

# **BRITISH REPORT**

*reporter*

Oliver POPPLEWELL

High Court judge

CONFERENCE OF JUDGES OF SUPREME ADMINISTRATIVE COURTS  
ROME - 1992

1. *Whether every power of the Administration concerning the rights of individuals must be expressly granted by Statute. And if, by consequence, the categories of administrative decisions are limited.*

Public administration is carried out to a large extent under statutory powers conferred upon Public Authorities by Acts of Parliament. Statutory duties are also imposed in a similar way.

A Statutory power will be construed as authorising everything which can fairly be regarded as incidental or consequential to the power itself and this doctrine is broadly applied. Bylaws which are the creatures of Acts of Parliament similarly grant some administrative authorities their powers.

There are other sources which do not have a statutory basis, namely corporate and contractual powers, non legal powers and the royal prerogative. So far as powers of Corporations are concerned they exist in two categories. There is a statutory corporation the objects and powers of whom are solely those which Parliament has laid down expressly or impliedly in the Act setting up that corporation. There are other corporations which are set up by the Crown under its prerogative power. They have complete legal personality with full power to hold property, to make contracts and so forth. They may by their charter be empowered to make bylaws. In the case of *The Attorney General v Leeds Corporation* (1929) 2 Ch. 219, the difference is expressed as follows:

«The Corporation (The Leeds Corporation) was incorporated by Royal Charter in the year 1627 in the reign of King Charles I. The fact that it is incorporated by Royal Charter is of importance because a corporation so constituted stands on a different footing from a statutory corporation. The difference being that the latter species of corporation can only do such Acts as are authorised directly or indirectly by the statute creating it. Whereas the former can, speaking generally, do anything that a normal individual can do»

The Courts have treated some non statutory bodies as subject to the restraints of Administrative law as if they were statutory, for instance the Criminal Injuries Compensation Board, the Panel on Takeovers and Mergers and the Civil Service Appeal Board. They are treated as de facto public authorities even though none of them were created or given powers by Parliament but their actions are subject to Judicial Review and to legal remedies.

So far as Prerogative Powers are concerned the broad principle laid down by Lord Diplock in *O'Reilly v Mackman* (1983) 2 AC 236 at 279 was:

«Were ever any person or body of persons has authority conferred by legislation to make decisions of the kind that I have described it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failing to act fairly towards the person who will be adversely affected by the decision....»

Lord Diplock observed that the power of the High Court to make declaratory judgments which was first introduced by Rule in 1883 drew no distinction between declarations that relate to rights and obligations under private law and those that relate to rights and obligations under public law.

Indeed he said:

«The appreciation of the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system. It is a consequence of the development that has taken place in the last 30 years of the procedures available for judicial control of administrative action.»

Contracts of Employment highlight the difference between private and public law. An employee of the BBC *R v British Broadcasting Corporation ex parte Lavell* (1983) WLR 23 failed in her application for certiorari to quash a dismissal by the Corporation but a prison officer who was dismissed was entitled to

bring proceedings against the Home Secretary on the basis that he was not under a contract of employment but was appointed to an office and subject to a statutory code of discipline (see *R v Home Secretary ex parte Benei* (1985) QB554. Even where private bodies are immensely powerful they still will not be susceptible to Judicial Review. (See the recent decisions of *Massingberg Mundi* and the *Jockey Club ex parte Ram* relying on the decision of *Law v National Greyhound Racing Club* (1983) 1WLR 1302 and *Calvin v Kerr* (1982) AC 573.

In *Datafin* the Court of Appeal had to consider the position of the takeover panel. 1987 QB 815: it was held:

«That the supervisory jurisdiction of the High Court was adaptable and could be extended to anybody which performed or operated it as an integral part of a system which performed public law duties which was supported by public law sanctions and which was under an obligation to act judicially but whose source of power was not simply the consent of those over whom it exercised that power. That although the panel purported to be part of a system of self regulation and to derive its power solely from the consent of those whom its decision affected it was in fact operating as an integral part of the governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties and was under a duty in exercising, what amounted to public powers to act judicially.»

