



LAW REFORM COMMISSION

Discussion Paper

Judicial Review

[November 2009]

Port Louis, Republic of Mauritius

4th Floor, Cerné House

Tel: (230) 212-3816/212-4102

Fax: (230) 212-2132

E-Mail: lrc@mail.gov.mu

URL <http://lrc.gov.mu>

About the Commission

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) the Director of Public Prosecutions or his representative;
- (e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

LAW REFORM COMMISSION

Chairperson : Mr. Guy OLLIVRY, QC, GOSK

Chief Executive Officer : Mr. Pierre Rosario DOMINGUE

Secretary to Commission : Mrs. Saroj BUNDHUN

Members : Mr. Satyajit BOOLELL

Mr. David CHAN KAN CHEONG

Mr. Rashad DAUREEAWO

Mr. Pazhany RANGASAMY

Mr. Roland CONSTANTIN

Ms. Odile LIM TUNG

Ms. Juliette FRANÇOIS

Dr. Sheila BUNWAREE

Table of Contents

Page

(A)	Introductory Note	1
(B)	Nature and Character of Judicial Review	
	(a) Judicial Review and the Supervisory Jurisdiction of the Supreme Court	2
	(b) Constitutional Jurisdiction of the Supreme Court and Judicial Review	8
	(c) Judicial Review: The Relevance of English Principles	12
(C)	Availability and Scope of Judicial Review	
	(a) Procedural Aspects (Two Stage Process)	15
	(i) Application for Leave to Apply for Judicial Review	15
	(ii) Substantive Judicial Review Application (Application on the Merits)	19
	(b) Persons against whom Judicial Review may lie [The test for determining whether a person may be amenable to Judicial Review]	20
	(c) Decisions in respect of which Judicial Review may lie [A Justiciable issue]	23
	(d) The Procedural Exclusivity of Judicial Review [The Public and Private Law Divide]	35
	(e) The Requirement of Sufficient Interest [Standing (Locus Standi)]: Who may apply for Judicial Review?	36
	(f) Discretionary Nature of Judicial Review	39
	(i) Grounds on which a Remedy can be refused	39
	(ii) Judicial Review and the Availability of other Remedies	40
	(g) Statutory Exclusion or Restriction of Judicial Review [Finality Clauses; Ouster Clauses; Time Limit Clauses]	41
(D)	Review for Jurisdictional Defects and Error of Law	
	(a) Illegality as a Ground of Review	42
	(i) The Ultra Vires Doctrine	42
	(ii) Mistake as to a Jurisdictional Fact	44
	(b) Error of Law on the Face of the Record	46
(E)	Judicial Review of the Exercise of Discretion	
	(a) Nature of Discretion	49
	(b) Failure to Exercise Discretion (Fettering Discretion)	50
	(i) Acting under Dictation	50
	(ii) Unauthorized Delegation of Power	53
	(iii) Over-Rigid Adherence to Self-Created Rules of Policy	56
	(iv) Fettering Discretion by Contractual or Similar Undertakings (Undertaking not to Exercise Discretion)	61
	(c) Abuse of Discretion.....	64

(i)	Exercise of Discretion for an Improper Purpose	65
(ii)	Exercise of Discretion based on Irrelevant Grounds or Without regard to Relevant Considerations	67
(iii)	Where the Use of Power is Unfair	69
	[Duty to act fairly]	
(iv)	Where there is Bad Faith or Malice	72
(v)	Unreasonable Exercise of Discretion	73
	[Irrationality or Wednesbury Unreasonableness]	
(vi)	Proportionality as a Ground of Review.....	74
 (F) Review of Procedural Impropriety		
(a)	Procedural Ultra Vires	76
(b)	Natural Justice	80
(c)	Natural Justice and Fairness – The <i>Audi Alteram Partem</i> Rule (The Right to a Fair Hearing)	
(i)	Historical Development	81
(ii)	Scope of the <i>Audi Alteram Partem</i> Rule	85
(iii)	Content of the <i>Audi Alteram Partem</i> Rule	98
	[Prior Notice of decision-making; Opportunity to be heard; Right to Cross-examine; Right to Legal Representation; Duty to give reasons]	
(iv)	Exclusion of the <i>Audi Alteram Partem</i> Rule	112
(v)	International and Constitutional Recognition of the Rule	113
(d)	Natural Justice and the Rule against Bias and Interest – <i>Nemo Judex in Causa Sua Potest</i>	114
(i)	The Rule against Interest [No direct pecuniary or other personal interest]	117
(ii)	The Rule against Bias	119
(iii)	The Test for Bias	121
(iv)	Exceptions: Situations where Bias will not apply	124
 (G) Remedies available through Judicial Review and Validity of Unlawful Administrative Action		
(a)	Prerogative Orders	125
(b)	Other Judicial Review Remedies	126
(c)	Validity of Unlawful Administrative Action: The Void/Voidable distinction	130
 (H) Concluding Observations:		
	Need for Reform	134
 Annex: LRC (1995-1997) Draft Administrative Justice Bill		
		135

(A) Introductory Note

1. With a view to better strengthening the rule of law, the Commission has examined the law on judicial review and has assessed its effectiveness as a means for controlling governmental action.
2. It is noteworthy to recall that during the period 1995-1997, the Commission has considered and approved the proposal for an Administrative Justice Bill, inspired from the Barbados Administrative Justice Act, which was meant to codify the law as to judicial review. The proposed Bill is reproduced as an Annex to this Discussion Paper.

In this Discussion Paper, the nature of judicial review, which stems from the supervisory jurisdiction of the Supreme Court, is examined, as well as the relationship between the constitutional jurisdiction of the Supreme Court and judicial review. The relevance of English principles in matters of judicial review is also analyzed. This is followed by an examination of the procedure for judicial review, its availability and scope. The grounds for review, the remedies available, as well the validity of unlawful administrative action, are then considered. We conclude that reform is necessary; reforms that have been either instituted or recommended elsewhere can provide useful alternatives upon which we can base our proposed options for change to the judicial review of administrative decisions.

(B) Nature and Character of Judicial Review

(a) Judicial Review and the Supervisory Jurisdiction of the Supreme Court

3. Judicial Review is the process by which the High Court, in England, and the Supreme Court, in Mauritius, exercises its *supervisory jurisdiction* over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.¹ As Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 3 All ER 935 at 949 (HL) said:

"Judicial review ... provides the means by which judicial control of administrative action is exercised".

It forms part of the inherent jurisdiction of the Supreme Court and is exercised by the prerogative writs of mandamus, certiorari and prohibition.

(i) Judicial Review to be distinguished from Appeal

4. Judicial review is to be distinguished from an appeal.² As Lord Brightman pointed out in *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made".

¹ As to the historical background to Judicial Review, vide G. Drewry, ‘Judicial Review: the Historical background’ in M. Supperstone, J. Goudie & Sir Paul Walker (eds.), *Judicial Review* (Butterworths, 3rd ed., 2005) at pp. 7-21. Judicial Review requires the articulation of acceptable principles governing the exercise of public functions and the vindication of the rights of the individual against the State. These principles and rights are now seen as fundamental features of a constitutional democracy. In this respect, vide H. Woolf, J. Jowell and A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 3-67.

² Sir John Donaldson MR in *R v. Panel on Take-overs and Mergers, ex parte Datafin PLC* [1987] 1 All ER 564 commented that “an application for judicial review is not an appeal”.

He also observed “unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

5. Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.³ It is entirely different from an ordinary appeal. It is made effective by the Supreme Court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer. Thus in *Ramdin v. PSC* [1990] SCJ 26, it was observed that "the Court's function is not to substitute itself for the respondent in determining what is the appropriate punishment to be meted out to an erring public officer".
6. A right of appeal is always statutory; no court has an inherent appellate jurisdiction. In *Healey v. Minister of Health* [1954] 3 All ER 449 (CA), it was pointed out that where an enactment confers no right of appeal, the court will not assume to itself a right of appeal. In *Re Racal Communications Ltd* [1980] 2 All ER 634 (HL), the House of Lords stressed that the jurisdiction of the Court of Appeal in UK is wholly statutory; it is appellate only. It has no jurisdiction itself to entertain any original application for judicial review; it has appellate jurisdiction over judgments and orders of the High Court made by that court on an application for judicial review. In *Harel Freres Ltd v. Minister of Housing* [1986] SCJ 331 [1987] LRC (Const) 754, the Supreme Court observed that the procedure provided for under section 8(1)(c) of the Constitution for contesting compulsory acquisition of land for a public purpose concerned more the legality of the decision (and is akin to review) than its merits (that is an appeal).
7. In *R v. Crown Court at Carlisle, ex parte Marcus-Moore* [1981], Times, 28 October, Donaldson, then LJ, said that judicial review was capable of being extended to meet

³ Lord Fraser in *Re Amin* [1983] 2 ALL ER 864 (HL), said: “Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made ...”

changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. The purpose of the remedy of judicial review, he went on to say, is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable body could have reached or abused its powers.

8. As pointed out in *Hungsraz v Mahatma Gandhi Institute & ors* [2008] MR 127:

“Judicial review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this Court is concerned only with reviewing, not the merits of the decision reached, but of the decision-making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decision; to ascertain that it is in conformity with all the elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this Court that it is not its role to substitute itself for the opinion of the authorities concerned. This Court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However, it will intervene when the body concerned had acted *ultra vires* its powers; reached a decision which is manifestly unreasonable in the *Wednesbury* sense; had acted in an unfairly manner and the applicant was not given a fair treatment.”

- (ii) Grounds for and Remedies available through Judicial Review

Grounds

9. In *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 3 All ER 935, Lord Diplock considered that the grounds, upon which administrative action is subject to control by judicial review, can conveniently be classified as threefold. The first ground is "illegality", that is the decision-maker must understand correctly the law that regulates his

decision-making power and must give effect to it. The second is "irrationality", that is he must not reach a decision which no reasonable body would have reached nor must he abuse of his powers. The third is "procedural impropriety", that is he must not commit breach of the rules of natural justice. Lord Diplock further said “That is not to say that further developments on a case by case basis may not in course of time add further grounds.”⁴ One development to which he then referred specifically was the possible recognition of the principle of proportionality. Vide *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 All ER 720 (HL).

Remedies

10. A contrast between English administrative law and French administrative law is that the former is remedy-oriented whereas the latter is right-oriented. Indeed, the development of English administrative law has been dependent on the availability of remedies.⁵

Prerogative Orders/Writs

11. *Certiorari* lies to bring decisions of an inferior court or tribunal or public authority before the High Court or Supreme Court for review so that the court can determine whether they should be quashed, or to quash such decisions.

⁴ On the question of further development on a case-by-case basis, which might, in course of time, add further grounds, vide Mr. Justice Walker, ‘Other Grounds of Review’ in M. Supperstone, J. Goudie, & Sir Paul Walker (eds.), *Judicial Review* (Butterworths, 3rd ed, 2005) at pp. 383-391.

On the relevance of equality in cases of judicial review, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008) at pp. 693-707.

⁵ On the historical development of Judicial Review Remedies and Procedures, vide H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007) at pp. 779-820.

12. The order of *prohibition* is an order issuing out of the High Court or Supreme Court and directed at an inferior court or tribunal or public authority which forbids that court or tribunal or public authority to act in excess of its jurisdiction or contrary to law.
13. The order of *mandamus* is, in form, a command issuing from the High Court or Supreme Court, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.

Mandamus has never been limited to, or indeed primarily concerned with, persons or bodies whose office is judicial or who have a duty to act judicially. It will lie on any person or body in respect of anything that appertains to his or their office and is in the nature of a public duty: vide *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694 (HL). The breach of duty may be a failure to exercise a statutory discretion, or a failure to exercise it according to proper legal principles.

14. Orders of certiorari and prohibition, on the other hand, issue primarily to inferior courts and other persons and bodies having legal authority to determine questions affecting the rights of subjects. It does so where there has been an actual or threatened usurpation of jurisdiction, or a breach of the rules of natural justice, or a denial of legitimate expectation without a hearing, or an error of law on the face of the proceedings.
15. The legal authority in question is normally one derived from statute, but the orders are also available to control the exercise of jurisdiction by non-statutory bodies performing functions of a public nature, as distinct from a private nature.

It is to be noted that at one time it was thought that before certiorari or prohibition could issue, a body had to have a duty to act judicially. Vide *R v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd* [1924] 1 KB 171, at 205, per

Atkin LJ. However this limitation is no longer supported. Vide *Ridge v. Baldwin* [1963] 2 All ER 66 (HL) and *O’Reilly v. Mackman* [1982] 3 All ER 1124 (HL).

16. It should be observed that whereas certiorari is concerned with decisions in the past, prohibition is concerned with those in the future. Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury. Vide observations of Watkins LJ in *R v. Bolton Justices, ex parte Scally* [1991] 2 WLR 239 at 256. Prohibition will issue to forbid any such determination. It is common practice to apply for certiorari and mandamus together, that is quash a decision of a body and to require that body to go through the decision-making process again. Vide *R v. Panel Take-overs and mergers, ex parte Datafin PLC* [1987] 1 All ER 564 (CA).

* *Other Judicial Review Remedies*

Equitable remedies:-

17. A *Declaration* sets forth what the legal rights of the parties to the action are. A declaration as such cannot be enforced; it has no coercive force and disobedience to it is not a contempt of court.

18. An *injunction* can be issued requesting a body to refrain doing a certain act or for performing something.

Common Law remedies:-

19. The award of damages is very exceptional.

(b) **Constitutional Jurisdiction of the Supreme Court and Judicial Review**

20. The Supreme Court is vested with original jurisdiction to interpret the provisions of the Constitution: sections 17, 83 and 84.⁶

21. In *Vallet v. Ramgoolam* [1973] MR 29, at 33-34, the Supreme Court had this to say regarding its privileged position under the Constitution of this country:

“Unlike the Courts in England, this Court is, by virtue of a written Constitution which is the supreme law of the land, endowed with original jurisdiction not only to interpret, but also to enforce obedience to, its provisions, and for so doing is provided with a wide range of remedies from which to choose (including an order of *mandamus*). It is the Court's *duty* to determine the validity of any statute, which is alleged to be unconstitutional, because no law that contravenes the Constitution can be suffered to survive, and the authority to determine whether the legislature has acted within the powers conferred upon it by the Constitution is vested in the Court. The Court's primary concern, therefore, in any case where a contravention of the Constitution is invoked, is to ensure that it be redressed as conveniently and speedily as possible. For those reasons, while it is true to say that, where the form of redress applied for is an order of *mandamus*, the Court should and will, as far as feasible, follow the English principles applicable to that order, it is obvious that, having regard to its special powers and duties under the Constitution, the Court may find it necessary to evolve principles of its own, in certain circumstances, which may not always accord with those applicable in England.”

⁶ See also sections 8(1)(c) and 8(4A)(a), 30A(1) and (2), 37, 41(5), 64(5), 101(1) and 119 of the Constitution, and the First Schedule to the Constitution.

22. It is important to bear in mind that the review powers of the Supreme Court are of two kinds: review of constitutionality and review of legality. This is made clear by section 119 of the Constitution, entitled ‘saving for jurisdiction of courts’, which reads as follows:

“No provision of the Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question, whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions”.

23. In *Yerriah v. PSC* [1974] MR 22, it was argued, on the basis of section 118(4) of the Constitution⁷, that the Supreme Court has no jurisdiction to review a decision of the Public Service Commission. Overruling the objection the Court held it derived its jurisdiction from section 119 and that its power of review is limited to the following three situations:

- (1) where the Commission acts in violation of the Constitution;
- (2) where the Commission contravenes any other law;
- (3) where it performs a function which it is not authorized.

24. In *Descelles v PSC* (1978) SCJ 226, the Supreme Court pointed out that it has jurisdiction to enquire whether the PSC has been acting in conformity with the provisions of the PSC Regulations and has not infringed the requirements of natural justice.

25. In *Unuth v. Police Service Commission* [1982] MR 232, the Supreme Court held that section 76 of the Constitution did not preclude it from exercising, in relation to a body such as the Police Service Commission, the powers of review which it derived from section 119. The Court stressed that:

⁷ Section 118(4) provides regarding Commissions established under the Constitution that, in the exercise of its functions under this Constitution, no such Commission shall be subject to the direction or control of any other person or authority.

“We may here open a parenthesis to note that it is not appropriate to speak of this Court's inherent powers in the same way as we do in relation to the English High Court of Justice. This Court is a creation of the Constitution and it derives its powers, and its jurisdiction, pervasive and considerable though they may be, from that instrument. Whilst this Court is charged with the sole duty of ensuring that constitutional rights are protected, it cannot assume any functions, which the instrument does not confer upon it. It is as well, however, to observe at the same time that, whilst it is open to Parliament to alter this Court's jurisdiction, it can only curtail the powers and jurisdiction conferred upon the Court by section 76 of the Constitution, and other sections, in strict accordance with the procedure laid down in section 47(2) of the Constitution, which governs amendments to entrenched clauses.

So that, whatever may have been the object of the amendment effected to section 15 of what is now the Courts Act, the result cannot be that Parliament has taken any of our powers to proceed to judicial review in the field of administrative law, any more that it can be said to have abolished, for example, our power to hold persons in contempt, which we also derived from the old section 15.⁸

In relation to judicial review of the proceedings taken before a person or body of persons who exercise disciplinary powers and who are not governed by section 119 of the Constitution, we shall therefore be guided by *Reg. v. Board of Visitors of Hull Prisons, Ex Parte St Germain* (1979) Q.B. 425, which removed the uncertainty which had been created by certain earlier decisions in relation to the English Courts' powers of review of disciplinary proceedings. That case has, incidentally, been recently followed in *O'Reilly v. Mackman* (see *The Times*, July 1, 1982).

But in relation to bodies that are governed by section 119 of the Constitution, the position is, as we see it, different. This Court's powers of review are limited by that section. It is not, as in the case

⁸ Section 15 of the then Courts Ordinance provided that -

The Supreme Court shall be a superior Court of record and in addition to any other jurisdiction conferred by this or any other Ordinance, shall possess and exercise all the powers, authority, and jurisdiction that are possessed and exercised by the High Court of Justice in England...

That section was altered by section 7(2) and the Second Schedule to the Revision of Laws (Amendment) Act (No. 27 of 1981) and it now reads -

The Supreme Court shall be a superior Court of record and in addition to any other jurisdiction conferred upon it, shall have all the powers and judicial jurisdiction necessary to administer the laws of Mauritius.

of judicial review in other spheres, every kind of error of law on the face of the record that can be investigated, but only instances where a Service Commission acts *ultra vires*, or disregards the Constitution or law. This is not to say, of course, that once the Service Commission shows that it has followed the procedure laid down in its regulations, and it cannot be proved that it has contravened any provision of the Constitution or of any other law, that is an end of the matter. We know that for example, the Police Service Commission Regulations make full provision for affording a fair hearing to an officer who is charged with misconduct. But these are regulations made by the Commission itself, which may, by section 118 of the Constitution, regulate its own procedure in the absence of regulations. Suppose, then, that the regulations made no provision for bringing to the notice of an officer the charge preferred against him. Would this Court agree to a submission that, since there had been no breach of the regulations, no review was possible?

We think not, because powers of judicial review are exercised in relation to all tribunals or others bodies which, unlike for example purely private or domestic ones, have a public duty to act fairly. It follows therefore that a body like a Service Commission which is protected by section 119 may, in appropriate instances, be taken to task because of blatant unfairness.”

26. In *Baureek v PSC* (1987) SCJ 229, it was pointed out that the Supreme Court would only look at the decision-making process. As observed in *Sookia v Commissioner of Police* (1983) SCJ 87, the Court would interfere in a case where it is obvious the irregularity was so gross as to render the whole decision-making process void. In *Hafejee v PSC & anor* (1989) SCJ 321, the Supreme Court took the view that where an inquiring body or officer acts behind the back of the ‘accused’ in that evidence is never made available to the latter or his counsel, this would be most improper and would amount to a blatant breach of the rule of fairness in relation to the hearing.

27. In *Ramdin v PSC* (1990) SCJ 26, the Supreme Court pointed out that it would also see to it that in arriving at a decision, the disciplinary authority has taken into account all the relevant considerations and has not been influenced by considerations which are either

irrelevant or not borne out by the record. Faced with a situation where such does not appear as the case, the Court will have no option but to quash the determination.

(c) **Judicial Review: The Relevance of English Principles**

28. In *Central Electricity Board v. Forget and CEB Staff Association* [1974] MR 299, the Supreme Court noted that:

“We have practically no rules of our own regulating applications for *certiorari* and must turn to the English Rules of Court for guidance, if necessary. According to those rules as now in force (Order 53 rr. 1 and foll.) the first step in proceedings for *certiorari* is to ask for leave to apply for the order. This first motion is made *ex parte*. It should be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought and by affidavits verifying the facts relied on. When leave is obtained, the second step is to apply for the order; if to the Court, by notice of motion. With the notice, copies of the statement accompanying the application for leave are served and copies of any affidavit filed with that application are supplied on demand to the opposite party. This then is the present procedure in the High Court of justice in England. Our Supreme Court Rules, 1903, make no provision similar to Order 53 rr. 1 and foll, but, among the forms set out in the schedule to those Rules, forms 71 to 74 would show by their tenor that the procedure contemplated by the Rules was that the application for the writ should be made by notice of motion with summons accompanied by an affidavit setting out the facts and law upon which the relief was sought. As for the procedure actually followed in the past before this Court the position is not so clear. From reported decisions it would seem that in some cases the procedure adopted was that traced out by the English rules prior to the passing of the Administration of Justice Act of 1938 (by which the old writs of *mandamus*, prohibition and *certiorari* were replaced by orders of the same name) that is to say, by first obtaining a rule nisi and a summons to show cause. The stage of the proceedings to which forms 71 to 74 of our Rules of Court refer would thus appear to be very much to the same effect as the second stage under the present English law. By the time both are reached, the Court and all parties concerned are in presence of the relief sought, the grounds and the facts upon which it is prayed for. It does not appear to have been so far decided whether the enactment of the Administration of Justice Act 1938, and the consequential change in the English rules automatically applicable by this Court as vested with the jurisdiction of the High Court of justice in England by section 15 of the Courts Ordinance (cap. 168) as amended by Ordinance No. 12 of 1954, although it would result from the *cursus curiae* of recent years that that has been taken for granted. We think that this application affords the Court an opportunity of removing any existing uncertainty on the question and we hold that the correct course for applicants is to comply with the present English practice. For the purposes of this motion, however, we propose to adopt the relevant English rules regulating

the second step in the proceedings, namely, the notice of motion. Those rules lay down that the Court may, on the hearing of the motion allow the statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application.”

29. In *Berenger v. Goburdhun* [1985] MR 209, it was observed:

“In cases such as applications for what were termed prerogative orders (as in a number of other matters), where our rules of procedure are silent, it will follow English practice, or be guided by it. But it has also said, and this in our view is the more correct approach, that it will not blindly and in every respect apply to Mauritius the English Rules of the Supreme Court [*See Murdaye v. Police Service Commission* (1984) S.C.J. 246]. Still less would it be appropriate for this Court to do so in relation to rules which are now embodied in the U.K. Supreme Court Act 1981. No one could be heard to suggest that we should be subject to the will of the Parliament of another State”.

30. It is to be noted that Rule 2.4 of the Supreme Court Rules 2000, is to the effect that “an action for a prerogative order shall be governed by the practice prevailing for the time being in the Courts of England and Wales.”⁹

In *Domah v. Judicial and Legal Service Commission & ors* [2001] SCJ 175, the Supreme Court had this to say about the significance of this provision:

“It is the contention of learned Counsel for the applicant that in England and Wales applications for judicial review are heard by a single Judge and that by virtue of the above provision we have imported the practice which obtains in England and Wales into our judicial system. Therefore, according to learned Counsel, the case ought to be heard by a single Judge. Learned Counsel is also of the opinion that, our Rules of Court being no longer silent as to the practice in respect of applications for judicial review, the judicial pronouncements that we should not "blindly" follow the practice obtaining in England, are no longer applicable. So is the *cursus* that such applications be heard by two Judges.

On the other hand, learned Counsel for the respondent and co-respondent no. 6 submitted that the provision of Rule 2.4 was never intended to sweep away the well established practice followed from time immemorial in all matters of judicial review.

⁹ As to the procedure in England, vide R. Drabble & T. Buley, ‘Procedure: the Early Stages’, in M. Supperstone, J. Goudie & Sir Paul Walker (eds.), *Judicial Review* (Butterworths, 3rd ed., 2005), pp. 539-571. Also H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007) at pp. 821-883.

We have given due consideration to the submissions of Counsel. According to us, learned Counsel for the applicant missed the spirit and purpose of Rule 2.4, which is only a Rule of Court. Therefore, like all Rules of Court, Rule 2.4 is designed as a guidance to regulate procedures for the proper administration of justice. We wish to stress that a distinction must be made, in our view, between a provision as to the composition of the Court - which has traditionally been contained in our Constitution or Courts Act - and provisions relating to purely procedural aspect such as initiation of proceedings and pleadings, which are normally prescribed in Rules of Court. Furthermore it has always been the practice that matters of judicial review are normally heard by two Judges. We are of the considered opinion that Rule 2.4 (*Supra*) is intended to cover only the procedural steps to be followed in an application for a prerogative order, it cannot be so construed as to impose on us the very composition of the Court as obtains in England and Wales when hearing such an application. It is worth noting that in England and Wales such applications are now dealt with in the Administrative Court (*Vide The White Book (2001) Civil Procedure Vol. 1, 54 PD - 002*).

Even when it comes to the procedural steps we have not followed the procedure obtained in England and Wales as prescribed under the now defunct Order 53 to the letter (*Vide Berenger and Anor v. Goburdhun and Pillay* [1985 MR 208]), nor are we following the practice prevailing in England and Wales as provided under Part 54 of the Civil Procedure Rules, which introduces significant changes to the procedure for applying for permission. We may here refer to *The White Book (2001) Civil Procedure Vol. 1 Part 54 Para. 54.4.1*.

Procedure for determining applications for permission

"... The claimant must first a claim form file in the Administrative Court Office. The claim form must contain the matters set out in CPR rule 8.3 and 54.6 (see para. 54.6.1 below) together with the material required by the relevant practice direction. That claim form must also be served on the defendant and any interested person within 7 days of being issued by the Administrative Court Officer (CPR r. 54.7). They must then file an acknowledgement of service within 21 days and serve it as soon as reasonable practicable and not later than 7 days on the claimant and any interested person (CPR r. 54.8(2)). The acknowledgement of service must set out a summary of the grounds for contesting the claim (CPR r. 54.8 (4)).

Thus in England and Wales a claim for judicial review is made on a prescribed form - the claimant's form - which must be filed in the Administrative Court Office (*Supra*), whereas our Rule 2.2 provides that an action for a prerogative order may be initiated by way of motion supported by affidavit. If there is an objection to the application, exchanges of affidavits follow."

(C) Availability and Scope of Judicial Review

(a) Procedural Aspects [Two Stage Process]

31. An application for judicial review is carried out in two stages. First, there must be a motion for leave to apply for one or more of the prerogative orders. Only if and to the extent that such leave is granted will the Court proceed to hear the substantive application for judicial review.

(i) Application for Leave to Apply for Judicial Review

32. The purpose of the requirement for leave is to operate as a screening process to eliminate at an early stage any application, which is frivolous, vexatious or hopeless. As pointed out by Lord Diplock in *R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1981] 2 All E R 93 at 105, the requirement that leave must be obtained is designed to “prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

The requirement for leave also reflects the discretionary nature of judicial review; the decision of a public authority is reviewed at the discretion of the Court.

