee by:

- a UK Law Officer;[135]
- the Lord Advocate in Scotland;
- the First Minister and deputy First Minister of the Northern Ireland Executive, acting jointly under the Northern Ireland Act 1998; or
- the National Assembly for Wales.

5.44 As yet there are no court decisions dealing with devolution. Your legal advisers are your best resource if you need help with this area. Whatever the situation you encounter, we recommend you consult them if you think it may touch a devolution or HRA issue or both. You should also consider the need to consult other Departments either directly or through the Cabinet Office.

EC Law

5.45 Community (or "EC") law is incorporated into the UK's laws by the European Communities Act 1972. In some circumstances, where EC Treaty provisions or EC Directives have not been given full effect in national law, individuals may rely

[135] A new UK Law Officer post of "Advocate General" has been established to deal with this role in relation to Acts of the Scottish Parliament. This law officer will also advise the UK Government on questions of Scots Law.

directly on the rights they create.[136] These rights are described as having "direct effect" because they are enforceable in national courts without the need for legislation by a Member State. In addition:

- All EC Regulations are "directly applicable" and enforceable without the need for national implementing measures.
- Binding Decisions adopted by the Council of Ministers or the EC Commission bind those they address. If addressed to a Member State, they may have direct effect, giving rise to rights enforceable in national courts, where their terms are clear and precise.

5.46 The Act requires that questions as to the validity, meaning or effect of Community provisions have to be determined according to EC law principles.[137] If there is a conflict between national and EC law, directly enforceable EC rights and obligations take precedence over inconsistent national law. Domestic measures inconsistent with EC law, or which are considered to hamper the attainment of the objectives of the EC Treaty, may be found unlawful.

5.47 In Community law cases, the courts have jurisdiction to grant interim relief. For example:

- an interim injunction against a Minister or Department; or
- an order to disapply legislation (including primary legislation).[138]

5.48 They can also seek an authoritative opinion on an issue of EC law from the European Court of Justice ("ECJ") by way of a preliminary reference, sometimes called an "Article 234 reference".[139]

5.49 The decisions of the ECJ on a matters of EC law form part of the national law of Member States. Because the EC recognises the ECHR as a source of general principles of law, Convention rights can be enforced in UK courts as part of an action based on EC law.

---

136 Treaty provisions have to be sufficiently complete, clear and concise to be enforceable by a court. Directive provisions must be unconditional and sufficiently precise.

137 See section 3(1) of the European Communities Act 1972.

138 See *R v Secretary of State for Transport, ex parte Factortame Ltd (No.2)* (Case C 213/89) [1991] 1 AC 603, HL(E).

139 Before the EC Treaty was renumbered following the Treaty of Amsterdam, this was known as an "Article 177 reference."

5.50 The Government's failure to give proper effect to EC law conferring rights on individuals may give rise to a damages claim. Community law will confer a right to reparation where three conditions are met:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious (manifest and grave disregard by the Member State of the limits of its discretion);
- there must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the parties.

5.51 Liability for such damages is one of the exceptions to the principle that, in general, damages are not awarded for breach of public law. Damages of this type are often called *Francovich* or *Factortame* damages after two leading EC law cases.[140]

5.52 A basic principle of Community law is that when the liabilities of a Member State are considered all its organs of Government are treated as being a single entity. A significant internal change in the UK, arising under the devolution settlements, is that the Scottish and Northern Irish Executives and the National Assembly for Wales are now responsible for implementing EC obligations relating to devolved matters. But the National Assembly for Wales implements EC obligations only in so far as it has the power to do so. The Scottish Executive, National Assembly for Wales and Northern Ireland Executive will be liable for any financial penalty resulting from a failure to implement a relevant provision.[141]

5.53 Any acts of the devolved bodies that are incompatible with Community law are *ultra vires*, and can be challenged under the devolution legislation. The consequences of any *ultra vires* acts are explored more fully in our section on devolution.

---

140 *Francovich v Italy* (Cases C-6/90 and C-9/90) [1991] E.C.R I-5357; *Brasserie du Pecheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport, ex parte. Factortame Ltd (No. 4)* (Cases C-46/93 and C-48/93) [1996] QB 404 ("*Factortame III"*). See now also *R v Secretary of State for Transport, ex parte Factortame Ltd and Others (No. 5)* [1999] 3 WLR 1062, HL(E).

141 Note also, Article 263 of the EC Treaty, as amended (formerly Article 198a) recognises the role of autonomous nations and regions within Member States.

The Categories of Convention Rights in the Human Rights Act 1998

The absolute rights

(no restriction possible, see ECHR Article 15(2)):

- **Prohibition of Torture (Article 3)**
- **Prohibition of Slavery and Forced Labour (Article 4.1 only, 4.2 is limited)**
- **No punishment without law (Article 7)**

The limited rights

(restriction limited to that indicated in Convention and "proportionate"):

- **The Right to Life (Article 2, but no further restriction unless war)**
- **Right to Liberty and Security (Article 5)**
- **The Right to a Fair Trial (Article 6)**
- **Right to Marry (Article 12)**
- **Prohibition of discrimination (Article 14)**
- **Restrictions on political activity of aliens (Article 16, a bare limitation)**
- **Prohibition of abuse of rights (Article 17)**
- **Limitation on use of restrictions on rights (Article 18)**
- **Protection of Property (Article 1 of the First Protocol)**
- **Right to Education (Article 2 of the First Protocol)**
- **Right to Free Elections (Article 3 of the First Protocol)**

The qualified rights

(restriction if within "margin of appreciation" and "proportionate"):

- **Right to Respect for Private and Family Life (Article 8)**
- **Freedom of Thought, Conscience and Religion (Article 9)**
- **Freedom of Expression (Article 10)**
- **Freedom of Assembly and Association (Article 11)**

How to find more information

Useful reference books

De Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (5th ed 1995) & 1998 Consolidated Supplement (1999), Sweet & Maxwell
Francis Bennion, *Statutory Interpretation* (3rd ed 1997), Butterworths
Lester & Pannick (eds), *Human Rights Law and Practice* (1999), Butterworths.

Official publications

Human Rights Comes to Life - The Human Rights Act 1998: Guidance for Departments (on the Home Office website)
Rights Brought Home: The Human Rights Bill, CM 3782 (1997)
A New Era of Rights and Responsibilities - Core Guidance for Public Authorities (on the Home Office website)
Human Rights in Scotland, Scottish Office (1999)

Official Internet websites

Home Office:	www.homeoffice.gov.uk\hract
Lord Chancellor's Department:	www.open.gov.uk/lcd
Treasury Solicitor:	www.open.gov.uk/tsd/tsdhome.htm
National Assembly for Wales:	www.wales.gov.uk
Northern Ireland Assembly:	www.ni-assembly.gov.uk/
Scottish Parliament:	www.scottish.parliament.uk
Scottish Courts Service:	www.scotcourts.gov.uk
European Court of Justice:	www.curia.eu.int
European Court of Human Rights:	www.dhcour.coe.fr
Council of Europe, Human Rights Directorate:	www.dhdirhr.coe.fr

Courses

There are a number of courses organised either within Departments or on a central basis by the Civil Service College on administrative law, judicial review, EC law, devolution and human rights law. Your training section will be able to supply you with details.