Lord Diplock said in *The Council of Civil Service Unions v The Minister for the Civil Service* (1985) AC 374 at 409:

«For a decision to be susceptible to Judicial Review the decision maker must be empowered by public law (and not merely as in an arbitration by agreement between private parties) to make decisions that if validly made would lead to administrative action or abstention from action by an authority endowed by law with executive powers which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision making powers is nearly always nowadays statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision making power may still be the common law itself i.e. that part of the common law that is given by lawyers the label of "the prerogative". Where this is the source of the decision making power the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank.»

The position now is that the source of the power is not the sole test whether a body is subject to Judicial Review; it may be decisive; on the one hand if the source of powers is a statute or subordinate legislation then clearly the body in question will be subject to Judicial Review. If at the other end of the scale the source of power is contractual then clearly that will not be subject to Judicial Review. Between these extremes is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question was exercising public law function or if the exercise of its functions have public law consequence then that may be sufficient to bring the body within the reach of Judicial Review.

If the source of power is under the prerogative it will be treated as a public law issue. The term prerogative strictly construed is confined to those powers which are unique to the Crown and have traditionally been said to confer discretion which no court can question. It is clear that the exercise of prerogative power can be subject to Judicial Review, i.e. the dismissal of a Civil Servant but the extent of the courts power is not entirely clear. Clearly a court cannot enquire into the making of Treaties but the grant of a passport which is wholly within the prerogative and discretion of the Crown can be challenged see *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* (1987) *The Times*. Lord Diplock said in the *CCSU v Minister for Civil Service* (1985) 1AC 374 at 409 this:

«Nevertheless whatever label may be attached to them there have unquestionably survived into the present day residue of miscellaneous fields of law in which the executive government retains decision making powers that are not dependant upon any statutory authority but nevertheless have consequences on the private rights or legitimate expectatios of persons which would render the decisions subject to Judicial Review if the power of the decision maker to make them was statutory in origin. From matters so relatively minor as the grant of pardons to condemned criminals, of honours to the good and great, of

corporate personality to deserving bodies of persons and of bounty of monies available to the executive government by Parliament they extend matters so vital to the survival and welfare of the nation as the conduct of relations with foreign states what lies at the heart of the present case, that the defence of the realm against potential enemies..... My Lords I see no reason why simply because a decision making power is derived from a common law and not a statutory source it should for that reason *only* be immune from Judicial Review.»

Lord Fraser said in the same case at 398:

«Once the existence and the extent of a power are established to the satisfaction of the court the court cannot enquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities which I have briefly referred and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the Armed Forces and with foreign policy and with other matters which are unsuitable for discussion or review in the Law Courts»

and he added at 398:

«An Order in Council being made under the prerogative derives its authority from the Sovereign alone and not as is more commonly the case with legislation, from the Sovereign in Parliament. Legislation frequently delegates power from the legislating authority, the Sovereign alone in one case the Sovereign in Parliament in the other, to some other person or body and when that is done the delegated powers are defined more or less closely by the legislation. But whatever their source powers which are defined either by reference to their object or reference to procedure for their exercise or in some other way and whether the definition is expressed or implied are in my opinion normally subject to judicial control to ensure they are not exceeded».

It follows from the above that the categories of administrative decisions are not limited.

The categorisation of cases in matters of «public law» or «private law» is not followed in Scotland as a test for the use of Judicial Review procedure. The availability of that procedure is determined primarily by reference to the declaration of one body making the decision and the nature of the decision. There may be cases where judicial review would be available which in England would not be categorised as cases of public law.

2. *Whether the Statute which grants a power to the Administration must describe, as a rule in detail, the situation from which the power arises.*

In broad terms a Statutory Power will be construed as authorising everything which can fairly be regarded as incidental or consequential to the power itself and this doctrine is not to be applied narrowly. Buses may be run a short distance beyond the end of the authorised route if there is no other practical way of turning them around. The Home Secretary may make charges to prisoners for privileges allowed to them and there are many other examples. Statutory powers have considerable latitude and by reasonable construction the courts can soften the rigour of the ultra vires principle. The courts intervene only where the thing done goes beyond what can fairly be treated as incidental or consequential. Thus under the Local Government Act 1972 Local Authorities may do anything which is «calculated to facilitate or is conducive or is incidental to the discharge of any of their functions». In broad terms an authority is entitled to do anything which comes within the four corners of the power itself.