33. The application for leave is generally made ex parte to the Supreme Court and is accompanied by affidavit stating the facts of the case, the relief sought for by the applicant and the grounds on which the relief is sought. In *Chellum v. Commissioner of Police* (1991) MR 7, the Supreme Court noted that:

“Leave is normally granted on an *ex parte* application. However, recently the *cursus* adopted by this Court in a number of cases has been not to grant leave on *ex parte* applications but allow the other party to be heard first.¹⁰ No doubt this procedure has largely been motivated by the fact that this Court has been overburdened in recent times by many flimsy *ex parte* applications for leave to apply for judicial review.”

In *Domah v. Judicial Legal Service Commission* (2001) MR 180 [SCJ 175], it was highlighted that from time immemorial the *cursus* of the Supreme Court has been that all matters of judicial review are to be heard by two Judges.

34. Leave would be granted if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant. As pointed out in *Luchmun v. Mauritius Sugar Terminal Corporation* (1990) MR 343, the requirement for leave is to ensure the applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further consideration.
35. The supporting affidavit must set out all the facts relied on, including any relevant evidence. Specific averments are necessary to disclose an arguable case that there is a serious flaw in the decision-making process or that the decision is so unreasonable that no reasonable body could have reached such a decision. It was held in *Ramdene v. Registrar General and Tax Appeal Tribunal* (1997) SCJ 303 that no arguable case is shown when the applicant merely avers that the decision reached by the respondent is “unwarranted, unfair and in breach of the rules of natural justice” and without averring specific facts constituting the alleged breach. Similarly, it was held in *Coulon v. TCSB* (1997) SCJ 304 that it is not enough to establish an arguable case to aver that a decision is “capricious”, “arbitrary” or “unjustified” without specifying why the decision deserves those qualifications. In *Hurnam v. Lan Yee Chiu* (2001) MR 81 [SCJ 153], it was pointed out that mere imputations of motives are not sufficient; to establish an arguable case; there must be some material

¹⁰ The applicant would be requested to summon the adverse party with a view to allowing him to show cause why leave should not be granted; the adverse party would have to file an affidavit explaining the facts and circumstances of the case which would justify why he is resisting the application.

leading to a reasonable inference of improper motivations likely to make a decision unreasonable.

36. There is a duty on the applicant to make a full and frank disclosure. The applicant for leave must show *uberrima fides* [that is utmost good faith], and if leave is obtained on false statement or suppression of material facts in the affidavit, the Court may refuse an order on this ground alone.¹¹

37. Proceedings must be brought against the appropriate Respondent [*Subron v. District Magistrate of Curepipe* (1992) MR 1; *Hurnam v. Pillay & ors.* (2001) SCJ 136]. In *Hurnam v. Judicial and Legal Service Commission & ors.* (2001) SCJ 149, the Court said:

“We are of the view that if a party has been wrongly put into cause at the stage of leave and he makes a request to be put out of cause, his request should be entertained there and then. Indeed, failure to do so would mean that such a party might have to incur the expense of retaining Counsel again upon being put into cause anew by the applicant, in the event that leave is granted, in the application on the merits. And that would be an unfair result ...

In applications for judicial review, only persons or bodies whose decisions and decision-making processes are being challenged should be joined as respondents. We are also of the view, having regard to the practice obtained in Mauritius, that interested parties, - in the sense of “affected” parties, vide para. 5.1.26 of Supreme Court Practice 2000 cited above - who can also be properly joined, should be joined as co-respondents”.

38. Application for leave to move for judicial review must be made promptly, that is as soon as practicable or as soon as the circumstances of the case will allow, and in any event such application must be made within 3 months from the date of the decision. For this purpose time starts to run from the date when the grounds for the application first arose, when the decision was communicated to the aggrieved party. In the particular case of an application for an order of certiorari in respect of any judgment, order, conviction or other proceedings, the date when

¹¹ *R v. Kensington Commissioners.* (1917) 1 KB 486] See also *Gopaul v. NTA* (1991), *Societe Louclem v. Minister of Finance* (1993) SCJ 431.

grounds for the application first arose will be taken to be date for that judgment, order, or conviction.¹²

There can be cases where, even though the application was made within the 3 months period, leave might be refused because on the facts, the application had not been made promptly [*R. v. Independent Television Commission ex parte TV NI* The Times Dec 30, 1991].

39. The Court has power to extend time for applying for leave to move for judicial review, but only if it considers that there is "good reason" for doing so. The Court will consider whether an extension of time for applying for judicial review will be likely to cause substantial hardship or prejudice, not only to the instant parties, but to a wider public or may be detrimental to good administration [*R. v. Stratford-On-Avon D.C ex parte Jackson* (1985) 1 WLR 1319].

40. In *R v. Dairy Products Quota ex parte Caswell* (1989) 1 WLR 1089, the Court of Appeal held the fact that the application for leave was not made promptly or within 3 months at the latest carries with it the inevitable consequence of undue delay, even where the applicant has shown good reason for it and extension has been granted, and it is open to the Court hearing the substantive application for judicial review to refuse relief on the ground of "substantial hardship" or "detriment to good administration".

In *Monty v. Public Service Commission* (1981) MR 244, the Supreme Court considered that whilst there may be obvious cases when the Courts will, and should, rule on the question of undue delay at an early stage, there are others when it would be more appropriate for the Court to look at all the surrounding circumstances in arriving at a decision on that preliminary issue, particularly before deciding to send an applicant out of Court. Where it is not possible to assess the consequences of applying outside the delay, the proper course is to leave the issue open until the case is heard on the merits.

¹² As regards the effect of delay on availability of judicial review, see *Mon Loisir Sugar Estate Company Ltd v District Council of Pamplemousses and Riviere du Rempart* (1983) MR 183, *Transport Employees Union v Permanent Arbitration Tribunal* (1977) MR 83 and *Murdaye v Commissioner of Police* (1984) MR 118.

(ii) Substantive Judicial Review Application (Application on the Merits)

41. Having obtained leave to move for Judicial Review the next stage is for the applicant to institute a substantive application for judicial review. To institute such a substantive application the applicant must within 14 days of the date of the grant of leave -

- (a) serve on all parties directly affected a Notice of motion and affidavit [*Gopaul v. NTA* (1992) MR 1 (SCJ 409)]; and
- (b) lodge the motion with the Court.

Respondent and Co-respondent(s) will then file their respective affidavits.

No new grounds will be normally entertained after the grant of leave.

42. The applicant may also ask for bringing up the record of the case. In *Guddaye v. PSC* (1988) MR 175, the Supreme Court held that whether or not the records of a public body are to be produced is to be decided on its individual merits and circumstances:

“In the case of *Chinien v. The Public Service Commission*, 1981 M.R. 430, this Court made some observations concerning the bringing up of the records of bodies like The Public Service Commission. The learned Judges (Espitalier-Noel and Lallah JJ.) had this to say at page 432:

‘... the removal of the record of a statutory body such as the Commission, the record of which may contain confidential and personal information relating to parties other than those in Court, is not to be had for the mere asking, unless of course, the Court is satisfied that its production is required for the purposes of determining the real question at issue or that the material necessary to determine the question is not already contained in the affidavits filed by the parties’.

The learned Judges in *Chinien* were only prescribing what logic and common sense command in matters where this Court is called upon to review a decision of a Service Commission by virtue of its powers under section 119 of the Constitution. In a few cases this has been the course of action taken by this Court. In *Nababsing & Ors v. The Public Service Commission & Ors* (1978) S.C.J. 24 the Court, on an issue of an appointment to a post in the public service, did not hesitate to peruse the record of the case. In *Ramsawaruth v. The Public Service Commission* (1984) S.C.J. 245, the Court asked that the record

containing the proceedings of a disciplinary committee be brought up in order to ascertain whether there was evidence to justify the findings of the Committee on the basis of which ultimately a public officer was dismissed from the service. The same course of action was taken in the cases of *Hansrod v. Local Government Service Commission* (1988) S.C.J. 124 and *Municipal Council of Port Louis v. Local Government Service Commission* (1988) S.C.J. 164.

The above cases show that nothing should debar an applicant from successfully moving for the record to be brought up. Nor should it be understood that statutory bodies will be compelled to bring up their records at the request of anybody. Each case must be decided on its own merits and only the circumstances of each case will warrant a decision one way or the other.”

43. It is also possible, in exceptional circumstances, to move that someone who has filed an affidavit be tendered for cross-examination [*Société Ramdin v. Tea Board* (1979) MR 118].¹³

(b) Persons against whom Judicial Review may lie [The test for determining whether a person may be amenable to Judicial Review]

44. Judicial review is only available to review decisions of bodies performing public functions¹⁴: *O’Reilly & ors v. Mackman & ors.* [1982] 3 All ER 1124 (HL). In *Boodhun v District Magistrate of Black River & anor* (1999) MR 120, the Court, referring to *Duval v District Magistrate of Flacq* (1990) MR 125¹⁵, held that the decision of a magistrate to

¹³ As to the procedure in England for hearings and appeals, vide J. Swift & J. Stone, ‘Procedure: Hearings and Appeals’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 573-614.

¹⁴ Vide H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007) at pp. 109-176. Also M. Supperstone & E. Laing, ‘The Ambit of Judicial Review’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005) at pp. 69-89.

¹⁵ In *Duval v District Magistrate of Flacq* (1990) MR 125, the applicant was charged on two counts of complicity in attempted murder and a third count of conspiracy to murder. He was committed for trial following a preliminary enquiry. The applicant sought leave to apply for an order to quash the finding of the magistrate. The issues were whether (i) judicial review was available for a preliminary enquiry; and (ii) any of the applicant’s grounds warranted judicial review or whether they were more appropriately addressed at a trial. The Court held that judicial review is available if the enquiry has been conducted in flagrant violation of the law. It took the view that the applicant’s grounds, if substantiated, could be addressed at the trial stage.

commit a person for trial following a preliminary enquiry started at the request not of the DPP but of the Police could be questioned on certiorari.

In *Karamuth v Universal Hotels* (1988) MR 171, the applicants sought judicial review of a decision of the Judge in Bankruptcy. The respondent claimed that since the Bankruptcy Court was a division of the Supreme Court, and not an inferior court, it could not proceed against itself by way of judicial review. The Supreme Court held the Bankruptcy Court is only nominally a division of the Supreme Court. As a jurisdictional matter it is inferior to the Supreme Court, and the Supreme Court exercises a supervisory jurisdiction over the Bankruptcy Court by way of appeals and judicial review.

45. Decisions of bodies other than Courts but exercising quasi-judicial functions can be the object of judicial review. In *Bérenger v. Goburdhun* (1985) MR 209, the Court considered it could review the proceedings or decision-making process of a Commission of Inquiry charged with investigating fraud.¹⁶
46. Decision of a private non-statutory body cannot be reviewed when no public law element is involved: *Ex parte Jhurry* (1977) MR 359. In *Gowrisunkur v. Mauritius Family Planning Association* (1980) MR 112, it was held that the decision of the association dismissing one of its officers could not be the object of judicial review as it did not perform any function of a public nature.

¹⁶ In *Gopee v Rault & Attorney General* (1987) MR 181, the applicant sought an order of certiorari to strike off the paragraph in the Commission’s report which concerns him. In the alternative, he sought (i) a declaration to the effect that the Commission was wrong in law and in fact in reaching the conclusion that he was a drug trafficker; or (ii) any other order that may be appropriate. With regard to the order of certiorari, the Court observed that the findings of a Commissioner of Enquiry do not have the character of those of a Court of law or of a tribunal having similar jurisdictional powers and those findings do not have any juridical effect. The Court went on to say that where there is juridically nothing, there is nothing for a Court of law to quash or strike out. As regards review of proceedings or of decision-making process of commissions of inquiry see *Valayden v Matadeen & ors* (2002) SCJ 82; *Ramgoolam v Matadeen & ors* (2001) SCJ 317; *Dayal v Yeung Sik Yuen & ors* (2002) SCJ 263.

47. Judicial review does not lie in respect of a domestic tribunal adjudicating on a private matter arising out of a contractual relationship: *Sham v. Mauritius Turf Club* (1985) MR 217.

48. Note that even a public body’s decision can only be the object of judicial review if it has a public law element and is not solely concerned with private law rights. Decisions of public corporations on employment matters are thus not reviewable as the relationship with staff is governed by private law, not public law: *Augustave v. Mauritius Sugar Terminal Corporation* (1990) MR 222.¹⁷ Employment decisions would however be reviewable when there exists special statutory provisions injecting a public law element in the relationship, or else when there is an alleged violation of the Constitution. In *Islam v. Mauritius Housing Corporation* (1992) MR 1, the Court said:

“We note that there is no special statutory provision bearing directly on the right of the Corporation to dismiss its employees. It is the existence of such statutory provision, which injects the element of public law necessary in this context to attract the remedies of administrative law. ‘Employment by a public authority does not *per se* inject any element of public law’ said Sir John Donaldson in *Regina v/s Berks Authority* W.L.R. (1984) p. 826.”

In *Koo Tze Mew v Mauritius Basketball Federation* (1993) MR 367, the applicant sought judicial review of the respondent’s decision to suspend the applicant from acting as a referee during basketball matches and excluding him from the list of persons from whom referees could be selected. The respondent was, admittedly, a Sports Federation, which is established pursuant to section 7 of the Physical Education and Sport Act 1984 and it had a number of functions that were set out in the Second Schedule to the Act. There was however nothing in the statute, which purported to regulate the manner in which referees are selected, or not selected as the case may be, to officiate at matches. And there was no averment that the applicant was seeking to assert, or protect any right, as would be the case, for example, if the case concerned a contract of employment. The Court thus held that as there was no public

¹⁷ Vide also *Luchmun v Mauritius Sugar Terminal Corporation* (1990) MR 343. In *Federation of Civil Service Unions v State of Mauritius* (1998) MR 81, the Court held that judicial review does not lie as a public law remedy for an alleged breach of contractual obligations of service.

law element involved in the internal regulation, by the Federation, of its choice of referees, the decision it had taken was not amenable to judicial review

(c) **Decisions in respect of which Judicial Review may lie [A Justiciable issue]**

49. Judicial review will only lie with respect to a decision or conduct, and not merely a recommendation. In *Transport and General Workers Union v. Industrial Relations Commission* (1975) MR 150, it was pointed out that:

“It would result from a study of decisions by the Courts in England (by which this Court, vested by statute with the jurisdiction of the English High Court of Justice in the matter, allows itself to be guided) that *certiorari* would rarely issue to quash reports or recommendations, and never when it would serve no purpose.”

In *De Robillard v Yeung Sik Yuen* (1992) MR 218, the Court had this to say regarding the category of complaints relating to what were termed “observations/findings”:

“We are not prepared to say that judicial review would lie merely in respect of observations or the use of particular words, however unfortunate they may be considered to be, by the applicant. We conceive the purpose of a judicial review to be to correct or quash decisions or findings and not simply remarks used in the context of findings.”

50. In *Planche v The Public Service Commission and ors* [1993] SCJ 128, the Supreme Court referred to the observations made by Lord Justice Clerk Thomson in *Mc Naughton v Mc Naughton’s Trs.* SC 387 at page 392 :

“Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise

litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau”¹⁸

51. In *Sinatambou v Council of Legal Education & ors* (1997) MR 173, the view was expressed that decisions of a Visitor or Board of Examiners are not normally reviewable unless the examiners have abused their power or acted in breach of the rules of natural justice, inasmuch as “principles of natural justice transcend domestic law, and where their infringement is in issue the matter is susceptible to review”.

52. The question has arisen whether decisions of the Director of Public Prosecutions to prosecute or not to prosecute would be amenable to judicial review. In *Lagesse v. DPP (1990) MR 194*, the Court considered that:

“There is no doubt that the Director’s decision to institute and undertake or take over criminal proceedings against any suspect, to discontinue any such proceedings by way of a *nolle prosequi* or indeed not to institute proceedings in any matter is an administrative decision and as such could be liable to be reviewed by the Courts. However, these administrative decisions fall broadly in two categories and the control exercisable by the Courts will differ depending on which category of decision is in issue.

The first category of the Director’s decisions concerns those cases where the decision is to file a *nolle prosequi* where a prosecution is already in process or where the decision is not to prosecute. The Courts will undoubtedly not interfere with such decisions for two main reasons. First, the complainant always has a remedy against the suspected tortfeasor and there is no fundamental right to see somebody else prosecuted and, in most cases, the complainant may additionally enter a prosecution himself though, even here, the Director can stop the prosecution except on appeal by the convicted person. Secondly, the Courts would find it inappropriate to substitute what would be their own administrative decision to prosecute, at the risk of jeopardising their inherent role to hear and try a case once it comes before them.

The second category of decision is where the Director decides to

¹⁸ Also referred to in *Francois v Electoral Supervisory Commission & ors* (2005) SCJ 176.

prosecute. By its very nature and in contradistinction from other administrative decisions, the matter automatically falls under the control of the Courts by virtue of sections 10, 76 and 82 of the Constitution.”

53. In *Hurnam v. Lan Yee Chiu* (2001) MR 81 [SCJ 153], it was pointed out that there was an element of ambiguity, if not contradiction, in the formulation of the principle laid down in *Lagesse’s case*. The court said:

“After saying that even the D.P.P’s decision not to institute proceedings is an administrative decision liable to be reviewed by the courts, and that the control exercisable will differ depending on which category of decision is in issue, the court seems to contradict its first proposition by saying, in effect, that, notably, a decision not to prosecute would not be liable to be reviewed by the courts. (“*Courts will undoubtedly not interfere with such decisions*”). Counsel who appeared for the D.P.P. himself had to concede that there is here an apparent contradiction.

The argument that in fact, the D.P.P’s decision not to prosecute is reviewable, finds support in English authorities, notably the case of *Regina v Director of Public Prosecutions, Ex parte Manning and another*, (2000) 3 W.L.R 463, where we read from the judgment of the Queen’s Bench Division, as handed down by Lord Bingham of Cornhill C.J., (at p. 474, para. 23): “*Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see for example, Reg v Director of Public Prosecutions, Ex parte C [1995] 1 Cr. App. R 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised.*” The judgment goes on to explain (same page, same paragraph) the reasons why the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere, but goes on to say: “*At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.*”

In the light of *Ex parte Manning* (*supra*), and *Ex parte C* referred to in that case (where the grounds for review of the D.P.P’s decision are stated even more widely), it appears to us arguable that what the court in *Lagesse* really meant was not that the D.P.P’s decision not to prosecute is not reviewable as such but simply that a court of review would normally seldom interfere for a variety of reasons.

On the other hand, of course, it could be argued that the principles relating to the D.P.P.’s decision in England are not applicable to the D.P.P. in Mauritius but such an argument could only be valid if based upon a proper comparative law exercise showing, for instance, that the D.P.P.’s powers in England are different or that he enjoys a significantly different status.”

54. In *Mohit v. DPP* (2003) SCJ 239, the Supreme Court examined the status of the English DPP as opposed to that of the English Attorney-General, and analyzed the status of those two officers with that of our DPP and was of the view:

“Our DPP, having taken over the role of the Attorney General in England in respect of criminal proceedings when our Constitution had been drawn up, his decisions to prosecute or not to prosecute or to stop a prosecution are therefore not subject to judicial review for the reasons given in *Lagesse, Gouriet, Maxwell and Keung Siu Wah* (supra). But this does not mean that the Court cannot, in considering the right of an accused to a fair hearing within a reasonable time before an impartial court, rule that the decision of the DPP to prosecute is in breach of the constitutional rights of the accused or constitutes an abuse of the process of the Court. At any rate where the DPP decides to prosecute the matter, as we have already said, automatically falls under the control of the Court by virtue of sections 10, 76, 82 and 119 of the Constitution.

For the reasons given, we respectfully rule that the DPP’s decision to file a nolle prosequi or to prosecute or not to prosecute is not amenable to judicial review.”¹⁹

55. The decision of the Supreme Court was reversed on appeal to the Judicial Committee of the Privy Council [*Mohit v DPP* (PC Appeal No. 31 of 1995)]. The Law Lords had this to say:

¹⁹ In *Bissoonauth v District Magistrate of Rose Hill* (2002) MR 164, the Court found that the applicant, who sought leave to apply for orders of certiorari and mandamus in relation to a case which the magistrate had dismissed for want of prosecution, had not made out an arguable case. With regard to the Court’s power to review a decision of the DPP not to prosecute where he had given no reasons, the Court observed that under section 72(6) of the Constitution, ‘in the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority’ whereas in England, as can be gathered from *R v DPP ex parte Manning and anor* [2000] 3 WLR 463 ‘General Responsibility for the institution and conduct of prosecutions in England and Wales is entrusted to the Director, subject to the superintendence of the Attorney-General, and the responsible staff of the Crown Prosecution Service’, which shows clearly the difference in status of the two DPPs. One should be very careful before adopting the English case-law as such note of warning was already mentioned in *Lagesse v DPP*.

“The issue in this appeal is whether a decision by the Director of Public Prosecutions of Mauritius to discontinue a private prosecution, in exercise of his powers under section 72(3)(c) of the 1968 Constitution, is in principle susceptible to review by the courts. In a judgment given on 30 September 2003 the Supreme Court (YKJ Yeung Sik Yuen and P Lam Shang Leen JJ) held that it was not, and on a repeat application by the appellant this decision was applied by K P Matadeen and P Balgobin JJ on 14 September 2004. The appellant challenges the correctness of these rulings ...

Before 1964 there was in Mauritius an office of Procureur General which has no precise analogue within the British legal system. Under article XXXVII of Ordinance No 29 (1853) and article 48 of Chapter 169 of the Laws of Mauritius in force in 1945 the Procureur General was expressly empowered to enter a nolle prosequi. With the advent of the 1964 Constitution that office came to an end, and in its place there were created two new offices, that of Attorney-General and Director of Public Prosecutions. This arrangement was retained in the 1968 Constitution, which remains in force. Neither of these Constitutions conferred an express power to enter a nolle prosequi and the power of the Procureur General lapsed with the demise of his office.

By section 69 of the 1968 Constitution there is to be an Attorney-General, who is the principal legal adviser to the Government of Mauritius. His office is not a public office within the meaning of the Constitution, and he is not a public officer. He is, instead, a Minister. He may or may not be a member of the Assembly. But he is not qualified for appointment as Attorney-General if he is not a member of the Assembly and is for any cause disqualified from membership of it, and if he is not a member of the Assembly he may take part in the proceedings of the Assembly and is to be treated as if he were a member of it, save that he may not vote. The Attorney-General may not at the same time hold the office of DPP.

The office of DPP is governed by section 72 of the 1968 Constitution, on which these appeals largely turn. It provides (so far as material):

“72 *Director of Public Prosecutions*

- (1) *There shall be a Director of Public Prosecutions whose office shall be a public office and who shall be appointed by the Judicial and Legal Service Commission.*
- (2) *No person shall be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.*
- (3) *The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –*
 - (a) *to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);*
 - (b) *to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and*

- (c) *to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*
- (4) *The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.*
- (5) *The powers conferred upon the Director of Public Prosecutions by subsection (3)(b) and (c) shall be vested in him to the exclusion of any other person or authority.*
- Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.*
- (6) *In the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.”*

Construing the language of subsection (6), found in identical terms in the 1970 Constitution of Fiji, the Board held in *Attorney General of Fiji v Director of Public Prosecutions* [1983] 2 AC 672, 679, that this amounted to a constitutional guarantee of independence from the direction or control of any person. A “public office” is defined in section 111 of the Constitution, for present purposes, as “an office of emolument in the public service”, meaning “the service of the State in a civil capacity in respect of the Government of Mauritius”. By section 93 the DPP may be removed from office before reaching retirement age “only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with this section”. The section requires that a tribunal appointed by the President shall have recommended removal. Finally, reference should be made to the saving for the jurisdiction of the courts contained in section 119 of the Constitution, which has reference to section 72(6) already quoted:

“No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question, whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions.”

Provisions to the same or very similar effect as those quoted were included in a number of Constitutions of Commonwealth States. They have been the subject of judicial consideration in Guyana (*Tappin v Lucas* (1973) 20 WIR 229), Barbados (*Re King’s Application* (1988) 40 WIR 15), Jamaica (*Tapper v Director of Public Prosecutions* (Supreme Court of Jamaica in the Constitutional Court, 8 February 1999, unreported)) and Fiji (*Matalulu v DPP* [2003] 4 LRC712) as well as in Mauritius. While the

reasoning of these judgments varies, in none (save in Mauritius) has the DPP’s statutory power to discontinue proceedings been held to be immune from judicial review ...

In its judgment of 30 September 2003 the Supreme Court conducted a detailed and wide-ranging review of Mauritian and international authority. It considered the position of the Attorney General and the DPP in England and Wales, distinguishing these from the position of the DPP in Mauritius, and echoed warnings in earlier authority (such as *Edath-Tally v M J K Glover* [1994] MR 200) against over-ready identification of the Mauritian DPP with the English Attorney General. In finally concluding that decisions of the DPP in Mauritius to prosecute or not to prosecute or to stop a prosecution were not subject to judicial review, the Supreme Court based itself in particular on its earlier decision in *Lagesse v Director of Public Prosecutions* [1990] MR 194, on the House of Lords’ decision in *Gouriet v Union of Post Office Workers* [1978] AC 435, on observations in the High Court of Australia in *Maxwell v R* [1996] 1 LRC 299 and on the decision of the Hong Kong Court of Appeal in *Keung Siu Wah v Attorney General* [1991] LRC (Cons) 744. It did not adopt the decision of the Supreme Court of Fiji in *Matalulu*, above. Rejecting the appellant’s claim, the Supreme Court noted that a person who considered that his constitutional rights had been, were being or would be likely to be contravened had a right to redress under the Constitution, but that is not a claim which the appellant makes or has ever made. It added that nothing prevented a victim bringing a civil claim for compensation against the wrongdoer, and that the DPP might be removed for inability to discharge the functions of his office.

In *Lagesse*, above, the plaintiff claimed damages against the DPP for malicious prosecution and the question arose whether a plaintiff could, through an action in tort or otherwise, in effect ask a court to determine whether the DPP had acted in breach of the Constitution or any other law. Addressing this issue, the court said, with reference to section 119 of the Constitution quoted above, at p 200:

“Section 119 is not a substantive provision of the Constitution which confers, or rather creates, jurisdiction upon or for the courts. It is, in our judgment, a clause inserted ex abundanti cautela to spell out that the various provisions of the Constitution which protect various public officers and authorities from other kinds of interference should not be taken to mean that the Courts are thereby precluded from exercising such jurisdiction as is or may be conferred on them by the Constitution or any other law.”

With this observation the Board respectfully and wholly agrees, and it was accepted by the parties. The court then continued, at pp 200-201:

“There is no doubt that the Director’s decision to institute and undertake or take over criminal proceedings against any suspect, to discontinue any such proceedings by way of a nolle prosequi or indeed not to institute proceedings in any matter is an administrative decision and as such could be liable to be reviewed by the Courts. However, these administrative decisions fall broadly in two categories and the control exercisable by the Courts will differ depending on which category of decision is in issue.

The first category of the Director’s decisions concerns those cases where the decision is to file a nolle prosequi where a prosecution is already in process or where the decision is not to prosecute. The Courts will undoubtedly not interfere with such decisions for two main reasons. First, the complainant

always has a remedy against the suspected tortfeasor and there is no fundamental right to see somebody else prosecuted and, in most cases, the complainant may additionally enter a prosecution himself though, even here, the Director can stop the prosecution except on appeal by the convicted person. Secondly, the Courts would find it inappropriate to substitute what would be their own administrative decision to prosecute, at the risk of jeopardising their inherent role to hear and try a case once it comes before them.

