JOINT PLANNING LAW CONFERENCE

CHALLENGING DECISIONS - THE CHALLENGER

by

S Sedley, QC

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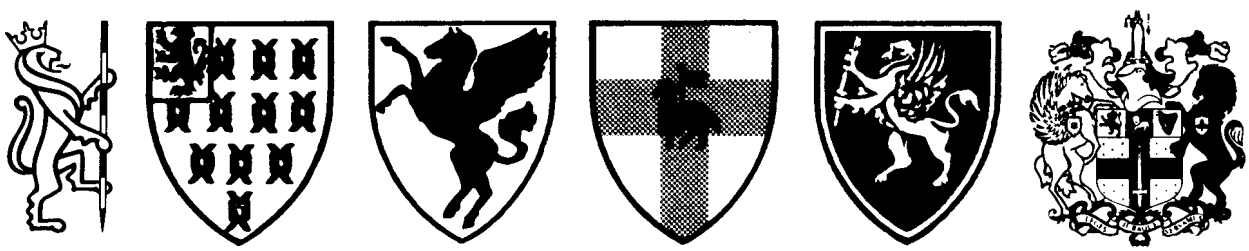

ANNOTATIONS

1. R v Northumberland Compensation Appeal Tribunal, ex p. Shaw (1951) 1 KB 711.

2. (1952) 1 KB 338.

3. Anisminic Ltd v Foreign Compensation Commission (1969) 2 A C 147.

4. R v Criminal Injuries Compensation Baord, ex p Lain (1967) 2 QB 864

5. (1982) 3 W L R 1096.

6. see eg Buxton v Minister of Housing and Local Government (1961) 1 Q B 278.

7. eg Turner v Secretary of State for the Environment (1973) 28P AC R 123.

8. Hollis v Secretary of State for the Environment (1983) JPL 164

9. R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd (1982) A C 617.

10. Covent Garden Community Association Ltd v Greater London Council (1981) J P L 183.

11 & 12 Times Law Reports July 1985.

13. O 52 R S C

14. Leary v National Union of Vehicle Builders (1971) Ch. 34.

15. (1980) AC 574.

16. R v London Borough of Brent, ex p Gunning, Times

17. CCSU v Minister for Civil Service (1984) 3 W L R 1174.

18. Greater London Council v Secretary of State for the Environment.
The Times 18 July 1985.

19. R v Hertfordshire County Court, ex p Lee 1985 unreported.

1. Legal and constitutional historians are going to look back on the growth of administrative law during the last generation as an almost revolutionary event. I do not believe that its growth has been accidental; nor do I think that it can be explained by a self-congratulatory account of bright-eyed lawyers responding to modern problems with modern solutions. Indeed, this is a field in which the practising profession has lagged embarrassingly behind academic commentators in grasping what was going on under its nose. Like Molière's bourgeois gentilhomme, who learnt at an advanced age that he had speaking prose all his life without realising it, the legal profession has only recently woken up to the fact that it possesses a fully-fledged system of public law.

2. Although, in the traditional mode of the common law, every innovative step has been taken by the judiciary in the name of established principle and precedent, the old prerogative remedies by which administrative action has for centuries been able to be prohibited, commanded or quashed by the courts, now stand at the centre of a developed body of law and practice which, I would argue, owes the speed and force of its development to something more plausible than the onward march of rationality. This is not the place to argue out a historical thesis on the question, but I do think it is important to have in mind certain factors which, having radically influenced the development of public law in the recent past, are likely to continue to do so in the future.