The discretion which is available to those exercising the power under a statute is very wide indeed; and in general terms is incapable of review. However, there has grown up a practice whereby an enactment will provide that an order or determination to be protected: «Shall not be questioned in any legal proceedings whatsoever». They are known as «ouster clauses». In *Anisminic Limited v Foreign Compensation Commission* (1962) 2AC 147 the Foreign Compensation Act 1950 provided by Section 4(4) that a determination of the Commission: «shall not be called in question in court of law.» The House of Lords held that the Ouster Clause did not protect a determination which was made outside the jurisdiction and that the Commission misconstrued the Order in Council; therefore there was an excess of jurisdiction they having based their decision on a ground which they had no right to take into account and sought to impose another condition not warranted by the Order.

It is likely now that Ouster Clauses will almost certainly be rejected by the Court though partial Ouster Clauses such as directing particular form of appeal as more convenient will be enforced by the Court. So far as the prerogative is concerned it is well established that the Courts will intervene to prevent executive action under prerogative powers and violation of property or other rights of the individual where this is inconsistent with statutory provisions provided for the same executive action. Where the executive action is directed towards the benefit or protection of the individual it is unlikely that its use will attract the intervention of the Courts. Before the courts will hold that such executive action is contrary to legislation express and unequivocal terms must be found in the statute which deprive the individual of receiving the benefit or protection intended by the exercise of prerogative power. See *Attorney General v De Keyser's Royal Hotel* (1920) AC 508 per Lord Dunedin at 526 and Lord Parmoor at 575. The cases of *The Crown of Leon (Owners) v Admiralty Commissioners* (1921) KB595 *Attorney General v DeKasars Royal Hotel Limited* (1920) AC 508 and *Burma Oil Co Limited v Lord Advocate* (1965) AC75 are cases where the Courts were dealing with a purported exercise of the prerogative in war time conditions. In the *Burma Oil* case Lord Reid pointed out the exercise of the prerogative in the circumstances must be rare because in recent times powers to requisition were available under the emergency legislation.

3. *Whether the reasons of administrative decisions must - as a rule - be evident from their text. Eventual exceptions to the rule.*

As a general rule there is no requirement that the reasons for administrative decisions must be evident from their text. Nevertheless a practice has grown up of giving reasons in administrative law and an administrative authority may be unable to show that it has acted lawfully unless it explains itself and if a decision is not explained satisfactorily it may be condemned as arbitrary and unreasonable. A number of statutes provide for the giving of reasons. For instance, Section 12 of the Tribunals and Enquiries Act 1958 requires that «where any Tribunal or any Minister notifies any decision taken by him after the holding by him or on his behalf of a Statutory enquiry or taken by him in a case in which a person concerned could have required the holding of a statutory enquiry it shall be the duty of the Tribunal or Minister to furnish a statement either written or oral of the reasons for the decision if requested on or before the giving or notification of the decision to state the reasons. Section 12 of the 1971 Act requires the tribunals to furnish a statement, either written or oral of the reasons for the decision. ... Many statutes expressly deal with the giving of reasons i.e. the Town and Country Planning Enquiries Procedures 1988 17 (1) provides:

«The Secretary of State shall notify his decision on an application or appeal and his reason for it in writing to all persons entitled to appear at the enquiry who did appear and to any other person who having appeared at the enquiry has asked to be notified of the decision and the same applies to Inspectors who determine Planning Appeals».

There may be exception i.e. in cases of national Security or where it would be contrary to the interests of a patient.

The rule at common law is set out in the decision of *Re Poyser and Mills Arbitration* (1964) 2QB 467 by Mr Justice Megaw at page 478 when he said:

«Parliament provided that reasons shall be given and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not be only be intelligible but which deal with the substantial points which have been raised».