The second category of decision is where the Director decides to prosecute. By its very nature and in contradistinction from other administrative decisions, the matter automatically falls under the control of the Courts by virtue of sections 10, 76 and 82 of the Constitution.”

With the concluding paragraph of this passage the Board again, respectfully, agrees: where proceedings initiated by the DPP are before the courts, they must ensure that the proceedings are fair and that a defendant enjoys the protection of the law even if that involves interference with the DPP’s discretion as prosecutor. But the Board is not persuaded by the court’s reasons for holding that the DPP’s decisions to file a *nolle prosequi* or not to prosecute are not amenable to judicial review. The complainant may, as in this case, have no remedy against any suspected tortfeasor. The alternative course of resort to private prosecution is not an available option where it is a private prosecution which the DPP has intervened to stop. Recognition of a right to challenge the DPP’s decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP’s decision are made out, it involves the courts in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner.

In *Gouriet*, above, the House of Lords unanimously held that only the Attorney General could sue on behalf of the public in civil proceedings and that his decision to withhold consent to the bringing of proceedings in his name was immune from challenge in the courts. The Supreme Court relied in particular on a strong statement by Viscount Dilhorne at p 487:

“The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.”

Unless reviewed or modified in the light of the later decision of the House in the *GCHQ* case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374), this remains a binding statement of English law on cases covered by it. It must, however, be borne in mind that the power in question was a non-statutory power deriving from the royal prerogative. It was moreover a power exercised by a minister answerable to Parliament, a matter recognised as of significance by Lord Edmund-Davies (p 512) and Lord Fraser of Tullybelton (p 524), as it had been by Cockburn CJ in the leading case of *R v Allen* (1862) 1 B & S 850, 855, when he spoke of the Attorney General as “responsible for his acts before the great tribunal of this country, the High Court of Parliament”. Where the Attorney General’s power derives from a statutory source, as in

giving his consent to prosecutions requiring such consent, Professor Edwards has noted (*The Attorney-General, Politics and the Public Interest* (1984), p 29), and the Law Commission has tacitly accepted (LCCP 149 *Criminal Law: Consents to Prosecution*, September 1997, p 29), that “[s]ince the source of the discretionary power [to grant or refuse consent] rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked”. Much more closely analogous to the position of the Mauritian DPP than the English Attorney General is the English DPP, and his prosecuting decisions have not been held to be immune from review, as mentioned below.

In *Maxwell v R*, above, the central issue was whether, on the facts, the appellant had pleaded guilty and whether the trial judge could reject a plea which the prosecutor had accepted. In a passage quoted by the Supreme Court, Gaudron and Gummow JJ observed *obiter*, at pp 329-330:

“The power of the Attorney General and of the Director of Public Prosecutions to enter a *nolle prosequi* and that of a prosecutor to decline to offer evidence are aspects of what is commonly referred to as ‘the prosecutorial discretion’ (see *Barton v R* (1980) 147 CLR 75 at 91, 94 per Gibbs and Mason JJ, *R v McCready* (1985) 20 A Crim R 32, *R v von Einem* (1991) 55 SASR 199 and *Chow v DPP* (1992) 28 NSWLR 593 at 604-605 per Kirby P). In earlier times, the discretion was seen as part of the prerogative of the Crown and, thus, as unreviewable by the courts (see Wheeler ‘Judicial Review of Prerogative Power in Australia: Issues & Prospects’ (1992) 14 Sydney LR 432). That approach may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all states and territories and in the Commonwealth. Similarly, it may pay insufficient regard to the fact that some discretions are conferred by statute (see *Newby v Moodie* (1988) 83 ALR 523; see also *R v Toohey, ex p Northern Land Council* (1981) 151 CLR 170 at 217, 220 per Mason J) such as that conferred on a prosecutor by s 394A of the Act.

It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, unsusceptible of judicial review. They include decisions whether or not to prosecute (see *Connelly v DPP* [1963] 3 All ER 510 at 519, [1964] AC 1254 at 1277, *DPP v Humphrys* [1976] 2 All ER 497 at 527-528, [1977] AC 1 at 46 and *Barton v R* (1980) 147 CLR 75 at 94-95, 110), to enter a *nolle prosequi* (see *R v Allen* (1862) 1 B & S 850, 121 ER 929 and *Barton v R* (1980) 147 CLR 75 at 90-91), to proceed *ex officio* (see *Barton v R* (1980) 147 CLR 75 at 92-93, 104, 107, 109), whether or not to present evidence (see, for example, *R v Apostilides* (1984) 154 CLR 563 at 575), and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted (see *R v McCready* (1985) 20 A Crim R 32 at 39 and *Chow v DPP* (1992) 28 NSWLR 593 at 604-605). The integrity of the judicial process— particularly, its independence and impartiality and the public perception thereof— would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what (*Barton v R* (1980) 147 CLR 75 at 94-95, *Jago v District Court (NSW)* (1989) 168 CLR 23 at 38-39, 54, 77-78 per Brennan J, Gaudron J, *Williams v Spautz* [1993] 2 LRC 659 at 690, (1992) 174 CLR 509 at 548 per Deane J and *Ridgeway v R* [1995] 3 LRC 273 at 320, (1995) 129 ALR 41 at 82 per Gaudron J.)”

This, plainly, is authority supportive of the Supreme Court’s conclusion, although deriving from two members of the High Court only and relying strongly on Australian precedent.

The decision of the Hong Kong Court of Appeal in *Keung Siu Wah v Attorney General*, above, is again supportive of the Supreme Court’s conclusion. Penlington JA (p 763) considered the authorities to be “overwhelming that the decision of the Attorney General whether or not to prosecute in any particular case is not subject to judicial review”. The leading judgment of Fuad V-P was to like effect, and both Hunter and Penlington JJA agreed with it.

The decision of the Supreme Court of Fiji in *Matalulu v DPP*, above, which the Supreme Court chose not to adopt was given by Von Doussa, Keith and French JJ and was made (unlike *Maxwell* and *Keung Siu Wah*) with reference to constitutional provisions indistinguishable in substance from those in Mauritius. At pp 735-736 the court said:

“It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP’s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.”

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. *In excess of the DPP’s constitutional or statutory grants of power—such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).*
2. *When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review.*
3. *In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.*
4. *In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.*

5. *Where the DPP has fettered his or her discretion by a rigid policy— eg one that precludes prosecution of a specific class of offences.*

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.”

The court went on to question whether a mistaken view of the law by the DPP could ever found a successful challenge, save perhaps where it had prompted a decision not to prosecute.

The essence of the appellants’ argument is encapsulated in the cited passage of the judgment of the Supreme Court of Fiji in *Matalulu*. Under the Constitution of Mauritius the DPP is a public officer. He has powers conferred on him by the Constitution and enjoys no powers derived from the royal prerogative. Like any other public officer he must exercise his powers in accordance with the Constitution and other relevant laws, doing so independently of any other person or authority. Again like any other public officer, he must exercise his powers lawfully, properly and rationally, and an exercise of power that does not meet those criteria is open to challenge and review in the courts. The grounds of potential challenge certainly include those listed in *Matalulu*, but need not necessarily be limited to those listed. But the establishment in the Constitution of the office of DPP and the assignment to him and him alone of the powers listed in section 72(3) of the Constitution; the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account; and, in some cases, the difficulty or undesirability of explaining his decisions: these factors necessarily mean that the threshold of a successful challenge is a high one. It is, however, one thing to conclude that the courts must be very sparing in their grant of relief to those seeking to challenge the DPP’s decisions not to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any review at all, as a line of English authority relating to the DPP and other prosecuting authorities has shown: see, for example, *R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118; *R v General Council of the Bar, Ex p Percival* [1991] 1 QB 212, 234; *R v Chief Constable of the Kent County Constabulary, Ex p L (a minor)* [1993] 1 All ER 756; *R v Inland Revenue Commissioners, Ex p Mead* [1993] 1 All ER 772; *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136; *R v Crown Prosecution Service, Ex p Hitchins* (Queen’s Bench Divisional Court, 13 June 1997, unreported); *R v Director of Public Prosecutions, Ex p Treadaway* Queen’s Bench Divisional Court, 31 July 1997, unreported; and *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330.

In supporting the decision of the Supreme Court, the DPP relies less on the source of the power to enter a *nolle prosequi* as a prerogative power not thought to be subject to judicial review than on the nature of the decision to be made when a decision not to

prosecute is made or a nolle prosequi entered. He relies on the observation of Lord Scarman in the *GCHQ* case, above, at p 407, that “Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter”, and refers to authority showing that the power to enter a nolle prosequi cannot be subject to judicial review: see, for example, *Barton v The Queen* (1980) 32 ALR 449, 455, 457, 458; *Hanna v Director of Public Prosecutions of NSW* [2005] NSWSC 134, para 56; *The State v Ilori* [1983] 1 SCNLR 94, 106, 108. The DPP contends that a decision not to prosecute or to discontinue an existing prosecution, private or public, involves the assessment of factors, which the courts cannot and should not seek to review.

In *R v Panel on Take-overs and Mergers, Ex p Datafin PLC* [1987] QB 815, 847, Lloyd LJ observed that “If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review”. It is unnecessary to discuss what exceptions there may be to this rule, which now represents the ordinary if not the invariable rule. Thus the Board should approach the present issue on the assumption that the powers conferred on the DPP by section 72(3) of the Constitution are subject to judicial review, whatever the standard of review may be, unless there is some compelling reason to infer that such an assumption is excluded. What compelling reason is there in a case such as this?

The DPP cannot, in the opinion of the Board, rely on the immunity enjoyed, at any rate in the past, by the English Attorney General when exercising the prerogative power to enter a nolle prosequi since he is not the Attorney General, he is not (like the Attorney General) answerable to Parliament, he has no prerogative power, his power derives from the Constitution and the Constitution does not use the language of nolle prosequi. The power expressly conferred on the Procureur General to enter a nolle prosequi has never, by that name, been conferred on the DPP. (The Attorney General of England and Wales in practice exercises his power very infrequently: twice in the past 5 years, in each case because of the defendant’s ill health). It has been pointed out that the English DPP, unlike his Mauritian counterpart, discharges his functions under the superintendence of the Attorney General (Prosecution of Offences Act 1985, s 3(1)), but this fact, if of any significance, would tend to weigh against rather than for the reviewability of his decisions, as providing a potential safeguard against abuse through the Attorney-General’s answerability to Parliament. Yet it has been common ground for some years that decisions of the English DPP are in principle reviewable, and the same view has been taken, for very much the same reasons, under the Constitution of Ireland: see *McCormack v Curran* [1987] ILRM 225; *H v Director of Public Prosecutions* [1994] 2 IR 589; *Eviston v Director of Public Prosecutions* [2002] IESC 43. It cannot, in the Mauritian context, be accepted that the extreme possibility of removal under section 93 of the Constitution provides an adequate safeguard against unlawfulness, impropriety or irrationality. There is here nothing to displace the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review on grounds such as those listed in *Matalulu*. The Board would respectfully endorse the cited passage from the Supreme Court of Fiji’s judgment in that case as an accurate and helpful summary of the law as applicable in Mauritius.

It follows from that conclusion that the judgments of the Supreme Court of Mauritius of 30 September 2003 and 14 September 2004 should be set aside and the Supreme Court

invited to reconsider the appellant’s applications in the light of this judgment and any evidence there may then be. That evidence will include any reasons the DPP may choose to give. But it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be. The English authorities cited above show that there is in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content. This is a matter for the judgment of the DPP, to be exercised in the light of all relevant circumstances, which may include any reasons already given. The Supreme Court must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief.”

56. In *Dayal v. President of the Republic & ors* (1998) MR 4, the view was taken that

“All the acts performed or purported to be performed by the [President of the Republic] in reaching his decision to set up the tribunal and suspend the applicant under section 93(4) and (5) of the Constitution are not reviewable by this Court since those acts had been performed or purported to be performed by the first respondent in his own deliberate judgment. The only sanction that can be taken against the first respondent for any violation of the Constitution is provided for in section 30 of the Constitution.

The position would be different, in our opinion, in the case of acts ostensibly performed by the first respondent under the Constitution or any other law but which are in reality performed by some other person or authority i.e. acts performed by the first respondent in accordance with the advice of some other person or authority where he is bound to comply with the advice given - vide section 64(1) of the Constitution.”

(d) **The Procedural Exclusivity of Judicial Review [The Public and Private Law Divide]**

57. In *O’Reilly & ors. v. Mackman & ors.* [1982] 3 All ER 1124 (HL), Lord Diplock stated that

“It would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action ...”²⁰

²⁰ Vide Sir L. Bloom-Cooper, ‘Judicial Review; its Provenance and Scope’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005) at pp. 23-30.

58. In *Société de l’Abri v. Minister of Agriculture* (1997) MR 139 [SCJ 201], the Court considered that:

- “1. The rule laid down in O’Reilly is subject to many exceptions based on the nature of the claim and on the undesirability of erecting procedural barriers.
2. The Court should be more concerned as to whether the proceedings amount to an abuse of its process rather than worry about the distinction between “public and “private law”.
3. The Court must adopt a flexible approach to the general rule laid down in the O’Reilly case [1983] 2 AC 237 in order not to whittle down a person’s fundamental right to have recourse to the court for the determination of his rights.”

59. In *Emtel v Telecommunications Authority* (2002) MR 60, the applicant sought a declaration that the respondent and the second co-respondent had the power and the duty to take certain decisions to protect the applicant’s rights. It was submitted that the applicant should seek its remedy, if any, under private law. The Court held the practice of our Courts has always been to maintain a procedural divide between public and private law. The Court will not exercise its discretion to grant the remedy in a case where issues of fact can more appropriately be decided at a trial.

(e) **The Requirement of Sufficient Interest [Standing (Locus Standi)]: Who may apply for Judicial Review?**

60. The applicant must disclose sufficient interest in the matter;²¹ it must transpire that somehow he is affected by the decision, which is challenged. In *Berenger & ors v. Goburdhun & ors* (1985) MR 209 at 212, the Court said:

²¹ On the law as to standing, vide T. Pitt-Payne, ‘Restrictions on the Availability of Judicial Review’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 518-529. See also P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 789-825. And H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 69-107.

“At the stage of an application for leave, an applicant may be put out of court if it is manifest that he is, for example, a crank or a mere busybody.”

It was held in that case that the applicants, who had made specific allegations to the Respondent (which was enquiring into fraud and corruption) and had been summoned by the Respondent, were not mere witnesses but could legitimately expect to be given a proper hearing and not be subjected to questioning on irrelevant issues: accordingly they had a sufficient interest to ask for a review in relation to the Respondent’s decision.

61. In *Ex parte DPP* (1984) MR 36, it was held that the DPP had no locus standi to challenge the decision of a magistrate of the Intermediate Court ordering that a judgment debtor be sent to prison inasmuch as that related to a civil matter and the DPP had no sufficient interest to make the application. In *R v. Inland Revenue Commissioner, ex parte National Federation of Self-Employed & Small Businesses Ltd* [1981] 2 All ER 93 (HL), it was held that where an interest is not direct or personal but is of a general or public interest, there is a need to consider the legal and factual context of the claim before a decision as to the sufficiency of the interest can be reached.

62. In *Betsy v. Bank of Mauritius* [1992] MR 231, the Court noted that;

“The law as to standing has progressed a great deal through the development mainly of case law in England since 1977 when the prerogative remedies like certiorari, prohibition and mandamus together with the private remedies of declaration and injunction have become available in a single application for judicial review. In Mauritius, also, those two classes of remedies are available since we follow and are guided by English practice, in this instance Order 53, owing to our failure to provide our own alternative rules - vide *Murdaye v. Commissioner of Police* [1984] MR 118 and *Berenger v. Goburdhun* [1985] MR 209.

We shall consequently seek guidance from English practice, case law and doctrine. Following the landmark decision of the House of Lords in *R. v. Inland Revenue Commissioners, Ex Parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, which was cited by learned Counsel for the applicant but completely ignored by both Counsel on the other side, Professor Wade (in his book, *Administrative Law* (6 edition, Clarendon Press, Oxford, 1988) has made the following pertinent observations at pages 702-703:

“The testing of an applicant's standing is thus made a two-stage process. On the application for leave (stage one) the test is designed to turn away hopeless or meddlesome applications only. But when the matter comes to be argued (stage two), the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it....

The novel aspect of the second-stage test, as thus formulated, is that it does not appear to be a test of standing but rather a test of the merits of the complaint. The essence of standing, as a distinct concept, is that an applicant with a good case on the merits may have insufficient interest to be allowed to pursue it. The House of Lords' new criterion would seem virtually to abolish the requirement of standing in this sense. However remote the applicant's interest, even if he is merely one taxpayer objecting to the assessment of another, he may still succeed if he shows a clear case of default or abuse. The law will now focus upon public policy rather than private interest”

Applying the "threshold" test at this stage of leave, we consider that this application is not "hopeless" having already ruled that the applicant has made out an arguable case. Nor can it be termed, in our view, "meddlesome" since the applicant's primary concern is whether the provisions of the law have been observed or not in connection with the issue of the 20-rupee note. As rightly pointed out by Lord Scarman in the *Inland Revenue Commissioners* case:

“If he [an applicant] fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks, and other mischief-makers. I do not see any further purpose served by the requirement for leave.”

Having regard to the principles distilled from English practice, case-law and doctrine, we consider that it makes good sense not to determine the standing of the applicant at this stage, in isolation from the merits of this application and in the absence of all the evidence that might yet be produced by any party. Consequently, for all the reasons given, we grant leave to the applicant.”

63. In *Chaumière v. Government of Mauritius* (2001) MR 177 [SCJ 155], the Court endorsed what was said by was said by *Rose L.J. in R v Secretary of State for Foreign and Commonwealth Affairs ex parte The World Development Movement* (1995) 1 WLR 386 at p: 395 –

“For my part, I accept that standing (albeit decided in the exercise of the court's discretion, as Sir John Donaldson M.R. said) goes to jurisdiction, as Woolf L.J. said. But I find nothing in *Reg. V. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 to deny standing to these applicants. The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the court during the last 12 years. It is also clear from

Ex parte National Federation of Self-Employed and Small Businesses Ltd. that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case: see per Lord Wilberforce, at p. 630D, Lord Fraser, at p. 645D and Lord Scarman, at p.653F.

Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Wade’s words in *Administrative Law* 7th ed. (1994): “the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interest are involved.”

Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasised [1982] A.C. 617; the importance of the issue raised, as in *Ex Parte Child Poverty Action Group* [1990] 2 Q.B. 540; the likely absence of any other responsible challenger, as in *Ex parte Child Poverty Action Group and Ex parte Greenpeace Ltd. (No. 2)* [1994] 4 ALL E.R. 329; the nature of the breach of duty against which relief is sought (see per Lord Wilberforce, at p. 630D, in *Ex parte National Federation of Self-Employed and Small Businesses Ltd.*);”

(f) **Discretionary Nature of Judicial Review**

(i) **Grounds on which a remedy can be refused**

64. As was pointed out by the Supreme Court in *Savanne Bus Service v. RTLA* [1976] MR 30, the Supreme Court enjoys plenty of discretion in matters of judicial review²²:

“The Court is vested with plenty of discretion in the matter: First the overall discretion to grant or refuse a prerogative order; secondly, a discretion, upon an application for leave to apply for the order, to direct that persons directly affected by the impugned proceeding should be served with the notice of motion; thirdly, a general discretion, which the English Court has under Order 3 r. 5, to enlarge or abridge any time appointed by the Rules. Those powers are, however, intended to enable the Court to do justice in a deserving case, not to encourage laxity in procedure. With regard to extension of time, it

²² As to the discretionary restriction on availability of remedies, vide T. Pitt-Payne, ‘Restrictions on Judicial Review’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 529-537.

is settled by authority that a strong case for it must be shown. It may appositely be observed in that connection that, where a statute of limitation governs the matter, leave to join a defendant to the proceedings will, except in special circumstances, be refused if the claim against him is barred. [*Braniff vs. Holland and Hannen and Cubitts* (1969) 1 W.L.R. 533]. Although, therefore, the Court enjoys with regard to its own rules of limitation a wider discretion, it must still ensure that a departure from them be permitted only in exceptional cases.”

65. The Court may refuse to grant a remedy because of misconduct on the part of the applicant²³, undue delay in bringing the proceedings²⁴, or still because of the triviality of the application. The Court may also refuse to grant relief because of the impact the decision may have, or where no useful purpose would be served by reviewing the finding or decision.

(ii) Judicial Review and the availability of other remedies

66. The availability of other remedies, for example an appeal to the Minister, is no bar to the availability of judicial review. Although the non-exhaustion of available remedies does not completely shut the door to judicial review, it is an important factor, which may affect the exercise of the court’s discretion.

67. It was held in *Khedoo & ors v. Road Transport Commissioner* (1981) MR 64 that the exhaustion of available remedies is not necessarily a condition precedent to the grant of an order of certiorari: the court has a discretion in the matter and, in exercising it, will take into account inter alia, the object and purpose of the application, the effectiveness of the remedies available and the conduct of the applicant.²⁵

²³ Vide *Glynn v. Keele University* [1971] 2 All ER .

²⁴ *Monty v. PSC* [1981] MR 244.

²⁵ See also *Savanne Bus Service v RTLA* (1974) MR 109.

In *Ramdene v. Registrar General and Tax Appeal tribunal* (1997) SCJ 303, the Court took into account that the proper and effective remedy for the applicant would have been to ask the Respondent - the Tax Appeal tribunal – to state a better case, and exercised their discretion to refuse leave.

(g) **Statutory Exclusion or Restriction of Judicial Review [Finality Clauses; Ouster Clauses; Time Limit Clauses]**²⁶

Finality Provisions:

68. A statutory provision to the effect that the decision of a public authority or a Minister shall be final does not preclude the Supreme Court from reviewing the decision of that public authority or Minister. It has been considered that it could not be the intention of Parliament to render final the decision of a Minister or public authority, which is unfounded in law: *R v. Medical Appeal Tribunal ex parte Gilmore* (1957) 1 All ER 796 (CA); *Anisminic v. Foreign Compensation Commission* (1969) 1 All ER 208 (HL).

69. In *Esther v Prime Minister* (1983) MR 121, the Court observed that the conferral of a discretion by Parliament on the Minister in matters of registration of the spouse of a Mauritian as citizen and the removal of the exercise of that discretion from judicial review or appeal do not operate to exclude or limit the constitutional jurisdiction of the Courts to intervene, though the Courts would, with regard to the specific grounds on which limitations are constitutionally permissible, no doubt exercise self-restraint when reviewing the matter.

²⁶ On the issue of exclusion of review, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 921-930. Vide also H. Woolf, J. Jowell & A. Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 184-189.

Time Limit Provisions:

70. A statutory provision to the effect that the decision of a public authority or a Minister can only be reviewed within six weeks from the date the decision is taken will be upheld by the Supreme Court. A distinction has been drawn between a 'finality provision', which ousts the jurisdiction of the Court and deprives an aggrieved party of any redress before the court, and a 'time limit provision', which requires of an aggrieved party that it seeks redress within a shorter period of time than is normally the practice. It is expedient and in the public interest that at times all those affected by a decision know where they stand. See *R v. Secretary of State for the Environment, ex parte Ostler* (1976) 3 All ER 90.

(D) Review for Jurisdictional Defects and Error of Law

(a) Illegality as a Ground of Review

(i) The Ultravires Doctrine: The Basic Principles – Actions within or outside Jurisdiction

71. A public authority may only validly exercise powers within the limits conferred upon it by law, by statute. It must act within its jurisdiction.²⁷ Since public authorities derive their powers from statute, they are said to be of 'limited jurisdiction' because they can only do what they are empowered to do by the terms of their enabling Act. The public authority is said to have acted 'intravires' when operating within the limits of the power provided by the enabling Act, and 'ultravires' if outside the limits of the enabling Act.

²⁷ Vide B. Hooper, 'Illegality: the Problem of Jurisdiction', in M. Supperstone, J. Goudie & Sir Paul Walker, *De Smith's Judicial Review*, at pp. 91-115; P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 437-473.; H. Woolf, J. Jowell & A. Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 179-183, 190-205.

The Supreme Court, just like the High Court in England, can only exercise its right to review the actions of public bodies if they have acted *ultra vires*.

The issue therefore is to determine whether a public body has acted *ultra vires*, and this can only be discovered when the limits of its powers have been assessed. The limits on the exercise of power can be of two types:-

First, express limits: these are clearly stated in the statute. It may take the form of procedural requirements, which must be observed before power can be exercised [for example, failure to comply with a mandatory procedural requirement, as opposed to a directory requirement: see *Howard v. Secretary for State for the Environment* (1975) QB 235], or the form of geographical or financial limits.

Secondly, there can be implied limits on power. These are limits that have not been expressed in the enabling Act but which the Supreme Court, just like the High Court in England, will consider the legislature must have contemplated at the time of enactment. For example, it is often said that Parliament cannot have conferred power to a body with the intention that it should be used unreasonably.

72. To decide whether a public authority had the power to do the act in question, one must construe the enabling statute to determine the ambit of the statutory power relied on. The act of the public body must be within the four corners of the powers given by the legislature. A court will thus examine the nature, object and scheme of the legislation, and in the light of that examination will consider the exact area over which powers are given by the legislative provision under which the public body purports to act. See *Attorney General v. Fulham Corporation* [1921] 1 Ch. 440. The task of construction should, however, allow for action incidental or consequential to the powers vested in public authorities. See *Attorney General v. Crayford U.D.C* [1962] 2 All ER 147. It must also take account of implied limitations on the power given. See, for example, *Bromley L.B.C. v. Greater London Council* [1982] 1 All ER 129.

A power may be vested in an authority but its exercise may still be *ultravires* because of a mistake of jurisdictional fact or law.

(ii) Mistake as to a Jurisdictional Fact

73. When a public body is given jurisdiction by statute to perform a particular task, Parliament envisages the possibility that the body may make a mistake in the course of its deliberations. Judicial review is not available simply because a mistake has been made. In other words, a mistake made by a body does not necessarily render its decision *ultravires*.²⁸

74. A body will have to make decisions on factual questions. These can arise in two ways. First, there are facts, which must exist objectively before a body can act. Secondly, there are facts that it is specifically empowered to determine. Suppose there is a tribunal given jurisdiction to assess the level of rent payable for residential premises, on the basis of the quality of the accommodation provided. The question whether a building is used for residential purposes is a question of fact that would have to be determined objectively before the tribunal has jurisdiction to go on and consider the actual question of fact it is empowered to deal with, the quality of the accommodation. Decisions of bodies on questions of fact are not normally reviewable because, whether they get the answer ‘right’ or ‘wrong’, they are merely deciding something they have power to determine, that is, they are acting *intravires*. Such decisions will be unchallengeable, therefore, unless Parliament has provided for some appellate body to consider the question afresh. Despite this, the decisions of bodies on certain questions of fact must be open to challenge before the courts. These are questions on a ‘jurisdictional fact’, that is a fact which must objectively be proved to exist before a body has jurisdiction. The courts must be able to review a public body’s decision on a question of

²⁸ Regarding the issue of review of facts and evidence, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 475-499.

jurisdictional fact, otherwise the body would be able to exercise power over any situation it chose simply by stating that it was satisfied that certain jurisdictional facts existed. In the example given above, the jurisdictional fact that must be established before the tribunal can act is that the building for which it is planning to set the correct level of rent is one used for residential purposes. If it is not, then the tribunal has no jurisdiction to set the level of rent payable. Determinations of public bodies on points of jurisdictional fact are thus open to review in order to prevent the body from assuming jurisdiction it does not possess.

