

Rapport pour le Royaume-Uni

par

His Honour Judge MYNETT Q. C.

Portée et conséquences de l'annulation par le juge d'un acte administratif. Est posé en particulier le problème de la reprise du nouvel acte en cas de changement de la règle de droit ou de la situation de fait.

England has no separate system of administrative Courts exercising a broad and exclusive jurisdiction in administrative matters. In so far as Courts have jurisdiction to review and to control administrative acts and decisions, that jurisdiction is vested in the ordinary Courts of the Country. To understand the nature of this jurisdiction it is necessary to consider the nature of the various procedures and remedies.

The law relating to judicial review of administrative acts and decisions has developed piecemeal through the centuries and understandably it is not always logical and quite often complex. Broadly speaking Remedies can be classified as being either statutory or non-statutory.

Statutory Remedies

Statutory Remedies include the following :

- 1) Rights of appeal to the Courts. From most inferior statutory Tribunals, appeals now lie on questions of law to the High Court, normally the Divisional Court of the Queens Bench Division.
- 2) Statutory applications to quash, or restrain the making of Compulsory Purchase and similar orders, and decisions on planning appeals, on the ground either that the order or decision is ultra vires, or that the applicant has been substantially prejudiced by non-compliance with a procedural or formal requirement on the part of the competent authority.
- 3) In some contexts a Minister may exercise statutory default powers to enforce compliance with public duties, particularly duties imposed on Local Authorities.

Non-Statutory Remedies

The main non-statutory remedies in administration law are the prerogative Orders of Certiorari, Prohibition and Mandamus, the Injunction, the Declaration and Damages. Certiorari, Prohibition and Mandamus are historical remedies evolved by the common law Courts through the centuries to control the powers of the executive. The Injunction is an equitable remedy. The Declaration is a nineteenth century creation and does not fit neatly into either category.

The substantive administrative law is interwoven with the law of remedies. This if it desired to have an order, act or decision of an administrative body quashed or declared invalid on the ground that it is ultra vires, this purpose may be achieved by means of an appeal (if one is provided by statute, or on a statutory application to quash for example, to quash a decision to confirm a compulsory purchase order) or by an application to the Divisional Court of the Queens Bench Division for an order of Certiorari, or action claiming a Declaration that the act, order or decision is invalid.

Each of the non-statutory or common law remedies has developed separately, and inevitably they tend to overlap. The modern form of Certiorari, which emerged in the seventeenth century, is Certiorari to quash a decision on the application of a party aggrieved. Prohibition came to serve much the same purpose, provided that there was left something to prohibit. It was mainly by these two writs (as they then were) that the Court of Kings Bench exercised a supervisory jurisdiction over inferior Tribunals. Of late the action for a Declaration — which has assumed much greater importance — has encroached on the field formerly reserved for Certiorari. In some cases non-statutory remedies have been ousted by statutory applications to quash. Statutory rights of appeal overlap with Certiorari. Mandamus, which existed to compel performance of a public duty, overlaps with Certiorari. This wealth of remedies has led to confusion, and an applicant might be sent away empty handed because he had chosen the wrong remedy. In recent years however the Courts have done their utmost to see that applicants are not sent away empty handed because they had chosen the wrong remedy.

The Discretionary Nature of Non-Statutory Remedies

All these remedies are discretionary. Save in certain circumstances a person aggrieved cannot demand them of right, even when he has made out a case of unlawful action or omission. Since those remedies all developed separately, the principles governing the manner in which the Courts would exercise their discretion vary from one remedy to another.

However, many of the uncertainties and difficulties resulting from the different remedies will be resolved following the implementation of Recommendations made by the Law Commission (report on Remedies in Administration Law). On 11 January 1978 new procedural Rules came into operation. Under these Rules there was introduced a new form of procedure, known as an Application for Judicial Review, whereby a person wishing to challenge an administrative act or omission can obtain from the High Court one of the prerogative orders of Certiorari, Prohibition or Mandamus, or an injunction, or a Declaration or Damages as may be appropriate. This is dealt with in a little more detail later in this paper.

The system of judicial review of administrative acts and decisions is primarily based on the common law, although this is being increasingly modified by Statutes containing clauses abolishing the traditional common law remedies and in their place giving the Court express power to quash an administrative act or decision within a stated period either on the ground that it is not empowered to be made or granted under the Act or that any requirement under the statute has not been complied with. After some initial hesitation it has been held that these provisions only lay down time limits' and do not alter the fundamental grounds for review, which remain the same as at Common Law.