Put shortly the reasons shall be proper, intelligible and adequate.

4. *Whether the Administration must hear the individuals directly concerned before making a decision. Eventual exceptions to the rule.*

It is the general practice in almost all administrative decisions that the decision will not be made except after representations either orally or in writing have been made by the Applicant.

Whether the Administrative Authority is required as a matter of natural justice either to hear or see the Applicant in person or by legal representation or whether it is sufficient to receive representations in writing or otherwise depends on the nature of the case and on the legitimate expectation which has been created by previous conduct. It is not possible to set out at all the different occasions upon which a court will take the view that the failure to hear the Applicant *in person* is contrary to natural justice.

Put in simplest terms Natural Justice requires a fair tribunal and a fair hearing. To be fair requires the absence of bias or prejudice actual or perceived on the part of the Tribunal and of any interest direct or indirect in the result. A fair hearing includes giving the Applicant an opportunity to know what case he has to meet and in giving him the opportunity to state his case and call witnesses. The nature of the hearing may well vary and whether legal representations will be allowed again will depend on the particular circumstances. The extent to which there will be disclosure of advice the Minister receives is a matter of degree.

In *O'Reilly v Mackman* (1983) 2AC 237 at page 276 Lord Diplock said:

«A fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it shall render null and void any decision reached in breach of this requirement».

Likewise a duty of a consultation may arise from a legitimate expectation of consultation either aroused by a promise or by established practice. The use of the word «natural» in Natural Justice has been criticised; «justice» is as good a way of describing it. Likewise attempting to say that natural justice requires someone to act fairly is stating the obvious. In employment law for instance a practice has grown up of dismissing an appeal on the ground that it has made no difference even if the proper procedure had been followed. That view has been criticised by Megarry J in *John v Rees* (1970) Chancery 345 at 402 where he said:

«As everybody who has anything to do with the law well knows the path of law is strewn with examples of open and shut cases which somehow were not; of unanswerable charges which in the event were completely answered, of inexplicable conduct which was fully explained; of fixed unalterable determinations which by discussion suffered a change.»

It is likewise not necessary that there should be a right of appeal. However questions sometimes arise where there is a right of appeal and the first hearing is defective because of procedural deficiency: there is an argument that a proper procedure on subsequent appeal cannot cure that initial deficiency. That argument is based on the logic that a man who is given a right of appeal is entitled to two bites of the cherry. However the general position seems to be that a defective hearing can be cured by a full rehearing on an appeal.

5. *Whether all administrative documents must be placed at the disposal of interested parties. Eventual exceptions to the rule.*

In general terms this is not a rule of practice. It arises often during the course of litigation but it is very uncommon for documents to be placed at the disposal of interested parties before a decision is made or after the decision is made but before litigation. Sometimes it is disclosed when an Applicant threatens legal action so as to enable the Applicant to know whether it is proper to proceed with the case and sometimes it is done by the Administrative Authority in order to ensure that the Applicants case proceeds no further.

Order 53 provides for applications for discovery. These applications are made on an interlocutory application either to the Judge dealing with leave or Master of the Queens Bench Division. See Order 53 rule 8. There is power to order not only discovery of documents but interrogatories and cross examination. In general terms cross examination on Affidavits rarely occurs and applications for discovery are infrequent.

6. *Whether the lack of administrative decision is illegal where a time-limit for deciding is established by Law, either automatically or following an application.*

Whether there is a principle of law which requires the authorities to answer any application non manifestly absurd or belated. Whether this lack of decision is illegal in the same sense as a decision contrary to the law.