75. In *R v. Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* [1951] 2 KB 1, a rent tribunal was empowered to assess the correct level of rent payable for unfurnished lettings, and proceeded to reduce the rent payable to a landlord, who contested its decision on the basis that it had no jurisdiction to set a rent because the letting was in fact furnished. The Divisional Court refused his application for certiorari to quash the tribunal’s determination, but in the course of so doing Lord Goddard stated:

“... If a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this court may, by means of proceedings for certiorari, inquire into the correctness of the decision.”²⁹

²⁹ In *Baccus v Permanent Arbitration Tribunal* (1986) MR 272, it was observed that an award of the Permanent Arbitration Tribunal, which goes outside the terms of reference will be *ultra petita* and may be quashed just as any other award.
See also *Dayal v Yeung Sik Yuen & ors* (2002) SCJ 263.

(b) Error of Law on the Face of the Record

76. When reviewing the decision of a public authority, the courts will not only make sure that it kept within its jurisdiction, but they will also see to it that the law has been observed. The courts are concerned that inferior bodies, which generally have no particular legal expertise, should apply the law correctly. Were the courts not to exercise their inherent common law right to supervise such decisions, the rule of law would in fact be flouted, because the law would not be followed by inferior bodies, as it should be.

77. In *R v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338, the English Court of Appeal examined the availability of certiorari as a remedy for dealing with errors of law made by statutory bodies. Lord Denning (then Denning LJ) stated:

“The Court of King’s Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal, which on the face of it offends against the law. The King’s Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so.”

Until the decision of the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, it was thought that error on the face of the record was an intravires mistake. It was considered that if a tribunal or body had the jurisdiction to make a decision then it logically had the power to make that decision wrongly. In *Anisminic*, it was held that any error of law made by an administrative tribunal or authority in the course of reaching its decision on matters of fact or administrative policy would result in it having asked itself the wrong question with the result that the decision it reached would be a nullity.

78. In *Re Racal Communications Ltd* [1981] AC 374, Lord Diplock confirmed that the breakthrough made by *Anisminic* was that, as respects administrative tribunals and

authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished.

This approach may not be applicable to judicial bodies. As Lord Diplock pointed out:

“[*Anisminic*] proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfillment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So, if the administrative tribunals or authorities have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity ...

But there is no similar presumption that where a decision-making power is conferred by statute on a court of law, Parliament did not intend to confer on it power to decide questions of law as well as questions of fact.”

79. It should not be assumed that review for error of law will lie in respect of any tribunal making decisions within the sphere of public law. The reviewing authority will have regard to the status and expertise of the decision-making body, and consider the wider implications of any decision to review.³⁰

Error of Law

80. The interpretation to be given to a word in a statute is a question of law. In *R v. Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, it was considered that to arrive at a conclusion unsupported by the facts could constitute an error of law. Similarly, failing to apply the correct legal test to the facts will constitute an error of law. In *R v. Minister of Housing and local Government, ex parte Chichester RDC* [1960] 2 All ER 407, the

³⁰ See *R v. Lord President of the Privy Council, ex parte Page* [1992] 3 WLR 1112 (HL); *R v. Visitors to Lincoln’s Inn, ex parte Calder* [1993] 3 WLR 287.

Minister’s decision was quashed for error of law after he applied the wrong test to determine whether or not land was ‘capable of reasonably beneficial use’.

81. Procedural irregularities, such as wrongly refusing to grant an adjournment so that an applicant can prepare his case properly, has been held to amount to an error of law: see *R v. Medical Appeal Tribunal, ex parte Carrarini* [1966] 1 WLR 883.

“On the Face of the Record”

82. In *R v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338, Denning LJ, as he then was, stated that the record would comprise at least the documents initiating the proceedings, the pleadings if any, and the adjudication.

83. In *R v. Greater Birmingham Supplementary Benefit Appeal Tribunal, ex parte Khan* [1979] 3 All ER 759, the concept of ‘record’ was extended to include a letter containing the reasons for the tribunal’s decision sent by the tribunal to the applicant. In *R v. Knightsbridge Crown Court, ex parte International Sporting Club Ltd* [1982] QB 304, the record was held to include the judgment, the reasons of the judgment, and the affidavit evidence upon which it was based.

(E) Judicial Review of the Exercise of Discretion

(a) Nature of Discretion

84. Discretion may be defined as existing where there is power to make choices between courses of action or where, even though the end is specified, a choice exists as to how that end should be reached. If only one course can lawfully be adopted, the decision taken is not the exercise of discretion but the performance of a duty. To say that somebody has discretion presupposes that there is no uniquely right answer to a problem. There may, however, be a number of answers that are wrong in law.

85. There are three principal ways in which such discretion can be controlled.³¹

First, the courts can impose controls on the way in which the discretion is exercised. The objective is to ensure that there is no failure to exercise the discretion, which has been vested in the decision-maker. Limitations on delegation, and on the extent to which an authority can proceed through policies or rules, provide the two main limbs of this type of constraint.

Secondly, the judiciary can impose limits on whose views should be taken into account when discretion is exercised. Such constraints are in principle related to the process by which the discretion is exercised. However, the line between substantive and procedural oversight of discretion is difficult to maintain.

Thirdly, constraints can be placed upon the means an authority can adopt and the ends it can pursue in order to ensure that there is no misuse of power. The concepts of relevancy, purpose and reasonableness provide the main mechanisms through which this type of

³¹ As to the role of judicial review in the context of discretionary powers, vide P. Wallington, ‘Discretion and Duty: the Limits of Legality’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 117-134; P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 613-645; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 223-264.

control is expressed. Substantive limits are placed on the power of a public body. It is to be noted that concepts, such as proportionality, fundamental rights and legitimate expectation now play an increasing role in this area.

(b) **Failure to Exercise Discretion (Fettering Discretion)**

86. It concerns those situations where a public authority has failed to retain that degree of free and unfettered power of judgment as to whether, and if so how, it should exercise its discretion, which Parliament is assumed by the courts to have intended that those conferred such powers should have retained.³²

(i) Acting under Dictation

87. In *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689, Duplessis, the Prime Minister and Attorney General of Quebec, ordered the Quebec Licensing Commission to revoke Roncarelli’s liquor permit, in response to Roncarelli’s activities in acting over 380 cases as surety for Jehovah’s witnesses charged with distributing literature (some of which was thought to be seditious) without a licence. Though the decision to revoke was legally that of the Commission, there was ample evidence to the effect that the cancellation was the result of instructions given by Duplessis.

³² Vide P. Wallington, ‘Discretion and Duty: the Limits of Legality’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 143-155; P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 501-530; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 297-316, 479-498.

The Commission’s decision was quashed on the ground that the Commission had acted under dictation, and also because “it was a gross abuse of legal power expressly intended to punish Roncarelli for an act wholly irrelevant to the statute”.

88. The extent to which a decision by a councillor to vote in accordance with the “party line” can fall foul of the rule against the fettering of discretion was considered in *R v Waltham Forest London Borough Council, ex parte Baxter* [1988] QB 419. Members of the majority group on the council held a private party meeting where they discussed what the policy of the group would be as to the setting of the rate at the forthcoming council meeting. After discussion, the group agreed to support a rate increase. The group’s standing orders provided that members were required to refrain from voting in opposition to group decisions, the sanction being withdrawal of the party whip. A number of members who voted against this level of increase at the group meeting voted in favour at the council meeting, at which a resolution to increase the rate by the previously agreed amounts was passed. A number of ratepayers sought judicial review on a variety of grounds.

The Divisional Court rejected arguments to the effect that the councillors had fettered their discretion by regarding themselves as bound by the terms of their election manifesto to undertake expenditure, which rendered such a rate inevitable, and that some of the councillors had voted contrary to their personal views.

The Court of Appeal held that had the councillors in question voted for the resolution not because they were in favour of it but because their discretion had been fettered by the vote at the group meeting, then the councillors would have been in breach of their duty to make up their minds as to what rate was appropriate. However, that was not established on the facts. The councillors were entitled to take account of party loyalty and party policy as relevant considerations provided that they did not dominate so as to exclude other considerations. The Court noted that the sanction was only withdrawal of the party whip: there is nothing to prevent a councillor who voted against the party line continuing as an independent member.

Furthermore these procedures were widely adopted by political groups throughout the country.

89. Parliament may on conferring power to a public authority impose an obligation to consult with specified or unspecified persons or bodies prior to exercising the power. The process of consultation prior to coming to a decision may be regarded as part of the required process by which a decision-maker must seek to inform himself of all relevant circumstances in relation to the decision he is to take. More generally still, the process of consultation can be regarded as part and parcel of the process of ‘good administration’ – as providing a mechanism, by which decision-makers may take account of, and benefit from, a broad range of expertise and opinion in coming to their eventual decisions. A public authority exercising statutory power must steer a proper course between the process of consultation and the requirement that the ultimate power of decision must remain in its hands. Were it to act under the dictation of another body, its decision would be flawed in law.

90. In some instances legislation may expressly empower one body to issue ‘guidance’ or ‘general directions’ to another as to the exercise of the latter’s powers. In *Laker Airways v Department of Trade* [1977] QBD 643, the Court of Appeal considered the provisions of the UK Civil Aviation Act of 1971 under which the Secretary of State was empowered to give ‘guidance’ to the Civil Aviation Authority as to the exercise of its functions, and the Civil Aviation Authority was, in turn, obliged to “perform those functions in such manner as it considers is in accordance with” such guidance. Construing the scope of this power to issue guidance, the Court of Appeal held that it did not cover guidance, which contradicted policy objectives expressed in the Act. The power to issue guidance was restricted to power to explain, amplify or supplement those objectives. As regards the Civil Aviation Authority’s duty to follow guidance given under the Act, Lord Denning MR explained:

“So long as the ‘guidance’ given by the Secretary of State keeps within the due bounds of guidance, the Authority is under a duty to follow his guidance. Even so, the Authority is allowed some degree of flexibility. It is to perform its functions ‘in such manner as it

considers is in accordance with the guidance’. So, whilst it is obliged to follow the guidance, the manner of doing so is for the Authority itself ...”

91. In determining the extent to which a body is obliged to follow statutory guidance the particular terms of the legislation must be considered. For example, an Act may use a formula under which a body exercising powers is required simply to take guidance into account, without being obliged to follow the guidance. Such was the case in *R v Police Complaints Board, ex parte Madden* [1983] 1 WLR 447. The Police Complaints Board was required by the UK Police Act of 1976 to “have regard to” certain guidance given to it by the Secretary of State. The Board accepted a policy of following the guidance given. Mc Neill J. held that the Board had thereby failed properly to exercise its own discretion as to the exercise of its powers. It had erred in regarding its obligation to “have regard to” the guidance as an obligation “to comply with” the guidance. Rather the Board, “as an independent body, ought to have been asserting its independence”. Certainly it was obliged to take the guidance into account in reaching its own decisions. It fell into error in regarding the legislation as conferring a power of dictation on the Minister.

(ii) Unauthorized Delegation of Power

92. This ground reflects a presumption of statutory interpretation known as the principle ‘*delegatus non post delegare*’ – the principle that where a function has been entrusted by a statute to a body “X” the function should be performed by “X” and not delegated by “X” for performance by body “Y”. The legislature has delegated power to “X”, and a delegate does not itself have power further to delegate such power. Body “X” may be said in these circumstances to have failed properly to exercise its discretion by having

delegated its power of decision to another body.³³ The decision can also be challenged for ‘want of jurisdiction’. The purported exercise of power by the body, on which there has been an unlawful delegation, is challengeable as an act beyond the powers of that body. The principle, taken to an extreme, could operate as a severe restraint on administrative decision-making. Limits have therefore been imposed on its operation both by Parliament and by the courts. The principle does not prevent the exercise by civil servants of powers entrusted by legislation to the ministerial head of a government department or to the department itself. This is known as the Carltona Principle: it was established in *Carltona Ltd v Commissioner of Works & ors* [1943] 2 All ER 560 (CA). The company was a manufacturer of food products and under Defence regulations was requisitioned. It challenged the decision taken by the Assistant Secretary in the Ministry for and on behalf of the Minister. The Court had this to say:

“In the administration of government in this country the functions which are given to Ministers (and constitutionally properly given to Ministers because they are constitutionally responsible) are functions so multifarious that no Minister could even personally attend to them ... The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organization and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them. In the present case the Assistant Secretary, a high official of the ministry, was the person entrusted with the work of looking after this particular matter ... The appeal must be dismissed.”

93. Parliament may provide express authority to a body, on which it has conferred powers, to delegate, and even for that delegate to sub delegate, those powers. The maxim ‘*delegatus non potest delegare*’ is a presumption of interpretation, which must give way to clear contrary legislative intention. Where a power of delegation does exist the courts may still,

³³ Vide P. Wallington, ‘Discretion and Duty: the Limits of Legality’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 135-143.

of course, be called upon to consider whether the delegate has acted within or beyond the scope of the powers delegated.

94. The rule against delegation has been interpreted as requiring that the designated statutory body should retain the ultimate power of decision, as to whether and how discretion is to be exercised. It does not preclude that body from delegating to another body some preliminary tasks leading up to that final decision. In so doing the appointed body is adopting a procedure by which it seeks assistance in reaching what can still be regarded as its own decision on the matter. Thus a body may delegate certain fact-finding tasks to, and even seek recommendations from, another body (or its own sub-committee). It must, however, retain to itself the power of final decision – it must not allow itself to be dictated to by the delegate, nor can it confer power to make any binding decision (as distinct from non-binding recommendation) on the delegate. In such a situation courts will hold that no delegation of the power of decision has in fact occurred. Note that courts have been more tolerant of such decision-making arrangements in relation to the exercise of administrative functions than in relation to the exercise of judicial powers.

95. In *Barnard & ors v National Dock Labour Board & ors* [1953] 1 All ER 1113 (CA), the UK Dock Workers (Regulation of Employment) Order of 1947 set up a scheme to ensure greater regularity of employment for dock workers, and to secure an adequate number of dock workers was available for the efficient performance of dock work. The National Dock Labour Board was established by the Order to administer the scheme. It was required by the Order to delegate to local boards all appropriate functions. These included the operation of a disciplinary code. Under that Code, the local board would suspend a registered dockworker, who failed to comply with any of the provisions of the scheme. One of the local boards, the London Dock Labour Board, passed a resolution, which had the effect of leaving the power of suspension to the London Port Manager. As a result of a dispute, the latter suspended the applicants. They exercised their right of appeal unsuccessfully and eventually applied to the High Court for declarations that their

suspension had been wrongful in the light of the facts of the dispute. McNair J. held that the local board had power to delegate its disciplinary functions to the Port Manager. The Court of Appeal reversed McNair J. on this point. Lord Denning, then LJ, said:

“While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication. The Port Manager is in the position of an usurper; ... he has assumed a mantle which was not his, but that of another.”

96. There are many administrative duties that cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, he would, normally, have no authority to delegate. He could take advice, of course, but he could not authorize someone else to make the appointment without further reference to him.

(iii) Over-Rigid Adherence to Self-Created Rules of Policy³⁴

97. The courts have struck a balance between:

- on the one hand, the presumption that statutes conferring discretion should be interpreted as intending that decisions as to whether and how that power is to be

³⁴ Note how this ground of challenge overlaps with others. To fail to give proper consideration to the merits of an individual matter may at one and the same time be to apply a policy over-rigidly and to fail to take into account a relevant consideration. Equally, to defend successfully a decision taken in accordance with a policy it may be necessary to show that one has ‘acted fairly’ in the sense of having given notice of the policy, which was to be followed, and having indicated that representations that an exception should be made or that the policy should be changed would be considered. The need to make a policy known to those who may be affected by it would seem to follow from the obligation to be receptive to representations. This obligation is only of substance if those affected are aware of the policy in respect of which they may raise arguments.

Note also that there is a link between fettering discretion by adoption of an over-rigid policy and denial of a fair hearing. See *R v Secretary of State for the Environment, ex parte Brent LBC* [1982] 2 WLR 693; *John v Rees* [1970] Ch 345; *R v Police Complaints Board, ex parte Madden* [1983] 2 All ER 353.

exercised should be taken in the light of individual consideration on the merits of each particular case; and

- on the other hand, appreciation that such individualized, case-by-case, decision-making may be less conducive to good and fair administration than an approach under which discretionary decisions are taken in the light of, though unduly constrained by, previously determined rules or principles of policy.

In any case where a decision has been taken in accordance with a self-created rule of policy the following matters must be considered:

- Is the policy intrinsically flawed? For example, does it require the decision-maker to take into account irrelevant consideration? Does it seek to operate the powers for an improper purpose? Is the policy ‘unreasonable’?
- Assuming that there is nothing intrinsically objectionable about the policy, has the policy been applied over-rigidly and to the exclusion of the genuine exercise of discretion in the particular case?

98. The leading decision is that of *R v Port of London Authority, ex parte Kynoch Ltd* [1919] 1 KB 176 (CA). Kynoch Ltd applied to the Port of London Authority [PLA] for a licence under the Port of London Act and the Thames Conservancy Act to construct a deep-water wharf and other works on land they owned on the bank of the Thames. The PLA rejected the application ‘on the ground that the accommodation applied for is of the character of that which Parliament has charged the Authority with the duty of providing in the port.’ Under the Port of London Act, the PLA was under a duty to take into consideration the state of the river and the accommodation and facilities afforded in the Port of London and to take such steps as it considered necessary for improvement. The PLA had power under the Act, inter alia, to ‘construct, equip, maintain, or manage any docks, quays, wharves and other works in connection therewith’. Kynoch Ltd appealed to the Board of Trade

against the PLA’s decision but subsequently withdrew the appeal and applied instead for mandamus to compel the Authority to exercise its discretion according to law. There was an affidavit showing that the merits of the application had been fully considered by two committees and the Authority itself.

On review, the Court held that the PLA acted lawfully in rejecting the application, because it had fully considered the arguments raised by Kynoch Ltd and rejected them on their merits. The vital point, in the view of Bankes LJ, was that the decision-making body must not ‘shut its ears’ to an applicant who has something new to say. He observed:

“There are, on the one hand, cases where a tribunal in the honest exercise of its discretion has adopted a policy and without refusing to hear an applicant intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in this case ... If the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand, there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes ...”

99. In *Lavender & Son Ltd v Minister of Housing and Local Government* [1970] 3 All ER 871, the company applied for planning permission to extract sand, gravel and ballast from part of Rivernook Farm, Walton-on-Thames. Most of the site was within an area of high quality agricultural land reserved for that purpose. The planning authority refused planning permission, and the company appealed to the Minister. The only substantial objection to the development came from the Ministry of Agriculture, which wished to see the land maintained as agricultural land. There was evidence that the company would be able to restore the land to a high standard of fertility after excavation. The inspector who conducted the public inquiry could find no reason to refuse the planning permission apart from the objection of the Ministry of Agriculture. The Minister dismissed the appeal. His decision letter included the two sentences:

“It is the minister’s present policy that land in the reservations should not be released for mineral working unless the Minister of Agriculture, fisheries and Food is not opposed to working. In the present case the agricultural objection has not been waived, and the Minister has therefore decided not to grant planning permission for the working of the appeal site.”

The company applied to the High Court for the Minister’s decision to be quashed. Willis J. had this to say:

“It seems to me that [the Minister] has said in language which admits of no doubt that his decision to refuse permission was solely in pursuance of a policy not to permit minerals in the Waters agricultural reserve to be worked unless the Minister of Agriculture was not opposed to their working ...

I do not think that the Minister after the inquiry can be said in any real sense to have given genuine consideration to whether on planning (including agricultural) grounds this land could be worked. It seems to me that by adopting and applying his stated policy he has in effect inhibited himself from exercising a proper discretion (which would of course be guided by policy considerations) in any case where the Minister of Agriculture has made and maintained an objection to mineral working in an agricultural reservation. Everything else might point to the desirability of granting permission, but by applying and acting on his stated policy I think the Minister has fettered himself in such a way that in this case it was not he who made the decision for which Parliament made him responsible. It was the decision of the Minister of Agriculture not to waive his objection which was decisive in this case, and while that might properly prove to be the decisive factor for the Minister when taking into account all material considerations, it seems to me quite wrong for a policy to be applied which in reality eliminates all the material considerations save only the consideration, when that is the case, that the Minister of Agriculture objects. That means, as I think, that the Minister has by his stated policy delegated to the Minister of Agriculture the effective decision on any appeal within the agricultural reservations where the latter objects to the working ...

I am satisfied that the applicants should succeed. I think the Minister failed to exercise a proper or indeed any discretion by reason of the fetter which he imposed upon his exercise in acting solely in accordance with his stated policy; and further, that upon the true construction of the Minister's letter the decision to dismiss the appeal, while purporting to be that of the Minister, was in fact, and improperly, that of the Minister of Agriculture, Fisheries and Food.”

100. In *British Oxygen Co. Ltd v Minister of Technology* [1970] 3 All ER 165 (HL), the House of Lords expressed the view that the legality of adopting a rule to govern the exercise of discretion would vary with the context within which decisions were made. A rule could be adopted provided that the decision-making body was willing to listen to someone with something new to say. As Lord Reid said:

“A Ministry or large authority may have had to deal with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say.”

101. The correct way to approach the application of a policy to the exercise of discretion would be to ask two questions:

- First, has the body listened to applicants with something new to say? If no, then it is acting *ultravires*.
- In the affirmative, then the second question must be asked: is the policy that has been applied *intravires*? This would involve consideration of whether it was reasonable, based on relevant considerations and so on.

102. The context within which the policy or rule is laid down is crucial. Thus in *Attorney General v Wandsworth LBC, ex parte Tilley* [1981] 1 ALL ER 1162, Court of Appeal considered that a strict policy was inappropriate where the welfare of children was at stake. Templeman LJ stated:

“A local authority, dealing with individual children, should not make a policy or an order that points towards fettering its discretion in such a way that the facilities offered to the child do not depend on the particular circumstances of that child or of its family but follow some policy which is expressed to apply in general cases ...”

103. In *Findley v Secretary of State for the Home Department* [1984] 3 All ER 801 (HL), the House of Lords upheld the Home Secretary’s policy of not considering certain

categories of prisoner for parole unless they had served 20 years of their sentences. The House of Lords considered the minister was entitled to have a policy regarding the exercise of his discretion to grant parole, since it would be difficult for him to manage the complexities of his statutory duties in regard to parole without a policy. Furthermore, consideration of an individual case was not excluded by a policy which provided that exceptional circumstances or compelling reasons had to be shown for parole because of the weight to be attached to the nature of the offence, the length of the sentence and the factors of deterrence, retribution and public confidence, all of which it was the duty of the Secretary of State to consider.

(iv) Fettering Discretion by Contractual or Similar Undertakings
(Undertaking not to Exercise Discretion)

104. Courts have drawn a line between
- on the one hand, contracts or other binding undertakings, which they have upheld as having been entered into in the valid exercise of power, and
 - on the other hand, purported contractual or other commitments, which the courts have held to be invalid as unduly infringing the requirement that bodies in whom powers have been vested should retain freedom as to the exercise of those powers.

The courts have acknowledged the fact that public authorities will commonly need to enter into binding commitments in order that they may perform their various statutory functions. Express provision to such effect may appear in legislation, or may appropriately be implied there from. At the same time, the courts have had regard to the principle that, notwithstanding an authority’s possession of a power to enter into binding commitments, the authority’s discretion has been conferred on it to be exercised as the public interest may from time to time require. Commitments, which seem unduly to restrict an authority from acting in the exercise of its powers as the public interest may in due course require will therefore be held invalid. Were a public

- authority to regard itself as unable, because of commitments entered into, to exercise its powers as it may consider the public interest to require may involve that body in having failed to have retained sufficiently the broad scope of its power.³⁵
105. In *Ayr Harbour Trustees v Oswald* [1883] 8 App Cas 623, the trustees were appointed under the UK Ayr Harbour Act of 1879 for the management and improvement of the harbour and were empowered to take certain lands (including Oswald’s) for this purpose. In order to reduce the amount of compensation payable to Oswald on taking his land the trustees agreed that the conveyance of the land should restrict its use of it so as not to interfere with access from Oswald’s remaining land to the harbour. Oswald did not agree with this course of action and brought proceedings for a declaration that the trustees had to purchase the land absolutely. The House of Lords, affirming the decision of the Court of Session, held that the trustees had the power under the Act then or at any time in the future to modify the land taken so as to destroy any access from Oswald’s land to the harbour and that the trustees were not competent to dispense with the future exercise of their powers by themselves or their successors. The trustees had been given the powers of compulsory purchase so that they might be able to develop the harbour and surrounding land in the public interest, without having to defer to the private interests of individuals. An agreement to grant access to the land being acquired would be totally incompatible with the purpose for which the trustees had been vested with the powers.
106. Where a public authority has entered into what is essentially a normal commercial contract, the courts will not permit that body to plead the fettering of discretion principle in order for it to be released from its obligations. One may refer to the decision of the House of Lords in *Birkdale District Electricity Supply Co. Ltd v Southport Corporation* [1926] AC 355. In 1901, the company, a statutory body, took over the local electricity supply from Birkdale UDC and agreed, under seal, that the prices charged by it to private customers should not exceed those charged in an

³⁵ Vide P. Wallington, ‘Discretion and Duty: the Limits of Legality’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 148-155

- adjoining area by Southport Corporation. The company continued to supply electricity to the area. In 1923, the Corporation applied for an injunction to restrain the company from charging prices in excess of the Southport prices. The company argued that since it had a statutory power to charge what it wished, within certain limits, the 1901 agreement was invalid as an unlawful fetter on the exercise of this discretion. The House of Lords held that, far from being an unlawful fetter on the statutory body’s discretion, the agreement was of a type that was commonly entered into by commercial bodies. The situation would have been entirely different had the statutory body entered into a contract not to generate electricity.
107. But note that in *York Corporation v Henry Leatham & Sons Ltd* [1924] 1 Ch 557, it was established that a local authority would not be bound by a commercial undertaking which, while not being incompatible with its other functions, goes too far in committing it to a particular course of action. In that case, the plaintiff corporation was entrusted by statute with the control of navigation in parts of the rivers Ouse and Foss, with power to charge such tolls, within limits, as the corporation deemed necessary to carry on the two navigations in which the public had an interest. The corporation made two contracts with the defendants under which they agreed to accept, in consideration of the right to navigate the Ouse, an annual payment in lieu of the authorized tolls. The agreements, which were perpetually renewable at the request of the defendants, were held by Russell J. to be ultravires, and thus void, because they purported to disable the corporation, whatever emergency might arise, from exercising its statutory powers to increase tolls as from time to time might be necessary.
108. Furthermore, a local authority cannot, by means of a commercial contractual undertaking, be prevented from exercising its legislative powers in the public interest. In *William Cory & Sons Ltd v London Corporation* [1951] 2 KB 476, the authority had entered into an agreement with the plaintiff company under which refuse would be transported in barges down the Thames. When the contract still had twenty years

- to run, the Corporation passed new bye-laws introducing more rigorous hygiene controls over refuse carried in open barges. The effect was to make the contract less profitable because modifications had to be made to the barges used by the plaintiffs in performance of the contract. The Court held that it could not imply a term into the agreement to the effect that the Corporation would refrain from enacting legislation making the contract more onerous to perform. Such a term would clearly have been *ultravires*.
109. A body which has held itself out as having greater powers than in fact it possesses will not be prevented, estopped, in subsequent proceedings from relying on its lack of power in the matter in question: *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257. The courts have noted that to apply the doctrine of estoppel in such circumstances would be to allow an agency by its own actions to extend the ambit of the legal powers conferred on it by Parliament. A body may not, for the same reason, by reason of estoppel disentitle itself from performance of a legal duty imposed on it.

