

# **United Kingdom Report**

by

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*«In all matters involving a mass of petty detail, the law giver must leave gaps; rules and up-to-date amendments must be made from year to year by... (experienced)... persons who are taught by practice until a satisfactory code is finally agreed upon to regulate such proceedings».*

*Plato, Laws VI, 772 B*

*«Even under the British system of undiluted sovereignty the last word on any question of law rests with the courts... So long as the courts move in step with public opinion, their constitutional subservience need not prevent them from developing the principles of administrative law imaginatively».*

*H.W.R. Wade, Administrative Law; 5th Edn, p. 29*

## **1.GENERAL CONSIDERATIONS**

### **(a) Measures embodying delegated legislation**

(i) The vast expansion of delegated legislation in the twentieth century has not been accompanied by a rational or consistent terminology. There is a rich and confusing nomenclature: Orders in Council, rules, regulations, bye-laws, orders, directions and others appear to defy attempts at classification. However, no legal distinctions depend upon the terms used. In practice the more important forms of delegated legislation are usually made by Order in Council: they will be drafted by the executive but enacted by the Privy Council. Other forms of delegated legislation may be made by designated Ministers or Government departments; but also by other bodies such as local authorities, nationalised industries, public utilities, marketing boards, professional associations including the Law Society, and the Universities of Oxford and Cambridge.

Delegated legislation of general application, usually requires approval, express or implied, by Parliament and may also be examined in draft by Parliamentary scrutiny committees. It will normally be published, as required by the Statutory Instruments Act 1946. Excluded from that Act, however, are measures of an individual character: the exclusion (itself effected by subordinate legislation made under the Act) extends to measures which apply only to a named person or premises and which do not require Parliamentary approval.

(ii) While delegated legislation will normally have the force of law, and mere administrative guidance will not, there is an intermediate range of cases of uncertain status, and there is no clear dividing line between measures which have the force of law and those which do not. On the one hand, a mere «code of practice» issued, pursuant to Act of Parliament, by an advisory body for the purpose of promoting good industrial relations may have legal effect in the sense that it is admissible in evidence before the industrial tribunals which adjudicate employment cases and is to be taken

into account on any question to which the tribunal thinks it relevant: Employment Act 1980, s. 6; and the courts have assumed jurisdiction to quash decisions of the Criminal Injuries Compensation Board which do not accord with the published rules of the compensation scheme, even though the scheme rests upon no statutory authority and in law is merely a system of *ex gratia* payments: *R.v. Criminal Injuries Compensation Board ex parte Lain* [1967] 2 QB 864. On the other hand, the prison rules, made under the Prison Act 1952, have been held to be unenforceable at the suit of prisoners: see e.g. *R.v. Hull Prison Visitors ex parte St. Germain* [1979] QB 425; c.f. *Raymond v. Honey* [1983] 1 A.C.1; and the immigration rules, made by the Home Secretary under the Immigration Act 1971, have been held to be rules of administrative practice only, not rules of law and not delegated legislation: see e.g. *R.v. Home Secretary ex parte Zamir* [1980] A.C. 930.

A common form of administrative guidance is the departmental circular by which a government department disseminates instructions to its local offices or to local authorities over which it exercises control. While such circulars have no legal force in themselves, they may have legal effects. Thus where under war-time regulations, continued in force, the Minister of Health was empowered to take possession of land for any purpose and to delegate that power, subject to such restrictions as he thought proper, he delegated the power to local authorities by a series of circulars. The circulars contained instructions that there should be no requisitioning of furniture or of any house which the owner himself wished to occupy. Both instructions were disregarded by a local authority in an attempted requisition of the plaintiff's house. The Court of Appeal held that the instructions were legal restrictions limiting the delegated power and that the requisition was therefore invalid: *Blackpool Corporation v. Locker* [1948] 1 K.B. 349.

A celebrated recent case in which the legality of a circular was challenged was *Gillick v. Department of Health and Social Security* [1985] 3 AER 402. The Department had issued a circular advising doctors that they might in certain circumstances prescribe contraceptives to girls under 16 without informing their parents. The circular was contested by Mrs. Gillick who as the mother of several daughters under 16 had no difficulty in establishing her standing (as to which see below): it was alleged to be contrary to public policy. Her case succeeded in the Court of Appeal but failed in the House of Lords. Although the circular had no legal effects, there was no doubt that its legality could be considered on the merits.