Some statutes set out time limits and the question in case of time limited ouster clauses is whether the time limit is reasonable. The basic distinction between void and voidable appears to be between an action which is ultra vires and an action which is liable to be quashed for error on the face of the record. An action which is ultra vires is unauthorised by law, is outside the jurisdiction, is nul and void and has no legal effect. But an order vitiated merely by error on its face is intra vires and within the jurisdiction but liable to be quashed. It remains intra vires and valid and effective unless and until the court quashes it. Once a court condemns an order as void it is destitute of all legal effect from the outset but one which is voidable has legal effect up to the time when it is quashed and in respect of that period it remains a valid order even after being quashed. There is a view that the discussion of the difference between void and voidable is a matter of semantics see Sir John Donaldson in *Data/in* (1987)1QB 815 at 840 when he said:

«I think it is important that all who are concerned with takeover bids should have well in mind a very special feature of public law decisions such as those of the panel, namely that however wrong they may be, however lacking in jurisdiction they may be they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction.»

An Act may be validly done after the expiry of a statutory time limit on the basis that the regulation in question was directive and not mandatory that the act is voidable and not void and is good if accepted and acted upon. Thus a Local Planning Authority which is required by regulations to give notice of its decision within two months was held able to give a valid decision after three months. See *James v Minister of Housing and Local Government* (1966) 1WLR 135. It is said that time limits may be held to be mandatory whenever the rights of other persons depend on it or because their special importance but there are equally cases where public policy requires some latitude.

There is no principle in law which requires the Authorities to answer *any* application not manifestly absurd or belated. The authorities have a discretion whether to accept a late application. They have no discretion to accept an application for instance which is not a public law matter or not justiciable and the exercise of that discretion either to accept or reject an application is subject to the same control of the court as the exercise of any other discretion.

7. *There are occasions in which the Administration may or may not make use of a power; or can choose with regard to the time or to the way of using it. Whether this choice can at times be freely made, as in the case of an individual, who may or may not enter into, or terminate, a contract. Whether, on the contrary, these choices are always discretionary, in the sense that: a) they must protect the public interest, and insure the equal treatment of individuals involved; and b) they are subject, on these grounds, to judicial scrutiny.*

*In broad terms the distinction between a duty and a power is in the language used in the particular statute thus generally the words such as «it shall be lawful» or «may» confer a power where words which are mandatory such as «shall» convey a duty. All public Authorities have a duty to exercise their powers as the public interest requires but as Coleridge J said in *R v Tithe Commissioners* (1849) 14 QB459:*

«The words undoubtedly are only empowering; it has so often been decided as to become an axiom that in public statutes words only directory, permissive or enabling may have a compulsory force where the thing to be done is for the public benefit or an advancement of public justice».

*Padfield v Ministry of Agriculture Fisheries and Food* (1968) AC977 is a good example where permissive words gave the Minister a discretion but he was not entitled to use that discretion in such a way as to thwart the policy of the Act of Parliament. In general terms the context in which the language is used and the avowed purpose of a particular legislation or regulation are all matters to be considered.

There are occasions in which the administration may choose to use its power or not to use its power. It has a discretion. A Local Authority may take the view that prosecuting those who trade on Sundays is not a particular law which they seek to uphold or that given that legislation is going through Parliament it is not one which they wish to pursue or that their resources are such that they do not choose to spend money.

Equally they can in general terms exercise their own judgment in which powers they use so that if there is a breach of planning law a Local Authority may decide to prosecute because somebody has not got a site licence; they may take enforcement proceedings because there is not planning permission or issue a stop notice. They may do one or the other; even if there is a continuing offence they may choose to act only at irregular intervals. Unless the absence of the exercise of the power gives an individual a legitimate expectation that that power will not be exercised there is nothing to prevent an authority from doing effectively what likes. If there are reasonable grounds for abstaining from exercising a power a court will not interfere *R v Metropolitan Police ex parte Blackburn* (1968) 29B 118 and (1973) 19B 241.

8. *Whether these decisions, or lack of decisions, can be challenged in front of impartial non judicial authorities, making use of formal contradictory procedure.*

Judicial Review is available for any person to challenge the decision of a public body exercising a public function. It is before an impartial judicial authority. It is done on Affidavit and there is formal adversarial procedure by way of argument. Sometimes there is a statutory appeal to another administrative body followed by an appeal to a court. In Immigration cases there is a Tribunal who are expected to act in an impartial and judicial way with formal contradictory procedure. In Judicial Review it is extremely rare for oral evidence to be heard.