(c) **Abuse of Discretion**

110. There are various grounds upon which it may be alleged that the manner of exercise of power amounts to an abuse of discretion.³⁶ In this context the courts have consistently stated that their function is not to act “as a court of appeal” on the merits of the discretionary decision – their function is to intervene only if one or more of the established grounds of review has been infringed. Unlike in continental legal systems, proportionality does not constitute a discrete ground of challenge under English or Mauritian law.

³⁶ On the issue of abuse of discretion, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 531-549.

(i) Exercise of Discretion for an Improper Purpose

111. A statutory power must only be used for the purposes expressed in, or to the implied from, the enabling statute. Courts will determine the purpose of a particular statute as a matter of construction, and will strike down discretionary decisions where the discretion has been used for an improper purpose.³⁷ In *Padfield & ors v Minister of Agriculture, Fisheries and Food & ors* [1968] 1 All ER 694 (HL), the minister had the power to refer a complaint, in the instant one from milk producers, to a committee of investigation. The minister declined to refer the complaint. The Divisional Court issued an order of mandamus, which was set-aside on appeal. The House of Lords allowed the appeal. Lord Reid had this to say:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.”

112. A decision-maker purporting to exercise discretion while in reality pursuing some ulterior goal will be abusing his power, in the sense that he is flouting the aims and objects of the enabling Act. Thus in *Congreve v Home Office* [1976] 2 WLR 291, the English Court of Appeal considered that the Home Secretary could not use his powers to revoke television licences where people had bought a new licence early in order to avoid a price increase.

³⁷ Vide P. Wallington, ‘Discretion and Duty: the Limits of Legality’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 155-167; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 265-280.

113. In *R v Hillingdon LBC, ex parte Royco Homes Ltd* [1974] 2 WLR 805, the respondent authority, in its capacity as local planning authority, granted outline permission for the residential development of land for the purpose of constructing dwelling houses, subject to conditions requiring that they should be designed so as to provide space and heating to the standards required by the government for council housing; that they should be constructed at a cost per dwelling not exceeding the limits normally allowed for council housing, to receive government subsidies; that they should first be occupied by persons on the authority’s housing waiting list with security of tenure of 10 years. Lord Widgery CJ summarized Royco’s arguments in this way:

“These four conditions were imposed to suit an ulterior purpose, a purpose ulterior to the duty of the council as planning authority ... Their purpose was to ensure that, if a private developer was allowed to develop this land, he should have to use it in such a way as to relieve the council of a significant part of its burden as housing authority to provide houses for the homeless ... they are ultra vires and bring the whole planning permission down.”

The Divisional Court considered that the applicants were entitled to an order of certiorari. It held that the local planning authority could not use powers granted for ‘planning purposes’ to relieve the housing shortage in the area over which it had jurisdiction.

114. The permitted purpose must be the true and dominant purpose behind the act, although it is acceptable if some other purpose outside the authority’s power is also served. In *Westminster Corporation v L. & N.W. Ry.* [1905] AC 426, the local authority, which was empowered to build public conveniences but not subways, constructed an underground convenience that effectively formed a subway under a particular street. The railway company argued that a power to build lavatories was being used to build subways. The House of Lords held that this was merely an incidental benefit arising from a legitimate use of the authority’s power.

(ii) Exercise of Discretion based on Irrelevant Grounds or Without regard to Relevant Considerations

115. A decision will be declared ultra vires if it is based upon irrelevant considerations or if relevant considerations are not taken into account.³⁸ The definition of what is relevant in a particular context will depend on the statute conferring the discretion being exercised, since the statute will set out the aims and objects of the power and the circumstances in which it may be exercised. Justice Megaw in *Hanks v Minister of Housing and Local Government* [1962] 3 WLR 1482, discussed the issue of ‘relevance’ in the following terms:

“If it be shown that an authority exercising a power has taken into account as a relevant factor something which it should not properly take into account in deciding whether or not to exercise power, then the exercise of the power, normally at least, is bad. Similarly, if the authority fails to take into account as a relevant factor something which is relevant, and which is or ought to be known to it, and which it ought to have taken into account, the exercise of the power is normally bad ...”

116. In *Roberts v Hopwood & ors* [1925] All ER Rep. 24 (HL), a metropolitan borough was empowered, under by section 62 of the Metropolis Management Act of 1855, to employ such servants as may be necessary and allow to them such wages as it ‘shall think fit’. A metropolitan borough employed persons at wages which were found to be in excess of those necessary for attaining a high degree of efficiency and to have been arbitrarily fixed without reference to the value of the work to be done, the purchasing power of the sums paid, current trade union wage rates, or the scale of payments adopted by other local or national authorities. Lord Atkinson considered that the councillors failed in their duty and “allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.”

³⁸ Vide H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 280-297.

117. In *Laker Airways Ltd. v. Department of Trade* [1977] 2 All ER 182, an order of certiorari was issued as the Minister exercised his statutory discretion to give directions with regard to civil airways with the ulterior motive of making it impossible for one of the airlines to pursue a course of which the Minister disapproved.
118. In *Reufac v Minister of Agriculture and Natural Resources and the Environment* [1980] MR 20, the applicants sought leave to close down their factories, which were run at a loss. The Minister referred the application to a Board of Enquiry, which found that the closing down would harm no one, would benefit several, and would be beneficial to the sugar industry as a whole. The Minister refused leave to close on the ground of “public interest”. The Court held that as all reasons pointed in favour of the closing down, and no reason justifying the refusal was suggested, the Minister must have taken irrelevant factors into account, or he must have omitted relevant factors. The Minister’s decision was quashed and he was directed to reconsider the applications in the light of the judgment. The Court had this to say:

“The Minister is bound by the rules of collective responsibility, and is answerable to Parliament. It would be unrealistic to expect him to insulate the sugar industry and to consider it otherwise than in the context of the national interest: a decision *prima facie* advantageous to the part, but detrimental to the whole, is bound in the long run to have an adverse effect on the part as well as on the whole. The Act itself lays stress on socio-economic factors. If, for instance, a decision were profitable to the sugar industry considered as a monadic entity, but the re-routing of transport to other factories were to cause serious traffic jams in an urban area, or the level of pollution was to increase significantly in a residential district, the Minister would be entitled to consider those factors in arriving at a decision.

But that is not the same as saying that it is enough for the Minister to say that he took his decision in the public interest. On the one

hand, the Minister has no duty to deliver a written “judgment” setting out valid reasons for his decision. He has no need to give any reason at all, and it is for those who challenge his decision to show that it is wrong, and not for him to show that it is right. On the other hand, we respectfully endorse what Lord Reid said in *Padfield vs. Minister of Agriculture* (1968) A.C., 997: ‘I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the Court must be entitled to act’. And Lord Pearce added: ‘If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions’.”

(iii) Where the Use of Power is Unfair [Duty to act fairly]

119. A public body, which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it. In *HTV Ltd. v. Price Commission* [1976] I.C.R. 170, Scarman L.J., said, at p. 189:

"Agencies, such as the Price Commission, must act fairly. If they do not, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or, as is sought in this case, by declaring the meaning of the statute and the duty of the agency. It is a commonplace of modern law that such bodies must act fairly. It is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness."

120. In *Preston v Inland Revenue Commissioners* [1985] 2 All ER 327 (HL), in 1978 an inspector in the special investigations section of the Inland Revenue informed the taxpayer that he did not intend to raise any further inquiries on his tax affairs if the taxpayer withdrew certain claims for interest relief and capital loss. The taxpayer withdrew the claims and paid capital gains tax on a transaction about which the inspector had been inquiring. Following the receipt of new information in October 1979 relating to the same transaction, the Inland Revenue Commissioners concluded that the taxpayer had received from the transaction a tax advantage of a kind to which section 460 of the Income and Corporation Taxes Act 1970 applied, and in July 1982 they issued the taxpayer with a request for further information. On 14 September 1982 the Inland Revenue Commissioners gave the taxpayer formal notification initiating the procedure under section 460 of the Act of 1970 for the cancellation of a tax advantage. On an application by the taxpayer for a judicial review of the notification, the judge held that the commissioners had acted unlawfully. On appeal by the commissioners, the Court of Appeal allowed the appeal.

On appeal by the taxpayer, it was held, dismissing the appeal, that the Inland Revenue Commissioners were amenable to the process of judicial review and a taxpayer could challenge a decision taken by the commissioners in exercising their statutory powers and duties if he could show that they had failed to discharge their statutory duty towards him or that they had abused their powers or acted ultra vires; that unfairness in the purported exercise of a power could amount to an abuse or excess of power if it could be shown that the commissioners had been guilty of conduct equivalent to a breach of contract or breach of representation but that in the circumstances the taxpayer had failed to discharge the burden placed upon him. A taxpayer cannot complain of unfairness, merely because the commissioners decide to perform their statutory duties including their duties under section 460 to

make an assessment and to enforce a liability to tax. The court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair.

Lord Templeman said the following:

“In most cases in which the court has granted judicial review on grounds of "unfairness" amounting to abuse of power there has been some proven element of improper motive. In the leading case of *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 the Minister abstained from exercising his statutory discretion to order an investigation because he feared the consequences of the investigation might be politically embarrassing. In *Congreve v. Home Office* [1976] Q.B. 629 the Minister exercised his power to revoke television licences because he disapproved of the conduct of the licence holders, albeit they had acted unlawfully. In *Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643 the Minister exercised his statutory discretion to give directions with regard to civil airways with the ulterior motive of making it impossible for one of the airlines to pursue a course of which the Minister disapproved. In these cases judicial review was granted because the Ministers acted "unfairly" when they abused their powers by exercising or declining to exercise those powers in order to achieve objectives, which were not the objectives for which the powers had been conferred ...

In the *HTV* case [1976] I.C.R. 170, the "unfairness" of the decision was due not to improper motive on the part of the Price Commission but to an error of law whereby the Price Commission misconstrued the code they were intending to enforce. If the Price Commission had not misconstrued the code, they would not have acted "inconsistently and unfairly." Of course the inconsistent and unfair results to which Scarman L.J. drew attention were themselves powerful support for the contention that the Price Commission must have misconstrued the code.

In the present case, the appellant does not allege that the commissioners invoked section 460 for improper purposes or motives or that the commissioners misconstrued their powers and duties. However, the *HTV* case and the authorities there cited suggest that the commissioners are guilty of "unfairness" amounting to an abuse of power if by taking action under section 460 their conduct would, in the case of an authority other than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the Commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of contract or breach of representation does

not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for "unfairness" amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part.”

(iv)Where there is Bad Faith or Malice

121. In *R v. Derbyshire County Council ex parte The Times Supplements Ltd* [1990] 3 Administrative Law Review 241, the council resolved to remove all its advertising from newspapers owned by Mr. Rupert Murdoch. Shortly before, the Sunday Times had published articles about the council, which had led to the institution of libel proceedings by a councillor. The decision involved switching advertising for teaching posts from the Times Educational Supplement to The Guardian notwithstanding that the cost was greater and the likely readership among teachers much smaller. The Divisional Court granted certiorari to quash the decision. The court was satisfied on the evidence that there was no educational ground for the decision (contrary to the claims of the councillors) and that the majority labour group on the council had been activated by bad faith or vindictiveness.³⁹

122. In many ways acting in bad faith represents an extreme example of taking into account irrelevant considerations. Here the administrator deliberately sets out to harm the interests of another person, knowing that he does not have the power to act in this way. The courts have consistently pointed out that there is an enormous evidential burden

³⁹ Vide also *Roncarelli v. Duplessis* [1959] 16 DLR (2nd ed.) 698, the Prime Minister of Quebec purported to revoke a liquor licence because the holder had regularly provided sureties to Jehovah’s witnesses who had been arrested by the police. The Prime Minister was motivated by a desire to affect adversely the interests of the citizen.

resting upon anyone attempting to establish bad faith and they have been, in general, reluctant to allow such challenges to succeed.⁴⁰

123. The significance of establishing bad faith may lie in respect of the availability of damages. The malicious abuse of power is a tort in its own right.

(v) Unreasonable Exercise of Discretion [Irrationality or Wednesbury Unreasonableness]

124. In *Associated Provincial Pictures Ltd v Wednesbury Corporation* [1947] 2 All ER 680, Lord Greene MR said:

“If a decision on a competent matter is too unreasonable that no reasonable authority could ever come to it, then the courts can interfere ... An unreasonable decision is one which is so absurd that no sensible person could ever dream that it lay within the powers of the authority.”⁴¹

125. The courts have consistently stated that in considering challenges on this ground they must preserve the distinction between review on the ‘merits’ and (is it the decision I would have come to?) and review of ‘legality’ (is it a decision which a reasonable body could have come to?) The former may be appropriate in appeal proceedings, where such exist and permit the appellate body such a wide power of review; but is regarded by the judges as going beyond their proper remit in proceedings for judicial review. “Unreasonableness” is justified as a ground of review of legality on the basis that although Parliament may have intended to authorize a variety of, not unreasonable, ways

⁴⁰ . See *Cannock Chase DC v Kelly* [1978] 1 All ER 152; *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 2 All ER 518.

⁴¹ On the issue of unreasonableness, vide Mr. Justice Walker, ‘Unreasonableness and Proportionality’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 169-214; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 543-608.

in which a power might be exercised, and have intended to leave such choice to the body in question rather to the judges, it can be assumed that Parliament had not intended its grant of that power to cover its unreasonable exercise.

126. In *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL), Lord Diplock agreed with the *Wednesbury* test of total unreasonableness but preferred to use the word ‘irrationality’ instead of ‘unreasonableness’ to describe this category of review. He thought it better conveyed the sense of absurdity that needs to exist about the decision in order for the reviewing court to set it aside. Lord Diplock described as irrational “a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.⁴²

(vi) Proportionality as a Ground of Review?

127. In *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL), Lord Diplock suggested that proportionality might one day become a ground for review. To some extent this concept is already part of the *Wednesbury* test because a disproportionate penalty may be set aside as being *Wednesbury* unreasonable: *R v Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 3 All ER 452 (CA). However, Lord Diplock probably had in mind the European concept of proportionality, which has been part of public law on the continent for many years. Under it, a judge is able to set standards against which to measure administrative action in order to decide whether a decision is manifestly wrong or out

⁴² In *Hung Min Shipping Co Ltd & ors v Permanent Secretary Ministry of Fisheries & ors* (2002) MR 210, the applicants sought a judicial review of decisions of the first respondent relating to their business on the ground that they were unfair and unwarranted. The Court held that one of the decisions was so unreasonable that it had to be struck down.

of proportion to that required.⁴³ The test requires a reasonable proportion between the administrative objective and the means used to achieve it, with a requirement that the measures taken by the administration should be the least restrictive of individual rights compatible with the objective being pursued. Under this approach the primary judgment, subject only to a limited ‘margin of appreciation’ for the decision-maker, is for the court rather than the executive, that is the constitutional balance shifts by allowing the judges to evaluate their merits.

128. Traditionally in English law judges exercise only a secondary judgment to review the legality of administrative action. For this reason, Lord Diplock’s suggestion has been received with great caution and some hostility, with some judges suggesting that proportionality cannot become a separate ground for review unless Parliament gives the judges clear authority for using it. This was the view expressed by Lords Ackner and Lowry in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 All ER 720.

⁴³ On the issue of proportionality, at common law and in European continental law, vide Mr. Justice Walker, ‘Unreasonableness and Proportionality’, in M. Supperstone, J. Goudie & Sir Paul Walker (eds.), *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 214-232.

(F) Review of Procedural Impropriety

(a) Procedural Ultra Vires

129. When a statute creates a body to perform some task on behalf of the executive, such as the granting of licences, or payment of benefit, it is likely to also lay down a procedure that the body should follow in performing its functions.⁴⁴ Where a body is left largely to decide upon its own procedure, the courts will apply the common law rules of natural justice, as well as the standard laid down in section 10(8) of the Constitution, to ensure that basic fairness is complied with.

In laying down procedural requirements, Parliament may seek to achieve various aims. Time limits are often prescribed to reduce delays. Matters may be required to be recorded in writing so as to achieve certainty. Notice of decisions being taken and of rights of appeal is provided to promote fairness. The requirement of prior consultation may also be to promote fairness and a better-informed decision.

The consequence of failing to comply with a procedural requirement will depend on whether it is regarded as mandatory or directory. Should a requirement be mandatory, failure to observe it will normally render any subsequent action void. Where the requirement is directory, failure to abide by it will not normally be fatal to the validity of the ensuing determination.

130. Whether a particular requirement is to be regarded as mandatory or directory will depend much on the context. In *Howard v Boddington* [1877] 2 PD 203, Lord Penzance expressed the problem thus:

⁴⁴ Regarding statutory procedural safeguards, vide Mr. Justice Elias & A. Blake, ‘Procedural Rules and Consultation’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 233-253.

“You cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act.”

131. In *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL), Lord Hailsham of Saint Marylebone LC favoured a flexible approach:

“When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon him. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like "mandatory," "directory," "void," "voidable," "nullity" and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition ...

Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is

frequently in the presence of differences of degree, which merge almost imperceptibly into differences of kind.”

132. The courts have been unable to develop clear guidelines on whether a particular step is to be regarded as mandatory or directory. A step is likely to be regarded as mandatory if it provides an important safeguard to individual interests such as a requirement to give prior notice of a decision or a hearing [*Bradbury v Enfield London Borough Council* (1967) 1 WLR 1311; *Lee v Department of Education and Science* (1967) 66 LGR 211]; or to give notice of rights of appeal [*London & Clydeside Estates Ltd v Aberdeen District Council* (1979) 3 All ER 876 (HL)]; or to give notice of a right to make objections [*R v Lambeth London Borough Council, ex parte Sharp* (1986) 55 P. & C.R. 232]; or to give the prescribed period of notice of the implementation of a licensing scheme by a council resolution [*R v Birmingham City Council, ex parte Quietlynn Ltd* (1985) 83 LGR 461]; or to consult appropriate bodies [*Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* (1972) 1 All ER 280]. It may also be held to be mandatory where the requirement reflects the need for justice to be seen to be done [*Noble v Inner London Educational Authority* (1983) 82 LGR 291, in respect of regulations prohibiting (inter alia) a teacher-governor of a school participating in the consideration of the transfer, promotion or retirement of a teacher where that would result in a vacant post for which he or she could be candidate]. Where requirements are put in for administrative convenience only, they are likely to be interpreted as directory. For example, time limits for taking certain kinds of decision.
133. Where a statute requires matters to be put in writing, the requirement is generally regarded as being mandatory [*Epping Forest DC v Essex Rendering Ltd* (1981) 1 WLR 158]. Similarly where a measure seeks to impose some financial burden, the courts apply any procedural requirements strictly.
134. Trivial deviations from procedural requirements will not normally invalidate the whole process. Thus in *R v Dacorum Gaming Licensing Committee, ex parte E.M.I. Cinemas*

- and Leisure Ltd* [1971] 3 All ER 666, the Divisional Court held that a misprint in the public notice in a newspaper of an application for a bingo club license (describing the club as the “A.B.E. Social Club” rather than the “A.B.C. Social Club”) did not render the notice ineffective so as to deprive the gaming committee of jurisdiction to entertain the license application. This was regarded as “a trifling typographical error ... which was not in any sense the fault of the applicants and which cannot possibly have misled anybody.”
135. Even when a requirement is regarded as mandatory because of its significance, the actions of a public authority will not be invalidated if it has failed to comply with it in some minor way so that it can be said that there has been “substantial compliance. Courts have been inclined to hold a requirement to be directory if non-compliance causes no substantial prejudice. In *Coney v Choyce & ors.* [1975] 1 All ER 979], regulations required notice, in relation to the establishment or closure of a school, to be given in a local newspaper, in some conspicuous place or places, at or near any main entrance to the school, and in such other manner as appeared to be desirable for giving publicity to the notice. In the case of two schools no notice was posted at or near the main entrance. Templeman J. held that the main object of the regulations was “that notice should be published in a manner designed to show a representative number of people what their rights are.” The specific requirements were therefore to be regarded as directory. The notices were in fact well publicised apart from these omissions, and so no substantial prejudice was suffered by those for whose benefit the requirements had been introduced
136. If classifying a requirement as mandatory would cause substantial public inconvenience, the courts may incline towards holding it to be directory. In *Simpson v Attorney-General* [1955] NZLR 271, the Governor-General of New Zealand in 1946 issued his warrant for the holding of a general election 26 days after the last day of the previous Parliament, instead of within 7 days, as there was some misunderstanding about what was the last day of the Parliament. The New Zealand Court of Appeal held that the 7-day

requirement was directory rather than mandatory, and rejected the argument that the general election (and the legislation subsequently passed by the new Parliament) was invalid.

(b) **Natural Justice**

137. Rules of natural justice are designed to ensure that the decision-making body has followed a fair procedure. The precise requirements of natural justice will vary with the circumstances of each case, such as the nature of the decision being taken, the status of the applicant, and so on.

In administrative law “the rules of natural justice” have traditionally been regarded as comprising two procedural rules:

- **the *audi alteram partem* rule:** the rule that no person is to be condemned without a hearing; it requires the maker of a decision to give prior notice of the decision to persons affected by it, and an opportunity for those persons to make representations, to be heard;
- **the *nemo iudex in causa sua* rule:** the rule is to the effect that no person should sit as a judge in his own case; the decision-maker is disqualified from acting if he or she has a direct pecuniary or proprietary interest, or he or she might otherwise be biased [determination by an impartial body, disinterested and unbiased].

138. The rules are historically closely tied to judicial decision-making in the courts, but they have been extended to apply to administrative authorities and to administrative decision-making. The courts have recognized that there is a duty to act fairly, which may include some aspects of “natural justice”, but which can be applied to a wider range of decisions in which there has been abuse of discretion.

In the case of each of the twin rules of natural justice, the basic issues involved are:

- (a) Does the rule apply to the particular situation?
- (b) If so, what is the precise content of the rule in that situation?
- (c) If it applies, has the rule been observed?

(c) **Natural Justice and Fairness - The *Audi Alteram Partem* Rule (The Right to a Fair Hearing)**⁴⁵

(i) Historical Development

139. As far back as 1615, when James Bagg, a chief burgess of Plymouth, who had been disfranchised for singularly unbecoming conduct, was reinstated by mandamus because he had been removed without notice or hearing. In 1723 mandamus was issued to restore Dr Bentley to his academic degrees in the University of Cambridge, of which he had been deprived without a summons. In *Bonaker v Evans* (1850) 16 QB 162, it was said that “no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him”.

In *Board of Education v Rice* (1911) AC 179, Lord Loreburn LC said obiter:

⁴⁵ On the *audi alteram partem* rule, vide M. Beloff, ‘Natural Justice and Fairness: The Audi Alteram Partem Rule’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 261-352; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 317-477; P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 371-416.

“In the present instance ... what comes for determination ... (by the Board) is a matter of administrative kind ... In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is the duty laying upon every one who decides anything.”

Much later confusion and hardship would have been avoided if the dictum of Lord Loreburn LC had been applied to subsequent cases.

140. During the period 1911 to 1964 the courts were unable to adapt and develop administrative law to deal adequately with the demands of a rapidly developing state. There was a retreat from natural justice; the judiciary remained firmly committed to the view that natural justice only applied to judicial functions. In *Local Government v Arlidge* (1915) AC 120, the House of Lords held that the standards of fairness required of a court of law could not be demanded of a government department, with the result that it was not a violation of natural justice for the Board to refuse to disclose the contents of a report to Arlidge which contained the evidence upon which it had upheld a decision to demolish his property. In *Franklin v Minister of Town and Country Planning* (1948) AC 87, the House of Lords held that the Minister’s statutory duties, including the making of a draft order designating Stevenage as a ‘new town’, were ‘purely administrative’, with the result that allegations that he had acted in breach of natural justice were irrelevant. In *R v Metropolitan Police Commissioner, ex parte Parker* [1953] 2 All ER 353, the Divisional Court refused to quash the revocation of Parker’s licence to operate as cab-driver despite the fact that he had not been granted a hearing before this was done. The court held that the Commissioner’s powers of revocation were ‘administrative’ and therefore certiorari was not available to quash a decision made as a result. Finally, in *Nakkuda v Jayaratne* (1951) AC 66, the Privy Council had to consider the validity of the action of the Controller of Textiles of Ceylon who had cancelled the appellant’s textile licence, because he had ‘reasonable ground to believe’ that the appellant was unfit to continue in business. The appellant argued that the hearing he had

been given before revocation of his licence had been inadequate, and therefore the revocation had been in breach of natural justice. The Privy Council held that the Controller in cancelling licences was exercising powers that were administrative in nature; consequently there was no obligation upon him to grant the appellant any hearing, let alone an adequate one.

141. The judicial reluctance to impose the rules of natural justice on the proceedings of inferior bodies because their activities were seen as ‘administrative’, not judicial, threatened to render natural justice redundant as a means of ensuring fairness in the administrative process. The House of Lords in 1963 restored the law to the path from which it had deviated. In *Ridge v Baldwin* (1963) 2 WLR 935, Charles Ridge had been dismissed from his position as Chief Constable of the County Borough of Brighton by the local watch committee. He contended before the House of Lords that the principles of natural justice applied to the exercise of powers to dismiss him, and that these had been breached by not allowing him to know the full case against him, and by not allowing him to put his case properly. The House of Lords allowed his appeal, holding that natural justice did apply and had not been observed. In an illuminating review of the authorities, Lord Reid repudiated the notions that the rules of natural justice applied only to the exercise of those functions which were analytically judicial, and that a “superadded” duty to act judicially had to be visible before an obligation to observe natural justice could arise in the exercise of a statutory function affecting the rights of an individual.⁴⁶ He emphasised that the duty to act in conformity with natural justice could,

⁴⁶ In *Rakotozafy v Minister for Employment* (1977) MR 170, the Supreme Court took note of these developments in English law:

“As De Smith says:

Till the 1960s it was generally assumed that certiorari and prohibition could not issue to a body of persons acting in a purely administrative capacity, though in fact the orders had often issued in respect of acts and decisions bearing only a remote resemblance to the judicial. This assumption is not yet obsolete. Where a court declines to award certiorari or prohibition it may still explain its decision on the ground that the act impugned is not judicial but administrative, and conversely, in explaining why it can properly certiorari or prohibition it is still apt to strain the use of language in order to characterise the impugned act as judicial or quasi-judicial. Nevertheless, it seems that certiorari and prohibition may now issue, in a proper

in some situations, simply be inferred from a duty to decide “what the rights of an individual should be”.

142. Since the decision of *Ridge v Baldwin*, the scope of the rights protected by the rules of natural justice, and the range of decision-makers whose functions are now reviewable on the ground of breach of natural justice, has been expanded considerably. In *Leech v Deputy Commissioner of Parkhurst Prison* (1988) 1 All ER 485, the applicants sought judicial review of the decisions of a prison governor in exercising his statutory powers to discipline prisoners were amenable to judicial review, because he was exercising a power which affected the legitimate expectations or rights of citizens, and such a power had to be exercised in accordance with the rules of natural justice. In the course of his speech, Lord Bridge stressed the significance of the rights affected as the key to the application of natural justice.

case, to a body which exercises functions that are analytically administrative and which is not even required to act judicially in the performance of those functions. Or, again, to quote from Halsbury's Laws of England, 4th edn., Vol. 1 at p. 104:

The orders will not issue in respect of the performance of purely ministerial acts or the deliberations of a legislative assembly, or, possibly, acts of a legislative nature, There is also authority to the effect that they will not issue to bodies acting in a purely administrative capacity, though they may issue in respect of a discretionary administrative decision preceded by a hearing or inquiry of a judicial or quasi-judicial character, but on these matters the authorities are not easily reconcilable, mainly because the terminology adopted by the courts to distinguish judicial from administrative functions has not been uniform. In order to establish that certiorari or prohibition will issue, it appears to be enough to show that the body in question was obliged to act in a judicial manner, in the sense that it was under an express duty to adopt a procedure analogous to a judicial procedure, or that it was required to determine questions of law and fact or otherwise to exercise a limited or judicial discretion, or that it was under an implied duty to act judicially in accordance with natural justice, or even under a more loosely formulated duty to act fairly. A duty to act judicially may be inferred from the severity of the impact made by the exercise of a power or duty on individual interests; but not every person or body whose acts are subject to review by prohibition or certiorari is necessarily obliged to observe the procedural standards imposed by the rules of natural justice. An act or decision lacking any judicial characteristic whatsoever, substantive or procedural, will not, it seems, be amenable to review by means of the two orders; hence, a discretionary decision that can be based entirely on considerations of public policy will not be thus reviewable unless it imports a duty to observe fair procedural standards”.