## **(b) Types of delegated legislation**

(i) Classification by legislator: Orders in Council are normally made by the Crown, or by Ministers, under powers conferred by Act of Parliament. Naturally they are valid only insofar as they conform to the power conferred by Parliament.

Orders in Council may also be made, however, under the royal prerogative, i.e. in the exercise of the Crown's residual powers at common law. Examples are the powers

of the Crown in the field of foreign affairs, and over the Civil Service, to the extent to which those powers have not been supplanted by Act of Parliament.

An Order in Council made directly under the royal prerogative is primary rather than delegated legislation. An example is the Civil Service Order in Council 1982 which empowers the Minister for the Civil Service to «give instructions... for controlling the conduct of the Service, and providing for... the conditions of service». In December 1983 the Minister for the Civil Service issued an oral instruction, in exercise of those powers (and therefore by way of delegated legislation), to the effect that the terms and conditions of civil servants at Government Communications Headquarters (GCHQ) (whose main functions were to ensure the security of military and official communications and to provide signals intelligence) would be revised so as to exclude membership of any trade union other than a departmental staff association approved by the director of GCHQ. On an application for judicial review of the instruction, the House of Lords held that the exercise of the prerogative power was subject to judicial review, and a majority considered that powers exercised directly under the prerogative are also not immune from judicial review: *Council of Civil Service Unions and others v. Minister for the Civil Service* [1984] 3 All E.R. 935.

More generally, it is nowadays unusual to attach importance to the source of the delegated legislation which is challenged. It used to be thought that the source might affect the possibility of judicial review: for example, that delegated legislation which had been approved by Parliament was less susceptible to challenge; or that the bye-laws of local authorities, but not the decisions of Ministers, could be attacked as unreasonable. These views find some support in the older cases but must be treated with caution in the light of the readiness of the courts to intervene today. The identity of the legislator may still be a factor in the outcome of the case but no rule of law turns upon it.

(ii) Inherent powers and delegated powers: In the United Kingdom the executive has no inherent legislative power: see Wade, *Administrative Law* (5th ed. 1982), p. 747, who contrasts the «pouvoir réglementaire» in France. However an exception to that statement has been seen above, in legislation made under the royal prerogative. The exception is of limited scope and such legislation is subject, as has been seen, to judicial review.

## **2. AVAILABILITY OF JUDICIAL REVIEW**

### **(a) Direct challenge to delegated legislation**

(i) Standing (*locus standi*) of the Applicant. At common law the requirement of standing was sometimes restrictively interpreted; moreover the extent of the requirement varied according to the remedy sought by the applicant. The position at common law was criticised on both grounds by the Law Commission in its Report on Remedies in *Administrative Law*: It proposed as a general test that a person should have stan-

ding when he has a *sufficient interest* in the matter to which the application relates: Law Commission no. 73, Cmnd 6407, pages 22, 33. That test was adopted in the Rules of the Supreme Court, Order 53 and was subsequently incorporated in the Supreme Court Act 1981, Section 31 (3), which states:

« No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates».

The requirement of sufficient interest has been construed broadly. For the purposes of leave to apply for judicial review, standing will be established if on a «quick perusal of the material then available the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief» sought: *R.v. Inland Revenue Commissioners ex parte The National Federation of Self-Employed & Small Businesses Ltd.* [1982] AC 617 at 644. In that case, the House of Lords also indicated that standing should not be considered as a preliminary issue on the hearing of an application, but should be considered together with the merits. The facts were that casual labour was common on Fleet Street newspapers, and that workers often adopted fictitious names (e.g. «Micky Mouse») and paid no taxes. The Inland Revenue Commissioners made a deal with the relevant Unions, workers and employers whereby if the casual workers would fill in tax returns for the previous two years then the period prior to that would be forgotten. The National Federation argued that that deal was ultra vires the IRC and sought a declaration to that effect and an order to compel the IRC to collect the back taxes. The IRC contended that the National Federation had no standing. The House of Lords held that the Federation's application failed on the merits, but that if the case had succeeded on the merits the application might have succeeded. The result appears to be that, even if the applicant's interest is remote, he may still succeed in establishing standing if he shows a clear case of default or abuse. The decision laid the foundations for a liberal and public-oriented doctrine of standing which has been followed in subsequent cases. For example, where a taxpayer challenged the payment of monies to the European Communities the Court found that since the application raised a serious question as to the powers of Her Majesty in Council to make an order in Council in the form of the draft then before Parliament, and since the making of such an order was likely to be followed automatically by the expenditure by the Government of substantial sums from the consolidated fund, there was little doubt that Mr. Smedley, if only in his capacity as a taxpayer, had sufficient locus standi to raise that question by way of an application for judicial review: *R.v. Her Majesty's Treasury ex parte Smedley* [1985] 2 WLR 576.