The Principle of Vires

Courts have inherent power to hold that any act or decision which is contrary to law is invalid. A Court approaches a challenged administrative act on the footing that it is either lawful or unlawful, either ultra vires or intra vires. In the former case he has no concern with it. In the latter case it may (but not necessarily will) quash it and declare it to be void. It is irrelevant that there may be parallel jurisdiction in some other body or some alternative administrative remedy. The Court is only concerned with the question has there been a breach of the law in the situation before it.

Fundamentally this common law jurisdiction of the Courts rests on two distinct principles: a) excess of jurisdiction or ultra vires and b) error on the face of the Record.

The Jurisdictional Principle

For historical reasons the Jurisdictional principle is the root principle of the review of administrative law in this Country. In this context 'jurisdiction' means legal authority or power. Putting the matter generally if an action is within the powers granted, it is valid. If it is outside such powers it is said to be ultra vires or without jurisdiction and so void. Almost every variety of excess or abuse of power has been forced into this Jurisdictional mould. The problem may be easy where a Tribunal or other administrative body has clearly acted without authority or has not followed the correct procedure. In many cases however it is more artificial. A decision may be quashed as being unreasonable, or as being motivated by some improper purpose or as founded on a finding of fact which is manifestly incorrect. In the *Anisminic Case* (*Anisminic v Foreign Compensation Commission* (1969) 2AC 147) it was observed by the House of Lords that a Tribunal having jurisdiction over a matter in the first instance might exceed its jurisdiction by breaking the rules of natural justice, by applying a wrong legal test, by failing to take relevant considerations into account or by basing the decision on legally irrelevant considerations.

In order to justify their decisions in each case it is assumed by the Court that the Statute conferring the power contained implied conditions that exercise of that power would be reasonable for the purpose for which it was given, for example that only relevant considerations would be taken into account and in the case of a quasi judicial hearing leading to a decision, that the Rules of Natural Justice would be observed during the hearing.

If therefore the implied conditions have not been observed, the act or decision is assumed to be just as unauthorised and so void, as the crudest excess of power. The Courts in a long line of decisions have developed a body of administrative law by devising numerous different categories of ultra vires under the guise of statutory interpretation.

It would appear that this Jurisdictional principle is closely akin to the continental principle of legality which prescribes a line of conduct for the administration from which it cannot depart without committing an excess de pouvoir. Any violation of that principle can be a ground for review (*cas d'ouverture*) and will make the 'acte administratif void. Again, the traditional grounds for review,

namely incompetence, vice de forme, violation de la loi and détournement de pouvoir have their counter part in the jurisdictional grounds for review in England.

An act which is ultra vires because wholly unauthorised is void and a nullity.

Review by way of error on the face of the Record

Review by way of error on the face of the Record is much narrower in its scope than jurisdictional review. This is the one case where a Court may quash an administrative decision which is intra vires. An example would be a reasoned decision based on some misinterpretation of the law, but nevertheless within jurisdiction, such as a Tribunal acting within its jurisdiction refuses a claim that it ought to have allowed, and its error appears clearly in the grounds of decision. Certiorari would be available to quash such a decision.

In such a case, the decision would not be void, but only voidable, because it is intra vires, and therefore valid and effectual unless and until it is quashed.

The Distinction between review on jurisdictional grounds and error on the face of the Record

The distinction between errors going to jurisdiction and errors within jurisdiction has never been clearly delimited. With the recent revival of review by way of error on the face of the Record and the extension of Statutory Rights of Appeal on points of law to the High Court, jurisdictional control over administrative Tribunals has lessened in importance, and the distinction between errors going to jurisdiction and errors within jurisdiction has been greatly reduced. The procedural reforms above mentioned will probably obliterate any remaining distinction between these two types of review.

Void and Voidable administrative acts

Some administrative acts are void ab initio, while others are merely voidable, that is to say valid until quashed. It is difficult to distinguish analytically between acts which are void and those which are merely voidable, because this is an area of law which is far from clear due to the overlapping nature of the different remedies and their legal consequences and also the elasticity imported into the law by the discretionary nature of most of the remedies, which is apt to generate uncertainty.