143. A procedure, which violates the rules of natural justice, may also be attacked on the basis that it was unreasonable to adopt such a procedure. In *R v Secretary of State for the Home Department, ex parte Tarrant* (1984) 1 All ER 799 the decision of the board of visitors not to allow a prisoner legal representation was regarded as both unfair and unreasonable by the court on the ground that no reasonable tribunal would have refused the prisoner representation given the gravity of the charges and the possible loss of remission.

(ii) Scope of the *Audi Alteram Partem* Rule

144. In *Mc Innes v Onslow Fane & anor* (1978) 3 All ER 211 [(1978) 1 WLR 1520], on May 28, 1976, the plaintiff applied to the western area council of the British Boxing Board of Control to be granted a boxers' manager's licence, and asked for an oral hearing and prior information of any thing that might militate against a favourable recommendation. On July 16, 1976, the board refused his application without having given him an oral hearing, and without giving him any reasons for their refusal. The plaintiff had previously held a promoter's licence for about a year in 1954 and 1955, a trainer's licence, granted in 1971, and a master of ceremonies' licence granted in 1973; but in May 1973 all licences had been withdrawn. Before the present application, the plaintiff had made five applications for a boxers' manager's licence between July 1972 and November 1975, but all had been refused.

He sought a declaration that in refusing his application of May 28, 1976, the board had acted in breach of natural justice and unfairly in that they failed to comply with his request (i) to be informed of the case against him so that he could answer it before the board considered his application and (ii) to be granted an oral hearing. The Divisional Court considered that since the case was, however, not one

involving forfeiture of an existing right or deprivation of an existing position, and was equally not one where the plaintiff had any legitimate expectation that his application for a boxers' manager's licence would succeed, the board, while under a duty to reach an honest conclusion without bias and not in pursuance of any capricious policy, were under no obligation to give the plaintiff even the gist of their reasons for refusing or proposing to refuse, his application, and similarly were under no obligation to grant the plaintiff an oral hearing; refusal of a licence did not cast any slur upon the plaintiff's character, and in the absence of any suggestion that the board had been affected by dishonesty, bias, or caprice, or other impropriety, the court ought not to interfere, since the board were the best judges of the desirability of granting the licence.

Justice Megarry had this to say:

“... Where the court is entitled to intervene, I think it must be considered what type of decision is in question. I do not suggest that there is any clear or exhaustive classification; but I think that at least three categories may be discerned. First, there are what may be called the forfeiture cases. In these, there is a decision, which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence or a person already elected or appointed to some position seeks confirmation from some confirming authority: see, for instance, *Weinberger v. Inglis* [1919] A.C. 606; *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175; and see *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170, 173 and *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052, 1058.

It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason: and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which in *Ridge v. Baldwin* [1964] A.C. 40, 132, Lord Hodson said were three features of natural justice which stood out) are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no

requirement of an opportunity of being heard in answer to the charges. Instead, there is the far wider and less defined question of the general suitability of the applicant for membership or a licence. The distinction is well-recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on an application for admission to it. The intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable.”

145. *Bates v Lord Hailsham* (1972) 1 WLR 1373 is authority for the proposition that natural justice does not apply to the discharge of legislative functions. The court held that failure to consult prior to exercising powers to enact delegated legislation, in the absence of any statutory requirements to do so, could not invalidate the process on the ground that there had been any breach of the rules of natural justice – they simply do not apply.

146. There a number of authorities suggesting that natural justice will not apply where action is merely preparatory to the making of a decision, or ‘purely administrative’ as it is sometimes described. In *Furnell v Whangarei High Schools Board* (1973) AC 660, it was held that an individual had no right to be heard by a subordinate body instructed to prepare a report for a disciplinary body. Only when the charges were put to the individual concerned did the right to be heard apply. Similar reasoning was adopted in *Norwest Holst Ltd v Secretary of State for Trade* (1978) Ch 201, where it was considered that the company had no right to be heard prior to the appointment of inspectors to investigate the company’s affairs. Such appointments were ‘purely administrative’ decisions.

‘Mere Applicants’

147. In the light of *Mc Innes v Onslow Fane & anor*, a mere applicant has no right to be heard as such, except where so expressly provided by statute. In *R v Gaming Board for Great Britain, ex parte Benaim and Khaida* (1970) 2 WLR 1009, an application for a gaming licence had been refused by the Board without reasons being given or the applicants being notified of the evidence against them. The applicants sought certiorari to quash the refusal and an order of mandamus to compel the Board to give sufficient information for the applicants to be able to know the case against them. Lord Denning MR considered what natural justice required in such cases and had this to say:

“It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject matter: see what Tucker L.J. said in *Russell v. Norfolk (Duke of)* [1949] 1 All E.R. 109, 118 and Lord Upjohn in *Durayappah v. Fernando* [1967] 2 A.C. 337, 349. At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v. Baldwin* [1964] A.C. 40. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *Reg. v. Metropolitan Police Commissioner, Ex parte Parker* [1953] 1 W.L.R. 1150 and *Nakkuda Ali v. Jayaratne* [1951] A.C. 66 are no longer authority for any such proposition. See what Lord Reid and Lord Hodson said about them in *Ridge v. Baldwin* [1964] A.C. 40, 77-79, 133.

So let us sheer away from those distinctions and consider the task of this Gaming Board and what they should do. The best guidance is, I think, to be found by reference to the cases of immigrants. They have no right to come in, but they have a right to be heard. The principle in that regard was well laid down by Lord Parker C.J. in *In re H. K. (An Infant)* [1967] 2 Q.B. 617. He said, at p. 630:

"... even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly."

Those words seem to me to apply to the Gaming Board. The statute says in terms that in determining whether to grant a certificate, the board "shall have regard only" to the matters specified. It follows, I think, that the board have a duty to act fairly. They must give the applicant an opportunity of satisfying them of the matters specified in the subsection. They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office, as in *Ridge v. Baldwin* [1964] A.C. 40; or depriving him of his property, as in *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180. After all, they are not charging him with doing anything wrong. They are simply inquiring as to his capability and diligence and are having regard to his character, reputation and financial standing. They are there to protect the public interest, to see that persons running the gaming clubs are fit to be trusted.

Seeing the evils that have led to this legislation, the board can and should investigate the credentials of those who make application to them. They can and should receive information from the police in this country or abroad who know something of them. They can, and should, receive information from any other reliable source. Much of it will be confidential. But that does not mean that the applicants are not to be given a chance of answering it. They must be given the chance, subject to this qualification: I do not think they need tell the applicant the source of their information, if that would put their informant in peril or otherwise be contrary to the public interest ...”

148. In *Breen v AEU* (1971) 1 All ER 1148, Lord Denning stated, obiter, that:

“If a man seeks a privilege to which he has no particular claim ... then he can be turned away without a word. He need not be heard. No explanation needs to be given ...”

‘Persons having a legitimate expectation’

149. The courts have recognized that there are persons who while not being ‘mere applicants’ do have a legitimate expectation of being dealt with in accordance with the rules of natural justice. This expectation arises not simply because some property right or status is being threatened: it can also arise because a previous course of conduct on the part of the decision-making body or a previous statement leads the individual or group to

believe that it will be consulted, notified or heard before action affecting it is taken. Much will depend on the context.⁴⁷

150. In *Schmidt v Secretary of State for Home Affairs* (1969) 1 All ER 904 [(1969) 2 WLR 337], an American student of scientology applied to the Secretary for Home Affairs for an extension of his stay. The application was rejected without giving him the opportunity of being heard. He sought to challenge the decision by way of judicial review for breach of rules of natural justice. The English Court of Appeal held that an alien had no right at common law to enter the United Kingdom except by leave of the Crown, which could be refused without giving any reason; that the defendant Secretary of State had ample statutory power to refuse entry to an alien or to extend his stay if permission were given to enter for a limited purpose; that the defendant had properly and fairly exercised his power for the public good and his policy regarding scientology could not be challenged; and that as he had no kind of right to an extension of his stay the defendant was under no duty to give him a hearing or to hear his representations and had not infringed the precepts of natural justice. He had no legitimate expectation of being granted a hearing. The situation might have been different if his right to stay had been revoked before its expiry. Lord Denning observed that the distinction between the exercise of an administrative power and doing a judicial act is no longer valid:

“Some of the judgments in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in *Ridge v. Baldwin* [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.”

⁴⁷ On the issue of legitimate expectation, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 647-691; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 609-650.

151. In *Rakotozafy v Minister for Employment* (1977) MR 170, the Supreme Court held that, in cases such as the grant of a work permit to an alien, whilst the label “administrative decision” would not per se rule out review by the courts, they would only interfere if it were shown that the Minister has acted unlawfully or in bad faith. The Court had this to say:

“We are of the view that when one is dealing with the exercise of what may be termed an “administrative” decision which must obviously be conditioned by questions of national policy relating to aliens, the Courts will only interfere in appropriate cases. Such a case may well arise if the Minister were, under the Act, to suddenly cancel a work permit for no apparent reason. It could then be argued that the person concerned had acquired a right or interest or, at least, “some legitimate expectation”. But the same reasoning cannot be applied in the case of a foreigner who comes here to seek authorisation to enable him to secure employment. When the Minister is vested with an absolute discretion to determine, having regard primarily to questions of national policy, whether a certain privilege, to be held at pleasure, namely the right to seek employment here, could or should be extended to a foreigner, it seems to us that there is every reason to apply the thinking of the Courts in cases relating to an alien's entitlement to enter a country to cases, such as the present one, which deal with aliens who seek to be authorised to work in this country. It is clear that the Minister need not give reasons for his decision, still less grant the applicants a hearing.”

152. In *Cinnamond v British Airports Authority* (1980) 1 WLR 582 [(1980) 2 All ER 368], Lord Denning MR held that taxi-cab drivers who were prohibited by an order from entering Heathrow Airport other than as legitimate passengers had no legitimate expectation of being heard. He said:

“In cases where there is no legitimate expectation, there is no call for a hearing ... Applying those principles: suppose that these car-hire drivers were of good character and had for years been coming into the airport under an implied licence to do so. If in that case there was suddenly a prohibition order preventing them from entering, then it would seem only fair that they should be given a hearing and a chance to put their case. But that is not this case. These men have a long record of convictions. They have large fines outstanding. They are continuing to engage in conduct, which they must know is unlawful and contrary to the byelaws. When they were summonsed for past offences, they put their case, no doubt, to the justices and to the Crown Court. Now when the patience of the authority is exhausted, it seems to me that the authority can properly suspend them until further notice ... In the circumstances they had no legitimate expectation of being heard. It is not a necessary preliminary that they should

have a hearing or be given a further chance to explain. Remembering always this: that it must have been apparent to them why the prohibition was ordered: and equally apparent that, if they had a change of heart and were ready to comply with the rules, no doubt the prohibition would be withdrawn. They could have made representations immediately, if they wished, in answer to the prohibition order. That they did not do. The simple duty of the airport authority was to act fairly and reasonably. It seems to me that they have acted fairly and reasonably. I find nothing wrong in the course, which they have taken.”

153. Where there has been a departure from a published policy or from express assurances or from a previous course of conduct, there would be a legitimate expectation to be heard. In *R v Secretary of State for the Home Department, ex parte Khan* (1985) 1 All ER 40, the Home Office had published a circular indicating the criteria that would be applied when persons in the United Kingdom wished to adopt a child from abroad. The applicant wished to adopt a relative’s child who lived in Pakistan. He applied for an entry clearance certificate for the child, which was refused by the Secretary of State, applying criteria other than those set out in the circular. The applicant applied for judicial review of the Secretary of State’s refusal, contending that he had a legitimate expectation, arising out of the circular, that the procedure therein set out would be followed. The Secretary of State claimed that his discretion in such matters was unfettered. The Court held that, provided the circular did not conflict with the Minister’s statutory duty, he was under a duty to apply the criteria therein stated. He could only depart from the provisions of the circular if there was an overriding public interest that he should so act, and interested persons were first afforded a hearing. In the circumstances, the Secretary of State had acted unfairly and unreasonably in deciding the applicant’s case after applying criteria different from those set out in the circular.
154. In *Attorney-General of Hong Kong v Ng Yuen Shiu* (1983) 2 WLR 735, the Hong Kong government had made public its changed policy towards illegal immigrants, stating that each one, if he or she came forward, would be interviewed, and although

no guarantee would be given that they would not subsequently be removed, each case would be treated on its merits. The respondent who had entered Hong Kong illegally was interviewed by an immigration officer and subsequently detained pending the making of a removal order. The respondent’s appeal to the immigration appeal was dismissed without a hearing. The Court of Appeal of Hong Kong granted the respondent an order of prohibition preventing his removal, pending a proper hearing of the case. The Attorney-General of Hong Kong appealed to the Privy Council. In dismissing the appeal, the Privy Council substituted an order of certiorari for the order of prohibition. Their Lordships held that where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise provided the implementation did not conflict with the authority’s statutory duty; that, accordingly, assuming that an alien had no general right to be heard before being deported, the implementation of the promise to interview each illegal immigrant and decide each case on the merits required the applicant to be given an opportunity to state his case and the failure to ask him whether he wished to make representations why he should not be removed was a sufficient ground for setting aside the decision; and that, accordingly, the court would substitute for the inappropriate order of prohibition an order of certiorari to quash the decision.⁴⁸

155. In *Council of Civil Service Unions v Minister for the Civil Service* (1984) 3 All ER 935, the Prime Minister had issued a directive prohibiting membership of trade unions at the government’s communications headquarters in Cheltenham. The unions applied for a declaration that the action was in breach of natural justice, because they had not been consulted prior to the directive being issued. The House of Lords held, inter alia, that the previous regular practice of consultation between the Minister and the union on matters relating to conditions of service, gave the unions a legitimate expectation of being consulted on this occasion before union membership was prohibited. In this case,

⁴⁸ See also *R v Secretary of State for the Home Department, ex parte Ruddock* (1987) 2 All ER 518.

however, such legitimate expectation was displaced by considerations of national security.

It is to be noted that the legitimate expectation is in respect of the procedure to be followed, for example consultation before decision-making, since natural justice is concerned with the legality of the procedure adopted by the decision-making body. Where an applicant has an expectation as to what the substantive decision would be, for example that the applicant would be granted a licence, and a public body later makes a contrary decision, his only grounds of challenge might be that the decision was unreasonable, or possibly that the public body is estopped from denying him the privilege he expected to obtain.

156. In *R v Secretary of State for Transport, ex parte Richmond-Upon-Thames London Borough Council* (1994) 1 All ER 577 [(1994) 1 WLR 74], the Secretary of State for Transport, pursuant to section 78(3)(b) of the Civil Aviation Act 1982, issued a press notice announcing his intention to introduce a new system of night flying restrictions at the airports of Heathrow, Gatwick and Stansted whereby the maximum number of take-off and landing movements would not be fixed but would vary according to the type of aircraft involved, fewer movements being permitted for noisy aircraft than for the less noisy. The applicants, a number of local authorities, challenged the proposed changes to the regulations governing night flights at London’s airports. They contended they had a legitimate expectation that that any revision to the regulations would not result in an increase in noise from night flights. Laws J had this to say:

“A public authority may, by an express undertaking or past practice or a combination of the two, have represented to those concerned that it will give them a right to be heard before it makes any change in its policy upon a particular issue which affects them. If so, it will have created a legitimate expectation that it will consult before making changes, and the court will enforce this expectation save where other factors, such as considerations of national security, prevail. This was the position in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. This species of legitimate expectation may be termed "procedural," because the content of the promise

or past practice consists only in the holding out of a right to be heard: a procedural right.

In another case, the public body in question may have adopted a particular policy, and by promise or past practice, represented that this would be its *continuing* policy. In this case, there is no promise or past practice to the effect that those affected will be allowed a voice before the policy is changed. But if - and it will depend on the particular facts - the court concludes that there exists what amounts to an assurance that the policy will continue, it may deem it unfair for the authority to make a change in the policy unless it announces its intention in advance so as to allow an affected person to make representations before any change is carried out. An example of this is *Reg. v. Secretary of State for the Home Department, Ex parte Ruddock* [1987] 1 W.L.R. 1482, where Taylor J., while rejecting the application on its factual merits, accepted in principle that circumstances of this kind might give rise to an enforceable legitimate expectation. He held - what is now commonplace - that the doctrine is rooted in the ideal of fairness. It is important to notice that in holding as he did Taylor J. was rejecting an argument that the law only recognised the first species of legitimate expectation which I have described, namely, that arising where there is a promise or practice of consultation as such: [1987] 1 W.L.R. 1482, 1494. It is, I think, misleading to describe the type of case exemplified by *Ex parte Ruddock* as one of substantive, in contrast to procedural, expectations, since the case demonstrates no more than that there may be circumstances in which it will be unfair to change a policy adhered to over a period of time without giving those affected a right to be heard; as such the protection afforded is as surely "procedural" as in the *Council of Civil Service Unions* case [1985] A.C. 374. I consider that the putative distinction between procedural and substantive rights in this context has little, if any, utility; the question is always whether the discipline of fairness, imposed by the common law, ought to prevent the public authority respondent from acting as it proposes. There are other instances in which the courts have upheld legitimate expectations of the type exemplified in *Ex parte Ruddock*. One, much pressed by Mr. Gordon, is *Reg. v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 W.L.R. 1337. But there is no case, so far as I am aware - certainly none was cited to me - in which it has been held that there exists an enforceable expectation that a policy will not be changed *even though* those affected have been consulted about any proposed change. And this is no surprise: such a doctrine would impose an obvious and unacceptable fetter upon the power, and duty, of a responsible public authority to change its policy when it considered that that was required in fulfillment of its public responsibilities. In my judgment the law of legitimate expectation, where it is invoked in situations other than one where the expectation relied on is distinctly one of consultation, only goes so far as to say that there may arise conditions in which, if policy is to be changed, a specific person or class of persons affected must first be notified and given the right to be heard. The extent to which, case by case, this principle applies may be affected by the important distinction between situations where the class of persons in question have specific expectations for the determination of their individual cases, as in *Ex parte Asif Mahmood Khan* and others where the policy is of a more general nature which does not involve the resolution of any individual claims of right or status. But it is unnecessary for present purposes to go deeper into such an antithesis.

Mr. Gordon relies upon particular words used by Parker L.J. in *Ex parte Asif Mahmood Khan* [1984] 1 W.L.R. 1337, 1344:

"There can, however, be no doubt that the Secretary of State has a duty to exercise his common law discretion fairly. Furthermore, just as, in the case cited, the corporation was held not to be entitled to resile from an undertaking and change its policy without giving a fair hearing so, in principle, the Secretary of State, if he undertakes to allow in persons if certain conditions are satisfied, should not in my view be entitled to resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demands it."

It is these last words that are stressed by Mr. Gordon. He would set them alongside a passage from the judgment of Lord Denning M.R. in *Reg. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 308:

"At any rate they ought not to depart from [an undertaking] except after the most serious consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it."

Mr. Gordon's submission is that these references to "the overriding public interest" imply that where a public authority has effectively given an assurance that it would continue to apply a policy which it has adopted, there are two conditions which must be fulfilled before it may lawfully change tack: not only that a right to be heard must be accorded to those affected, but also that the change must be justified by reference to "the overriding public interest." But this latter condition would imply that the court is to be the judge of the public interest in such cases, and thus the judge of the merits of the proposed policy change. Thus understood, Mr. Gordon's submission must be rejected. The court is not the judge of the merits of the decision-maker's policy. In fact, Mr. Gordon disavowed any such proposition; but if, as must be the case, the public authority in question is the judge of the issue whether "the overriding public interest" justifies a change in policy, then the submission means no more than that a reasonable public authority, having regard only to relevant considerations, will not alter its policy unless it concludes that the public will be better served by the change. But this is no more than to assert that a change in policy, like any discretionary decision by a public authority, must not transgress *Wednesbury* principles. That, however, is elementary and carries Mr. Gordon nowhere.

I was shown an interesting and illuminating article by Dr. Christopher Forsyth, "The Provenance and Protection of Legitimate Expectations" [1988] C.L.J. 238, in which he argues that the doctrine of legitimate expectation may, or should, in some circumstances be deployed so as to protect a substantive expectation of a favourable result in the particular case; and he discusses both *Ex parte Ruddock* and *Ex parte Asif Mahmood Khan* as well as other material. Dr. Forsyth is a distinguished public lawyer to whom I mean no disrespect in saying, without traveling into the detail of his reasoning, that no consideration which he puts forward can, in my judgment, extend the ambit of legitimate expectation to a point which would assist Mr. Gordon. I was also shown the recent decisions in *Reg. v. Inland Revenue Commissioners, Ex parte M.F.K. Underwriting Agents Ltd.* [1990] 1 W.L.R. 1545 and *Reg. v. Disciplinary Committee of the Jockey Club, Ex parte Massingberd-Mundy* [1993] 2 All E.R. 207; I do not consider that there is anything in either authority inconsistent with the reasoning which I have set out. It follows that there is nothing in this argument based on legitimate expectation."

157. It is to be noted that when the Minister responsible for land transport hears appeals against decisions of the Disciplinary Committee of the National Transport Authority, under the Road Traffic Act, the Minister as the appellate authority need not grant an oral hearing to an appellant: *Teeluck v N.T.A.* [1986] SCJ 183. That decision was approved in *Jagoo v National Transport Authority* [1988] MR 99. In *Jekarajee v National Transport Authority & Anor* [2000] SCJ 379 it was held that pursuant to Section 99 of the Road Traffic Act and Regulation 25 of the Road Traffic Regulations there was no need for any full-fledged submissions by legal advisers in a Court like fashion. Furthermore, the decision, which is to be reached by the Minister is to be considered as appropriate if he acts on the strength of the grounds of appeal submitted by the appellant and of the record of the proceedings held before the Licensing Authority.
158. As regards the need for the Minister to give reasons for his decision, when hearing such appeals, the Court in *Ganesh v NTA & anor* (2005) SCJ 2 had this to say:

“We believe that some clearer guidelines than had hitherto been stated are called for. In *Jekarajee (supra)* it was held that the Minister, who is the appellate authority, need not give reasons for his decision on hearing an appeal considering that he is not necessarily a person with a legal background who would be conversant with Court procedure or the provisions of the Constitution. The same reasoning was adopted in *Ramjan v NTA & anor* [1993] SCJ 323 and *Madhoo v Minister of Works* [1995] SCJ 201. In *Madhoo*, the approach adopted in England in the field of Administrative Law was invoked as an added reason viz. that in the absence of a statutory obligation to give reasons, it is unusual for one to be implied as a requirement of natural justice or fairness [see *Halsbury’s Law of England 4th Edition vol. 1(1) paragraph 8.3 at page 156*]. After earnest consideration we believe that whatever may be the position in England as regards the concept of natural justice or fairness, including a litigant’s right to a fair hearing, the position in Mauritius appears to be particularly stringent since we have a written Constitution which contains strict provisions proclaiming the need for a fair hearing – vide S. 10(8) of the Constitution.

In *Jhuboo v. The Honourable Minister of Public Infrastructure, Land Transport and Shipping & Anor* (Record No. 83968), a judgment delivered on 5 October this year, the Court expressed its view that in a straightforward case where the facts speak for themselves, and are clearly proved against the licensee, the Minister was under no obligation to give any reason for upholding the decision of the National Transport Authority. However, we agree that the general principle is that reasons must be given. As was held in *Ramlochun v Minister of Land & Transport* [2000] SCJ 97, while it was

not expected of the Minister to expatiate on his decision when acting in his capacity as the appellate authority, he “*ought all the same to have said why he was rejecting the appeal; the more so, that the concept of natural justice demands some degree of transparency.*”

The bottom line is that the decision of the Minister is itself appealable by way of Judicial Review so that the reasons relied upon by him for reaching his decision must be expressed, albeit shortly and in ordinary language. We say this for the added reason that this Court, in exercising its jurisdiction as Reviewing Authority of an administrative decision and in the exercise of its statutory duty under section 10(8) of the Constitution which requires that it ensures a fair hearing in determining the existence or extent of any civil right or obligation, must be in a position to assess whether any questioned decision that is being appealed from has not been so reached as a result of wrong or irrelevant considerations. This position can exist only where reasons for having reached a decision are given by any deciding authority, albeit in a few words.”

(iii)Content of the *Audi Alteram Partem* Rule
[Prior Notice of Decision-Making; Opportunity to be Heard (Right to make representations); Right to Cross-examine; Right to Legal Representation; Duty to Give Reasons]

159. Where natural justice or the duty to be fair applies to a particular decision-making process, the determination of the precise content of the fair hearing will depend on the context. In *Baureek v Public Service Commission & ors* (1988) MR 1, the Supreme Court quashed the decision of the Public Service Commission to reprimand the applicant, as the latter had not been afforded an opportunity of being heard. The Court had this to say:

“In this connection reference can usefully be made to the following extract from Garner’s Administrative Law, 6th Ed. at pp. 145-147.

“As the range of contexts in which the rule applies has, particularly, in recent years, been extended, the courts have, perhaps inevitably stressed the flexibility of the rule in terms of the variable content of the obligations imposed. The basic idea remains in each case that due notice be given of an impending decision or action, that due notice be given of matters to be taken into account or the ‘charges’ against the citizen, and an adequate opportunity be afforded the citizen to make representations prior to the final decision or action being taken. What will actually be required to have been

done to satisfy these basic obligations may vary much from one context to another (ie what is due notice, or adequate information, or fair opportunity to state one’s case, will depend on context). In some contexts the obligations may be far-reaching. Thus at one end of the spectrum they may approximate to the judicial procedures associated with the courts of law - eg clear advance notice of charges or the case to be met; all evidence upon which the decision is to be based to be openly available to affected parties; opportunities to produce witnesses, and to cross-examine witnesses produced by the other side; no hearing of one side in the absence of the other; possibly, the opportunity to be represented by a lawyer. In other contexts, at or towards the other end of the spectrum, the audi alteram partem obligations may be satisfied by much less elaborate or sophisticated procedural safeguards. So, for example, it may only be necessary to give the citizen a ‘general idea’ of the matters to be taken into account or the ‘case’ against him and it may not be necessary to offer any oral hearing at all - an opportunity to make written representations sufficing. When the content of the obligation tends towards the former ‘judicial model’ the judges tend to refer to the duty to comply with natural justice; when the content is of the latter kind the judges, since the mid 1960’s have taken to referring instead to a duty to act fairly as representing the standard of procedural administrative justice with which they will require compliance.

In this way the courts have resurrected, and then proceeded to develop, a doctrine of great flexibility. Two points ought immediately to be made. First, we should note the warnings of Lord Reid in Ridge v. Baldwin where he said:

The principle of audi alteram partem goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority. In modern times opinions have sometimes been expressed that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist.