(i) Actio popularis

The wide standing afforded by the Courts reduces the need for an actio popularis,

which is not as such known to English law. However an individual who is unable himself to establish sufficient standing may seek the assistance of the Attorney General by way of a «relator action». That action involves the Attorney General, at the relation (i.e. instance) of the individual concerned, bringing an action claiming an injunction or declaration in order to prevent some breach of law. The policy reason is that the Crown, as represented by the Attorney General, has an interest in upholding the law for the general public benefit. The Crown always has standing; to all intents and purposes having conferred that standing on the individual concerned the Attorney General usually takes no further part in the case although he retains a supervisory role.

## (ii) Time Limits

Order 53 rule 4(1) states:

*«An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made».*

A degree of uncertainty has however been introduced by section 31 (6) of the Supreme Court Act 1981 which provides that

*«where the High Court considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant (a) any leave for the making of the application; or (b) any relief sought on the application, if it considers that 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».*

It is therefore not entirely clear whether the Court's discretion is to allow a delayed application out of time under Order 53, in which case the onus lies on the applicant, or to refuse relief in circumstances of hardship etc. under Section 31 (6), in which case the onus will lie on the respondent.

## (b) Indirect challenge to delegated legislation

Delegated legislation may be challenged not only directly, by way of judicial review, but also indirectly by «collateral challenge»; for example, by way of defence to a criminal charge, or by way of defence to a demand for some payment: see generally, on collateral challenge, Rubenstein, Jurisdiction and Illegality, Chapter 3.

As a general rule, the Court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Thus, a firm may resist a demand for purchase tax by showing that the assessment is made under an invalid regulation: *Commissioners of*

*Customs & Excise v. Cure & Deeley Ltd.* [1962] 1 QB 340. The Commissioners had power to make regulations «for any matter for which provision appears to them to be necessary» for the administration of purchase tax. The made regulations providing that in default of a proper return the might themselves determine the tax due, and that the taxpayer should have only 7. days to dispute it. The regulations, although apparently within the wide powers conferred by Act of Parliament and although duly laid before Parliament, were held, invalid as, wholly unreasonable. (Compare, *Nottinghamshire County Council v. Secretary of State for the Environment* [1986] 1 All E.R. 199 (House of Lords: where a minister's exercise of a statutory power required and received House of Commons approval then the Courts would not normally review the exercise of the power on the ground of unreasonableness because the responsibility for overseeing the minister's action lay with the House of Commons rather than the Courts).

In other cases, however, the Courts have held that measures cannot be challenged in collateral proceedings, but only by direct challenge. For example, it may be held that the remedy provided by statute, such as a right of appeal, is the only remedy available.

### 3. NATURE OF JUDICIAL REVIEW

#### (a) Direct challenge

(i) Direct challenge to any executive act, including delegated legislation, can normally now be made only by way of an application for judicial review. Recent developments have introduced a true public law system, at least in relation to remedies. Before those developments, remedies against the public authorities could be sought either under public law (by way of the prerogative remedies, particularly «certiorari» — an order to quash) or under private law (particularly a declaration). A report of the Law Commission on Remedies in Administrative Law, referred to above, proposed a new comprehensive remedy, the application for judicial review. The proposal was largely implemented in the Rules of the Supreme Court (themselves an instance of delegated legislation) in 1977 (Order 53), and subsequently given statutory force, with some modifications, in the Supreme Court Act 1981, section 31.