If the administrative act or decision is completed outside jurisdiction and so ultra vires, it is null and void. If the act or decision is within the jurisdiction conferred, but is flawed by some error which does not take it out of the jurisdiction, it is said to be voidable, and is valid until set aside on appeal or quashed by certiorari for error on the face of the Record. It is impossible to generalise on this, because many errors will take an administrative act which was originally within jurisdiction, outside jurisdiction and so render it void.

When Parliament lays down the procedure to be followed when a power is exercised or a duty is to be performed, it seldom states what will be the legal consequences of a failure to observe that procedure. The Courts must therefore formulate their own criteria for determining whether the procedural rules to be observed by the administration are to be regarded as 'mandatory', in which case disobedience will render void or voidable what has been done, or merely 'directory' in which case disobedience will be treated as not affecting the validity of what has been done, provided there has been 'substantial compliance' with the statutory requirements. Again it is almost impossible to lay down general rules to determine into which category breach of procedural rules will fall.

Normally void acts are destitute of all legal effect, and will be quashed on appeal or by certiorari.

But although the Courts may quash an act which is clearly ultra vires and so void, it does not follow that it will necessarily do so. Thus for example in a case where a Tribunal which had power to grant cinematograph licences, adopted a practice of approving building plans before the application for a licence was made, on the ground that it would later grant a licence if it approved the plans, the Court refused mandamus and certiorari, on the ground that the Tribunal had clearly no legal authority whatsoever to make such provisional decisions, and that this was self-evident. (*R v Barnstable* 33 ex parte Carter (1928) 1KB 385.)

On the other hand even when an administrative act is clearly ultra vires, a person affected may require a formal pronouncement by a Court declaring the act to be void. In certain cases if the party aggrieved takes no judicial proceedings

within a specified time, the void decision may become as impregnable as if it had been valid ab initio. And until such a party has obtained a judicial pronouncement quashing the decision, third parties lacking the locus standi to impugn the invalid decision, may be obliged to treat it as if it were valid.

In certain cases in the public interest the Courts have accorded full recognition to decisions by de facto officials, who, because of some informality in their appointment, were not strictly entitled to exercise any jurisdiction at all.

Consent and Waiver

The general rule is that decisions and acts which are void for want of jurisdiction cannot be validated by consent or waiver on the part of the person over whom the purported jurisdiction is exercised. On the other hand voidable acts can become unimpeachable as a result of consent or waiver. But here again the distinction is blurred. In the first place, because of the essential discretionary nature of the control exercised by the Court, the Courts have for a variety of reasons, including the conduct of the applicant in approbating the act or decision sought to be impugned, refused to set aside some act or decision. In the second place the Courts have sometimes distinguished between total lack of jurisdiction which cannot be waived, and less serious jurisdiction defects which can be waived.

Acts which are partly void

An act or decision may be wholly void or partly void and partly valid. To take a clear case, suppose a Tribunal acting within its power revokes a licence held by X, but then goes on to order that X shall be disqualified from making a further application for a new licence for 5 years. It has no power to impose such a disqualification. In this case X will be able to obtain an order for certiorari to quash the purported disqualification, or alternatively a declaration that the disqualification is void. The Court can still hold that the revocation of the licence is valid, because the two limbs of the Tribunal's order are severable one from the other. No difficulty arises in such a case as this.

In most cases of partial invalidity however the case is more complicated because the good and the bad elements are not clearly distinguishable one from another. Suppose a permit or licence has been granted subject to void conditions, the Court has three alternatives viz (i) it may set aside the entire decision, because the competent authority might well have been unwilling to grant unconditional permission, or (ii) it may attempt to sever to good from the bad. In such a case the effect could be to give unconditional permission if all the void conditions are struck out as invalid, or (iii) it may sever the invalid conditions only if they are trivial or if they are really extraneous to the subject matter of the grant or perhaps if there are other reasons for supposing that the authority would still have granted permission had it believed that the conditions were invalid. The latter approach commented itself to the House of Lords in *Kingsway Investments (Kent) Ltd v Kent C.C.* (1971) AC. 72. The criticism that could be levied at this last method of approach is that it involves the Court in a speculative attribution of intent to an administrative body, and it would perhaps be more satisfactory if the Courts had statutory power to remit the matter for reconsideration by the administrative body.

Application for Judicial Review

There has been increasing discussion in recent years about the desirability of reforming certain aspects of administrative law, in relation both to substantive issues and procedural problems.