To minimise vagueness the question that needs to be considered is not the very general one what does audi alteram partem require?, but rather ‘what in particular situations may audi alteram partem be held to require?’ To predict the operation of the audi alteram partem principle requires judgment of context rather than mere knowledge of ‘black-letter’ rules. That does not, however, in itself make the decisions of the courts any less predictable. Secondly, it should be noted that in cases where breach of audi alteram partem is alleged there are potentially twogrounds upon which a court may, if it wishes, find against the citizen. Either by holding that in the particular context the principle does not apply; or, alternatively, by holding that the principle does apply but that its requirements have, on the facts, been satisfied. In times prior to the development in the mid 1960’s of the notion of the duty to act ‘fairly’, the notion of audi alteram partem was regarded as of less flexible content, and so something of an all-or-nothing approach prevailed. When it applied, its requirements were relatively strict (ie to act judicially’); and so, inevitably, where to require conformity with such

obligations would have been unduly onerous, the courts would hold there to be no requirement to comply with natural justice. Since Ridge v Baldwin, and the emergence soon after of the notion of the duty to act fairly, the approach of the courts has altered. The judges no longer appear to trouble much with the formerly dominant question of whether audi alteram partem applies. Attention has shifted to the more substantial questions - ‘what procedure has been adopted in this case?’ ‘Does it satisfy requirements of justice and fairness?’ In a number of cases, as we shall see, the obligation to act fairly has been said to exist, but then has been held to have been satisfied by little or nothing in the way of any real opportunity to make representations. Perhaps this shift in approach is an inevitable consequence of the modern discussion of procedural requirements in terms of a duty to ‘act fairly’. Judges formerly could speak with clear conscience of there being no duty to ‘act judicially’ in a particular case: it is more difficult to hold there to be no duty to ‘act fairly’.”

160. It is apposite to refer to what Lord Mustill observed in *R v Secretary of State for the Home Office, ex parte Doody & ors* (1993) 3 WLR 154:

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner, which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute, which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer”.

Prior Notice of decision-making

- 161.A basic requirement of a fair administrative process is that those likely to be affected by decisions are given adequate notice that they are going to be made. Adequate notice allows

an individual to prepare his case properly and conduct his affairs accordingly [by knowing the factors, which may weigh against his interests, and being informed of the gist of the case which he has to answer]. Where natural justice requires some notice to be given of an impending decision, it also requires the decision-making body to provide some information as to the nature of the hearing, what is being determined. A proper hearing must always include a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. If this were otherwise, giving notice of the decision being taken would be pointless as the individual would not be able to prepare his case properly. As pointed out by Lord Denning in *Kanda v Government of Malaya* (1962) AC 322:

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”⁴⁹

162. A licensing authority must disclose any objections lodged with it so that the applicant may reply to them. In *R v Huntingdon DC, ex parte Cowan* (1984) 1 WLR 501, the applicants, on behalf of the company, applied to the local authority for the licence but the local authority, having received observations from the police and fire authority and a petition from members of the public, refused to grant the licence. The applicants had neither been informed that any objections had been received nor been given an opportunity to comment or put their case. The applicants challenged the decision by way of judicial review. The Court held that the local authority was under no duty to give the applicants an oral hearing but the requirements of natural justice did place a duty on the local authority to inform the applicants of the substance of any objections or representations made and to give the applicants an opportunity to reply; and that,

⁴⁹ In *Chief Constable of the North Wales Police v Evans* (1982) 1 WLR 1155, where a chief constable required a police probationer to resign on account of allegations about his private life which he was given no fair opportunity to rebut, the House of Lords granted the remedies of unlawful dismissal. In *R v Assistant Metropolitan Police Commissioner, ex parte Howell* (1986) RTR 52, the English Court of Appeal quashed the refusal of renewal of a taxi driver’s licence because an adverse medical report was not disclosed to him.

since the local authority had failed in its duty, the court would grant an order of certiorari to quash the decision. Glidewell J said:

“Accordingly, in my judgment, a local authority is under a duty, when dealing with entertainment licences, first, to inform the applicant of the substance of any objection or of any representation in the nature of any objection (not necessarily to give him the whole of it, nor to say necessarily who has made it, but to give him the substance of it); and, secondly, to give him an opportunity to make representations in reply.

I am not going to lay down - because it does not seem to be necessary to do so - any clear requirement as to what these representations should be or in what form they should be. I do not think it necessarily follows that an oral hearing should take place; it may well be that in many cases written representations will suffice. I think it is for the local authority to decide if in a particular case hearings are required or to lay down their own procedure in this respect, but that some such opportunity is required I have no doubt.”

163. There is no obligation to disclose confidential sources of objections, if there are good reasons in the public interest for not doing so, but the applicant must be told of the substance of objections raised against him [*R v Gaming Board for Great Britain, ex parte Benaim & Khaida*]. Disclosure of objection must occur in such a way as to give the applicant sufficient time to consider the objections and to prepare answers to them [*R v Thames Magistrates’ Court, ex parte Polemis* (1974) 2 All ER 1219].

The Right to make representations (Opportunity to be heard)

164. Where a person’s livelihood is at stake, or allegations have been made which amount to an attack on an individual’s integrity, then representations will almost certainly have to be allowed. In *R v Wear Valley District Council, ex parte Binks* (1985) 2 All ER 699, the respondent authority terminated the applicant’s oral contractual licence to sell take-away food from a caravan. The business was her only source of livelihood. She was given no notice of the decision, and four weeks’ notice to remove her caravan. On an application for judicial review, Taylor J held that the local authority was obliged to comply with the rules of natural justice in terminating the licence, and that this required that the applicant should be given an opportunity to be heard before the decision was

taken, and should be given reasons for the decision. The court regarded as significant the fact that the applicant’s licence was one, which permitted her to trade in a public place, and that it was her sole means of livelihood.

165. A ‘hearing’ will normally be an oral hearing. But in some cases, it may suffice to give an opportunity to make representations in writing, provided that any adverse material is disclosed and provided, as always, that the demands of fairness are substantially met. An oral hearing though not essential for fairness would probably be required where there are substantial differences on issues of fact which could not be resolved on the papers [*R v Army Board of the Defence Council, ex parte Anderson* (1991) 3 All ER 375 (CA)] and justice would demand that the party be given an opportunity to depone on his own version of facts [*Llyod & ors v McMahan* (1987) 2 WLR 821 (HL)].

In *R v Immigration Tribunal, ex parte Mehmet* (1977) 1 WLR 795, the tribunal’s decision and resulting deportation order was quashed for failure to afford oral hearing. The Court held that were the applicant afforded an oral hearing, further matters might have been advanced on his behalf, and he had thus been deprived of this opportunity.

If an oral hearing is given then it must be conducted with procedural fairness; the applicant must have an opportunity to consider all the evidence, to call relevant witnesses and to question witnesses called by his opponents, and to comment and present argument on the case [*R v Deputy Industrial Injuries Commissioner, ex parte Moore* (1965) 1 QB 456].

The futility of the exercise may not suffice as a general ground for refusing a hearing [Per Lord Reid in *Ridge v Baldwin*, and in *Malloch v Aberdeen Corporation* (1971) 1 WLR 1578].

166. The refusal of an adjournment may result in breach of natural justice if, as a result, the applicant is unable to continue with a proper presentation of his case [*Priddle v Fisher & Sons* (1968) 3 All ER 506].

The Right to Cross-examine

167. As a rule, if an individual is afforded the right to make oral representations he will normally be allowed to cross-examine those giving evidence against him, so as to test the veracity of the evidence. In *Nicholson v Secretary of State for Energy* (1978) 76 LGR 693, the plaintiff was not allowed to cross-examine witnesses from local authorities at a public inquiry into an application to carry out cast mining. The Court felt it had no option than to quash the Minister’s grant of permission to carry out the works in the light of the breach of natural justice, the relevance of the local authority evidence to the plaintiff’s case being a decisive factor.
168. A denial of cross-examination has been held not to be unfair where it would not have served any useful purpose: *Bushell v Secretary of State for the Environment* (1981) AC 75 (HL).

The Right to Legal Representation

169. The right to representation by a lawyer or other person may prove to be a part of natural justice in suitable cases.⁵⁰ Such a right exists in the case of a formal tribunal [*R v Assessment Committee, St Mary Abbots, Kensington* (1891) 1 QB 378] or investigation [*R v Commissioner of Police, ex parte Edwards* (1977) 32 FLR 183] if there is no

⁵⁰ Note that where such a right exists, it is up to the person entitled thereto to avail himself of that opportunity. The existence of the right would depend much on what is at stake for the individual concerned [eg the person’s reputation or livelihood].

provision to the contrary, but regulations excluding it have been upheld [*Maynard v Osmond* (1977) QB 240].

170. In cases concerning non-statutory domestic tribunals, it has been held that it could be excluded by an association’s rules. In *Enderby Town Football Club Ltd v Football Association Ltd* (1970) 3 WLR 1021, the English Court of Appeal upheld the validity of the Football Association’s decision prohibiting legal representation in cases before it.

Lord Denning MR observed:

“Is a party who is charged before a domestic tribunal, entitled *as of right* to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the *discretion* of the tribunal. They are masters of their own procedure: and, if they, in the proper exercise of their discretion, decline to allow legal representation, the courts will not interfere ... In many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game. But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: "We will *never* allow anyone to have a lawyer to appear for him." The tribunal must be ready, in a proper case, to allow it. That applies to any one in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart: see *Rex v. Port of London Authority Ex parte Kynoch Ltd.* [1919] 1 K.B. 176, 184, as applied in this court in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 169, and by the House of Lords in *British Oxygen Co. Ltd. v. Board of Trade* [1970] 3 W.L.R. 489. That is the reason why this court intervened in *Pett v. Greyhound Racing Association Ltd. (No. 1)* [1969] 1 Q.B. 125. Mr. Pett was charged with doping a dog - a most serious offence carrying severe penalties. He was to be tried by a domestic tribunal. There was nothing in the rules to exclude legal representation, but the tribunal refused to allow it. Their reason was because they never did allow it. This court thought that that was not a proper exercise of their discretion. Natural justice required that Mr. Pett should be defended, if he so wished, by counsel or solicitor. So we intervened and granted an injunction ...

Is it lawful for a body to stipulate in its rules that its domestic tribunal shall not permit legal representation? Such a stipulation is, I think, clearly valid so long as it is construed as directory and not imperative: for that leaves it open to the tribunal to permit legal representation in an exceptional case when the justice of the case so requires. But I have some doubt whether it is legitimate to make a rule which is so

imperative in its terms as to exclude legal representation altogether, without giving the tribunal any discretion to admit it, even when the justice of the case requires it.”

171. Courts in England have been called upon to pronounce themselves as to the circumstances where prisoners, subjected to the disciplinary regime of prison, would be entitled to legal representation. In *Fraser v Mudge* (1975) 1 WLR 1132 [(1975) 3 All ER 78] (CA), the court held that prisoners subjected to the disciplinary regime of the prison did not have full rights of legal representation. In certain circumstances, however, such hearings can have serious consequences for those concerned, such as loss of significant amounts of remission, and the importance of such hearings has now been recognised by the courts, as evidenced by decisions such as *R v Secretary of State for the Home department, ex parte Tarrant* (1984) 2 WLR 613 [(1984) 1 All ER 799], where it was held that although a prisoner appearing before a Board of Visitors on a disciplinary charge did not have an automatic right to legal representation, the Board did have a discretion to permit it. In that case it had been a breach of natural justice to deny the prisoner legal representation, given the grave nature of the charge [eg a charge of mutiny] and the consequences for the prisoner of his being found guilty. Webster J. had this to say:

“As it seems to me, the following are considerations which every board should take into account when exercising its discretion whether to allow legal representation or to allow the assistance of a friend or adviser. (The list is not, of course, intended to be comprehensive: particular cases may throw up other particular matters):

- (1) The seriousness of the charge and of the potential penalty.
- (2) Whether any points of law are likely to arise.
- (3) The capacity of a particular prisoner to present his own case.
- (4) Procedural difficulties.
- (5) The need for reasonable speed in making their adjudication, which is clearly an important consideration.
- (6) The need for fairness as between prisoners and as between prisoners and prison officers.

In my view, all these are matters which a board should take into account in deciding whether to allow legal representation, or the assistance of a friend or adviser, bearing in mind the overriding obligation to ensure that a prisoner be given a full opportunity of hearing what is alleged against him and of presenting his own case”.

172. In *R v Board of Visitors of the Maze Prison, ex parte Hone* (1988) 2 WLR 177 [(1988) 1 All ER 321] (HL), the House of Lords considered that the rules of natural justice did not require the board of visitors of a prison to allow legal representation in every case as of right to a prisoner appearing before them on a disciplinary charge, notwithstanding that the facts of the offence charged might in law constitute a crime; and that whether they required legal representation or the assistance of a friend or adviser to be afforded in any particular case depended on the circumstances of that case.

Is there a duty to give reasons?

173. Traditionally, the law has taken the view that those coming within the category of ‘mere applicants’ for a particular privilege have little or no right to be told of the reasons for decisions.⁵¹ Justice Megarry in *McInnes v Onslow Fane* (1978) 1 WLR 1520 suggested that a mere applicant would only be entitled to reasons for a decision where, for example, the refusal of a licence involved a slur on his reputation. In many such cases there was ‘no case against’ the applicant as such; the decision-making body simply considered him to be unsuitable. Justice Megarry said:

“... in the absence of anything to suggest that the [members of the tribunal] have been affected by dishonesty or bias or caprice, or that there is any other impropriety, I think that [they] are fully entitled to give no reasons for their decision, and to decide the application without any preliminary indication to the plaintiff of those reasons.”

174. In *R v Secretary of State for Trade & Industry, ex parte Lonrho plc* (1989) 1 WLR 525 [(1989) 2 All ER 609] (HL), the House of Lords confirmed that there is no general

⁵¹ On the question of duty to give reasons, vide Mr. Justice Elias & A. Blake, ‘Procedural Rules and Consultation’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005), at pp. 253-260.

common law duty to requiring public bodies to give reasons for their decisions. Such a duty may be imposed by statute. Although there is no general rule of law requiring the giving of reasons, an administrative authority may be unable to show that it has acted lawfully unless it explains itself.⁵² As Lord Keith in *Lonrho* observed:

“The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker who has given no reasons cannot complain if the court draws the inference that he had no rational reason for his decision.”

175. In certain circumstances, the courts will infer that a decision has been abused [*Padfield* case] or fettered [*Sagnata Investments Ltd v Norwich Corporation* (1971) 3 WLR 133] unless reasons are forthcoming.

176. Statutory tribunals are expected to give satisfactory reasons for their decisions in order that the losing party may know whether he should exercise his right of appeal on a point of law. In *Quality Soap Ltd & anor v MCCB Ltd* (1999) SCJ 221, learned Counsel for the appellants contended that the decision of the Tribunal should be set aside and a fresh hearing ordered in view of the fact that no reasons had been advanced for the conclusions reached by the Tribunal, the more so as the latter did not think it fit to set out the items of evidence that justified such conclusions. The Court had this to say on the issue:

“The duty of a trial body to give reasons has been commented upon by Lord Justice Henry in *Flannery and Another v Halifax Estate Agencies Ltd*. (The Times, March 4, 1999) as follows –

“*The first was that fairness surely required that the parties, especially the losing party, should be left in no doubt why they had won or lost. That was especially so since without reasons the losing party would not know, as was said in Ex parte Dave* (1994) ALL ER 315, whether the court had

⁵² Thus in *R v Sykes* (1875) 1 QBD 52, where the Act empowered licensing justices to refuse a licence on one of several specified grounds, and they refused an application without stating any ground, mandamus was granted to make them state the ground even though they were not obliged to give their reasons for it. Going still further, the Privy Council in *Minister of national Revenue v Wrights’ Canadian Ropes Ltd* (1947) AC 109 at 123 considered that a minister who had failed to give reasons for a special tax assessment had not shown that it was correct and that the taxpayer’s appeal must be allowed.

misdirected itself, and thus whether he might have an available appeal on the substance of the case.

The second was that a requirement to give reasons concentrated the mind; if it was fulfilled, the resulting decision was much more likely to be soundly based on the evidence than if it was not.

2. *The first of those aspects implied that want of reasons might be a good self-standing ground of appeal.*

Where because no reasons were given it was impossible to tell whether the judge had gone wrong on the law or the fact, the losing party would be altogether deprived of his chance of an appeal unless the court entertained an appeal based on the lack of reasons itself.

3. *The extent of the duty, or rather the reach of what was required to fulfill it, depended on the subject matter.*

Where there was a straightforward factual dispute whose resolution depended simply on which witness was telling the truth about events which he claimed to recall, it was likely to be enough for the judge, having, no doubt, summarised the evidence, to indicate simply that he believed X rather than Y; indeed there may be nothing else to say.

But where the dispute involved something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he preferred one case over the other.

That was likely to apply particularly in litigation where, as here, there was disputed expert evidence; but it was not necessarily limited to such cases.

4. *That was not to suggest that there was one rule for cases concerning the witnesses’ truthfulness or recall of events, and another for cases where the issue depended on reasoning or analysis, with experts or otherwise.*

The rule was the same: the judge must explain why he had reached his decision. The question was always what was required of the judge to do so and that would differ from case to case. Transparency should be the watchword”

Bearing in mind the principles enunciated above, especially the ones we have underscored which are directly applicable to the present case, we have no hesitation to say that the judgment of the Tribunal was far from transparent and we frankly do not know whether the President had “adequate or inadequate reasons” for the conclusions reached, especially as we have left completely in the dark as to the evidence, if any, which could be prayed in support of those reasons.

For all the reasons we have given, we allow the appeal, quash the decision of the Tribunal and order a fresh hearing before a differently constituted tribunal.”

177. The English Court of Appeal in *R v Civil Service Appeal Board, ex parte Cunningham* (1991) 4 All ER 310, held that a “fully judicial body” is required by natural justice to give “sufficient reasons for its decision to enable the parties to know the issues to which it addressed its mind and acted lawfully.” Where reasons are given, they should be adequate in the sense of being intelligible and indicative of the basis for the decision: *R v Criminal Injuries Compensation Board, ex parte Cummins* (1992) *The Times*, 21 January.
178. In *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* (1994) 1 All ER 651 [(1994) 1 WLR 242], it was considered that academic judgments were not in the class of case where the nature and impact of the decision itself required that reasons be given as a routine aspect of procedural fairness but were in a class where some factor would be required to show that in the circumstances of the particular decision, fairness required reasons to be given; that where the decision which was sought to be impugned was on the evidence no more than an informed exercise of academic judgment, fairness alone would not require reasons to be given; that despite the importance of the decision to the applicant, the combination of openness in the run up to the decision with the prescriptively oracular character of the decision itself made the council's allocation of grades inapt for the giving of reasons; and that there was nothing inexplicable about the decision itself, which could not have occurred within a lawfully conducted evaluation, so as to oblige the council to furnish reasons. Sedley J. had this to say:

“In summary, then:

- (1) there is no general duty to give reasons for a decision, but there are classes of case where there is such a duty.
- (2) One such class is where the subject matter is an interest so highly regarded by the law (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right.

- (3) (a) Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengeable) or apparent;
- (b) it follows that this class does not include decisions, which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision.
- And (c) procedurally, the grant of leave in such cases will depend upon prima facie evidence that something has gone wrong. The respondent may then seek to demonstrate that it is not so and that the decision is an unalloyed exercise of an intrinsically unchallengeable judgment. If the respondent succeeds, the application fails. If the respondent fails, relief may take the form of an order of mandamus to give reasons, or (if a justiciable flaw has been established) other appropriate relief. But just as it is out with this court's powers to judge degrees of excellence in clinical dentistry research, or for that matter the wisdom of a body's administrative arrangements, so it is not open to this court to require the communication of reasons, even where such reasons must necessarily exist, in the current absence of a legal basis for the requirement. We would accordingly dismiss this application.”

179. It may be argued that the giving of reasons ought to be required simply to make the administrative process fairer, or at least to ensure that those affected by it understand why decisions are taken. Whether reasons should be provided is not, however, a matter that can be considered in the abstract. There may be situations where some greater advantage is gained by withholding information. Where decisions have to be made speedily, it may be counter-productive to saddle the administration with a duty to explain every decision [*R v Secretary of State for Social Services, ex parte Connolly* (1986) 1 WLR 421⁵³]. Where the giving of reasons would involve compromising the source of confidential information, the courts will lean in favour of maintaining confidentiality [*R v Gaming Board, ex parte Benaim & Khaida* (1970) 2 QB 417]. Similarly where national security issues are involved [*R v Secretary of State for the Home Department, ex parte Hosenball* (1977) 1 WLR 766].

⁵³ The English Court of Appeal considered why Parliament had exempted Social Security Commissioners from having to give reasons for refusing to grant leave of appeal against decisions of an Attendance Allowance Board on a point of law.

180. Whilst a duty to give reasons is clearly desirable, it cannot be viewed as a universal requirement of the decision-making process.⁵⁴ Sir Louis Blom-Cooper, QC, sitting as Deputy High Court Judge in *R v Lambeth LBC, ex parte Walters* (1993) *The Times* 6 October, considered that English law might have arrived at a point where the duty to act fairly imparts at last a general duty to give reasons and it was hard to envisage any situation, except possibly where the giving of reasons would reveal some aspect of national security, or unintentionally disclose confidential information or invade privacy, where an individual should not know the reasons for the decision which had been made.

(iv) Exclusion of the *Audi Alteram Partem* Rule

181. Except when it concerns the determination of the existence or extent of a civil right or obligation, as laid down in section 10(8) of the Constitution, the following principles as evolved by the courts in England are of some relevance. It has been considered that the *audi alteram partem* rule does not find its application in the following cases:

- Where there is express statutory exclusion of a fair hearing;
- Where the legislation expressly requires notice and hearing for certain purposes but imposes no procedural requirement for other purposes;
- Where disclosure of information would be prejudicial to the public interest [eg in the interests of national security];
- Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action [urgency];

⁵⁴ It has been argued by the JUSTICE – All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice: Some Necessary Reforms* (1988), Ch. 3, that there should be a general duty to give reasons. The duty should be imposed by legislation; would arise on a demand being made; would make it incumbent to state not only the reasons but also the findings on material questions of fact with reference to the evidence or other material on which such findings were based; and could be subject to exemptions for specified categories of decision. Sir Harry Woolf has expressed the view that such a development would be the most beneficial improvement which could be made to English administrative law.

- Where for other reasons it is impracticable to give prior notice or opportunity to be heard;
- Where a procedurally flawed decision has been followed by an ex post facto hearing or by an appeal which complies with the requirements of fairness; Where the decision complained of is only a preliminary to a decision subject to procedural fairness;
- Where the defect of natural justice has made no difference and no prejudice has been caused to the applicant;
- Where the absence of a hearing is not due to any fault on the part of the decision-maker.

(v) International and Constitutional Recognition of the Rule

182. Section 10(8) of the Constitution, inspired from Article 6(1) of the European Convention on Human Rights, provides that any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.
183. In *Mohayuddin v Mauritius Football Association [MFA]* (1988) MR 201, plaintiff sought to be assisted by a legal representative at the hearing and this was refused. According to the rules of the MFA, any person who appears before a Disciplinary Committee may be assisted by an adviser who shall be a member of the Executive Committee of the Club, but that adviser shall not be a barrister or an attorney unless

he happens to be the President or the Secretary of the Club. He claimed that his constitutional right under section 10(8) of the Constitution had been infringed. The Court had this to say:

“Admittedly section 10(8) of the Constitution provides that any Court *or other authority* required or empowered by law to determine the existence or extent of any civil right or obligation shall afford a fair hearing to the parties. But it is clear to us that subsections (8), (9) and (10), which all refer to civil rights and obligations, must be read as being in opposition to subsections (1) to (7) and (11) and (12) of section 10 which govern criminal offences, so that they relate to the determination of rights under the civil law.

We accordingly agree with counsel for the respondent that the Disciplinary Committee of the respondent is not being asked to determine a civil right of the plaintiff: what it is asked to do is to enquire and find out whether the latter has breached the rules of the game and, if so, whether he should be sanctioned. That sanction may have for effect to prevent the plaintiff to take part in football matches sponsored here by the respondent or in international games; that however is not a right which he enjoys by virtue of our civil law.”

(d) **Natural Justice and the Rule against Bias and Interest - *Nemo Judex in Causa Sua Potest***

184. The *nemo judex* rule is to the effect that decisions should be made free from bias or partiality.⁵⁵ This rule is concerned with appearances. The courts do not look for actual bias; they ask whether there is a real danger of bias. They take no account of the fact that a person with a direct pecuniary interest did not allow himself to be influenced by it in any way: the direct pecuniary interest disqualifies him automatically. The result of the application of the rule is to disqualify a particular adjudicator altogether, in that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’.
- The rule is clearly applicable to decisions of judges and magistrates in courts of law. It is

⁵⁵ On the *nemo judex* rule, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 417-436; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 499-541; J. Goudie, ‘Bias – Interest and Favour’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005) at pp. 353-381.

also applicable to decisions of tribunals and Ministers exercising functions, which are ‘judicial’ in character, such as the hearing of appeals. In *Murray v Anderson & ors* (1990) MR 99, the Court observed that

“With regard to the question of bias, it is well settled law that when a body is called upon to adjudicate on a matter it should act fairly in the sense that the body should reach its decision impartially. This rule is strictly applied in the case of tribunals exercising judicial functions.

With regard to domestic tribunals the principle is that where such a body is adjudicating on the fate of one of its members, though the latter is contractually bound to his club by the rules, there is also an implied term in the contract that any decision which might adversely affect the member should be reached in accordance with the principles of natural justice. However, the application of rules of natural justice are not as strict in the case of domestic tribunals as it would be in the case of judicial bodies. But this does not preclude the domestic tribunal from carrying out its inquiry fairly and impartially. Where the livelihood of a person is at stake and a decision by the tribunal would adversely affect the job of the member, then it is no answer to come and say that the rules of natural justice with regard to domestic tribunals are so relaxed that it is for the domestic tribunal to decide how and when to apply them. The matter was thoroughly discussed in the case of *Lee v. The Showmen’s Guild* (1952) 1 Q.B. 329 where at page 342 Lord Denning had this to say:

*“Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard. That appears, I think, from the judgments of Brett L.J. in *Dawkins v. Antrobus*, of Kelly C.B. in *Wood v. Woad*, and of Lord Birkenhead L.C. in *Weinberger v. Inglis*, which are to be preferred to the dictum of Maugham J. in *Maclean v. The Workers’ Union* to the contrary. Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts from their jurisdiction: see *Scott v. Avery*, per Alderson B. and Lord Cranworth L.C. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void: see*

Czarnikow & Co. Ltd. v. Roth. Schmidt & Co., In re Raven and In re Wynn.

The question in this case is: to what extent will the courts examine the decisions of domestic tribunals on points of law? This is a new question, which is not to be solved by turning to the club cases. In the case of social clubs, the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club; and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules; but they will not otherwise interfere: see Labouchere v. Earl of Wharncliffe and Dawkins v. Antrobus. It is very different with domestic tribunals, which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say no. A man's right to work is just as important to him as, if not more important than, his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.”

185. The issue of bias or partiality can arise in two main contexts. First, the decision-maker might have some interest of a pecuniary or personal nature in the outcome of the proceedings. Secondly, the decision-maker might have ‘pre-conceived ideas’ concerning the subject matter before him.