9. *Whether there is access to the Courts against all administrative decisions, or lack of them, as well as against the decisions, or lack of them, taken by impartial non judicial authorities.*

In broad terms provided the issue is a matter of public law as opposed to private law there is access. The distinction between public law and private law is set out in *Data/in* see paragraph 1 page 3. Judicial Review is designed to prevent the excess and abuse of power by Public Authorities whose powers are conferred by Statute. Where a public authority wields affective power without any statute basis there are a number of examples where Judicial Review will still apply. Reference has already been made to the Criminal Injuries Compensation Board and the Panel of Takeover and Mergers. Some decisions are not justiciable, for instance the position of a student whose disciplinary rules are based on contract. Contractual rights are generally outside the scope of Judicial Review.

A right to move for Judicial Review is governed by Order 53 rule 3 sub paragraph 7:

«The court shall not grant leave unless it considers that the Applicant has a sufficient interest in the matter to which the application relates.»

The proper approach was laid down in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Business Limited* (1982) AC 617 and adopted in *R v Secretary of State for the Environment ex parte Rose Theatre Trust Company* (1990) QB 504 from which the following propositions may be extracted:

«1. Once leave has been given to move for Judicial Review the court which hears the application ought still to examine whether the applicant has a sufficient interest».

«2. Whether an applicant has a sufficient interest is not purely a matter of discretion in the court.»

«3. Not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision by that statute; to rule otherwise would be to deprive the phrase a sufficient interest of all meaning».

«4. However a direct financial legal interest is not required».

«5. Where one is examining an alleged failure to perform a duty posed by statute it is useful to look at the statute and see whether it gives an applicant a right enabling him to have that duty performed».

«6. Merely to assert that one has an interest does not give one an interest».

«7. The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have any interest».

«8. The fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest».

10. *Whether general regulations issued by administrative authorities (= règlements) may be directly challenged in the Courts.*

An Act of Parliament is unchallengeable in the courts save now if it conflicts with the Directives from Europe. That is not to say that the Courts will not interpret an Act of Parliament in some way to mean the exact opposite of what it appeared to say. i.e. in the *Anisminic* case. Orders or regulations or bylaws on the other hand may be challenged in the courts on the basis that they are ultra vires if they are not strictly in accordance with the Act of Parliament.

11. *Whether Law-suits dealing with administrative decisions should be especially rapid, in view of the public interest involved. Whether there are rules to insure this rapidity.*

Time limits are governed by Order 53 rule 4 reads:

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

Generally most applications are made within the three months and as a matter of practice the word «promptly» is very rarely invoked. Good reasons for extending the period are generally that the applicant has been applying for legal aid and it has taken time. The Courts are comparatively strict in enforcing the time limit because of the effect of administrative decisions continuing unchallenged for a period of time. By Order 3 rule 5 the time can be extended even if application to extend is made after the expiry of the time limit.

When leave has been obtained time limits are governed by a separate procedure namely Section 6 of the Supreme Court Act 1981. That reads:

«Where the High Court considers there has been undue delay in making an application for Judicial Review the Court may refuse to grant (a) leave for the making of the application or (b) any relief sought on the application if it considers the granting of the relief sought would be likely to cause substantial hardship to or substantial prejudice the rights of any person or detrimental to good administration».

Under Section 31.6 a Court has to consider firstly whether there has been undue delay and in that context anything over three months will be considered undue delay and *then* whether the granting of relief would be likely to cause substantial hardship etc. The reasoning appears from what Lord Diplock said in *O'Reilly* (1983) 2AC 237 at 280:

«The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached is purported the exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision».

The Courts have been reluctant to formulate any precise definition or description of what constitutes detriment to good administration but have suggested that it lies essentially in a regular flow of consistent decision made and published with reasonable dispatch and in citizens knowing where they stand and how they can order their affairs in the light of the relevant decision. Matters particularly important, apart from the length of time itself, will be the extent of the effect of the relevant decision and the impact which would be felt if it were to be reopened.