3. The post-war years have seen two developments of a significance which cannot have escaped the attention of the judiciary. One is the growth of government by administrative rather than legislative measures. The other is the occasional capture of the commanding heights of local or national political power by political interests seen by an essentially conservative judiciary as a threat to constitutional and social stability. In the same period the judiciary have dug a series of entrenchments from which they can exercise the maximum power of judicial review over the acts of central and local government. I do not think that the coincidence in time of these events is a matter of historical chance. If you look at the landmark cases which have marked the successive lines of entrenchment they can be seen to have been responding to perceived needs and shifts in the balance of constitutional power. When in 1952, in the Northumberland Compensation Appeal Tribunal case,[1] the Divisional Court,[2] upheld by the Court of Appeal, enlarged the grounds for quashing an administrative tribunal decision to include errors of reasoning, they were not acting in a vacuum. The re-discovery of forgotten precedent occurred in the context of a cogent attack on one of the proliferating tribunals thrown up by the post-Beveridge welfare state and charged, in that particular case, with quantifying the compensation of a hospital board administrator for loss of office on the introduction of the NHS. By 1969 the confidence of the judiciary had grown sufficiently for the House of Lords to make a bold and successful attempt, in the Anisminic case,[3] to outflank an apparent legislative prohibition on judicial intervention. Anisminic effectively established that any decision-making body set up by parliament was going to be

open to scrutiny by the courts to ensure not only that it acted within its powers but that it exercised those powers without error of law. The strength of this judicial position had been assured two years earlier by the Divisional Court which had decisively established (in a case[4] against the Criminal Injuries Compensation Board of which the significance has only recently been recognised by the House of Lords in the GCHQ case) that resort by government to the use of the Royal Prerogative to empower administrative action provided no hedge against the cold winds of judicial review. So by the 1970s the courts had established their power of review over every act of central or local government other than parliamentary legislation (which, apart from the occasional act of inspired interpretation, is constitutionally immune) or at the other end of the scale purely administrative acts giving rise to no justiciable issue.

4. From these now established positions the range of judicial fire has increased dramatically in the same period. Gone is the need to find your error on the face of the record, or to demonstrate that the impugned proceeding was quasi-judicial. A few years ago, for the benefit of a bemused university lecture class, I managed to extract 17 different grounds of judicial review from the decided cases. The possibility of successfully relying on one or more of them in court has been decreasingly determined by technical considerations and increasingly determined by considerations of substantial justice, with one major deviation. This has been the doctrine of O'Reilly v. Mackman;[5] which by a drastic piece of judicial legislation has constrained practically everybody who has a public law complaint to use the judicial review procedure laid down by Order 53 of the Rules of the Supreme Court to the exclusion of ordinary actions by writ or originating summons. The doctrine was laid

down in response to the perceived merits of one particular group of cases (prisoners seeking to challenge disciplinary adjudications made against them years earlier) and it has predictably brought a series of problems in its wake, requiring the courts and the House of Lords to invent new doctrines to grapple with them. But the O'Reilly decision, whatever its long-term faults, was a further reflection of the confidence with which the judiciary, by the 1980s, was able to propound its newly developed system of judicial review as offering a compendious set of remedies for all abuses of power.

5. The growth of administrative law which I have been looking at has of course co-existed with a series of statutory rights of appeal to the High Court against a wide range of administrative or quasi-judicial decisions. Prominent among these has been the right of appeal in planning matters now enshrined in Section 245 of the 1971 Act. The growth of public law through judicial review has, I think, had some impact on the construction of these statutory powers. For example, the limitation of locus standi by a restrictive interpretation[6] of "person aggrieved" gave way during the 1970s[7] to a concept much closer to the concept of "sufficient interest" which governs locus standi for judicial review. It is very doubtful whether such a development would have been possible if the statutory right of appeal had stood by itself. It seems clear from such recent cases as Hollis[8] that authorities under challenge have much less stomach than formerly for trying to marginalise their challengers as mere busybodies. We have happily gone far beyond the notion that only a person complaining about the effect of a decision on his rates, his taxes or his bank balance can legitimately call himself aggrieved. There is legal as well as philosophical depth