As a result of those developments a person challenging directly either delegated legislation or any other executive act will normally seek a declaration by an application for judicial review. While there was initially some doubt whether the new application excluded other means of challenge, the House of Lords has held that it would normally be an abuse of the process of the court to seek a declaration by any other procedure: *O' Reilly v. Mackman* [1983] 2 A.C. 237. It was pointed out that the new procedure established a balance between the rights of the individual and the interests of the public authorities. On the one hand, it provides for discovery (the exchange of documents between the parties), it makes provision for cross examination, and it allows damages to be claimed. On the other hand, it provides safeguards for the

public authorities, including the requirement of the leave of the court to bring the application and a relatively short time limit.

All applications for judicial review are made in the Queen's Bench Division of the High Court. While there are no separate administrative courts in England, such applications tend to be heard by specialist judges. The introduction of a single procedure has facilitated specialisation.

(ii) Other means of challenge: although *O'Reilly v. Mackman* decided that it would normally be an abuse of process to seek a declaration by a procedure other than judicial review, two exceptions were adumbrated: certain types of collateral challenge (considered below) and cases where the parties consent to a different procedure. The possibility that other exceptions might exist was left open to be decided upon a case by case basis. In practice all the exceptions have been narrowly construed.

### **(b) Collateral challenge**

The main issue here is where the plaintiff is seeking to enforce a private right rather than secure performance of a public duty. The issue arose in *Cocks v. Thanet District Council* [1983] 2 A.C. 286, where the plaintiff claimed a declaration and damages alleging a breach by the defendant Council of its duties under the Housing (Homeless Persons) Act 1977. It was argued that a person possessing private rights ought to be able to take proceedings of his own accord, without the leave of the court and without other restrictions attendant upon applications for judicial review. However Lord Bridge of Harwich, in the House of Lords, considered that under the Act the Council had to make a public law decision. Its duty to make enquiries, and to satisfy itself that the applicant fulfilled the necessary conditions entitling him to housing, were questions of public law. Moreover they were conditions precedent to the establishment of a private law right. Accordingly, proceedings could be brought only by way of judicial review; and an earlier case indicating that the claimant had a choice of proceedings was overruled in this respect.

Finally it may be observed that English law makes no distinction between an action for annulment and an action for damages in which a «plea of illegality» is only incidental. As was seen above, damages can be claimed in an action for judicial review. It is, however, possible that the illegality will have been established in other proceedings: in such cases, judicial review will not be necessary. In *Bourgoin v. Ministry of Agriculture, Fisheries and Food* [1985] 3 All. E.R. 585 the plaintiffs claimed damages for losses caused to them by the defendants' measures prohibiting the import of turkeys from France. The measures had been declared unlawful by the Court of Justice of the European Communities as infringing Article 30 of the EEC Treaty. The plaintiffs' claim for damages succeeded at first instance but failed in the Court of Appeal.

#### 4. SCOPE OF JUDICIAL REVIEW

##### (a) Control for conformity with legislation

Delegated legislation will be valid only if it conforms exactly to the law making powers granted by the Act of Parliament. Thus a local authority's power to make bye-laws will not enable it to modify Acts of Parliament; and a bye-law made by a County Council was void when it prohibited betting in public places altogether whereas the Act of Parliament allowed it under certain conditions: *Poell v. May* [1946] 1 KB 330.

##### (b) Conformity with the general principles of law or with the common law

It is not always possible to distinguish separate grounds of review since the Courts will assume that Parliament could not have intended powers of delegated legislation to be exercised inconsistently with certain fundamental principles: for example such powers must not be exercised unreasonably. That assumption has often been invoked in the case of bye-laws made by local authorities who are empowered to make such bye-laws for the good government of their area and for the suppression of nuisances. In the leading case, where in fact the Court upheld a bye-law against singing within 50 yards of a dwelling house, it was said:

*«If, for instance, [bye-laws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, «Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires». But... a bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient...».*

*Kruse v. Johnson* [1898] 2 QB 91.