The Law Commission's Report on «Remedies in Administrative Law» dealt with the latter topic, and their recommendations have been embodied in new rules of the Supreme Court. Various amendments in procedure were effected, but the principal one is contained in Rule 5, which introduces a Substituted Order 53 of the Rules of the Supreme Court, entitled 'Applications for Judicial Review'.

Order 53 Rule 1 deals with 'cases appropriate for application for judicial review viz

- 1) an application for —
 - a) an order Mandamus, Prohibition or Certiorari, or
 - b) an injunction under section 9 of the Administration of Justice (miscellaneous Provisions) Act 1938 restraining a person from acting in any office in which he is not entitled to act

- 2) an application for a declaration or an injunction (not being an injunction mentioned in 1) b) . . . and the Court may grant the declaration or injunction claimed if it considers that, having regard to —
 - a) the nature of the matters in respect of which relief may be granted by way of Mandamus, Prohibition or Certiorari,
 - b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
 - c) all the circumstances of the case,
it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

This will enable a litigant, under cover of the application for judicial review, to obtain any of the prerogative orders, or if appropriate a declaration or injunction, when the case involves an issue of public law.

An application under Rule 3 for leave to make the application for judicial review setting out the grounds, must be obtained from the Court, and that leave will not be granted unless the Court considers that the applicant has sufficient interest, in the matter to which the application relates. Where the Court considers that there has been undue delay in making the application for judicial review the Court may refuse to grant

- a) leave for making the application, or
- b) any relief sought on the application,

if in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the Rights of, any person or would be detrimental to good administration.

A claim for damages may now be joined with an application for judicial review. Rule 7 provides that on an application for judicial review, the Court may award damages to the applicant if

- a) he had included in the statement in support of his application for leave under Rule 3 a claim for damages arising from any matter to which the application relates, and
- b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

Also under the new procedure — where the relief sought is an order of Certiorari to quash a decision — a Court has for the first time a discretionary power to remit a case for reconsideration, whereas hitherto the practice has been that the Court could only quash, or refuse to quash the decision complained of.

There are other allied problems regarding substantial issues, which will require future attention, but these new procedural improvements are of great importance in administrative law.

For reasons which appear before it will be appreciated that only the most general answers can be given to the various questions set out in the Plan de travail.

I B. Questions découlant des observations

As a general principle the Courts have power to review and to declare void all administrative acts and decisions of whatever kind.

An Act of Parliament cannot be ultra vires. All kinds of subordinate legislation is subject to review by the Courts, and if found to be ultra vires can be declared void.

Administrative acts and decisions can be declared void if

- a) there is a right of appeal by statute on a matter of law,
- b) the act or decision is ultra vires, or
- c) for error on the face of the Record.

As already mentioned the distinction between b) and c) has been greatly reduced in recent years, and with the introduction of the new Application for Judicial Review will almost certainly vanish.

II. Portée de l'annulation d'un acte administratif par le juge

1. If an administrative act or decision is declared void by the Courts then it is a nullity ab initio, and no Rights or duties can flow therefrom.

Where the rights of third parties may be directly affected by the Courts decision, it is usual for them to be made parties to the proceedings, so that they are bound by the decision.

The Courts judgement quashing an ultra vires act or decision is unaffected by any subsequent renunciation of the benefit of such judgement by the successful applicant.

2. If an act or decision is quashed because it is ultra vires, then it is void ab initio.
3. A Court can only pronounce on the validity or otherwise of the act or decision challenged in the proceedings before it. It cannot substitute its own decision in place of that quashed, nor can it issue instructions to the administration what act or decision it must do or make in place of that declared void. Under the new procedure where the relief sought is an Order of Certiorari to quash, and the Court is satisfied that there are grounds for quashing the decision to which the application relates, it may in addition to quashing it remit the matter to the Court, Tribunal or Authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of Court.
4. Under certain circumstances, a Court will quash part of an administrative decision, while affirming the validity of the remainder. No general principle can be laid down, — since each case must be decided on its merits — but the conditions under which it may so act have been set out above.
5. All collateral acts which depend for their validity on the act or decision which is quashed are ipso facto void.
 - a) a Court will only pronounce on the validity or otherwise of the act or decisions the subject matter of the proceeds before it.
 - b) all collateral acts are implicitly invalidated.

III. Conséquences de l'annulation d'un acte administratif par le juge

Here one can only say that all administrative bodies and Tribunals are bound to obey in all respects the decisions of the Courts, and that if a Court quashes an act or decision it is void ab initio for all purposes, and no Rights or duties can flow from it.