in the doctrine laid down by the House of Lords in the Fleet Street Casuals[9] case that you cannot finally determine the locus standi of an applicant without reasoning out the matters of which he complains. Logically the same should apply to the determination of the question whether an appellant is a person aggrieved: except perhaps in very plain cases it should not be regarded as a preliminary question. Here too, the growth of public law may a pointer to the path which statutory appeal is going to follow. The Covent Garden[10] case is not the first in which a group of interested individuals who have incorporated themselves have been heard through their ad hoc corporation, but it emphasises the step away from individual self-interest as the test of locus. Meanwhile, however, the High Court has gone further in its judicial review jurisdiction: Mr. Justice Woolf recently allowed the Child Poverty Action Group, none of whose members had a direct pecuniary or personal interest in the outcome, to challenge an act of executive government which had disadvantaged thousands of those whose interests the CPAG sought to defend.[11] (The Court of Appeal[12] upset the decision on the substantive question, thereby avoiding the need to deal afresh with the question of locus). The possibilities for environmental and similar groups in planning matters, whether by way of statutory appeal or judicial review, are well worth bearing in mind.

6. There are several other ways in which the two forms of recourse converge. For example, the overriding judicial discretion to refuse relief lies parallel with the power given by the Rules of the Supreme Court[13] to disallow an otherwise sound statutory appeal if an error has caused no substantial mischief. There is no reason to suppose

that the principles upon which the court exercises these twin powers will diverge in the future. It might be thought that the distinctions between the two modes of recourse are well on the way to disappearing, particularly since O'Reilly v. Mackman has for practical purposes made a large hole in the doctrine that the remedies obtainable by judicial review are remedies of last resort. I doubt whether this is so. For example a challenge to a decision containing an error of law, which in principle can be pursued by either means, would risk failure if it were brought by way of judicial review within the prescribed period of 3 months but outside the limit of 6 weeks set under Section 245.

7. I am not convinced, either, that complete convergence would necessarily be in the long-term interests of administrative law. Because the doctrines of public law have been almost entirely the invention of the judiciary, the room for further invention, and for the abandonment of existing inventions, is very considerable. Some years ago, in a trade union case,[14] Mr. Justice Megarry held that if rules provided for a fair domestic hearing and a fair domestic appeal, it was ordinarily not good enough to provide the latter but not the former. Recently the Privy Council, in an appeal from Australia, has departed from this salutary doctrine, propounding an alarmingly pragmatic test of a fair result arrived at by fair means.[15] At least one judge[16] has refused to follow this new doctrine, but it is a storm warning of where the House of Lords may try to go next in matters of natural justice. Instead of concentrating entirely on the method by which a result has been arrived at and ignoring as irrelevant the actual result, the Privy Council's approach opens the way to a re-adjudication by the court on the merits of the impugned decision rather than its procedures. For myself I would see this as a damaging and

retrograde step; so, I think, would many of the judges whose task it would be to apply such a doctrine; but it reflects the abiding urge to escape from merely adjudicating on procedures and have a say on the merits and outcome of the matter in contention - a desire which I would argue it is as important as it ever was to resist.

8. I began this paper by suggesting that the underlying imperative in the modern development of administrative law has been a perceived need for the judiciary to be able, where possible, to govern government. It is a desire which Lord Denning from time to time articulated, but which the rest of the judiciary would not openly avow. If, however, I am right in thinking that it is a key to the recent development of administrative law so far, it is likely to continue to provide a rationale for its development in the immediate future. But the form the development takes is going to be conditioned by a variety of other factors, many of them political. The mode of government in this country has moved steadily, and over a longer period than the lifetime of the present administration, away from direct parliamentary rule and towards the delegation and sub-delegation of very considerable legislative powers to ministers, local authorities and administrative bodies. Legally this has meant the transfer of much power from an impregnable sovereign parliament to persons and bodies over whom the courts exercise the power of judicial review. The trend has been accelerated in the last few years by a concentration of sometimes draconic powers in administrative hands as the promised reduction in the extent of government has been matched, because of the continuing need for social control, by a growth in the intensity of what remains. On

most days of the week, the courts cannot pick and choose the situations in which they will and will not apply the wide ranging provisions for judicial review of administrative action, and one result has been that in the recent period the government has been a repeated casualty in first-instance decisions on challenges to the exercise of administrative power. Some of these cases, indeed, have revealed what I would consider a new and deeply disturbing development, a tendency towards recklessness and occasionally lawlessness on the part of central government itself. The constitutional need for an administrative court is therefore likely if anything to increase in the coming years.