##### (c) Conformity with constitutional provisions

Although the United Kingdom has no written constitution, the Courts do use certain constitutional principles when considering delegated legislation; an instrument which contravenes such principles will be declared void unless express statutory authority can be relied upon. Thus in *Attorney General v. Wilts United Dairies Ltd.* [1921] 39 TLR 781, the food controller was empowered to regulate the sale purchase etc. of food and to regulate price. A dairy company was granted a licence to trade in milk but it had to pay a charge of 2d per gallon. That condition was accepted by the company but it later resisted and refused to pay. Despite its express consent to the condition, the Court held that its refusal to pay was justified. The charge infringed

the fundamental provision contained in the Bill of Rights 1689 that no money should be levied to the use of the Crown without the consent of Parliament. The power to charge would not be implied from the general power to control the trade. The Courts have also relied on other constitutional presumptions. Such a presumption is the right of access to the courts itself: thus in 1920 a Defence of the Realm Regulation was held ultra vires because, in order to prevent disturbance of munition workers, it provided that no-one might sue for possession of a munition worker's house without the permission of the Minister: *Chester v. Bateson* [1920] 1 KB 829.

#### **(d) Conformity with international law**

Again, while treaties do not form part of English law unless they have been specifically incorporated, the Courts may consider that Parliament cannot have intended that delegated legislation should conflict with obligations arising under treaty. There is a strong presumption that legislation will not authorise a breach of the European Convention on Human Rights; and the House of Lords held that the Immigration Act 1971 could not be given retroactive effect where that would conflict with the prohibition of retrospective criminal legislation in Article 7 of the Convention: *R. v. Miah* [1974] 1 WLR 683.

#### **(e) Conformity with European Community Law**

Section 2(2) of the European Communities Act 1972 confers wide powers for the enactment of subordinate legislation to give effect to provisions of Community law: such subordinate legislation may be made either by HerMajesty by Order in Council, or by a Minister or department by way of regulations. Community directives have frequently been implemented in this way. Such subordinate legislation has not given rise to difficulties in practice; difficulties might however arise if it were to go beyond the obligations imposed by the directive: in that case it would be ultra vires.

What is of greater importance in practice is that any delegated legislation, adopted under any Act of Parliament, may be challenged as inconsistent with Community Law. Thus a scheme regulating the use of medicines in the national health service which reduced the competitiveness of cheaper imported medicines was held to infringe Article 30 of the EEC Treaty: *R v. Secretary of State for Social Services ex parte Bomore Medical Supplies Ltd.*, Court of Appeal, 29 November 1985.

### **5. EFFECTS OF REVIEW**

#### **(a) Direct challenge**

##### *(i) Annulment*

1. Scope of annulment: it is well established that a measure may be void in relation to one person but valid in relation to another. Thus where a measure is

challenged on the ground of failure to consult, it may be valid against organisations duly consulted but void against those not consulted: *Agricultural Training Board v. Aylesbury Mushrooms Ltd.* [1972] 1 WLR 190.

2. Annulment *ex tunc* and annulment *ex nunc*: English law draws a distinction between an act which is *ultra vires* and which therefore, having no basis in law, is void *ab initio* and an act which, while *intra vires*, is vitiated by an error on its face, and is therefore valid and effective unless and until the Court quashes it. The distinction is expressed in terms of *void* and *voidable* acts.

Although there has been some disagreement among judges, and possibly some confusion, as to which grounds of invalidity lead to which result, it appears now to be accepted that errors such as bad faith, wrong grounds and breach of natural justice all involve excess of jurisdiction and therefore render the *actes* concerned void.

It was also at one time thought that if a defect was manifest, it might be treated as void without being annulled by the Court. However that view has been rejected and, as Lord Diplock said in *Hoffman-La Roche v. Secretary of State for Trade and Industry* [1975] AC 295 at 366:

*«it leads, to confusion to use such terms as «voidable», «voidable ab initio», «void» or «a nullity» as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction».*

That case established that delegated legislation enjoys a presumption of validity: it must be treated as valid during the period that must elapse before the courts can decide on its validity. A supplier of drugs (used in large quantities in the national health service) claimed that a price-fixing order was invalid because of improper procedure by the Monopolies Commission. The cost to the supplier of obeying the order pending final determination of its validity was about 8m. When the Crown sought to enforce the disputed order immediately by an interim injunction, the supplier asked for the usual undertaking in damages to protect him in case the order should prove to have been invalid: there being doubt whether any remedy in damages would be available. The House of Lords refused to impose such terms and also held that the order must be presumed to be valid and must be obeyed pending the final determination of the case.