(i)The Rule against Interest [No direct pecuniary or other personal interest]

186. An adjudicator with a direct pecuniary or personal interest is disqualified from acting. The existence of such an interest is equivalent to a conclusive presumption of a real danger of bias. If an administrative decision is influenced by the financial interest of the person taking the decision, it is likely to be an *ultra vires* abuse of power in that an irrelevant consideration has been taken into account.

Pecuniary Interest

187. Pecuniary interest by a decision-maker in a matter subject to his influence is sufficient to invalidate any resulting determination. The leading case is *Dimes v Grand junction Canal Proprietors* (1852) 3 HL Cas 759, where Lord Cottenham LC had affirmed decrees by the Vice-Chancellor in relation to a company in which the Lord Chancellor held some shares. The House of Lords set aside the decrees issued by the Lord Chancellor on the ground of pecuniary interest. In the course of his speech Lord Campbell stated:

“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had shown in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen’s bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior

tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.”

188. Blackburn J. in *R v Hammond* (1863) 9 L.T. 423 has held that any pecuniary interest, however small, will be sufficient.

Despite the strictness with which the rule against pecuniary interest is applied, it is subject to a remoteness principle to the effect that where the pecuniary interest is so minimal, or indirect as to be of negligible significance, it will not be used as justification for invalidating a decision: *R v Rand* (1866) LR 1 QB 230.

This prohibition extends even to a councillor voting against his own interests: *R v Hendon RDC, ex parte Chorley* (1933) AER 20 (KBD).

Other Personal Interests

189. Other types of personal interest may disqualify the decision-maker if the courts find that the interest gave rise to a real danger of bias. In this area much will depend upon the factual nexus between the decision-maker and one of the other parties involved in the dispute. Family relationship [*Metropolitan Properties Co. (F.G.C.) Ltd v Lannon* (1968) 3 All ER 304], personal friendship⁵⁶ or hostility [*R v London County Council, re Empire Theatre* (1894) 71 LT 638], professional or vocational relationship, business connections and commercial ties [*R v Barnsley Licensing JJ, ex parte Barnsley and District Licensed Victuallers’ Association* (1960) 3 WLR 305], are examples of the interests, which can disqualify the decision-maker, as is membership of an organisation

⁵⁶ In *Cottle v Cottle* (1939) 2 All ER 535, a justice was disqualified where he was a friend of the mother of one of the parties and that party had let it known that the justice would be on her side, but the Court distinguished this sharply from cases of mere acquaintance or business contact.

interested in the dispute [*Allinson v General Council of Medical Education and Registration* (1894) 1 QB 750].

On occasion, it may be someone other than the actual adjudicator who has been involved. Nevertheless, provided that he or she has, or may appear to have, an influence on the decision given, then that will be sufficient to render the determination invalid.

190. In *R v Sussex Justices, ex parte McCarthy* (1924) 1 KB 256, the clerk to the justices was member of a solicitor’s firm acting for one of the parties in a collision out of which the prosecution of the other party arose. When the justices retired to consider their verdict, the clerk retired with them and they convicted the accused of dangerous driving. Quashing the decision on the ground that the appearance of bias was fatal, Lord Hewart CJ uttered his famous dictum to the effect that justice not only had to be done, but also had to be seen to be done.

(ii) Rule against Bias

191. A real danger of bias can arise where an adjudicator has already been concerned with the case in some other capacity (intermingling of functions), or there is indication that he has prejudged the case or might do so [eg he has indicated partisanship in relation to the issue].

Apparent Bias arising out of Intermingling of Functions

192. This would be the case where the adjudicator has supported the application, complaint or prosecution, which comes to be adjudicated. In *R v Sunderland Justices* (1901) 2 KB 357, councillors supporting road-widening scheme sat as justices and granted liquor licence for premises involved in the scheme.

This might also be the case where an adjudicator has previous knowledge of the issues or individual concerned.

Difficulties may arise where, for example, disciplinary action is taken by a subordinate body and has to be approved by an appellate or executive body, and members of the disciplinary body are also members of the appellate or executive body [see *Hannam v Bradford Corporation* (1970) 1 WLR 937; *R v Kent Police Authority, ex parte Godden* (1971) 2 QB 662]. Such ‘intermingling of functions’ may result in a decision being invalidated on grounds of bias.

193. In *R v Barnsley Metropolitan Borough Council, ex parte Hook* (1976) 1 WLR 1052, the applicant, a market trader licensed by the local authority, was seen urinating in the street by two council workmen. The applicant had done this because the council lavatories were shut. Heated words were exchanged, and the incident was reported to the market manager, who wrote to the applicant revoking his licence. The applicant appealed unsuccessfully to two council committees, the market manager having been present whilst these committees had deliberated on the outcome of these appeals. The Divisional Court refused to grant certiorari on the ground that the revocation was merely an administrative act. The Court of Appeal held that the relief sought would be granted, on the basis that in revoking a trader’s licence the council was under a duty to act judicially, the duty being inferred from the fact that the decision was one affecting the applicant’s livelihood. The decision had been vitiated by the market manager’s presence throughout

the committees’ proceedings, as this amounted to the prosecutor being present, in the absence of the accused, when the adjudicators were making their decisions.

Apparent Bias – Politics and Preferences

194. Apparent bias may arise from an adjudicator’s known preferences or views, especially when that calls in question whether he will be able to approach the matter with an open mind.
195. In *R v Bingham JJ, ex parte Jowitt* (1974) The Times 3 July, the accused’s conviction for speeding was quashed after evidence was put forward that at his trial the issue turned upon his word against that of a policeman, and the chairman of the bench had stated that in such cases his view was always to believe the evidence of the police officer in preference to that of a member of the public. This was evidence of bias arising from a prejudgment of the case.

(iii) The Test for Bias

196. Historically, the courts have applied one of two tests for bias: either ‘real likelihood of bias’ or ‘reasonable suspicion of bias’. In *Murray v Anderson* (1990) MR 99, the Court said:

“The rule against bias is explained as follows by Peter Cane in his book *An Introduction to Administrative Law* (Clarendon Law Series) at p. 109–

“If a person can show that a decision has actually been affected by bias on

the part of the decision-maker he is, of course, entitled to have that decision quashed. But if he relies on an appearance of bias, what must he show? The cases contain two different formulae: that there must be a ‘reasonable suspicion’ of bias, and that there must be ‘real likelihood’ of bias. There has been much discussion as to whether there is any significant difference between these two tests. Two points only need to be made. First, both tests are objective in the sense that the relevant question is how the outside observer would view the situation, given knowledge of the facts bearing on the question of bias. Secondly, the test of reasonable suspicion sounds easier to satisfy than the test of real likelihood, but neither test gives by itself any indication of how easy or difficult it is to satisfy. The outcome depends on a judgment by the court on the facts of the particular case. If the court feels the decision ought to be quashed for bias, it will choose terminology which enables it to reach that result; similarly if it thinks the opposite.”

In the case of Metropolitan Properties Co (FGC) Ltd. v. Lannon (1969) 1 QB 577 Lord Denning took an approach which seems to combine the two tests of ‘real likelihood of bias’ and ‘real suspicion of bias’ when he said:–

“In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.”

In a comment to this decision, Garner and Jones at p. 139 of their book on Administrative Law (6th edition) have this to say–

“Thus the test would seem to be one of ‘reasonable suspicion of a real likelihood of bias’. But at what time, and on the basis of what information, is that matter to be judged? Is it to be determined on the basis of the knowledge available to a hypothetical reasonable observer of the court proceedings, or is it to be determined on examination of all the information available to the reviewing court at the time of its review? For the latter approach see the decisions of Webster J in R v West Yorkshire Coroner, ex p Smith (1982) Times, 6 November, and Steeples v Derbyshire CC (1984) 3All ER 468. Note also the formulation in R v Liverpool City Justices, ex p Topping (1982) Times, 16 November, DC – whether a reasonable and fair-minded person sitting in court and having knowledge of all the relevant facts would have a reasonable suspicion that a fair trial for the defendant was not possible.”

197. The law on this issue has now been clarified by the decision of the House of Lords in *R v Gough* (1993) 2 WLR 883 (HL). Lord Goff of Chievely had this to say:

“I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant.”

198. In *R v Inner West London Coroner, ex parte Dallaglio* (1994) 4 All ER 139 (CA), Simon Brown LJ observed that:

‘... a real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility’.

He confirmed that proof of a real danger of bias is enough to vitiate the proceedings and that it is irrelevant whether an unbiased tribunal would have reached a different decision on the merits.⁵⁷

⁵⁷ Vide *Hossany & ors v Public Service Commission* (2009) SCJ 4.

(iv) Exceptions: Situations where Bias will not apply

199. The rule against bias is absolute; a decision taken in breach thereof would not, save in exceptional circumstances, be allowed to stand.

Necessity

200. The normal rules against bias will be displaced in circumstances where the individual whose impartiality is called in question is the only person empowered to act. Thus in the *Dimes* case it was held that the Lord Chancellor’s signature on an enrolment order which was necessary in order for the case to proceed to the House of Lords, was unaffected by his shareholding in the company because no other person was given the power to so sign. Similarly in *Phillips v Eyre* (1870) LR 6 QB 1, it was held that the Governor of a colony could validly assent to an Act of Indemnity which protected, inter alia, his own actions because the relevant Act had to receive this signature.

Waiver

201. A party may waive his objections to a decision-maker who would otherwise be disqualified on the ground of bias. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver if the disqualified adjudicator failed to make a complete disclosure of his interest, or if the party affected was prevented by surprise from taking the objection at the appropriate time, or if he was unrepresented by counsel and did not know of his right to object at the time.

Statutory dispensation

202. It is questionable, given the norms enshrined in section 10 of the Constitution, whether Parliament could grant exemption to the rule against bias in particular cases, as it has been done in UK.

(G) The Remedies available through Judicial Review and Validity of Unlawful Administrative Action

(a) **Prerogative Orders**⁵⁸
[Certiorari, Prohibition and Mandamus]

203. Certiorari is granted to quash an ultra vires decision. Normally this will be sufficient to ensure that the decision-maker will take a fresh decision in the light of the Court’s ruling on the law in question. Prohibition is granted to prevent an ultra vires decision from being taken. This will normally be sufficient to ensure that the decision-making process is restarted in the light of the Court’s ruling on the law in question.

204. Mandamus is granted to compel the performance of a public duty, including a duty to exercise a discretion according to law. In *Emtel (Mauritius) Ltd v Ministry of*

⁵⁸ On the availability of prerogative orders, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 828-841; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 784-800; Mr. Justice Walker, ‘Remedies: Mandatory, Prohibiting and Quashing Orders’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005) at pp. 453-476.

Telecommunications [Privy Council] 2000 MR 220, the appellant was refused leave to apply for an order of mandamus compelling the Telecommunications Authority to appoint an independent auditor to verify the books and accounts of its competitor in the market. The Judicial Committee of the Privy Council held the Supreme Court had, in arriving at its decision, taken too narrow a view of the relevant statutory provisions which, under the law in force at the relevant time, enabled the Authority to impose a condition on a licensee, so as to make its books and accounts available for inspection, in order to protect the interests of other users of the service.

205. In UK, prerogative orders of certiorari, prohibition and mandamus are not available against the Crown, but are available against Ministers in their official capacities: *Padfield v Minister of Agriculture* (1968) AC 997 [HL]. However, it will usually be unnecessary (as well as discourteous) to grant a prerogative order against the central government which invariably respects non-coercive declarations made by the Court: dicta in *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* (1994) 1 All ER 910 (HL).

(b) **Other Judicial Review Remedies**⁵⁹

Declaration

206. A declaration is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is an equitable and non-coercive remedy. Declarations will not be granted on purely academic or hypothetical issues, but may be

⁵⁹ Regarding principles which govern grant of equitable and other remedies, vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 841-859; H. Woolf, J. Jowell & A. Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 800-811, 885-963; Mr. Justice Walker, ‘Declarations, Injunctions and Money and Restitutionary Remedies’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005) at pp. 477-516.

granted in advisory form to settle issues of important public policy or ones affecting future specific rights or duties. At one time the declaration could be granted only in lieu of one of the prerogative orders, but the recent growth in the practice of awarding advisory declarations has led in UK to the development of the declaration as a free-standing remedy in public law, with a flexible and liberal test of locus standi. This development has been welcomed because the advisory declaration is regarded as a flexible and beneficial remedy: see per Sir Thomas Bingham MR in *Re S* (1995) 3 All ER 290 (CA) at pp 299e-302c for a review of the relevant authorities and praise for this development; see also *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* (1994) 1 All ER 910, discussed by Villiers and White (1995) 58 *MLR* 560 at pp566-568 especially.

207. In *Berenger v Goburdhun* (1985) MR 209, the Court observed that

“In former days, a declaration was looked upon as the alternative to enable a person who had been wronged to assert his rights where he could not, owing to the procedural fetters then in force, obtain what was then termed as a prerogative writ, or later a prerogative order. It seems to us, however, that it is to day more appropriate to consider whether a declaration will serve a practical purpose, whether any useful consequences are likely to flow from it, and, finally, whether, having regard to all the circumstances, it should be made, or indeed it need be made [See *Chief Constable of the North Wales Police v. Evans* (1982) 3 All E.R. 141 and *Mahon v. Air New Zealand Ltd.* (1984) 3 All E.R. 201].”

208. In *Colunday v Commissioner of Police* (1997) MR 240, the applicant had obtained leave to apply for remedies relating to his promotion prospects in the Police Force, but he had retired well before the case was heard on the merits. The Court held that as a general rule the Supreme Court will not interfere with a decision of the Commission. However, the view was taken that this was a case where the Court would have ordered that the applicant be considered for appointment as Assistant Superintendent of Police had he not retired from the Police Force; by acting as it did, the Commission had ignored the basic norms of fairness and deprived the applicant of

a chance of promotion in his career. It was considered a declaration would have been an effective remedy.

Injunction

209. An injunction is an equitable remedy. It can be prohibitory or mandatory. It can be asked for as an interim/interlocutory relief pending the determination of a main case. The main problem regarding injunctions in public law has been whether injunctions can be granted against the Crown or the State. Under section 21 of the UK Crown Proceedings Act 1947 [section 13(2) of the State Proceedings Act] compulsory orders in the form of injunctions and other coercive relief are declared unavailable against the Crown or State, and this ban applies in all private law proceedings against the Crown or State.
210. At one time the ban was also held to apply to public law proceedings brought against ministers of the Crown, but it is now established that such rulings were based on failure to take account of the relationship of the provision of the Crown Proceedings Act with the subsequent enactment of the judicial review process. This means that, at least in principle, injunctions and other coercive relief (eg a committal for contempt of court) may be granted against ministers in either their personal or official capacities: *M v Home Office* (1993) 3 All ER 537 (HL) especially per Lord Woolf. This decision is a landmark, not only for upholding the rule of law but also for ensuring a mechanism for the granting of interim relief in a judicial review application, since the injunction is the only remedy that may be granted in interim as well as final form. The need for an interim relief is particularly important because of the general unavailability of damages.

Damages

211. Damages are awarded only exceptionally when a decision smacks of bad faith and malice. It appears that there are only three torts, which may be directly involved in ultra vires decision-making.

Negligence:-

212. There is a well-established distinction between negligence in policy-making (which attracts no liability in private law) and negligence in operation of policy (which does attract liability). It follows that damages cannot be awarded for loss caused by an ultra vires decision resulting from negligent policy-making [*Home Office v Dorset Yacht Club* (1970) AC 1004 (HL)], unless, possibly, the negligence is of such an extreme character as to render the decision totally unreasonable in the *Wednesbury* sense: obiter, Lord Browne-Wilkinson in *X v Bedfordshire County Council* (1995) 3 All ER 353 (HL).
213. The Courts have been especially reluctant to hold liable in negligence those who have been given special responsibilities of protecting society from the wrong doing of others: *Hill v Chief Constable of West Yorkshire* (1989) AC 53; *Murphy v Brentwood District Council* (1991) 1 AC 398 (HL); *Elguzouli-Daf v Metropolitan Police Commissioner* (1995) 1 All ER 833 (CA); and *X v Bedfordshire County Council* (1995) 3 All ER 353 (HL).

Breach of statutory duty:-

214. Damages will be granted only if the particular statutory duty was designed to confer private rights of action for compensation for breaches of that duty. Since many statutory duties are designed for the benefit of the general public rather than for particular individuals, it may be difficult to establish this point.

The tort of misfeasance in a public office:-

215. It is committed if the ultra vires act or decision was intended to injure the applicant or was taken in the knowledge that it was unlawful, that is taken in bad faith. This is difficult to prove and hence damages are rarely awarded

(c) **Validity of Unlawful Administrative Action: the Void/Voidable distinction**

216. The terms ‘void’ and ‘voidable’ have been imported into administrative law from the law of contract. They were meant to distinguish between those acts, which have no legal validity or effect, and those which have legal validity or effect but which are liable to be set aside by a court of competent jurisdiction at the instance of a party to an action. Because of the peculiarities of administrative law, those concepts do not translate well into the administrative law context. While at one time the distinction between void and voidable may have had some value, it is of little relevance to the modern framework of

administrative law. It stems from confusion between the legal and practical effects of the ultra vires doctrine.⁶⁰

217. Judicial intervention in administrative decisions or actions is based upon ultra vires. If an authority has made a decision outside of its jurisdiction or powers, then that decision will be quashed as being ultra vires. Logically that decision can only be considered to be ‘void’. Once it is quashed, it is shown to have had no legal validity or effect. For this reason it has been held by the House of Lords that where an administrative action is ultra vires ‘there are no degrees of nullity’. If the decision is ultra vires, then it is void; it cannot be anything else [*Anisminic Ltd v Foreign Compensation Commission* (1969) 1 All ER 208].
218. Historically it was possible to distinguish between decisions which were quashed as ultra vires and decisions which were intra vires but nonetheless liable to be quashed. This latter category of decisions only arose in the context of error on the face of the record. Where a public body or, particularly, a tribunal made an error of law, which was within its jurisdiction, the court would quash its decision if that error appeared on the face of the record. Technically, such decisions were intra vires and therefore could properly be described as ‘voidable’; the decision had legal validity but was liable to be quashed when the record was produced to the court. Since all errors of law have been held to be jurisdictional as a result of *Anisminic* it follows that there is no longer any need to distinguish between the ‘void’ and ‘voidable’ decisions of a public body; there is no longer any such thing as a voidable decision.
219. Nonetheless confusion has stemmed from judicial support for the proposition that even an ultra vires decision might be ‘voidable’ rather than ‘void’. Thus in *R v Secretary of State for the Environment, ex parte Ostler* (1977) QB 122, Lord Denning stated that bad faith or a breach of the rules of natural justice would only make an order voidable, and not void. Later the House of Lords has favoured the view that ‘void’ is the correct term

⁶⁰ Vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 759-786; H. Woolf, J. Jowell & A. Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 205-208.

- to use [*Hoffman-La Roche v Secretary of State for Trade and Industry* (1975) AC 295 and Lord Denning himself later stated that this is the correct approach [in *Firman v Ellis* (1978) QB 886] so that the earlier line of judicial reasoning is no longer significant.
220. Confusion has also cropped up from the practical effects of the ultra vires doctrine. Whether a particular decision is ever quashed may depend upon a number of purely practical factors, such as the statutory time limit within which a decision may be challenged. If the decision is not challenged within that time limit then the court will not be able to set it aside later, even if its is ultra vires. In the meantime, the decision enjoys a presumption of validity, but is liable to be set aside if a challenge is brought within the statutory time limit. It may be thought then that such decisions are merely ‘voidable’ and not ‘void’.
221. Similar considerations arise because of the discretionary nature of judicial review remedies. Thus even where a decision is brought before the court and the court decides that it is ultra vires, it may nevertheless decline to quash the decision. In *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* (1986) 1 WLR 1, the Secretary of State neglected a mandatory duty of consultation in making certain regulations. As the duty was mandatory, the regulations were technically ultra vires. The court granted a declaration that the Secretary of State had neglected his duty, but declined in the exercise of its discretion to quash the regulations or to declare them void. By extension of this principle of discretionary relief, coupled with the presumption of validity, every ultra vires act could be described as ‘voidable’ rather than ‘void’.
222. This apparent paradox is more illusory than real. To describe ultra vires decisions as ‘voidable’ is a misuse of legal jargon. It is true that all decisions appear to be only liable to be set aside but as a matter of law, such decisions are not valid, they are merely presumed to be valid. They do not acquire validity in law by the operation of time limits or the discretion of the court. Time limits and the court’s discretion merely remove such invalid decisions from the bounds of challenge. In effect, they set practical

considerations above the purely legal effects of ultra vires decision-making. The paradox of ‘void’ decisions being in fact ‘voidable’ can thus be resolved if the legal effects of the ultra vires doctrine are separated from the practical reality of the administrative state, which requires that there be a degree of certainty in the decision-making process. Administrative decision-making would become wholly unworkable if public bodies had to await the possibility of a successful challenge each time they made a decision. Thus there is a need for a presumption of validity.

223. In lieu of using the terms ‘void’ and ‘voidable’ what would be more appropriate would be to speak of ultra vires decisions, which are presumed to be valid unless and until they are set aside by the court in the exercise of its discretion, a statement which appears to reflect accurately the realities of administrative law.

(H) Concluding Observations: Need for Reform

224. The Commission reiterates the position taken by previous Commissioners, during the period 1995-1997, that there is a need for procedural and substantive reform in the area of judicial review of administrative decisions.

There have been many reforms to the conduct of judicial review in the Commonwealth and beyond and the Commission is currently examining the reforms that have been either instituted or recommended elsewhere, as these provide useful alternatives upon which we can base our proposed options for change to the judicial review of administrative decisions.⁶¹ We are also considering the impact of the Human Rights Act 1998 and convention rights on judicial review in England.⁶²

225. We shall in due course release an Issue Paper on matters calling for reform and we shall invite stakeholders to submit their views on those matters.

⁶¹ On remedies and reform, vide, for instance, P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 861-919.

⁶² Vide P. Craig, *Administrative Law* (Sweet & Maxwell, 6th ed., 2008), at pp. 551-611; H. Woolf, J. Jowell & A. Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th ed., 2007), at pp. 651-700; A. Bradley, ‘The Human Rights Act and Judicial Review’, in M. Supperstone, J. Goudie & Sir Paul Walker, *Judicial Review* (Butterworths, 3rd ed., 2005) at pp. 31-68.

Annex: LRC (1995-1997) Draft Administrative Justice Bill

A Bill

An Act to provide for the improvement of administrative justice and for related matters

1. Short Title

This Act may be cited as the Administrative Justice Act.

2. Interpretation

In this Act:-

“act” includes any decision, determination, advice or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment;

“administrative act or omission” means an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment;

“court” means the Supreme Court;

“Judge” means a Judge sitting in Chambers.

3. Application of Act

This Act shall bind the State.

PART I

JUDICIAL REVIEW

4. Application for Judicial Review

- (1) An application to the Judge for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with this Act and with rules of Court.
- (2) Where the Court is of opinion that a person or body against whom an application for judicial review is made is not an authority of the Government, the Court may allow the proceedings to continue, with any necessary amendment, as proceedings not governed by this Act and not seeking any remedy by way of certiorari, prohibition or mandamus.

5. Grounds for relief

The grounds upon which the Court may grant relief by way of the remedies mentioned in this Act include the following:-

- (a) that an administrative act or omission was in any way unauthorised or contrary to law;

- (b) excess of jurisdiction;
- (c) failure to satisfy or observe conditions or procedures required by law;
- (d) breach of the principles of natural justice;
- (e) unjust, unreasonable or irregular or improper exercise of discretion;
- (f) abuse of power;
- (g) fraud, bad faith, improper purposes or irrelevant considerations;
- (h) acting on instructions from an unauthorised person;
- (i) conflict with the policy of an Act of Parliament;
- (j) error of law, whether or not apparent on the face of the record;
- (k) absence of evidence on which a finding or assumption of fact could reasonably be based;
- (l) breach of an omission to perform a duty;
- (m) denial of a legitimate expectation;
- (n) failure to take within a reasonable time a decision incumbent upon the relevant authority; and
- (o) failure to state reasons in terms of sections 13 to 15.

6. Remedies

- (1) The remedies that the Court may grant by way of relief on an application for judicial review are:-
 - (a) certiorari, for quashing unlawful acts;
 - (b) prohibition, for prohibiting unlawful acts;
 - (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.
- (2) The Court may, having regard to the scope of the remedies mentioned in subsection (1), grant in addition or alternatively:-

- (a) a declaratory judgement ;
 - (b) an injunction;
 - (c) restitution , compensation or damages in money; or
 - (d) an order for the return of movable or immovable property.
- (3) Any of the remedies mentioned in subsections (1) and (2) may be applied for together or in the alternative in an application for judicial review; and the Court may grant one or more of them as law and justice may require, and whether applied for in the original application or not.

7. Persons entitled to Relief

The Court may on an application for judicial review grant relief in accordance with this Act:-

- (a) to a person whose interests are or will be adversely affected by an administrative act or omission;
- (b) to any other person if the Court is satisfied that, that person’s application is justifiable in the public interest in the circumstances of the case.

8. Interlocutory Application

- (1) An application for an interlocutory order or injunction may be made in any application for judicial review, and the Court or Judge may make any interlocutory order, including an order for discovery of documents, for interrogatories and for cross-examination, and may grant any interim relief that the Court or Judge thinks fit.
- (2) The Court or Judge may at any stage direct that the proceedings to which the application relates shall be stayed until further order.

9. Power of Court to refuse relief

The Court may, if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administration.

10. Power to remit

Where the Court quashes an administrative act to which the application relates, it may in addition remit the matter to the court, tribunal or other authority concerned with a direction to reconsider the matter and to determine it in accordance with the Court’s order.

11. Injunction restraining a person from acting in a public office

(1) Where a person brings proceedings alleging that any person is not entitled to act in a public office, the Court may, if satisfied that the proceedings are justified, grant an injunction restraining that person from acting in the public office, and the Court may, if it thinks fit, declare the office to be vacant.

(2) For the avoidance of doubt information in the nature of quo warranto are no longer applicable.

12. Non-Application

- (a) The law relating to habeas corpus;
- (b) The right of the Attorney-General or of the Director of Public Prosecutions to bring proceedings under this Act or otherwise, either of his own motion or at the relation of any person.

PART II

ADMINISTRATIVE PROCEDURES

13. Reasons for Decisions

- (1) It is the duty of any person or body making a decision to which this section applies, if requested in accordance with section 14 by any person adversely affected thereby, to supply to that person a statement of the reasons for the decision.
- (2) This section applies to any decision that is required by any enactment or by contract to be made in accordance with the principles of natural justice or in a fair manner.

14. Request for Reasons

- (1) A request for reasons under section 13 must be made on or before the date of giving or notification of the decision or within 21 days after that date.
- (2) A request must be made in writing, except that where an oral hearing is held, the request may be made orally before the conclusion of the oral proceedings.
- (3) In the case of postal communications, a request for reasons shall be deemed to be made at the time when it is posted and a notification of a decision at the time when it reaches the addressee.

15. Statement of Reasons

A statement of reasons under section 13:-

- (a) must be in writing, except where the person requesting it agrees that it may be made orally;
- (b) must be supplied within thirty days from the time of the request.
- (c) shall be deemed to be part of the decision and to be incorporated in the record.

16. Principles of Natural Justice

The law relating to natural justice applies to any person or body granting, refusing, modifying, or revoking any licence, permission, qualification or authority or imposing any penalty under powers conferred by any enactment.

17. Rules

The Supreme Court may make rules generally for the purposes of this Act.

18. Commencement

This Act shall come into force on a day to be fixed by Proclamation.