12. *Whether the Judge can give orders regarding the contentious matter for the duration of the Law-suit, either by granting a suspension of the administrative decision, or by granting for the time being a decision which the party had hoped to obtain.*

A court has power to grant an injunction by way of interim relief provided that it grants leave. It appears to have no power to make an interim order without granting leave. An injunction will not be granted against the Crown. In the recent decision of the House of Lords in *Factortame* (1991) 1AC 603 there was raised a challenge to the lawfulness of an Act of Parliament as being incompatible with European law. The Divisional Court had granted relief to the Applicants so that the Secretary of State was

restrained from enforcing the provision in respect of the Applicants until the matter had been finally determined. The Applicants appealed from the Court of Appeal to the House of Lords which held that under Common Law the court had no power to make an order postponing the coming into force of a statute pending a reference to the European Court to determine its validity. The matter was referred to the European Court. They held that a National Court was required to set aside a rule of National law which it considered was the sole obstacle preventing it from granting relief in the case before that court concerning community law if to do otherwise would impair the effectiveness of the subsequent judgement to be given on the substantive issue of the existence of the rights claimed under Community law. The power to grant a stay is expressly given by Order 53 rule 3.10 which provides:

«Where leave to apply for Judicial Review is granted then (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, that grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the court otherwise orders (b) if any other relief is sought the court may at any time grant the proceedings such interim relief as could be granted in an action as begun by writ.»

In *R v Secretary of State for Education Science ex parte Avon County Council* (1991) 1QB 558 the Council wished to reorganise Secondary education in their area and applied to the Secretary of State for approval to do so. The Secretary of State rejected the Council's proposals and the Council sought leave to apply for Judicial Review to quash the Secretary of State's decision. Leave was granted but the Judge held he had no jurisdiction to grant a stay of the implementation of the Secretary of State's decision. It was held by the Court of Appeal that although the Courts had no jurisdiction to grant an injunction against Officers of the Crown they did have jurisdiction, in granting leave under Order 53 rule 3.10a to apply for Judicial Review of the decision made by an Officer or Minister of the Crown to grant a stay of the implementation of that decision. That was because in relation to decision making bodies other than the courts the proceedings which were stayed by the grant of leave under Rule 3.10a referred to the process by which the decision was reached including a decision itself. Moreover the grant of a stay would not nullify the statutory provisions under which the order was made but would merely have the effect of deferring the date for the implementation of the proposals until the Judicial Review proceedings were concluded.

In *Minister of Foreign Affairs v Vehicles and Supplies Limited* (1991) 1WLR 880 at 550 Lord Oliver said this:

«A stay of proceedings is in order which puts a stop to the further conduct of proceedings in court or before a Tribunal at the stage which they have reached the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not in its nature capable of being breached by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot while the stay endures effectively entertain any further proceedings except for the purpose of lifting the stay and in that general anything done prior to the lifting of the stay will be ineffective although such an order would not, if imposed in order to enforce the performance of a condition by a Plaintiff prevent a defendant from applying to dismiss the action if the condition is not fulfilled.»

The better view as to the position of the Crown since *Factortame* notwithstanding the decision of the Court of Appeal in the *Avon* case is that not only will the Court not grant an injunction against the Crown but will not grant interim relief by way of stay against the Crown. The two it is said being indistinguishable.

13. *If the judgment is unfavourable to the administrative authorities, whether its enforcement poses problems which do not arise in litigation between individuals. Whether the Courts are vested with special powers to curb administrative decisions (or lack of them) taken in disregard of this judgment.*

*In theory there are problems of enforcement against the Crown. In practice the Crown almost invariably scrupulously observes orders of the Court. No injunction can be given against the Crown. However, an order for mandamus, which is similar, can be granted against a Minister and if a Minister gives an undertaking and is in breach thereof in the light of a recent judgement by the Court of Appeal (which could be reversed by the House of Lords) he can be liable personally for contempt. In broad terms the Secretary of State for the particular department is responsible for what happens in his department. Enforcement poses no problem in relation to other administrative authorities, though there are certain immunities in relation to the disclosure of documents.*