9. The policy-making judges, I think, are ready and willing to take on this task, although I suspect that the concern in the forefront of their minds is more likely to be the actions of dissentient local authorities. Within the last two years we have seen the concept of legitimate expectation as the basis of rights capable of being protected by judicial review, elevated by the GCHQ case[17] to a major doctrine of administrative law. In the same case Lord Diplock went out of his way to adumbrate a yet further ground of judicial review which may enter the arena - the concept of proportionality. This is the continental notion that administrative acts, while on the face of them intra vires, may nevertheless be struck down because they are out of proportion to the mischief they seek to remedy. It is a concept which our courts will be able to deploy within the protean substance of the common law, by applying the well-known "no reasonable authority" test in a purposive fashion. Meanwhile at first instance some of the judges who take the Crown Office list are also innovating within the broad established principles of law. Mr. Justice

Woolf has recently, for example, suggested[18] that a party who is not the person aggrieved within the meaning of Section 245 but is nevertheless materially affected by an error in the reasoning on which a planning decision has been based can challenge that reasoning by means of judicial review. Mr. Justice Mann and other judges[19] have used the power in Order 53 to grant declarations even where no private right has been infringed but where declaratory relief served a useful public law purpose. Procedural provision is now lagging behind substantive law and is going to have to be brought in line in the near future. The judiciary are going to have to pay more attention to the need for service of proceedings, once leave is granted, on any potentially interested party, a matter which at present is left to the judgment of the applicant. The Rules Revision Committee has got to do something about respondents who turn up at court with major arguments of which they have not been required to give any notice: some provision for a respondent's notice is needed in the Rules.

10. The one thing the judiciary are not going to want is a push-button system of administrative law by which decisions can be struck down as of right on proof of some error. In judicial review the residual discretion of the court provides the hedge; in statutory appeals the same role is played by the provision in the Rules that an otherwise sound appeal may be disallowed if no substantial wrong or miscarriage was caused by the error. There is a danger that the courts may become cavalier about the exercise of this residual power and be tempted, as Lord Denning sometimes was, to use it as an excuse for adjudicating on the merits of a case. It may be that more attention will

have to be paid in public law proceedings to the way in which the criminal division of the Court of Appeal applies or withholds the application of the proviso by which they are enabled similarly to dismiss well-founded appeals. Where the error complained of is fundamental and goes to the jurisdiction of the tribunal concerned, the proviso is not applied and, I would suggest, the judicial review discretion should never be applied, even though the result was patently correct.

11. Although, therefore, statutory modes of appeal will continue to have to be used where they are properly available, they have become parliamentary islands in a judge-made sea of public law which has horizons far wider than statutory appeals can offer. The future of public law, at least in the short and medium term, is assured above all by its flexibility. In establishing it in its contemporary form the judges have almost effortlessly outflanked both parliament and the executive without doing any ostensible violence to the constitutional separation of powers. While the entrenchment of the modern doctrines has in essence been, I would argue, a political act, their application from case to case is not necessarily so: the present government probably has a longer casualty list in judicial review than any of its predecessors who, arguably, were the original cause of judicial concern. (Future historians will nevertheless have something to say about the political balance of success and failure of ministers and local authorities in crucial cases reaching the House of Lords in the period of which I have been speaking). Although I have spoken disparagingly of my profession in relation to the overall development of modern administrative law, which unusually owes most to a handful of academics and another handful of judicial strategists, the fact remains that

most developments depend ultimately on some barrister trying out a new point, as often as not one put forward by his or her professional or lay client. Public law is the single great growth area in the common law, and those concerned from any angle with administrative procedures can therefore continue to look to the judges who administer it for a less hesitant reception of new ideas than is generally found in our legal system.

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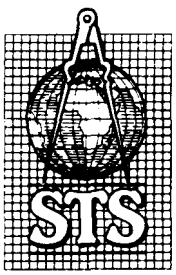
Organisers



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